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THE APPLICATION OF THE CITATION PROCEDURE FOR THE DISCOVERY AND RECOVERY OF ASSETS IN THE ADMINISTRATION OF ESTATES

By RICHARD D. GUMBEL, JR.*

INTRODUCTION

Within recent years the use of the citation procedure for the discovery and recovery of assets in the administration of estates has increased. Petitions therefore have become so numerous that four judges presently assigned to the Probate Division of the Circuit Court of Cook County, Illinois, now hear such matters in addition to the assignments of other aspects of the administration of estates.

Limitations of time and space do not permit a comprehensive analysis of all the cases dealing with the citation proceeding, however, this article is intended as a practical guide to the attorney representing a personal representative or other person involved in or interested in the discovery or recovery of assets during the administration of an estate.

Essential to an understanding of what follows is a familiarity with what the term "citation" means as used in connection with the administration of an estate for the disclosure and recovery of assets and the statutory article entitled "Citation to Recover Property and Discover Information."[1] The title of the article is an over-simplification of the entire procedure. No small confusion has resulted from the many judicial holdings applicable to the several provisions of the article, and the principles relating to the law of gifts, trusts, joint tenancies and contracts as they are relevant to citation proceedings.

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[1] ILL. REV. STAT. ch. 3, §§183-87a (1969).

A citation is a process adopted in civil proceedings from the canon and the civil law,[2] and has in some respects greater force than a summons, since the only penalty for failure to respond to a summons in a purely civil proceeding is that the respondent or defendant therein will be defaulted and have judgment entered against him; the failure to respond to a citation properly issued and served upon a respondent may lead to his incarceration. So a citation is both a summons and a subpoena. The citation is issued pursuant to an order of court and it commands the appearance of the respondent on a day certain, at a time and place set forth therein. It certainly is not a notice; notice and citation are not synonymous. A notice is sufficient in probate when the action of the court is on a thing — *in rem* —[3] but it is insufficient when the anticipated order is to be enforceable upon a respondent to compel the delivery of property and property rights. The effective issuance of a citation can emanate only from the office of the clerk of court and thereby becomes enforceable upon the respondent when served. Without the clerk's signature and seal the document is nothing more than mere writing or print.

The earliest statute enacted in the State of Illinois on the subject of citation in probate proceedings was for the purpose of having a person, or persons, appear and be examined on oath touching upon the possession, concealment or embezzlement of any property or evidence of property belonging to a deceased person.[4] That statute, enacted in 1829, provided for the enforcement of the court's orders and the means for compelling a reluctant respondent to testify or produce required documents. The citation could issue even if the named respondent was in another county.[5] While the primary section of the earlier statute was silent as to the recovery of property, another section implied the power of the court to order the recovery of property upon proper showing and proof that an executor or administrator " . . . was chargeable with so much of the estate . . . as they . . . shall recover and receive."[6] Strictly construed, the respondent in such proceedings was the person from whom the property had to be recovered because the proceeding was instituted against the person who had in his possession the property or pertinent documents, although the actual action for recovery was not maintainable in a probate court.

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[2] State v. McCann, 67 Me. 372 (1877).

[3] ILL. REV. STAT. ch. 3, §§64, 99 (1969). The court in *In re* Estate Rackliffe, 366 Ill. 22, 7 N.E.2d 754 (1937) noted: "Short-cut court proceedings cannot be substituted for the provisions of a special statute where the rights and liberty of a citizen are involved." *Id.* at 28, 7 N.E.2d at 757.

[4] WILLS AND TESTAMENTS, §86 (1829) ILL. REV. LAWS 191.

[5] People *ex rel.* McKee v. Abbott, 105 Ill. 588 (1833).

[6] WILLS AND TESTAMENTS, §88 (1829) ILL. REV. LAWS 191.

Subsequently, in 1871, a law entitled "Collection and Disposition of Assets"[7] was enacted and made substantial changes in the citation procedure. Three important differences existed between the 1829 statute, as amended in 1845, and the 1871 statute. First, the earlier statute, as amended, did not extend to a petitioner obtaining information from persons who did not possess the property sought to be recovered, or from the custodian of documents necessary for the recovery of other property from other persons. Secondly, while the earlier statute, as amended, provided for procedural enforcement orders and recovery only by implication, the 1871 statute expressly provided that the courts were empowered to "make such order in the premises as the case may require." The Supreme Court of Illinois held that by implication of the statute, the court had the power to examine witnesses other than the parties to the proceedings.[8] The court pointed out the glaring defect in the prior statute by stating that it could "not suppose that the legislature intended in all cases to have the party examined, much less to let the rights of the estate turn, alone, on the evidence of the party charged with having the property." Thirdly, the 1871 statute corrected an injustice created by a supreme court holding that:

> [u]nless the respondent had the identical money in his possession which had been received by his wife, the court could not properly order him to pay it over to the administrator, nor would it be possible for him to comply with such order. The payment of other money to an equal amount would not be a compliance with the statute. . . . "[9]

In 1874 the citation remedy was extended to estates of incompetents,[10] and in 1919 it was provided by statute that the citation remedy was available for utilization in the estates of minors.[11] Thus, the statute now in force and effect, enacted in 1939,[12] and subsequently amended, is a combination of several sections of former statutes.[13]

THE PRESENT STATUTE

The initial section of the statute begins by providing in pertinent part that:

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[7] ADMINISTRATION OF ESTATES, §81 (1871-72) ILL. LAWS 77.

[8] Wade v. Pritchard, 69 Ill. 279, 282 (1873).

[9] Williams v. Conley, 20 Ill. 643 (1858). The court did not consider $1.00, the equal of another $1.00, but rather it had to be the same bill Mrs. Williams had obtained from her father, the decedent. The court said that the statute was designed to obtain possession of property "which remained in specie". The court reasoned that a payment other than in specie was the payment of a debt. *Id.* at 644. *See also* Densmoor v. Bressler, 164 Ill. 211, 45 N.E. 1086 (1896).

[10] ILL. REV. STAT. ch. 86, §53 (1874).

[11] ILL. REV. STAT. ch. 64, §50b (1919).

[12] ILL. REV. STAT. ch. 3, §82 (1939).

[13] ILL. REV. STAT. ch. 3, §82 (1939); ILL. REV. STAT. ch. 64, §52 (1939); ILL. REV. STAT. ch. 86, §54 (1939).

> Upon the filing of a verified petition therefor, the court shall order a citation to issue for the appearance before it of any person whom the petitioner believes (1) to have concealed, converted, or embezzled or to have in his possession or control any personal property . . . which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his executor, administrator, guardian, or conservator or (2) to have information or knowledge withheld by the respondent from the executor, administrator, guardian or conservator and needed . . . for the recovery of any property. . . . [14]

Section 183 provides further that "(t)he citation shall be served not less than 10 days before the return day designated therein and shall be served and returned in the manner provided for summons in civil cases." The minimum time before return day and the method of service of the citation were not provided for in the earlier statutes. Obviously the stated time limitation is in fairness to the respondent so as to allow him to marshal the facts and information demanded of him and to allow time for an adequate presentation of his position on conflicting claims and issues.[15]

Finally, in 1965, the act was amended to delete the word "probate" from the citation statute. This was made necessary by the enactment of a new judicial article which provided for a single Circuit Court for each judicial circuit[16] thereby abolishing the several "Probate Courts" throughout the state. With the abolition of the "Probate Courts" and the adoption of the new judicial article went the many instances of limited jurisdiction which delayed and obstructed a final resolution of many of the problems in the administration of an estate.[17]

THE PETITION FOR THE ISSUANCE OF A CITATION

Historically, these citations were first used chiefly for dis-

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[14] ILL. REV. STAT. ch. 3, §183 (1969).

[15] 4 W. JAMES, ILLINOIS PROBATE LAW AND PRACTICE 318 (1st ed. 1951).

[16] ILL. CONST. art. VI, §8 (1870).

[17] *In re* Estate of Peters, 34 Ill. 2d 536, 217 N.E.2d 3 (1966). Sims v. Powell, 390 Ill. 610, 62 N.E.2d 456 (1945), involved a citation proceeding with five respondents. The appellant contended that the probate court was without jurisdiction to enter an order affecting a trust for the lack of general chancery jurisdiction. The court rejected the contention because the appellant had been a party to a consent decree, but it pointed out that the probate court had no power to determine titles to real estate in citation proceedings. In Moser v. Feciura, 324 Ill. App. 552, 58 N.E.2d 920 (1945), the creditors of the decedent sought to set aside a conveyance of property from the decedent to his daughters. On hearing in the probate court there was a finding for the daughters. The creditors appealed from an adverse ruling rendered in the Superior Court of Cook County where they contended that the probate court order was a nullity. The appellate court agreed and held that such an order could be attacked collaterally and the creditors were not obliged to take an appeal from that order. The appellate court indicated that the probate court lacked jurisdiction where the question of real estate ownership was involved.

covery purposes.[18] With that limited purpose, the petitioner was not faced with the problem of drafting an exacting pleading. In fact, earlier statutes required that the petitioner allege that he was "ignorant of the information" he sought in the proceedings.[19] It is without question that the provision of the statute as regards discovery is used often as a "fishing expedition." While the citation remedy is not an exclusive one for the petitioner, it was enacted for the purpose of giving a personal representative in an estate a speedier and less expensive way of discovering and recovering assets belonging to the estate which he represents,[20] obtaining information of which he has no independent knowledge[21] and promoting an honest, complete and prompt administration of the estate.[22] Some have characterized a citation proceeding for discovery as a "glorified deposition;" it has also been characterized as the equivalent of a deposition with greater satisfaction.[23] The proceedings are often instituted and maintained even though the petitioner is fully cognizant of the facts because he is desirious of having the respondent admit to the pertinent facts while under oath and before a judicial officer.

The citation procedure is purely statutory[24] and does not fall within either of the time honored distinctions of a matter being either at law or in equity. It was held to bear the equitable aspects of a bill for discovery.[25] This is of little importance when drafting the petition because the distinctions have been abolished by statute.[26] A clear majority of petitions presented pursuant to Section 183 pray for the issuance of a citation for discovery of assets and the production of various books and records. Petitioners usually allege that they believe the named respondents to have information or documents which will lead to the recovery of assets. Such petitioners pray for any and all relief to which

[18] Kahn, *Discovery and Recovery Citations in the Probate Court*, 44 ILL. B.J. 202 (1955).

[19] Simms v. Guess, 52 Ill. App. 543 (1893).

[20] Wilson v. Prochnow, 359 Ill. 148, 194 N.E. 246 (1934); Martin v. Martin, 170 Ill. 18, 48 N.E. 694 (1897).

[21] Simms v. Guess, 52 Ill. App. 543 (1893).

[22] People *ex rel.* McKee v. Abbott, 105 Ill. 588 (1882).

[23] Kahn, *Discovery and Recovery Citations in the Probate Court*, 44 Ill. B.J. 202 (1955).

[24] *In re* Estate of Hill, 30 Ill. App. 2d 243, 174 N.E.2d 233 (1961); Merchants Loan & Trust Co. v. Egan, 143 Ill. App. 572 (1905).

[25] Skidmore v. Johnson, 334 Ill. App. 347, 79 N.E.2d 762 (1948); Wood v. Tyler, 256 Ill. App. 401 (1930); *In re* Estate of Bennett, 248 Ill. App. 174 (1928); 4 W. JAMES, ILLINOIS PROBATE LAW AND PRACTICE 319 (1st ed. 1951).

[26] ILL. REV. STAT. ch. 110, §31 (1969); *see* Leighton, *Elements of Equitable Relief* 2 JOHN MAR. J. PRAC. & PROC. 230 (1969). In Ellman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350 (1952), the Illinois Supreme Court said: "There has been a fusion (of law and equity) sufficient to enable a court of law, when the occasion demands it, to apply equitable principles. . . ." *Id.* at 292, 106 N.E.2d at 353.

the court deems petitioner entitled. The petition for issuance of a citation to discover is not subjected to the scrutiny which is given to a petition for recovery. As will be enlarged upon hereinafter, a petition for the issuance of a citation for recovery must allege with extreme specificity and particularity the property sought to be recovered and the petitioner's right to such property.

The draftsman of the petition for the issuance of a citation must decide whether he is going to seek information or recovery. As stated above, if he does not have sufficient information to allege a basis for recovery, he should seek recovery. When the petitioner alleges that he is unable to discover the exact nature of the property or how the property, the decedent and the respondent were, or, are inter-related, and prays that "such order or orders may be entered by the court, and such action taken by the court, pursuant to Chapter 3, Article 183 (sic) and following . . . as may be in the best interest of the estate . . . " the court is unable to adjudicate title or claim to property because there are no issues on which to enter judgment.[27] If the petitioner seeks an accounting of property from the respondent, all allegations to support such relief must be asserted in the petition.[28]

WHO MAY BE A PARTY TO A CITATION PROCEEDING?

Under the provisions of the statute, the petition may be brought by the possessor and holder of letters as a personal representative in an estate "or by any other person interested in the estate or, in the case of an estate of a minor or incompetent, by any other person."[29] Infrequently, the petitioner falls into the category of "any other person." It is usually the personal representative who initiates the proceedings. The "any other person interested in the estate" may be an heir,[30] legatee,[31] a devisee,[32] a personal representative against his predecessor[33] or a

[27] *In re* Conservatorship of Baker, 79 Ill. App. 2d 234, 223 N.E.2d 744 (1967).

[28] In *In re* Estate of Garrett, 81 Ill. App. 2d 141, 224 N.E.2d 654 (1967), it was held that the court's order must be based upon an issue established by the pleadings.

[29] ILL. REV. STAT. ch. 3, §184 (1969).

[30] Johnson v. Nelson, 341 Ill. 119, 173 N.E. 77 (1930); Kahn, *Joint Tenancies and Citations*, 20 DECALOGUE J. 12 (1969), where the author notes:

> In testate estates a disinherited heir is probably not an interested person until such time as the will which disinherited him has been set aside. There is no decision construing the citation statute, but *Schroeder v. Gerlack*, 366 Ill. 596, 10 N.E.2d 332 (1937) is authority for this proposition by analogy.

Id. at 13.

[31] Day v. Bullen, 226 Ill. 72, 80 N.E. 739 (1907). The court felt that the inclusion in the statute of the words "any person" was broad enough to apply to legatees.

[32] Martin v. Martin, 170 Ill. 18, 48 N.E. 694 (1897).

[33] Kinney v. Keplinger, 172 Ill. 449, 50 N.E. 131 (1898). In this case, one Sarah Clark was the executor of her husband's estate. Upon her death

claimant who has been unable to get a personal representative to initiate citation proceedings to recover assets.[34]

An individual assumes numerous obligations when he applies for and accepts office as a personal representative in an estate. The foremost would be to avail himself of every remedy provided by statute which enhances the estate, and he may be held liable for his failure to marshal assets as well as to collect debts due the estate.[35] When the citation proceeding is initiated by an "interested person" and someone other than the personal representative is the respondent, the personal representative is not a necessary party to the proceedings[36] although he or his counsel is entitled to notice of all proceedings in compliance with the intent and spirit of the Illinois Supreme Court Rules.[37]

The Issuance of a Citation

The practice in the Probate Division, Circuit Court of Cook County, Illinois, is that the presentation of a petition for the issuance of a citation is not unlike the presentation of any other Motion of Course. The name of the estate and its sundry pertinent numbers of additional identification are entered on the "No Notice Call" of the presiding judge of said probate division for presentation on a day of counsel's choice. No notice to the respondent is necessary. When the petition is presented to the presiding judge, counsel should have, prepared and in hand, an order which commands the clerk of court to issue the citation directed to the named respondent and returnable on a day and at a time certain. The citation process provided by counsel includes

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she was succeeded by Kinney, and Keplinger was appointed the administrator of her estates. When Keplinger failed to deliver the assets of Sarah Clark's estate to Kinney, a citation proceeding was instituted. Keplinger contended that by reason of Sarah Clark's possession of her husband's assets, her estate be regarded as a debtor of the husband's estate, or of his legatees. It was held that her position as executrix was more nearly that of a trustee than that of a debtor.

[34] Clark v. Hogle, 52 Ill. 427 (1869). The court there noted:

> The complainant . . . is entitled to call upon the administrator to show what he has done with this estate; what assets, if any, there be, subject to the payment of this debt, and in default thereof, compel payment out of realty.

Id. at 432.

[35] Nonnast v. Northern Trust Co., 374 Ill. 248, 29 N.E.2d 251 (1940). It has been held many times that the citation procedure may not be utilized to collect a debt, however, it seems logical that a personal representative would be held responsible for the failure to recover property which clearly belonged to the estate. An "executor occupies a fiduciary relationship to the heirs and persons interested in the estate . . .". *In re* Estate of Lightner, 81 Ill. App. 2d 263, 274, 225 N.E.2d 417, 422 (1967).

[36] Where an "interested person", within the meaning of the statute, is convinced of the need to pursue a recovery from another person, and the personal representative is not convinced and refuses to act, such "interested person" has the right to initiate the proceedings in his own name and need not name the personal representative as a respondent therein, for the reason that no recovery is sought from the personal representative.

[37] ILL. REV. STAT. ch. 110A, §§11A, 104(b) (1969).

the name and address of the respondent, the return date, time and courtroom, and what is expected of the respondent regarding the production of documents. The clerk of court provides citation forms[38] which are generally used but counsel may prepare his own process.[39] When recovery is sought by the petitioner, it is advisable that sufficient insertions on the form be made which are consistent with the prayer of the petition to apprise the respondent that he may be deprived of the possession of property. When inserting the return date, which counsel chooses, he should be cognizant of the provision which states that service be made at least ten (10) or more days prior to the return day designated in the citation.[40]

When the order is signed commanding the issuance of the citation, the courtroom clerk assigns a citation number to the process and it is then recorded in the "Citation Docket" under the return date so that the matter may be called in open court. Counsel must then take a copy of the judge's order to the clerk's office for the placing of the clerk's seal on the citation. Then the citation must be taken by counsel to the sheriff's office and placed for service upon the respondent. The sheriff makes his return in accordance with the statute and returns the citation to the courtroom stated on the citation form prior to the return date stated thereon.

The service of the citation is what gives the court jurisdiction over the respondent. It is sufficiently important to repeat: the citation should inform the respondent whether he is required to appear for discovery or if property is to be recovered from his possession, actual or constructive. In the absence of service of the citation, the petition which obtained its issuance is just a paper with empty, meaningless words awaiting life when service of process is made.

When the matter is called on "return day," if service has been made on the respondent, it is assigned by the presiding judge to one of the judges assigned to the probate division. Whether the matter will be heard on that day depends on many variables. Usually the respondent appears without counsel, wants time to employ counsel, and requests a continuance. Frequently, the judge to whom the citation is assigned is presiding over another matter and must set a date for hearing on the citation. Infrequently, the respondent is ready for hearing and the

[38] Circuit Court General Form CCG 5 (for discovery) and Circuit Court Probate Form CCP68 (for discovery) are both adaptable for use in recovery actions.

[39] See for instance form 69, ILLINOIS UNIFORM PROBATE FORMS 91 (Burdette Smith Co. 1966).

[40] ILL. REV. STAT. ch. 3, §183 (1969).

court is able to accommodate all parties with a hearing on the "return day."

As stated above the greater number of citations are for discovery and the matter proceeds to hearing without preliminary motions or an answer to the pleading. An experienced "probate" attorney, allowing for the primary purpose of the discovery citation, being fully cognizant of the "fishing" nature of the proceedings, considers it a time-saver to simply have the respondent answer the oral interrogatories as soon as it is possible to have a hearing. He also knows that at the conclusion of a hearing on a citation for discovery, the order of court will be that the petition is dismissed and the respondent is discharged.

Now and then reference is made to the respondent "not being discharged" and allowing petitioners to file a supplemental petition for recovery. This is an injustice to a respondent because he is brought into court and then the rules are changed. An order which goes beyond the provisions of the statute and is broader than the issues raised in the petition is voidable.[41]

In *In re Baker*[42] it was held that the order was necessarily limited to the discovery of information although the petition prayed for entry of "such orders as may be in the best interests of the estate. . . . "[43]

Is a Petition Necessary?

Although the statute recites that a citation shall issue "upon the filing of a verified petition therefor. . . . "[44] the proceedings may be instituted and completed without the filing of a petition and issuance and service of the process if the party-respondent waives service and agrees to appear and be interrogated.[45] During the hearing on a routine motion in *In re Gingolph,*[46] before the presiding judge of the Probate Division, the personal representative through his counsel, orally charged that one of the interested parties present in the courtroom, a relative of the decedent, had in his possession or under his control property which belonged to the estate. The charge was vehemently denied, and, in a display of aching human emotions and predictable language of a scandalized adversary, the person so charged agreed to ap-

[41] Wilson v. Prochnow, 359 Ill. 148, 194 N.E. 246 (1934); Tappy v. Kilpatrick, 337 Ill. 600, 169 N.E. 739 (1929); *In re* Conservatorship of Baker, 79 Ill. App. 2d 234, 223 N.E.2d 744 (1967); Moser v. Feciura, 324 Ill. App. 552, 58 N.E.2d 920 (1945).

[42] *In re* Conservatorship of Baker, 79 Ill. App. 2d 234, 223 N.E.2d 744 (1967).

[43] *Id.* at 238, 223 N.E.2d at 747.

[44] ILL. REV. STAT. ch. 3, §183 (1969).

[45] *In re* Estate of Gingolph, 121 Ill. App. 2d 32, 257 N.E.2d 238 (1970); Hicks v. Monahan, 209 Ill. App. 516 (1918).

[46] 121 Ill. App. 2d 32, 257 N.E.2d 238 (1970).

pear at any time, any place and anywhere and give testimony to prove that the charge was a lie. An order was entered which recited:

> This cause coming on to be heard upon the motion of Benjamin Gingolph (sic) for notice of proceedings and matters regarding a safe deposit box; and the oral motion of the Administrator for a citation to discover assets to be issued against Benjamin Gingolph forthwith, and it appearing that said Benjamin Gingolph has appeared in open court and he having engaged counsel who has appeared this date and entered their appearance instanter in regard to said citation.
>
> For good cause shown it is ordered that (1) A citation to discover assets is hereby issued against Benjamin Gingolph (sic) instanter, and service of said citation having been waived by his attorney, the hearing on said citation is hereby assigned to . . . for disposition.[47]

Following entry of the order, and prior to the date set for his appearance, Benjamin Gingold, as he called himself, returned to his residence in Paris. A rule was entered for him to show cause why he should not be held in contempt of court. After an order adjudging him to be in contempt, he appealed contending that "the lack of verified petition pursuant to Section 183 makes the citation void since the trial court would have no jurisdiction without a petition to enter a citation." Reciting the order set out above, the reviewing court said that "[u]nder the circumstances we hold that it was proper for the trial court to permit the appellant to waive strict compliance with section 183 regarding the filing of pleadings," and thereby upheld the ruling that Gingold was in contempt of court. He is still in contempt, because when last heard of, Benjamin Gingold was alive and well and living in Paris with or without the assets of the decedent, depending on the truth or falsity of the administrator's charge.

Because the proceeding is purely statutory, it has been held that it should be in strict compliance with the statute.[48] The *Gingolph* proceeding was for discovery only. It could be argued that the requirements of the statute could not be effectively waived if the petitioner was seeking a recovery of property. The facts must be alleged so that the respondent may form his defense. Undoubtedly the respondent could waive service upon himself and submit to the jurisdiction of the court as in all other types of litigation, but if looking at citations in the perspective of litigation which leads to judgments, it is doubtful the proceedings could be instituted for recovery without a written and verified petition.

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[47] *Id.*

[48] *In re* Estate of Rackliffe, 366 Ill. 22, 7 N.E.2d 754 (1937); Urban v. Hynes, 285 Ill. App. 182, 1 N.E.2d 885 (1936).

The respondent may choose not to file an answer.[49] Should the respondent choose to file an answer denying the crucial allegation of the petition, the result would be only an admission of those allegations not denied and thereby not important to respondent's defense: the answer is not evidence and denial of possession of the property which is the subject of the proceedings is a conclusion of the pleader.[50]

The petitioner may initiate successive citations for discovery against the same respondent, limited only by not being unreasonable or abusive by doing so. The petitioner may also amend the petition at any time.[51]

THE HEARING — THE RESPONDENT AS A WITNESS

The statute provides that:

> At the hearing the court may examine the respondent on oath whether or not the petitioner has proved the matters alleged in the petition, may hear the evidence offered by any party, may determine all questions of title, claims of adverse title, and the right of property. . . . [52]

The petitioner assumes the burden of proceeding and the burden of proof. The respondent is the court's witness,[53] since it is the court's process which brought him before the court. In assuming his burden of proceeding, the petitioner may call the respondent as his witness under a provision of the Civil Practice Act,[54] or he may proceed to prove the allegations of his petition for recovery without the testimony of the respondent.

Where a respondent defended on the ground of a gift of the property from the decedent, he was not allowed to testify of his own motion by reason of the dead-man statute.[55] On a similar defense the respondent in another matter was permitted to testify.[56] It could be argued that if the petitioner assumed and successfully carried his burden of proof without calling the respondent as a witness, the dead-man statute should apply. There is merit to the argument that to prohibit the testimony of a re-

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[49] Hicks v. Monahan, 209 Ill. App. 516 (1918); Mohlke v. People *ex rel.* Moore, 117 Ill. App. 595 (1905).

[50] *In re* Estate of Halaska, 307 Ill. App. 176, 30 N.E.2d 119 (1940).

[51] Blair v. Sennott, 134 Ill. 78, 24 N.E. 969 (1890).

[52] ILL. REV. STAT. ch. 3, §185 (1969).

[53] *Id.*

[54] ILL. REV. STAT. ch. 110, §60 (1969).

[55] ILL. REV. STAT. ch. 51, §2 (1969); *cf.* Scianna v. Scianna, 69 Ill. App. 2d 388, 217 N.E.2d 101 (1966), where the affidavit of a party in opposition to the personal representative was held inadmissable. Johnson v. Mueller, 346 Ill. App. 199, 104 N.E.2d 651 (1952).

[56] Storr v. Storr, 329 Ill. App. 537, 69 N.E.2d 916 (1946); *In re* Estate of Halaska, 307 Ill. App. 176, 30 N.E.2d 119 (1940); Merchants' Loan and Trust Co. v. Egan, 222 Ill. 494, 78 N.E. 800 (1906); Wade v. Pritchard, 69 Ill. 279 (1873), wherein the court stated that it is discretionary with the court whether the party alleged to have property shall be examined under oath since it is the court which calls him.

spondent who was the only person privy to a transaction or occurrence may be a grave injustice. The courts of Illinois have given the dead-man statute a strict interpretation,[57] although it has been held that it must be given a reasonable interpretation which would be fair to the parties involved.[58] The allowance of testimony by the respondent lies within the careful exercise of the discretion of the trial court.[59] Since one of the dead-man statute's primary purposes is to place the parties on an equal footing,[60] if the petitioner has made a prima facie case for recovery, the respondent should be allowed to testify to prevent a procedural and substantive injustice. Regardless of the procedural strategy employed by the petitioner, the respondent may be called to testify by the court.[61] The interrogation of the respondent by the court, when called as a witness by the court, should not expand the testimony of the respondent beyond the limits raised by the petitioner.[62] Of course, the respondent is permitted to testify regarding any issue raised by the petitioner as an exception to the basic rule.[63]

The court is empowered to determine all questions of right of property.[64] All too familiar is the layman's phrase that possession is nine-tenths of the law. Perhaps the quantum the layman attributes to legal possession is debatable, but possession is a strong presumption of ownership and must be rebutted.[65] The many factual situations which give rise to presumptions, burdens of proof and the principles to be applied are hereinafter discussed.

The statute also provides for the enforcement powers of the court with regard to its orders or judgment.[66] The power of the court to commit to jail a respondent who refuses to answer pertinent questions put to him, or who refuses to deliver to the petitioner, or the estate as the case may dictate, the property which the court has found or ruled belongs to such petitioner is a necessary and intimidating power.

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[57] S. GARD, ILLINOIS EVIDENCE MANUAL 500 (5th ed. 1963).
[58] Pink v. Dempsey, 350 Ill. App. 405, 113 N.E.2d 334 (1953).
[59] Wagner v. Wagner, 17 Ill. App. 2d 307, 149 N.E.2d 770 (1958).
[60] Vancuren v. Vancuren, 348 Ill. App. 351, 109 N.E.2d 225 (1952); Firke v. McClure, 389 Ill. 543, 60 N.E.2d 220 (1945).
[61] Storr v. Storr, 329 Ill. App. 537, 69 N.E.2d 916 (1946); Price v. Meier, 324 Ill. App. 313, 58 N.E.2d 197 (1944); *In re* Estate of Harwood, 193 Ill. App. 514 (1915); Mahoney v. People *ex rel.* Patteson, 98 Ill. App. 241 (1901); Estate of Kraher v. Launtz, 90 Ill. App. 496 (1900).
[62] *In re* Estate of Breen, 329 Ill. App. 650, 70 N.E.2d 90 (1946).
[63] ILL. REV. STAT. ch. 51, §2 (1969).
[64] ILL. REV. STAT. ch. 3, §185 (1969).
[65] Martin v. Martin, 174 Ill. 371, 51 N.E. 691 (1898); *In re* Estate of Kreshner, 304 Ill. App. 640, 26 N.E.2d 529 (1940).
[66] ILL. REV. STAT. ch. 3, §185 (1969).

JUDGE OR JURY

Upon the demand of any party to the proceedings, the determination of title, claims of title, and the right to property in question shall be made by a jury.[67] This right was not available to the parties prior to the enactment of the Probate Act.[68] In accordance with the provisions of the Probate Act,[69] the choosing of a jury is in accordance with the Civil Practice Act.[70] In a matter in which the court is asked to determine the title or the right of property, it is reversible error to deny a trial by jury.[71]

THE PERSONAL REPRESENTATIVES AS THE RESPONDENT

The final provision of Article XV[72] provides a remedy for any person who claims ownership of property inventoried by a personal representative. The law grants to such other person all of the rights given to the personal representative in the preceding sections, including the right to trial by jury.

Infrequently, the citation proceeding is instituted by "another person" naming the personal representative as the respondent who has in his possession property which belonged to the decedent, or ward, which property he refuses to include in his inventory filed pursuant to statute.[73] When such is the case the court may appoint, and should be moved to do so, a guardian *ad litem* or special administrator to appear on behalf of and represent the estate. When the parties are so situated, the personal representative is a respondent in his individual capacity;[74] usually because he claims the property as his own.[75] Since his interest is inimical to the estate, the estate must be fairly represented. Sometimes such a petitioner may have a speedier resolution of the controversy by filing objections to the inventory filed by the personal representative. Occasional reports, most of them old ones, have dealt with the litigation of objections to inventories as a remedy for getting the question of ownership of property resolved where the personal representative has claimed the ownership.[76] It was suggested once that the simplest pro-

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[67] *Id.* §186.
[68] Martin v. Martin, 170 Ill. 18, 48 N.E. 694 (1897).
[69] ILL. REV. STAT. ch. 3, §5 (1969).
[70] ILL. REV. STAT. ch. 110, §190 (1969).
[71] Keshner v. Keshner, 376 Ill. 354, 33 N.E.2d 877 (1941); Hansen v. Swartz, 345 Ill. 609, 178 N.E. 246 (1931).
[72] ILL. REV. STAT. ch. 3, §5 (1969).
[73] *Id.* §171.
[74] Dubach v. Jolly, 279 Ill. 530, 117 N.E. 77 (1917).
[75] Heinrich v. Harrigan, 288 Ill. 170, 123 N.E. 309 (1919).
[76] *In re* Estate of Toigo, 107 Ill. App. 2d 395, 246 N.E.2d 68 (1969); Estate of Harwood v. Harwood, 193 Ill. App. 514 (1915); Emerick v. Hileman, 177 Ill. 368, 52 N.E. 311 (1898); Simms v. Guess, 52 Ill. App. 543 (1893); *see In re* Estate of Sacks, 89 Ill. App. 2d 1 (1967), where the proceedings were instituted to compel the personal representative to inventory stock interest.

cedure to be used by a personal representative who claims ownership is to inventory such property or asset and make notations thereon that he claims that asset.[77] The Horner book, Probate Practice & Estates, points out that the procedure of objecting to the inventory should only be employed where the personal representative has not attempted to conceal the asset or his interest, and where the person who is a probable petitioner in citation, or objection to the inventory, has knowledge of the existence of the asset. An order to inventory property is only interlocutory and does not adjudicate the right to it.[78] The "either-or" choice is practical only where all parties agree on the facts.

THE PLEADING, THE THEORY, AND THE RESPONDENT — THE IMPORTANCE OF THE INTERRELATIONSHIP

With regard to the petition, the pleader must adopt and allege his theory for recovery of property; this is of threshold importance. As in other adversary civil matters wherein the party initiating the litigation and praying for a recovery must state a cause of action, so too must the petitioner allege facts which support his prayer for relief. Should it appear from the petition and its allegations that the petitioner has no basis for recovery, a motion to strike and/or dismiss the proceedings may be filed and the respondent heard on the purely legal question of sufficiency of the petition. The petition for the issuance of a citation for recovery of property is not unlike a complaint at law or in equity. All of the provisions of the Civil Practice Act[79] and Rules of the Supreme Court[80] regarding pleadings apply. All parties to the proceedings have a right, as in all other civil matters, to use and employ the discovery provisions of the Civil Practice Act[81] and the Supreme Court Rules.[82]

When drafting the petition for recovery, the pleader should be sure to include as respondents all persons who are necessary for a final recovery of the property which is the subject matter of the planned proceeding. If the subject matter is property in the possession and custody of an individual, then such custodian should be a respondent.[83] If the subject matter is funds on deposit in a financial institution or credit union, it is necessary to make the financial institution or credit union a respondent together with all persons who claim a right to the funds. Usually, the need for a citation arises because the financial institution

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[77] Simms v. Guess, 52 Ill. App. 543 (1893); H. HORNER, PROBATE PRACTICE AND ESTATES 288 (1940).
[78] Simms v. Guess, 52 Ill. App. 543 (1893).
[79] ILL. REV. STAT. ch. 110, §§31-48 (1969).
[80] ILL. REV. STAT. ch. 110A, §§131-80 (1969).
[81] ILL. REV. STAT. ch. 110, §58 (1969).
[82] ILL. REV. STAT. ch. 110A, §§201-30 (1969).
[83] *In re* Estate of Garrett, 81 Ill. App. 2d 141, 224 N.E.2d 654 (1967).

which has the funds on deposit has informed all parties who have claimed the funds that it wants and will abide by a court order as to the true ownership of the funds. To assure a compliance with the final order determining ownership, the depositary must be made a respondent. Where property has been delivered by a proposed respondent to a third person, that person as custodian, who claims ownership through the proposed respondent, should be made a respondent. Where a person who is a respondent once had property and conveyed it to a third person, the grantee of such property should be a respondent too. In short, to effect recovery of property, the respondent against whom judgment is entered must have the power or legal obligation to make a delivery to the petitioner.[84]

As happens very often, where a depositary has delivered funds of an account to a surviving joint owner, the depositary should be a respondent in a citation proceeding for discovery. Then the petitioner is able to acquaint himself with the necessary facts for the development of his theory for recovery, prepare a sufficient petition and effectively present his "case" at the hearing. Most all banks and savings and loan associations will voluntarily provide a personal representative with copies of the signature cards and other information regarding the creation and status of the account. Presuming counsel has all the facts, then he need consider an agent of the depositary only as a necessary witness upon the hearing on the merits.

By statute all banks and savings and loan institutions are protected against liability for having delivered funds on deposit to a person named as a joint owner with right of survivorship to the funds.[85] No such protection extends to the institution where payment is made to a personal representative and there is a surviving joint owner. When such circumstances exist, then the depositary should be a respondent so that if petitioner is successful, he may pursue collection against the depositary and leave the depositary to pursue recoupment from the legal representative. Where the depositary is informed of a depositor's death, and subsequently delivers funds pursuant to a withdrawal slip signed by the depositor prior to his death, the citation should be directed against the person who withdrew the funds and the bank; the bank is not protected then by the statute.[86] The overriding element in the determination of who should be the respondent, or respondents is petitioner's theory as to against whom he can sustain a basis for recovery, and the probability of effecting that recovery.

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[84] *In re* Estate of Porter, 43 Ill. App. 2d 416, 193 N.E.2d 617 (1963).
[85] ILL. REV. STAT. ch. 76, §2(a) (1969).
[86] *Id.*

An interesting legal question arose in a citation matter at the trial court level where the petitioner sought recovery of a trust deed and not from decedent's estate on the theory that petitioner had advanced funds for a mortgage, the payment of which was secured by said instruments. The decedent had been an officer and stockholder of a bank which had become insolvent and had its depositors paid by the Federal Deposit Insurance Corporation. Upon learning of the citation proceeding, the FDIC, on its motion, was granted leave to intervene. The petitioner filed a motion to strike and dismiss the FDIC petition for recovery on the ground that the federal agency had no right to the instruments, or rights therein, until such time as there was a legal determination made that the instruments were assets of the decedent's estate. If the intervenor had a right to the property which was superior to that of the original petitioner, regardless of the original petitioner's interest, then the FDIC must be allowed to intervene,[87] and the provisions of the Commercial Code[88] were not applicable.

But the personal representative did not consider himself to be a bailee, and maintained that the documents properly belonged to the decedent's estate. Since the proceedings did not originate as an action in replevin, the provisions applicable to such an action did not apply.[89] The Civil Practice Act provisions applicable to parties and interpleader[90] did not apply because a finding for the petitioner, against the personal representative, would not expose the personal representative to "double or multiple liability."

Fundamentally, it would strain the construction of the citation statute to permit the adjudication of title to property between one who claims ownership and one who claims a lien thereon. The applicable Illinois constitutional provision,[91] the subsequently enacted statutes[92] and rules[93] designed to accomplish the objectives of the constitutional article, *i.e.*, to consolidate the various courts and expedite litigation, was not a just and sufficient reason to impose upon the petitioner, who was not the personal representative, the preparation and defense against the allegation, claim and proof to be offered of the lien holder or claimant by virtue of a liability of the decedent which was only remotely related to the asset. In anticipation, if the court had found that the property belonged to the initial petitioner, the in-

[87] ILL. REV. STAT. ch. 11, §29 (1969).
[88] ILL. REV. STAT. ch. 26, §§7-603 (1969).
[89] ILL. REV. STAT. ch. 119, §22(a) (1969).
[90] ILL. REV. STAT. ch. 110, §26.2 (1969).
[91] ILL. CONST. art. VI, §1 (1870).
[92] ILL. REV. STAT. ch. 110A, §21 (1969).
[93] *Id.*

tervention of the federal agency would have caused undue delay in the adjudication of petitioner's recovery.

In a matter where notes were payable to the decedent but were in the possession of an equitable owner, and said notes were not necessary to pay the debts of the estate, recovery by the administrator was denied.[94] The court has an obligation to protect the equitable owner and "if an order can accomplish no substantial good, it should not be made."[95] In practical application such positions are possible when the equitable owner concedes the interest of the payee, or vice versa. Applying those theories to the FDIC situation, ownership of the documents was not of importance to the personal representative, the petitioner was entitled to protection, and permitting the federal agency to intervene where the documents truly belonged to the petitioner could not accomplish any "good."

If the asset in the hands of another, who has lawful possession, is not needed by the personal representative to administer the estate, the personal representative need only assign the decedent's interest in the asset to the heir, or heirs, or legatee who is entitled to the distribution of decedent's assets.

A petitioner may not avail himself of the citation remedy for the collection of a debt.[96] Where the respondent owes a debt to the ward or owed a debt, unpaid, to the decedent, the personal representative must pursue an action at law. Where the petitioner has a demand against the estate which matured out of a debtor-creditor relationship, the remedy is to pursue a claim in accordance with statute.[97]

The pleader for the issuance of a citation should be thoroughly familiar with the various legal principles as they apply to gifts, both *inter vivos* and *causa mortis*. The theory of the petitioner for recovery is of the utmost importance. If the transfer is determined to be a gift to the respondent, he maintains possession. If, however, the respondent is found to hold the property only for the convenience of the decedent or as a trustee, the petitioner must prevail. The theory for recovery must be arrived at in the light of the property to be recovered and the circumstances surrounding the transfer of the property.

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[94] People *ex rel.* McKee v. Abbott 105 Ill. 588 (1883).

[95] 4 W. JAMES, ILLINOIS PROBATE LAW AND PRACTICE (1st ed. 1951).

[96] *In re* Conservatorship of Baker, 117 Ill. App. 2d 332, 253 N.E.2d 501 (1969); Dawdy v. Strickland, 378 Ill. 230, 37 N.E.2d 817 (1941); Johnson v. Nelson, 341 Ill. 119, 173 N.E. 77 (1930); *see In re* Estate of George, 335 Ill. App. 509, 82 N.E.2d 365 (1948), where the estate defended on the grounds that the petitioner's action was a claim. In Oliver v. Crook, 321 Ill. App. 55, 52 N.E.2d 453 (1943), the moving party's alleged claim was not a claim within the purview of ILL. REV. STAT. ch. 3, §204 (1943).

[97] ILL. REV. STAT. ch. 3, §192 (1969).

The reported cases have as the subject matter such diverse types of property as savings accounts,[98] cash,[99] bonds,[100] stocks,[101] certificates of deposit,[102] real estate,[103] proceeds of checks,[104] credit union interests,[105] partnership interests,[106] and furniture.[107] Once long ago, the citation procedure was utilized for the recovery of human beings.[108] In *Frey v. Wubbena*[109] the Illinois Supreme Court said: "[t]his case involves a wide variety of personal property interests and brings into sharp focus most of the troublesome problems which the concept of survivorship with respect to personality has presented to the courts."[110]

One matter, although involving a savings account, illustrates an unusual problem and needs a separate classification. The author has, upon occasion, referred to this case as the "Russian Roulette Account." During his lifetime the decedent had created a joint bank account with his spouse. Not long after her death, he changed it by adding the name of his then lady-friend as a joint owner with the right of survivorship. Within a short period

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[98] *In re* Estate of Watson, 120 Ill. App. 2d 83, 256 N.E.2d 113 (1970); *In re* Estate of Skinner, 111 Ill. App. 2d 267, 250 N.E.2d 295 (1969); *In re* Estate of Foster, 104 Ill. App. 2d 447, 244 N.E.2d 620 (1969); Roth v. Roth, 96 Ill. App. 2d 292, 238 N.E.2d 607 (1968); *In re* Estate of Bors, 83 Ill. App. 2d 447, 228 N.E.2d 127 (1967); *In re* Estate of Weaver, 75 Ill. App. 2d 227, 220 N.E.2d 321 (1966); *In re* Estate of Stang, 71 Ill. App. 2d 314, 218 N.E.2d 854 (1966); Dixon National Bank v. Morris, 33 Ill. 2d 156, 210 N.E.2d 505 (1965); Murgic v. Granite City Trust and Savings Bank, 31 Ill. 2d 587, 202 N.E.2d 470 (1964); Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); Schneider v. Schneider, 6 Ill. 2d 180, 127 N.E.2d 445 (1955); *In re* Estate of Artrowski, 286 Ill. App. 184, 3 N.E.2d 132 (1936).

[99] Kirkham v. Halford, 83 Ill. App. 300, 227 N.E.2d 527 (1967); *In re* Estate of Garrett, 81 Ill. App. 2d 141, 224 N.E.2d 654 (1967).

[100] Kellner v. First Trust and Savings Bank, 40 Ill. App. 2d 371, 189 N.E.2d 766 (1963); Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); Levites v. Levites, 27 Ill. App. 2d 274, 169 N.E.2d 574 (1960).

[101] *In re* Estate of Skinner, 111 Ill. App. 2d 267, 250 N.E.2d 295 (1969); *In re* Estate of Toigo, 107 Ill. App. 2d 395, 246 N.E.2d 68 (1969); Chiribes v. Bjorvik, 100 Ill. App. 2d 150, 241 N.E.2d 626 (1968); *In re* Estate of Pokorney, 99 Ill. App. 2d 230, 240 N.E.2d 740 (1968); *In re* Estate of Habel, 88 Ill. App. 2d 194, 231 N.E.2d 616 (1967); *In re* Estate of Stang, 71 Ill. App. 2d 314, 218 N.E.2d 854 (1966); *see also* Doherty, *Corporate Stock in Joint Tenancy — Right of Survivor* 4 J.M.L.Q. 169 (1938).

[102] Kirkham v. Halford, 83 Ill. App. 300, 227 N.E.2d 527 (1967).

[103] *In re* Estate of Garrett, 81 Ill. App. 2d 141, 224 N.E.2d 654 (1967); *In re* Estate of Bichl, 65 Ill. App. 2d 3, 213 N.E.2d 83 (1968).

[104] *In re* Estate of Oppenheim, 63 Ill. App. 2d 284, 211 N.E.2d 403 (1965).

[105] *In re* Estate of Dawson, 103 Ill. App. 2d 362, 243 N.E. 2d 1 (1968); Armstrong v. Daniel, 88 Ill. App. 2d 31, 232 N.E.2d 218 (1967).

[106] Frey v. Wubbena, 26 Ill. 62 185 N.E.2d 850 (1962).

[107] *In re* Estate of Smith, 90 Ill. App. 2d 305, 232 N.E.2d 310 (1967); *In re* Estate of Wilson, 404 Ill. 207, 88 N.E.2d 662 (1949).

[108] Ashley's Adm'rs v. Denton, 1 Litt. 86 (Ky. Ct. App. 1822).

[109] 26 Ill. 2d 62, 185 N.E.2d 850 (1962).

[110] *Id.* at 65, 185 N.E.2d at 853. There have been many other types of property which have been the subjects of the citation proceeding which did not reach the reviewing court: jewelry, photographs, furniture, and sentimental items of every imaginable description. Sometimes relatives initiate the citation proceedings seeking revenge rather than justice and in such a case, the property subject itself is immaterial.

of time, he changed the account so that the new joint owner with the right of survivorship was a new lady-friend in his favor. There were several ladies involved with "repeaters" among the joint owners. As in Russian Roulette, when the decedent's loaded chamber came up, the then joint owner with the right of survivorship was a lady-friend unknown to and disliked by the other lady-friends who knew each other and who had knowledge of the changes in the account. A daughter of the decedent instituted a citation proceeding against the surviving joint owner and on the hearing produced as petitioner's witnesses all of the other former girl friends of the decedent; four in number. The question arose as to whether this was an account for convenience or whether decedent possessed donative intent. It was held that frequent changes suggest a fitting pattern of convenience and indicate no intention of an ultimate gift to the joint tenant.[111]

TYPES OF PROPERTY TO BE RECOVERED

For a clearer understanding of the theories, presumptions and proof required as applicable to the proceedings for recovery of various types of property, each classification or type of property shall be considered separately.

Savings accounts

Illinois law provides as follows:

> (a) When a deposit in any bank or trust company transacting business in this State has been made or shall hereafter be made in the names of two or more persons payable to them when the account is opened or thereafter, such deposit or any part thereof or any interest or dividend thereon may be paid to any one of said persons whether the other or others be living or not, and when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payments so made.[112]

This statutory provision is an exception to the statute which abolished joint tenancies with the right of survivorship in personal property.[113]

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[111] *In re* Estate of Weaver, 75 Ill. App. 2d 227, 220 N.E.2d 321 (1966). In another trial level citation matter, a brother of the decedent maintained that he was told by a bank official that he could collect the decedent's savings, which were in excess of $8,000.00, if he submitted a surety bond. This he did and then withdrew the funds. At the hearing he admitted withdrawing the funds but stated that he had lost them gambling. On cross-examination it was established that he incurred a gambling debt in Las Vegas prior to withdrawal of the money in question. He had gambled on credit and paid off the debt with the money which was the subject of the citation controversy.

Another trial level matter further illustrates the emotionalism and distrust which such citation proceedings can cause. One female petitioner attacked her brother, the respondent, from behind, battering him with her purse. The citation proceeding was temporarily interrupted as the respondent had to be taken by ambulance to the hospital.

[112] ILL. REV. STAT. ch. 76, §2(a) (1969).

[113] *Id.*

The inclination was at common law that where there were no words which indicated the property was not in joint tenancy, the property was regarded as an estate in joint tenancy with the right of survivorship.

One reason given for such holdings[114] is that this result was a carry over from feudalism. However, this does not appear to have been the primary factor. It would appear that early reasoning was that if the so-called "unities" existed, the parties could not have intended to create anything other than a joint tenancy since they could have easily divided the property.

Consistent with other provisions of the Joint Rights and Obligations statute,[115] the above mentioned Section 2(a) makes it possible to create a joint ownership of funds so deposited with the right of survivorship notwithstanding that the initial depositor is named as one of the joint owners. The common law concept of the four unities is destroyed and the intervention of a third party, the "straw man" is unnecessary.[116]

In a literal construction of a section of the statute,[117] as it pertains to corporate stock, a federal court found that the statute was enacted only to limit the liability of corporations as to transfers of stock held jointly.[118] While the language of Section 2(a) is different, necessarily, a court would engage in strained construction to hold that the intent and spirit of sections 2(a) and 2(b) are incongruous. In construing the statute as it pertains to banks and savings accounts and what was intended, it has been held that the statute goes further than providing a protection for the bank in making payment to one of the joint owners or depositors. The court held that it also provided a statutory vehicle for the creation of joint accounts with the right of survivorship[119] which is the essential characteristic of an estate of joint tenancy.[120] By freeing the bank of liability when it pays out to a survivor, if the law is to have any meaning and reason, it follows logically that as between the bank and the survivor, the survivor is entitled to the funds.

When the subject of a citation for recovery is a savings or checking account, the petition should allege the name of the de-

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[114] In Shipley v. Shipley, 324 Ill. 560, 155 N.E. 334 (1927), the court said: "This leaning in favor of joint tenancies grew out of a desire to lessen the feudal burdens of the tenants since, only one suit and service was due from all the joint tenants." *Id.* at 560, 155 N.E. at 335.

[115] ILL. REV. STAT. ch. 76, §1 (1969).

[116] Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962).

[117] ILL. REV. STAT. ch. 76, §2(b) (1969).

[118] Petri v. Rhein, 162 F. Supp. 834 (N.D. Ill.), *aff'd*, 257 F.2d 268 (7th Cir. 1958).

[119] *In re* Vollmer's Estate, 45 Ill. App. 2d 294, 195 N.E.2d 44 (1964).

[120] Welsh v. James, 404 Ill. 18, 95 N.E.2d 872 (1951); Patridge v. Berliner, 325 Ill. 253, 156 N.E. 352 (1927). For a discussion of the principles of constructive and resulting trusts, see the text at note 188 *infra*.

positary, type of account, number of the account, title thereof and the amount sought to be recovered. As stated hereinbefore, if the funds have been paid to a survivor, or to survivors, the financial institution that released the funds is protected by statute from liability for having so released the funds, and the petition should name as the respondent the survivor, or survivors. Great care should be exercised in determining if the account was the type which afforded the bank the statutory protection in making payment to the survivor. If the petitioner knows, either through personal knowledge or as the result of discovery, that the funds are in the possession or under the control of another person or institution, then such other person or institution should be made a party respondent. A final and binding adjudication can be made only if the rights and claims of all persons involved are litigated. If the funds are still on deposit with the bank or trust company which created the account, then the bank or trust company and all who make a claim to the funds ought to be party respondents.

To determine whether the survivor or the estate has the right to the funds on deposit in the joint account or already in the possession of the survivor, the issue has loosely been stated to be whether there was donative intent in providing the funds or whether the account was created for convenience only. The donative intent to be determined must have existed at the time the joint account was created, or clear and convincing proof must be offered that subsequent to the creation of the account, the decedent made it known that it was his intent to create survivorship rights in the account. If such is the case, the donative intent relates back to the time of the creation of the account.[121] This by no means imports a gift *causa mortis*. The essentials of a gift *causa mortis* are: the execution of a document by the donor in anticipation of death; the gift to be effective only upon donor's death; and actual delivery of the property.[122]

Under the provision of the Joint Rights and Obligations statute,[123] and the presumption which arises thereunder, the gift is not delayed since the bank or trust company may pay out the funds to either or both of the parties during their life time. The courts will not apply the presumption that there was a gift, but

[121] The court in *In re* Estate of Stang, 71 Ill. App. 2d 314, 218 N.E.2d 854 (1966) said: "The evidence of donative intent must focus upon or relate back to the time of the creation of the joint tenancy". *Id.* at 817, 218 N.E.2d at 855. The *Stang* court considered the provisions of the decedent's will in order to ascertain his intent in the premises.

[122] Taylor v. Harmison, 179 Ill. 137, 53 N.E. 584 (1899); Williams v. Chamberlain, 165 Ill. 610, 46 N.E. 250 (1896).

[123] ILL. REV. STAT. ch. 76, §2 (1969).

they will indulge in the presumption that the decedent who provided the funds deposited had a donative intent.[124]

In *Erwin v. Felter*[125] the Supreme Court of Illinois held that the facts and circumstances surrounding the transaction which took place between the joint depositors and the financial institution may and should be inquired into for the purpose of aiding the court in making a determination regarding the intention of the parties.[126] The holding in *Erwin v. Felter* was followed both as to procedure and substance in citation proceedings for many years.

In *Schneider v. Schneider*,[127] on the subject of the controversy surrounding ownership of the proceeds of a savings account, it was held that "[t]o establish a gift, the proof must be clear and convincing, and the burden is upon the alleged donee to establish the existence of a donative intent." The court went on to say that "[t]he form of the [bank] agreement . . . is not conclusive as to the intention of the depositors between themselves."[128] As a result of that ruling, rendered in 1955, the survivor of a joint account with a right of survivorship was thereby compelled to assume and carry the burden of proving that there was a donative intent on the part of the deceased joint owner when the account was created, or a subsequent intent which would relate back to that time. In a dissenting opinion, Mr. Justice Hershey stated that in an appellate court opinion[129] wherein the facts were identical except as to the parties, the institution, and the amount involved, it was held that the rights of the parties were created by contract (agreement with the bank), and the respondent had to look to that contract for her rights. The appellate court had said it was improper to admit parol evidence to show an intention contrary to what was stated in the agreement. The agreement entered into at the creation of the account was not then, and is not now, a third party beneficiary contract, because it would be a grave error to presume that the contract was for the benefit of the survivor. It would be equally erroneous to consider it a bequest because the document as executed failed to meet the requirements for the making of an effective will.[130]

Thus in the *Schneider* matter, the court abandoned the contract theory and the rules of evidence applicable thereto. Hold-

[124] Murgic v. Granite City Trust and Savings Bank, 31 Ill. 2d 587, 202 N.E.2d 470 (1964).
[125] 283 Ill. 36, 119 N.E. 926 (1918).
[126] *Id.*
[127] Schneider v. Schneider, 6 Ill. 2d 180, 127 N.E.2d 445 (1955).
[128] *Id.* at 187, 127 N.E.2d at 449.
[129] *In re* Estate of McGrath, 276 Ill. App. 408 (1934).
[130] ILL. REV. STAT. ch. 3, §43 (1969).

ing that parol evidence was admissible to show the absence of a donative intent, it placed a burden on the respondent to prove such intent on the part of the decedent. Therefore, the respondent entered upon his defense of a citation for recovery in such matters without the benefit of a presumption or the implications derived from the language of the agreement executed at the time the joint account was created. The testimony given at the trial in *Schneider* was that the decedent said to the respondent, "I want your name on these bank accounts so that in case I am sick you can go and get the money for me."[131] That admission by the respondent was sufficient for the court to find that the decedent, who provided all of the funds for the accounts, did not have as a state of mind a donative intent when the accounts were created nor did anything occur thereafter which could prove that the account was anything but one created for the convenience of the decedent. On the facts, the ruling in *Schneider* would in all probability be the ruling in a current citation controversy. However, it is no longer the law that "to establish a right, the proof must be clear and convincing, . . . and the burden is upon the alleged donee to establish the existence of a donative intent."[132]

In 1964 the Supreme Court of Illinois reversed itself as to the initial legal position of the alleged donee in a citation proceeding.[133] It set standards of presumption and burdens of proof which abrogated some of the principles established by the *Schneider* opinion. It stated that "Public policy would seem to require the adoption by the courts of a more liberal and practical view of these [joint accounts] common transactions." The court went on to say:

> . . . the estate or other person claiming against the survivor should have the burden of disproving intent on the part of the decedent, and the degree of proof to void the presumption should be

[131] In Schneider v. Schneider, 6 Ill. 2d 180, 127 N.E.2d 445 (1955), the decedent withdrew funds from a savings account, and at the same financial institution created two joint accounts in his name and that of the respondent. The signature cards provided for "right of survivorship". The Probate Court of Cook County, Illinois, dismissed the estate's petition praying for recovery of the funds. On appeal and a trial de novo, the Superior Court of Cook County, Illinois, ruled that the funds belonged to the estate, which ruling was affirmed on appeal.

[132] *Id.* at 187, 127 N.E.2d at 449.

[133] In Murgic v. Granite City Trust and Savings Bank, 31 Ill. 2d 587, 202 N.E.2d 470 (1964), the decedent deposited funds in a joint savings account with right of survivorship with one Peter Murgic as his joint owner or depositor. An official of the bank had explained to both the decedent and to Peter Murgic the legal effect and ramifications of such an account. The testimony was that the decedent stated that Murgic was his friend and he wanted the said Murgic to have the funds if he pre-deceased Murgic. They signed an agreement and after some discussion as to who was to have the passbook it was delivered to the decedent. Unknown to Peter Murgic, additional funds were deposited in the account by the decedent. The trial court found for Peter Murgic by entry of judgment on a jury verdict.

> clear and convincing. . . . To hold that a lesser degree is required or that the burden shifted [from the Administrator to Murgic] would tend to make every joint tenancy account suspect and would promote instability rather than stability of ownership.[134]

In clear and concise language, the supreme court said:

> We hold that an instrument creating a joint account under the statutes presumably speaks the whole truth; and, in order to go behind the terms of the agreement, the one claiming adversely thereto has the burden of establishing by clear and convincing evidence that a gift was not intended. This burden does not shift to the party claiming under the agreement.[135]

Admitting the clarity and conciseness of the court, it bears repeating in another way — the survivor enters into the proceedings deep in the luxury of a presumption that his now deceased joint owner intended to make a gift of the funds, and the petitioner claiming the funds must assume the burden of rebutting that presumption. Upon a clear and convincing proof of the creation of an account for convenience, as in the *Schneider* matter, the presumption might be rebutted, but under present law and theory the respondent in *Schneider* would not assume the burden of clear and convincing proof that the decedent had a donative intent, as was the ruling. The presumption, as any other legal presumption, is obligatory on the court, and obligatory on a jury if such is the case.

Clear and convincing evidence has been held to be the quantum of proof which leaves no reasonable doubt in the mind of the trier of the facts of the trust of the fact, or facts, which are in issue.[136]

In the interim period between the *Schneider* matter and the *Murgic* matter, the supreme court determined that in *Schneider,* it was "concerned only with the rights of depositors between themselves and, irrespective of the equities between them, the savings association would be protected in making payments in accordance with the terms of the deposit agreement."[137]

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[134] *Id.* at 590, 202 N.E.2d at 471. After deciding *Murgic,* the Illinois Supreme Court found it necessary to decide Dixon National Bank v. Morris, 33 Ill. 2d 156, 210 N.E.2d 505 (1965), because in the lower court, Dixon National Bank v. Morris, 51 Ill. App. 2d 284, 201 N.E.2d 248 (1964), the initial position of the surviving joint owner was rendered as unstable as was the position of the respondent in *Schneider.*

[135] The issue might be raised as to whether the deceased joint owner was capable of forming the necessary donative intent. To be consistent with the law regarding the testimentary capacity of a testator, of importance is the cause of and the type of incompetence and whether the alleged incompetence was of sufficient magnitude to throttle effective intent.

[136] Galapeaux v. Orviller, 4 Ill. 2d 442, 123 N.E.2d 321 (1954); Finney v. White, 389 Ill. 374, 59 N.E.2d 859 (1945); Cravens v. Hubble, 375 Ill. 51, 30 N.E.2d 622 (1940); Northcrest, Inc. v. Walker Bank and Trust Co., 122 Utah 268, 248 P.2d 692 (1952); Greener v. Greener, 116 Utah 571, 212 P.2d 194 (1949); *In re* Chappel, 33 N.E.2d 393 (Ohio App. 1938); Merrick v. Ditzler, 91 Ohio St. 256, 110 N.E. 493 (1915).

[137] Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962).

The theory that the bank or trust company "is a mere stakeholder"[138] has been rejected. Pursuant to the agreement, the bank or trust company has an obligation to the survivor to pay him.[139] The payment to the survivor, and the acceptance of a receipt therefor, discharges the bank or trust company from liability, but does not determine the rights to the fund as between the estate of the original owner and the surviving joint owner. Thus, with the provisions of the statute,[140] and the decisions in *Frey* and *Murgic*, there is little cause for a bank or trust company to withhold payment of the proceeds of a savings or checking account to the surviving joint owner. Thus, if a financial institution resorts to an interpleader action, it is being extremely cautious.

The presumption of donative intent which marks the initial position of the respondent in such proceedings is a great procedural advantage. Unless called as an adverse party, the respondent may avail himself of a motion for a finding in his favor at the close of petitioner's proof without giving testimony if the petitioner has not rebutted the presumption of donative intent. The presumption is advantageous in both its procedural and its substantive aspects. It has greater meaning than that a party has made a prima facie case. The survivor has a presumption of law rather than one of fact. The presumption is not evidence, but it is a principle of law which creates the need for evidence to rebut it, and the failure to rebut it will cause the presumption to prevail.[141] While in itself it is neither evidence nor argument, it accomplishes the same purpose.[142] Dicta in an Illinois decision was to the effect that there is no difference in the meaning of the term "presumption" and the term "inference" so far as the law of evidence is concerned.[143] The Supreme Court of Illinois stated that the terms "inference," "probability," "assumption" and "presumption" have substantially the same meaning and import when used in legal writings and opinions.[144]

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[138] Illinois Trust & Savings Bank v. Van Vlack, 310 Ill. 185, 141 N.E. 546 (1923) (Thompson J., dissenting). The majority opinion has since been rejected. The majority held that the right of suvivorship must prevail on a contract theory.

[139] *In re* Estate of Wilson, 404 Ill. 207, 88 N.E.2d 662 (1949).

[140] ILL. REV. STAT. ch. 76, §2(b) (1969); ILL. REV. STAT. ch. 32, §770 (1969), provides for joint accounts, upon written agreement, with the right of survivorship.

[141] Brown v. Brown, 329 Ill. 198, 160 N.E. 149 (1928).

[142] Overcash v. Charlotte Electric, 144 N.C. 572, 57 S.E. 377 (1907).

[143] Paulsen v. Cochfield, 278 Ill. App. 596 (1935).

[144] Ohio Bldg. Safety Vault Co. v. Industrial Board, 227 Ill. 96, 115 N.E. 149 (1917); AESOP'S FABLES (Doubleday transl. 1968):

> The Man and the Lion: A man and a lion traveled together through the forest. They soon began to boast of their respective superiority to each other in strength and prowess. As they were disputing they passed a statue carved in stone, which represented 'A lion strangled by a man'.

The funds in a savings account on deposit in a bank or trust company may be the subject of an *inter vivos* gift. On facts created by not too unusual circumstances, it was held that the law presumes the acceptance by the donee of a gift, and the giving of the passbook of the account is an effective delivery.[145] Many matters involving an *inter vivos* gift have as witnesses thereto only the alleged donor and the donee. However, the fact that the donor is dead does not always prevent the establishment of the gift. In civil matters, the law only requires the best proof of which the case is susceptible or which can be reasonably made.[146] Also, a respondent should not be handicapped by the fact that a third person was present when the gift was made.[147]

Where a savings account is created in the name of a depositor, and he is labeled a "Trustee," with directions to the banking institution that upon the death of the depositor the balance in the account is to be paid to a named beneficiary, an *inter vivos* savings account trust is valid and enforceable by the named beneficiary, or his representative if he has one.[148] The trust agreement so labeled does not meet with the requirements made by the law for a valid testamentary bequest so the court adjudicates the issue as to whether a valid *inter vivos* trust is established. The court in ruling for the beneficiary in *In re Estate of Petralia,*[149] "accepted the position adopted by the American Law Institute in §58 of the Restatement (Second) of Trusts."[150] An attempt to dispose of P.O.D. [Payable on Death] accounts by testamentary bequest is ineffectual,[151] but the survivor of joint tenancy accounts, joint testators, and beneficiaries of trust accounts may effectively dispose of the property by testamentary bequest.[152]

The traveler pointed to it and said: 'See there. How strong we are, and how we prevail over even the king of beasts.' The lion replied: 'This statue was made by one of you men. If we lions knew how to erect statues you would see the man placed under the paw of the lion.'
Of all of the definitions and rulings regarding the word "presumption" and its synonyms, the one with the *jeu de mots*, and the wittiest, was rendered in a Supreme Court of Missouri opinion that " 'Presumptions' may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." Mackovik v. Kansas City J.&C.B.R.R., 196 Mo., 550, 571, 94 S.W. 256, 262 (1906).

[145] Schwanz v. Sangamo Electric Co., 294 Ill. App. 395, 13 N.E.2d 1007 (1938).

[146] See note 136 *supra.*

[147] *In re* Estate of Petralia, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

[148] *In re* Estate of Foster, 104 Ill. App. 2d 447, 244 N.E.2d 620 (1969).

[149] 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

[150] *Id.* at 138, 204 N.E.2d at 3.

[151] Estate of Schwendeman v. State Sav. & Loan Ass'n, 112 Ill. App. 2d 273, 251 N.E.2d 99 (1969).

[152] Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950); Rucker v. Harris, 91 Ill. App. 2d 208, 234 N.E.2d 392 (1968).

2. *Corporate Stock, Bonds, etc.*

When the property in controversy is corporate stock, bonds, or other evidence of interest, the pertinent statutory provisions[153] apply with the same effect as the law applies to bank accounts. The statute authorizes the corporation, or other entity, upon the order of the survivor, to make a transfer without inquiry and without the incurrence of liability for doing so. It also provides that all incriments, redemptions, etc. may be payable and delivered to any joint tenant thereof. The supreme court held with regard to the corporate stock that:

> A statutory right of survivorship exists and we think it unnecessary to follow the principles of common law joint tenancy whether an agreement has been signed by the parties or not. The registration of stock ownership upon the books of the corporation in appropriate statutory language is sufficient to vest legal title. . . .[154]

This statement was made notwithstanding the court's earlier holdings to the contrary. A transfer and valid gift was sanctioned where the unendorsed certificates had been transferred to the donee and the transfer was not made on the books of the corporation.[155]

When the property in controversy is a promissory note, the statute applies[156] and makes such property an exception to the statute which abolished joint tenancy with the right of survivorship in personal property.[157] It should be pointed out that the promissory note must designate the payees in language approriate to create rights of survivorship.[158]

3. *Contents of Safety Deposit Boxes*

Property found in a safety deposit box rented jointly causes a recurring problem. The presence of individual property in a safety deposit box rented jointly in the names of the decedent and others does not make the contents of the box joint tenancy property.[159] The question of ownership of the property frequently arises because the survivor of lessees of the box, usually a relative, hastens to the vault upon the death of his joint owner and removes the contents before the box can be inventoried.

4. *Partnership Interests*

In *Frey* the court was faced with an unusual property sub-

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[153] ILL. REV. STAT. ch. 76, §2(b) (1969).

[154] Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962).

[155] *In re* Estate of Toigo, 107 Ill. App. 2d 395, 246 N.E.2d 68 (1969); *In re* Estate of Hill, 42 Ill. App. 2d 396, 192 N.E.2d 429 (1963). In the *Hill* matter, the stock was not endorsed and remained in the name of the alleged donor. The court held that the delivery of the stock, together with the expressions of gift to the donee, was sufficient to constitute a gift.

[156] ILL. REV. STAT. ch. 76, §2(b) (1969). The statute includes within its provision as a classification of property rights "other evidences of indebtedness or of interest".

[157] Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962).

[158] *Id.* at 75, 185 N.E.2d at 858.

[159] *Id.*

ject. The decedent had executed a certificate in which he declared his one-fourth interest in a partnership to be joint between himself and his two daughters. The court held that his attempt was wholly ineffective under the Uniform Partnership Act.[160] It said that "[t]he very nature of a partnership is such that joint tenancy between one of the partners and a stranger to the partnership would be abhorrent to the act."[161]

5. *Certificates of Deposit*

Certificates of deposit, which are now in popular use, should be governed by the same principles promulgated for savings and checking accounts since there is a deposit made and the issuance of a certificate is made in lieu of the custom of issuing a passbook. It has been held that if a certificate of deposit is in "apt language," the statute would apply.[162]

6. *United States Savings Bonds*

The statute is clear and concise as to the ownership of a:

> United States Savings Bond, debenture, note or other obligation of the United States of America . . . issued . . . payable to a designated person and upon his death to another person therein named. . . . [It shall] become the property of and be payable to the survivor of them.[163]

Without the statute the effect would be the same since federal regulations which provide for payment to a survivor would prevail.[164]

7. *Credit Union Interests*

In a reported decision involving the proceeds of credit union funds held jointly by the decedent and another, while the reviewing court's opinion makes no mention of the statute and the presumption which arises thereunder, it applied the ruling and the reasoning in the *Murgic* matter that the written agreement spoke "the whole truth."[165]

8. *Real Estate*

With the constitutional demise of the various probate courts in the State of Illinois, and the constitutional unification of courts into Circuit Courts, the limitation of jurisdiction regarding cita-

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[160] *Id.*; ILL. REV. STAT. ch. 106½, §7 (1969) provides in pertinent part: In determining whether a partnership exists, these rules shall apply: (1) Except as provided by Section 16, (re liability), persons who are not partners as to each other are not partners as to third persons. (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

[161] Frey v. Wubbena, 26 Ill. 2d 62, 75, 125 N.E.2d 850, 858 (1962).

[162] *Id.* at 74, 185 N.E.2d at 857.

[163] ILL. REV. STAT. ch. 76, §2 (1969).

[164] Free v. Bland, 369 U.S. 663 (1962).

[165] *In re* Estate of Dawsen, 103 Ill. App. 2d 362, 367, 243 N.E.2d 1, 3 (1968).

tion proceedings to adjudicate title to real estate was removed. Formerly, the Probate Court was limited to the adjudication of title and right to possession of personal property, and could conduct inquiry and compel the production and recovery of documents which were evidence of the title to realty.[166] Now that the Circuit Court has unlimited original jurisdiction, "the complete determination of Article XV proceedings now lie within the competence of the Probate Division . . . Plenary actions in the Equity Division . . . for an accounting or for the adjudication of title to real estate are not now required."[167] For the court to adjudicate the title to real estate it must have jurisdiction over every person or other entity which claims title thereto and interests therein. An order upon a respondent to deliver to the petitioner property not in his possession or under his control is a nullity.[168]

INTER VIVOS GIFTS

Regarding the *inter vivos* gifts of personal property it was held that "[i]n addition to donative intent, other elements must be present. The donor must part with exclusive dominion and control over the subject of the gift and there must be delivery."[169] The delivery may be actual or constructive,[170] and acceptance of the property may be presumed as a matter of law.[171] The possession of the property standing alone is no indication of ownership. This is particularly true where the evidence of property has the name of two or more parties thereon since each cannot have manual possession at the same time.[172] Where the respondent in a citation proceeding has not obtained possession of the property until after the death of the decedent, he has the burden of proving ownership.[173] Gifts asserted after death of the alleged donor are regarded with suspicion.[174]

WHEN ON THE DEFENSIVE

The citation process served, or allegedly served, upon the respondent may upon proper showing be quashed as any other process. Obviously, a ground for quashing the process would be

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[166] Kahn, *Discovery and Recovery Citations in the Probate Court*, 44 ILL. B.J. 202 (1955), citing Sims v. Powell, 390 Ill. 610, 62 N.E.2d 456 (1945).

[167] *In re* Estate of Garrett, 81 Ill. App. 2d 141, 150, 224 N.E.2d 654, 659 (1967).

[168] *Id.* at 148, 224 N.E.2d at 658.

[169] Frey v. Wubbena, 26 Ill. 2d 62, 72, 185 N.E.2d 850, 856 (1962).

[170] *In re* Estate of Watson, 120 Ill. App. 2d 83, 89, 256 N.E.2d 113, 116 (1970).

[171] Chicago Savings Bank & Trust Co. v. Cohn, 197 Ill. App. 326, 329 (1916).

[172] Illinois Trust and Savings Bank v. Van Vlack, 310 Ill. 185, 192, 141 N.E. 546, 548 (1923).

[173] *In re* Estate of Bickford v. Bickford, 74 Ill. App. 2d 190, 219 N.E.2d 159 (1966); *In re* Estate of Vercillo v. Gagbardi, 27 Ill. App. 2d 151, 169 N.E.2d 364 (1966).

[174] Estate of Williams v. Tuch, 313 Ill. App. 230, 39 N.E.2d 695 (1942).

improper service. In view of the mandatory language of the statute regarding service of the process not less than ten days prior to the return day, it would appear to be error to allow the respondent more time rather than compelling the petitioner to affect another service upon the respondent. The statute also provides for service and return of the citation in the same manner as provided for summons in civil cases.[175] That provision could lead to a variety of reasons for quashing the service of the citation.

Once effective service has been made, the respondent may then attack the pleadings in the same manner as available to parties in civil matters. While there may be successive citation for discovery, providing such repeated use against the same respondent is not unreasonable, a ruling or determination on the issues raised in a petition for recovery of property in favor of the respondent is *res judicata*. The party in whose favor the judgment is entered, if served with a citation issued as a result of a new petition based on a different theory, should move to strike the petition or file a motion to dismiss on the grounds of estoppel by verdict. It has been held that where the petitioner pursued the wrong remedy and the respondent's position had not been prejudiced, the petitioner should be allowed to proceed on another petition. The court said:

> The quest for the assets of the estate of a deceased person is at times very difficult and so important that it calls for the use of a liberal construction of the powers of the court in the aid of an attempt to secure information or recovery of the assets.[176]

The ruling does not say, nor does it imply, that the court would permit a second petition for recovery of the same property from the same respondent after a prior adjudication of the former petition on the merits.

Available to the parties, if pleadings have been filed by both sides of the controversy, is the applicable statute for a determination of ownership of property on a motion for summary judgment.

The most utilized defense to a petition for recovery is that the decedent gave the property to the respondent. With the advent of *Murgic*, the respondent begins with the statutory presumption, when applicable, that such was the intent of the decedent. As to gifts *inter vivos*, the respondent assumes the burden of proving a gift and all of the necessary elements which constitute valid and enforceable ownership on the part of the donee.

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[175] ILL. REV. STAT. ch. 3, §183 (1969).
[176] Estate of Oppenheim, 63 Ill. App. 2d 284, 211 N.E.2d 403 (1965).

There are a variety of alleged statements and comments attributed to decedents by respondents in defense of petitions for recovery. The more common are: "I want . . . to have this when I am gone;" " . . . has been good to me and I want to leave this for her;" "When I die I want to be sure . . . is taken care of;" "It is your money." We are admonished to keep in mind the ease with which such oral declarations are made and how they may be unwittingly changed in repetition over a period of time. It is common knowledge that people use such expressions every day.[177] If such comments or declarations are promises to pay in the future, the person making such a comment or declaration does not create a trust with himself as the settlor and/or trustee.[178]

In attempting to recover the property in dispute, numerous reasons are alleged by petitioners as justification for the decedent's having created joint ownership of property merely for the convenience of the decedent while he was alive. Some of those same reasons have been employed by respondents as the justification for the court finding a donative intent on the part of the decedent and for finding ultimate gifts. Some of these reasons are: kinship, health, age, mental condition, disparity in age, more or less intelligence, business experience, fear, and trust. The attorney who has to pursue recovery should consider the reason for maintaining the claim of joint ownership as a convenience to the decedent, and in defending, one should consider the reason for maintaining that the creation of joint ownership was with donative intent on the part of the decedent. This consideration is important because such reasons have been given great weight in the determination of ultimate ownership.[179]

TRUSTS

The "conglomerate concept"[180] in at least three of its many classifications, and the application of equitable principles relative to that great body of law, has been considered in citation proceedings. Space and time limitations do not permit an exhaustive detailing of the application of the equitable and legal principles of "trusts" to the citation proceeding.[181]

Express Trusts

In order to create an express trust, it is sufficient that the owner of the *res* be qualified mentally to form an intent and that

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[177] Lanterman v. Abernathy, 47 Ill. 437 (1868).

[178] Schaefer v. Schaefer, 141 Ill. 337, 31 N.E. 136 (1892).

[179] *See* Kester v. Crilly, 405 Ill. 425, 91 N.E.2d 419 (1950) and *In re* Estate of Bichl, 65 Ill. App. 2d 3, 213 N.E.2d 83 (1965), as to how such factors are pertinent when a petitioner is asking the court to impose a constructive trust.

[180] Leighton, *Elements of Equitable Relief*, 2 JOHN MAR. J. PRAC. & PROC. 230 (1969).

[181] *But see* Leighton, *Elements of Equitable Relief*, note 180 *supra*.

this intent to create a trust be manifested. Such intent may be given orally or in writing or be evidenced by other acts.

An express trust in personal property may be created by spoken words.[182] In creating an express trust it is not necessary that words such as "trust" or Trustee" be used. Conversely, the use of such words, standing alone, do not necessarily indicate a trust intent.[183] It is essential, however, that the settlor must have manifested by some external or outward expression his definite intention that a trust be created. The settlor may create the trust without any consideration to himself; he may wholly divest himself of ownership without transferring the title by declaring himself as the holder of the property for another person. A trust will arise when the settlor manifests an intention to create one.

There is a conflict among authorities as to the necessity that the settlor convey or notify the beneficiary of the creation of the trust in order for it to be effective. His failure to communicate his intention to the beneficiary, or any other person, is evidence, although not conclusive, that he has not made a binding decision and therefore lacks final intention to create a trust. Oral declarations, taken to be promises to pay or deliver at a future time, do not create an interest for the beneficiary and an alleged trust must fail. "It is common knowledge that people use every day such expressions as 'the money is yours' and 'I will hold it for you' without any intention of creating a trust, but only as an emphatic way of saying 'you will be paid.' "[184]

The distinction between a declaration of trust and the execution of a gift must be considered in a citation proceeding as in other proceedings where the problem occurs. For an effective gift to be declared, a delivery, actual or constructive, must be made to the donee so as to divest the donor of possession. However, no gift is made if the alleged donor who makes a delivery is the holder of property in trust and lacks direction from the beneficiary or other authoritative person to cause the transfer of the *res*. "It has frequently been held that one who takes from a trustee who is violating his trust while having notice of such violation becomes himself a trustee."[185]

It is very necessary to make a determination as to the legal posture of the holder of the property. If one holds the property of another merely as a debtor, the citation remedy is not availa-

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[182] *Id.* at 264.

[183] Schaefer v. Schaefer, 141 Ill. 337, 31 N.E. 136 (1892).

[184] Calou v. Jones, 50 Cal. App. 2d 299, 122 P.2d 951 (1942); *see also* Lanterman v. Abernathy, 47 Ill. 437 (1868).

[185] Butts v. Estate of Butts, 119 Ill. App. 2d 242, 255 N.E.2d 622 (1970), Harris v. Ingleside Bldg. Corp., 370 Ill. 617, 19 N.E.2d 585 (1939); PERRY ON TRUSTS, 7th ed., §334; Wabbe v. Schaub, 143 Ill. App. 361 (1908).

ble and the collection thereof must be pursued at law. The holder may be a bailee. As a bailee he is not a fiduciary although both are entrusted relations. Since a bailee has no title and cannot sever the interest of the bailor in the property, he is unable to make an effective sale of same. Thus, the petitioner in a citation proceeding may pursue his remedy against the holder of the property as well as against the bailee. The position of a wrongful possessor is not any better than the position of the bailee who makes delivery to him. This is not true if the seller of another's property was not a bailee and had such an interest or possession which permitted the sale to be made to a *bona fide* purchaser; then the action must be for a wrongful conversion of property. Historically, the bailment action was at law; the trust action was in equity. In a citation proceeding no distinction is necessary.

An interesting problem is presented by the situation in which a person wins a permanent trophy but is to give up possession of such trophy to the new winner after a year. This person holds the trophy in trust and such is the understanding at the time he is presented the award.

The more common express trust which may be encountered in a citation proceeding is the trust savings account or the Totten Trust.[186] In *In re Estate of Petralia,* the Illinois Supreme Court held that a deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary.[187]

Constructive Trusts

When the proposed respondent has overreached his authority regarding property held in a fiduciary capacity and the fiduciary relationship has been breached, the law will apply the constructive trust theory. The proposed respondent must have been in a fiduciary relationship as agent with his principal.

> There is no invariable rule which determines the existence of a confidential relationship, but ordinarily there must be not only confidence of the one in the other, but also on the part of the former some inequality, dependence, weakness, want of knowledge, or other conditions giving to the latter some advantage over the former.[188]

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[186] Wilkinson v. Stitt, 175 Mass. 581, 56 N.E. 830 (1900). See text discussion following note 111 *supra.*

[187] 32 Ill. 2d 134, 138, 204 N.E.2d 1, 3 (1965).

[188] Jaeger v. Sechser, 65 S.D. 38, 43, 270 N.W. 531, 533 (1936).

Such a fiduciary or confidential relationship "may exist as a matter of law, as between principal and agent, guardian and ward, attorney and client, and the like, or it may be moral, social, domestic, or even personal."[189]

The applicable law in the State of Illinois is fully set out in an appellate court opinion.[190] Expressing the general rule of *Kester v. Crilly*,[191] the appellate court opinion recited that:

> In general, in the law of constructive trusts, a confidential relationship exists in all cases when one person reposes trust and confidence in another who thereby gains a resulting influence and superiority over the first. . . . The mere existence of a confidential relationship prohibits the dominant party from seeking any selfish benefit during the course of the relationship and affords a basis for fastening a constructive trust upon property so acquired. Where a confidential relationship exists, the presumption obtains that the transaction complained of resulted from influence and superiority and the burden rests upon the grantee to show that it was fair, equitable and just and did not proceed from undue influence. . . . [192]

The petitioner who claims the breach and abuse of a fiduciary relationship assumes the burden of proving it as a condition precedent to the court's imposing a constructive trust.[193] Once the petitioner shows the existence of a fiduciary relationship, there is the presumption that the respondent-agent acted indiscreetly and the burden shifts to such respondent-agent to prove that his acts were done in good faith.[194] The law of the State of Illinois is that transactions of parties who are in a confidential or fiduciary relationship, which is of a benefit to the dominant party, is "prima facie voidable" on the grounds of public policy[195] and are presumed fraudulent as a result of undue influence by the dominant party.[196]

Thus, upon examination and analysis of the facts and circumstances whereby the proposed or anticipated respondent became the owner or possessor of property which formerly belonged to a decedent, the attorney may find that he can recover the

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[189] Fisher v. Burgiel, 382 Ill. 42, 46 N.E.2d 380 (1943); Hensan v. Cooksey, 237 Ill. 620, 86 N.E. 1107 (1909); Irwin v. Sample,, 213 Ill. 160, 72 N.E. 687 (1904).

[190] *In re* Estate of Bichl, 65 Ill. App. 2d 3, 213 N.E.2d 83 (1965).

[191] Kester v. Crilly, 405 Ill. 425, 91 N.E.2d 419 (1950).

[192] *Id.* at 432, 91 N.E.2d at 423.

[193] Maley v. Burns, 6 Ill. 2d 11, 17, 126 N.E.2d 695, 698 (1955). *See* Koziol v. Harris, 82 Ill. App. 2d 472, 226 N.E.2d 387 (1967), where a party customarily made his accounts in joint tenancy with the person he was residing with at the time. The controversy had as its subject the plaintiff's entire estate. "It is unreasonable to presume a gift or an advancement where the subject consists of the entire estate of the alleged donor".

[194] Seeley v. Rowe, 370 Ill. 336, 18 N.E.2d 874 (1938); Tarpoff v. Karandjeff, 51 Ill. App. 2d 454, 201 N.E.2d 549 (1964).

[195] Eichhorst v. Eichhorst, 338 Ill. 185, 170 N.E. 269 (1930); *In re* Estate of Lightner, 81 Ill. App. 2d 263, 225 N.E.2d 417 (1967).

[196] McCord v. Roberts, 334 Ill. 233, 165 N.E. 624 (1929).

property on a constructive trust theory. So too may the theory be employed by another person for the recovery of property from an estate if the decedent or ward became the ostensible owner or possessor of property as the result of an encroachment on the confidential relationship he had with such other person.

When applying the principle that a constructive trust results from the acts of the parties, one must look to the facts as they existed when the *res* was acquired by the trustee.[197] These acts must consist of fraud or other wrongful conduct in order for a constructive trust to be imposed. "Once actual fraud, wrongful, unfair, or unconscionable conduct is shown, or when a fiduciary relation is established, the bases for a constructive trust are established."[198]

As in other citation proceedings, the common defense pleaded to defeat the imposition of a constructive trust is that the decedent made a gift of the property to the respondent. Other common defenses which will defeat the imposition of a constructive trust are: breach of written contract, no proof of fraud or overreaching of fiduciary duty, and lack of a confidential relationship between the parties.[199]

Resulting Trusts

Since, by definition, a resulting trust cannot be created expressly, but is a creature of the law, it often arises as a result of the manner in which the *res* is used. This includes the situation in which the possessor of the disputed property treats it as his own.[200]

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[197] Streeter v. Gamble, 298 Ill. 332, 131 N.E. 589 (1921). *See* Leighton, *Elements of Equitable Relief*, 2 JOHN MAR. J. PRAC. & PROC. 230 (1969) for excellent reading material on the subject:

> The other inquiry, absent actual fraud, unfair or wrongful conduct, is whether at the time there was a relationship of trust and confidence. Here, the possibilities are numerous. An agent is in a fiduciary relation with his principle. [Bremer v. Bremer, 41 Ill. 154, 104 N.E.2d 299 (1952).] A joint venturer owes a duty of trust and confidence to his fellow joint venturer. [Spencer v. Wilsey, 330 Ill. App. 439, 71 N.E.2d 804 (1947).] An employee, in most instances, is in a fiduciary relation with his employer. [Tinkoff v. Wyland, 272 Ill. App. 280 (1933).] A husband owes a duty of trust to his wife with regard to family property. [Maurica v. Haugen, 387 Ill. 186, 56 N.E.2d 367 (1944).] A son or daughter may be in a fiduciary relation with a parent who is unable to care for his or her affairs. [Oster v. Oster, 414 Ill. 470, 111, N.E.2d 319 (1953.] Other relations can be found out of which flow trust and confidence, and are thus fiduciary in nature. In any of these breach of the fiduciary relation will give rise to the trust, *ex maleficio* to be imposed on the thing gained.

Id. at 268. *See* Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962) for the right of a husband to dispose of his property.

[198] "A constructive trust must be established by clear and convincing evidence among which must be evidence of a traceable and identificable property or fund against which the trust must attach." Estate of Franke, 124 Ill. App. 2d 24, 33, 259 N.E.2d 841, 845 (1970).

[199] Leighton, *Elements of Equitable Relief*, 2 JOHN MAR. J. PRAC. & PROC. 230, 269 (1969).

[200] *Id.* at 265.

In examining the facts which give rise to the resulting trust, the court will look to the facts which existed at the time the title passed to the alleged trustee.[201] The surrounding circumstances, and the conduct of the parties, are of great importance in making the determination as to the imposition of a trust. "A resulting trust is based upon the presumed intention of the parties distilled from their conduct, and comes into being at the instant the title vests or not at all. . . ."[202]

Some of the factors considered by the courts in determining whether the transfer of disputed property was made with donative intent or merely for the convenience of the decedent are relevant to the issue of whether a resulting trust should be imposed. The kinship of the parties to the alleged trust is of the utmost importance. "In determining whether the requirements for a resulting trust are present, it is proper to take into account the family relationship of the parties and the informal character of their arrangement."[203]

The existence of, or lack of a family relationship is important. Where a kinship does exist, the degree of kindred or relationship should be considered. There is a presumption of a gift where a husband was the owner, purchaser, or grantor of property and his wife is the recipient or grantee.[204] The court will permit the presumption even if the marital union was void, and one of the parties, particularly the grantor, was under the impression that the grantee was his lawful spouse. While the author has not found an Illinois case which dealt with an anticipated marital relationship between grantor and grantee, it was held in another jurisdiction that the presumption of a gift rather than the imposition of a resulting trust was applied where the grantee was the grantor's fiancee.[205] The court found a gift where a father was the grantor and the grantee was a mentally incompetent son.[206] The question remains as to whether an Illinois court would make the same ruling if the grantee were an illegitimate child. The court has found a gift where the grantor was the mother and her child the grantee.[207] When the marital

[201] Note that in the constructive trust situation, the facts which the court looks to are those at the time the alleged trustee acquired the property. Resulting trusts are also referred to as "presumptive" trusts or as "intended" trusts.

[202] Suwalski v. Suwalski, 88 Ill. App. 2d 419, 422, 232 N.E.2d 64, 66 (1967).

[203] *In re* Estate of Roth, 96 Ill. App. 2d 292, 300, 238 N.E.2d 607, 612 (1968); *In re* Estate of Habel, 88 Ill. App. 2d 194, 203, 231 N.E.2d 616, 620 (1967); *see also* Merschat v. Merschat, 1 Ill. App. 2d 429, 117 N.E.2d 868 (1954).

[204] Reed v. Reed, 135 Ill. 482, 25 N.E. 1095 (1890).

[205] Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180 (1926).

[206] Cartwright v. Wise, 14 Ill. 417 (1853).

[207] Euans v. Curtis, 190 Ill. 197, 60 N.E. 56 (1901).

relationship is reversed and the wife is the owner, purchaser, or grantor of the property, and her husband is the recipient or grantee, the courts have presumed a trust rather than a gift.[208] Whether the effect of the many changes in the status women will lead a court to find a gift rather than impose a trust remains to be seen.

The degree of kindred, whether distant rather than close, calls for a different application of the law. It was determined that there was a trust rather than a gift as between an uncle and his niece.[209] It is entirely reasonable to expect a different ruling if such a relationship exists, but the grantor stands *in loco parentis* to the not-so-close kindred.[210]

Obviously, the gift theory fails upon proof that the grantor and grantee had an oral agreement or some other evidence inconsistent with a gift theory.[211] A person who voluntarily paid the purchase price of property for another, and did not receive a promise or an understanding to be reimbursed, cannot maintain the position necessary for the imposition of a resulting trust. A person who provided funds as a loan for the purchase or other acquisition of property may not have a resulting trust imposed.[212] However, if the person who claims a trust exists received funds on loan from the alleged trustee so as to pay for the property claimed to be held in trust, a trust will be imposed.[213] It could be presumed that the property was being held by the respondent as security for the loan. The opinions are numerous that where the funds for the purchase of real estate are provided by a person, and the title is conveyed to another, the law construes such facts to constitute a resulting trust.[214]

The attorney should consider if any other factors such as health, mental condition, age, business experience, etc. exist. He should also consider other motives such as the avoidance of the settlor's creditors, avoidance of taxes, avoidance of marital claims and responsibilities, and other reasons for creating a trust. Should the property have been acquired by agreement for aliquot payments in parts, then it is absolutely necessary that the true facts be learned and the principles of law relative to such situations be researched.

SUMMARY

The attorney confronted with the problem of ownership of

[208] Wright v. Wright, 2 Ill. 2d 246, 118 N.E.2d 280 (1954); Crawford v. Hurst, 307 Ill. 243, 138 N.E. 620 (1923).
[209] Niland v. Kennedy, 316 Ill. 253, 147 N.E. 117 (1925).
[210] Cook v. Blazis, 365 Ill. 625, 7 N.E.2d 291 (1937).
[211] Dorman v. Dorman, 187 Ill. 154, 58 N.E. 235 (1900).
[212] Cook v. Flatt, 338 Ill. 428, 170 N.E. 428 (1930).
[213] Towle v. Wadsworth, 147 Ill. 80, 30 N.E. 602, 35 N.E. 73 (1893).
[214] *In re* Estate of Jarodsky, 122 Ill. App. 2d 243, 258 N.E.2d 382 (1970).

property which is involved in the administration of an estate should first determine if he has sufficient facts to deal with the issue of ownership. If he represents the petitioner and his knowledge of the facts is insufficient, he may, and should, employ the citation procedure for discovery. From the knowledge gained through discovery, he must determine if it is feasible to proceed to a citation for recovery. Should a decision be reached to attempt recovery of the property, a theory must be adopted and the petition for the issuance of a citation for recovery should have allegations necessary to support petitioner's position. The pleader must keep in mind that the type of property to be recovered, the relationship of the parties, health, age and many other factors are important to his theory. He must also consider the legal presumptions and whether they are applicable to the type of property involved.

The citation, the actual process to be served upon the respondent, must state in unambiguous language what it is that the petitioner seeks from the person upon whom the process is served.

It is not sufficient that the pleading include a prayer for recovery if the respondent is not informed to that effect by the document which compels his appearance before the court. The petition for the issuance of a citation, and the service thereof are susceptible to attack by the use of all of the motions, including those which question the jurisdiction of the court, which are permissible in any other civil proceeding and granted by the Civil Practice Act.

The principal developments in citation proceedings resulted from Supreme Court of Illinois opinions in four matters; *Erwin v. Felter*,[215] *Schneider v. Schneider*,[216] *Frey v. Wubbena*[217] and *Murgic v. Granite City Trust and Savings Bank*.[218] Under the stimulus of each preceding opinion, the court abandoned the contract emphasis and adopted a gift emphasis. The thrust of the law has been away from a conservative position (*Erwin v. Felter*) to a liberal one (*Murgic.*)

Counsel participating in a citation proceeding, as attorney for the petitioner, as attorney for the respondent, or as a special administrator must familiarize himself, if need be, with the legal and equitable principles which relate to gifts and to trusts.

Many factors have given rise to a growing number of situations when a legal resolution of ownership of property is needed; the increased number of estates in probate, the generally in-

[215] 283 Ill. 36, 119 N.E. 926 (1918).
[216] 6 Ill. 2d 180, 127 N.E.2d 445 (1955).
[217] 26 Ill. 2d 62, 185 N.E.2d 850 (1962).
[218] 31 Ill. 2d 587, 202 N.E.2d 470 (1964).

creased affluence of people, more business ventures and transactions, and the increased propensity of persons to avoid probate due to recent publications. The more attempts made by laymen to avoid probate by disposition of property prior to death, the greater will be the number of situations requiring a judicial inquiry into the facts and circumstances surrounding the transaction.