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## INCORPORATION BY REFERENCE— NEW YORK MODIFICATIONS†

The trend in the development of the law of wills has been in the direction of requiring greater formality in execution.<sup>1</sup> But what appears to be a counter-current in this trend is the doctrine of incorporation by reference, which permits reference by a testator in his will to informal or formal unattested testamentary documents, *provided* the documents referred to are in existence at the time of the execution of the will, are referred to in the will as existing and are clearly identified by satisfactory proof as the papers referred to in the will.<sup>2</sup> This doctrine relaxes somewhat the rigid requirements for due execution of wills by permitting the inclusion of unattested papers under the above conditions.

Thus, it appears that the courts are constantly trying to balance two contesting rules of testamentary procedure: on the one hand they seek to prevent fraudulent alteration of wills and to ensure the posthumous execution of a testator's disposition of his property by a formal document which speaks effectively and legally at his death; on the other hand the rule of incorporation by reference is formulated to save unquestionably genuine legacies from amputation because of testamentary reference to some existing, non-dispositive document.

The problem of incorporation by reference arises in several general ways: 1) where reference is made by a testator to an informal memorandum or writing; 2) where a testator by a reference to the back of a page or to an appended page attempts a continuation of the text of the will beyond his signature; 3) where reference is made to a prior invalid will in a valid codicil; 4) or, where reference is made to a formal document such as a trust deed or the will of another person.

### *Incorporation of Informal Documents*

Where an extraneous document referred to in a will is not dispositive in character but merely describes and identifies property bequeathed or devised such reference is clearly permissible for the purpose of clarifying the testator's intent. The rule of incorporation has no application because no dispositive instrument is being incorporated.<sup>3</sup> However, it is often difficult to determine whether the instrument referred to is a testamentary document or merely identifies a gift.<sup>4</sup>

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† This article, save for minor changes, was prepared by Miss Eleanor C. Shoemaker, and submitted to the *FORDHAM LAW REVIEW* shortly before her untimely death, October 20, 1940.

1. See 1 PAGE, *LAW OF WILLS* (2d ed. 1928) § 232; 1 JARMAN, *A TREATISE ON WILLS* (6th ed. 1893) \*76 *et. seq.*

2. 1 JARMAN, *op. cit. supra* note 1, at \*97-100; See *Newton v. Seaman's Friend Society*, 130 Mass. 91, 93, 39 Am. Rep. 433 (1881); *Keeler v. Merchants' Loan & Trust Co.*, 253 Ill. 528, 529, 97 N. E. 1061, 1062 (1912).

3. *O'Leary v. Lane*, 149 Ark. 393, 232 S. W. 432 (1921); *Tonnele v. Hall*, 4 N. Y. 140 (1850). See *Hatheway v. Smith*, 79 Conn. 506, 519, 65 Atl. 1058, 1062 (1907); *Phelps v. Robbins*, 40 Conn. 250, 271 (1873).

4. See *Matter of Fowles*, 222 N. Y. 222, 233 (1918).

By the great weight of authority extraneous documents, although dispositive in character, may be incorporated by reference into a will if the requisite conditions are satisfied.<sup>5</sup> The first essential is that the document sought to be incorporated be in existence at the time the will is executed and be clearly and unambiguously referred to in the will as an existing instrument.<sup>6</sup> Parol evidence is inadmissible in this respect to clarify any uncertainty or ambiguity of language in the will. The identification of the extraneous document must be had from a description given in the will itself; otherwise the will is not wholly in writing but rests partly in parol, a relaxation of the requirement of due attestation which no court will venture to make.<sup>7</sup> However, the incorporation in a will of a letter which was referred to in a second letter, the letter being incorporated in the will by reference has been allowed.<sup>8</sup>

In *Simon v. Grayson*<sup>9</sup> a will, which was dated March 25, 1932, contained a provision leaving \$6,000 to the executors "to be paid by them in certain amounts to certain persons as *shall* be directed by me in a letter that *will* be found in my effects and . . . *will* be dated March 25, 1932." The letter found in the testator's safe deposit box was dated July 3, 1933. A codicil to the will was executed on November 25, 1933, which contained no reference to the letter. The court probated the letter as part of the will on the theory that the will was republished by the execution of the codicil and that at the time of republication of the will the letter was in existence.<sup>10</sup>

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5. *Newton v. Seaman's Friend Society*, 130 Mass. 91, 39 Am. Rep. 449 (1881). Cases in only five jurisdictions are to be found which renounce the doctrine of incorporation by reference. *O'Leary v. Lane*, 149 Ark. 393, 394, 232 S. W. 432, 433 (1921) (actually, it was held that the deeds, which the court refused to incorporate as part of the will, might be used for the description of the property and the identification of the beneficiaries); *Hatheway v. Smith*, 79 Conn. 506, 65 Atl. 1058 (1907); *Succession of Ledet*, 170 La. 449, 128 So. 273 (1930); *Hartwell v. Martin*, 71 N. J. Eq. 157, 63 Atl. 754 (1906); *Murray v. Lewis*, 94 N. J. Eq. 681, 121 Atl. 525 (1923) (Page points out that in each of the New Jersey cases some essential requisites for the application of the doctrine were lacking. 1 PAGE, *op. cit. supra* note 1, § 246); *Booth v. Baptist Church*, 126 N. Y. 215, 247, 28 N. E. 238, 242 (1891) (Page points out that all the essential requisites for the application of the doctrine were not present in this case. 1 PAGE, *op. cit. supra* note 1, at 423.); *Matter of Bouvier*, 257 App. Div. 665, 15 N. Y. S. (2d) 111 (1st Dep't 1939); *Matter of Hilliard*, 154 Misc. 872, 278 N. Y. Supp. 675 (Surr. Ct. 1935); *Matter of Angle*, 147 Misc. 445, 264 N. Y. Supp. 29 (Surr. Ct. 1933). See Chaplin, *Incorporation by Reference* (1902) 2 COL. L. REV. 148.

6. See *Appeal of Bryan*, 77 Conn. 240, 245, 58 Atl. 748, 750 (1904); *Magnus v. Magnus*, 80 N. J. Eq. 346, 84 Atl. 705 (1912).

7. *Appeal of Bryan*, *supra* note 6, at 251; *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011, 1012 (1899). *But see* *Estate of Shillaber*, 74 Cal. 144, 145, 15 Pac. 453, 454 (1887).

8. *Symes v. Appelbe* [1887] 57 L. T. 599.

9. 102 P. (2d) 1081 (Cal. 1940).

10. The lower court refused to probate the letter as part of the will. *Simon v. Grayson*, 94 P. (2d) 1044 (Cal. 1939). It argued that the letter was not incorporated in the will because it was not in existence at the time the will was executed. The codicil served to republish the will as it stood at the time of its execution; it could not incorporate any extraneous instrument which formed no part of the will at the time of its execution.

The question whether papers referred to in a will, but not in existence at the time of its execution may be probated as part of the will, if in existence at the time of the execution of a codicil thereto, although no reference to such papers is made in the codicil, has arisen with greater frequency in English jurisdictions than American. Early decisions permitted incorporation in such case,<sup>11</sup> but were later overruled.<sup>12</sup> The law in this regard was compromised in the leading case of *Goods of Truro*,<sup>13</sup> wherein it was held that the republication of a will by the execution of a codicil will not of itself entitle an unexecuted paper, written or signed between the date of the will and the date of the codicil, to probate. But where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil. Thus, where the reference in the will was to a future document, papers executed between the date of the will and codicil will be refused probate.<sup>14</sup> The language of the will must refer to the extrinsic document as an existing instrument in order that it be probated.<sup>15</sup>

In the *Simon* case the court relied upon the cases of *Goods of Truro*<sup>16</sup> and *Goods of Smart*.<sup>17</sup> However, the facts in the *Simon* case violate the rule expounded by the British cases cited, since the language of the will refers to the informal paper as a future instrument. An extenuating circumstance, however, is that the will was dated March 25, 1932, and directs the executors to a paper which *will* bear the same date. It may thus be argued that no sufficient length of time is allowed to lapse to prevent the reference from being *in praesenti*.

A natural corollary to the rule of incorporation is that the testator must have *intended* that the extraneous document be incorporated as part of his will. However, construction of the testator's intention from the language employed in the will is oftentimes difficult. In *Witham v. Witham*<sup>18</sup> the testator executed deeds of real property to his sons which were never delivered. The will recited, "I have heretofore transferred and conveyed to each of my sons certain parcels of my real property." It was held that the deeds were not incorporated in the will; a mere reference to an extrinsic instrument is not sufficient to show an intention of the testator to incorporate it into his will. In a similar case a like decision was reached by another court.<sup>19</sup> The court stated, "It is obvious that the reference in the will to the deed does not adopt the deed as part of the will, nor does it otherwise appear therefrom that the testator intended to give the property

11. *Goods of Hunt* (1853) 2 Rob. Eccl. 622; *Goods of Stewart* (1863) 3 Sw. & Tr. 192.

12. *Goods of Mathias* (1863) 3 Sw. & Tr. 100.

13. (1866) L. R. 1 P. & D. 201.

14. *Goods of Reid* (1868) 38 L. J. P. & M. 1.

15. *Durham v. Northen* [1895] 69 L. T. 691; *Goods of Smart* [1902] 71 L. J. P. 123.

16. (1866) L. R. 1 P. & D. 201.

17. [1902] 71 L. J. P. 123.

18. 66 P. (2d) 281 (Ore. 1937).

19. *Allenbach v. Ridenour*, 51 Nev. 437, 279 Pac. 32 (1929).

described in the deed by will. It expresses merely the opinion of the testator that he had conveyed by deed to take effect on his death."<sup>20</sup> An opposite result, however, was reached in the recent case, *Matter of Hogue's Will*.<sup>21</sup>

A sound and embracing rule concerning these cases was established in an earlier decision by an Illinois court.<sup>22</sup> It stated, "where the recital is to the effect that the testator has devised something in another part of the will, when in fact he or she has not done so, and thus the recital turns out to be erroneous, then such recital is construed to show a purpose and intention of the testator to devise by will, and the courts carry out such purpose and intent to devise by the will, and give such erroneous recital the effect of a devise by implication. But when the recital in the will is to the effect that the testator has, by some instrument other than the will, given to a certain person named in the recital property, when in truth and in fact he has not done so, such an erroneous recital does not disclose a purpose and intent on the part of the deviser to give by the will."<sup>23</sup>

#### *Incorporation of Matter Following Testator's Signature*

Most jurisdictions require a will to be signed at the foot or end thereof. Under such statutes a will which is not signed at the end is invalid.<sup>24</sup> However, attempts have been made to save such wills by application of the doctrine of incorporation by reference. In *Baker's Appeal*<sup>25</sup> a paragraph of the will began, "4th I give and bequeath to David S. Baker, our son, Two Hundred." Words which began a description of the devise were crossed out and alongside were written the words, "see next page." The will was signed on the first page. On the succeeding page was written an unsigned clause which was dispositive. The court admitted the will to probate holding that the 4th clause was incorporated in the will by reference.<sup>26</sup> The requisites for incorporation were specifically recognized by the court<sup>27</sup> with but one enlargement. Instead of an explicit reference to the extraneous matter being required as a condition for incorporation the court ruled that if a connection between the will and the extraneous matter is shown to have been intended which can be established from the internal sense of the instrument without resort to extrinsic proof that will be sufficient.<sup>28</sup> This doctrine gives a court wide latitude of action to discover a connection sufficient to save wills which otherwise would not be admitted to probate.<sup>29</sup>

20. *Id.* at 36.

21. 6 Atl. (2d) 108 (Pa. 1939). See also *Hourigan v. McBee*, 130 S. W. 661, 665 (Mo. 1939).

22. *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579 (1890).

23. *Id.* at 580. See also *Lander v. Lander*, 217 Ill. 289, 75 N. E. 487, 489 (1905).

24. 1 PAGE, *op. cit. supra* note 1, at 461.

25. 107 Pa. St. Rep. 381, 52 Am. Rep. 478 (1884).

26. *Id.* at 389.

27. *Id.* at 392.

28. *Id.* at 389, 392, 394.

29. "The incongruity of permitting an incorporation by reference of matter which by the

Among the jurisdictions which do not recognize the doctrine of incorporation by reference resort may not ordinarily be had to such expedient in order to save wills which would otherwise fail.<sup>30</sup> However, in *Matter of Field*,<sup>31</sup> the New York Court of Appeals distinguished and limited a respectable line of its former decisions<sup>32</sup> in order to admit to probate a will drawn upon a short-form printed blank which in the space intended for bequests contained the following, "I will and direct that my estate be settled as per the provisions of the pages hereto attached and numbered from one to six inclusive. . . ." Immediately after these words in said blank space there was attached by two pins six sheets in the handwriting of the decedent, numbered by him at the top consecutively from one to six, which contain the disposing provisions of the will. The signature of the defendant was written at the bottom of the printed form. The court ruled that a will should be read "as the mass of mankind would read it" and the testator's signature at the logical end of the will, rather than the physical end of the will, is sufficient compliance with the statute.

The rule of the *Field* case does not necessarily involve the doctrine of incorporation by reference but may be limited merely to an interpretation of the words "subscribed . . . at the end of the will."<sup>33</sup> However, the case reaches the same conclusion as does the *Baker* case by application of the doctrine of incorporation by reference. In both cases the requisites are the same, namely, the matter sought to be included as part of the will must be connected therewith by the internal sense of the will. The order of connection must appear upon the face of the will, and cannot be established by extrinsic proof.<sup>34</sup> Thus, no variance of decision between the courts of New York and those of the states adopting the doctrine of incorporation will be found in respect to the situation found in *Matter of Field*.

#### *Incorporation of An Invalid Will in A Codicil*

A codicil duly executed may incorporate therein by reference a prior will invalid because of improper execution or other legal cause.<sup>35</sup> And where the codicil is written on the same piece of paper as the will, the courts will relax

intention of the testator is already an integral part of his will is apparent, and, if permitted, it should be limited in its application to cases where, in view of the form of the will and the character of the matter sought to be incorporated, there is no room for the evasion of the statute by subsequent additions to the will under the guise of incorporation by reference." GARDNER, *THE LAW OF WILLS* (1916) 189.

30. *Matter of O'Neil*, 91 N. Y. 516 (1883); *Matter of Conway*, 124 N. Y. 455, 26 N. E. 1028 (1891); *Matter of Whitney*, 153 N. Y. 259, 47 N. E. 272 (1897); *Matter of Andrews*, 162 N. Y. 1, 56 N. E. 529 (1900).

31. 204 N. Y. 448, 97 N. E. 881 (1912).

32. See cases cited *supra* note 30; *Matter of Peiser*, 79 Misc. 668, 670, 140 N. Y. Supp. 844, 846 (Surr. Ct. 1913).

33. N. Y. DECEDENT ESTATE LAW § 21.

34. See *Baker's Appeal*, 107 Pa. St. Rep. 381, 392, 52 Am. Rep. 478, 488 (1884).

35. *In re Plumel's Estate*, 151 Cal. 77, 90 Pac. 192 (1907).

the requirement of clear and unambiguous reference and will incorporate the will although the only reference thereto is the use of the word, "codicil".<sup>36</sup>

New York courts, however, distinguish between situations where the will fails by reason of lack of due execution and where it fails solely by reason of the application of a rule of law.

In the leading case of *Brown v. Clark*<sup>37</sup> the testatrix properly executed a will, which by force of statute was revoked by her later marriage. Subsequently, she executed a codicil which reaffirmed and adopted the earlier will. The New York Court of Appeals ruled that execution of the codicil was a republication of the will and that it and the codicil were to be considered as the will of the testatrix. However, the court as part of its opinion recognized the application of the doctrine of incorporation by reference and intimated that it was the law of New York.<sup>38</sup> This was, of course, before the decision of *Booth v. Baptist Church*,<sup>39</sup> which repudiated the doctrine of incorporation in New York. However, cases decided after the *Booth* case follow *Brown v. Clark*, but limit the grounds for their decisions to republication rather than incorporation; that is, they hold that the codicil has the effect of republishing the will and the will thereby republished speaks from the date of the codicil.<sup>40</sup> Under the New York rule a will may be probated together with the codicil which republished it although intermediate between the two the will had been revoked by the execution of a second will; and proof of due execution of a codicil is sufficient to probate it and the will which it republishes although there may be failure of proof with respect to the due execution of the will.<sup>41</sup>

The New York position in this respect is consistent with its stand against incorporation because an unattested document is not being admitted to probate.

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36. *In re Plumel's Estate*, *supra* note 35; *In the Goods of Heathcote* (1881) 6 P. D. 30.

37. 77 N. Y. 369 (1879).

38. "It is established by a long line of authorities that any written testamentary document in existence at the execution of the will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct and clearly identifies, or renders capable of identification, by the aid of extrinsic proof, the document to which reference is made." *Brown v. Clark*, 77 N. Y. 369, 377 (1879). The court cited in support of its statement *Tonnele v. Hall*, 4 N. Y. 140 (1850). In *Caulfield v. Sullivan*, 85 N. Y. 153, 160, (1881) the court stated: "The codicil distinctly referred to and identified the will and reaffirmed the same, and hence the will and the codicil together constituted the will of the testator; the provisions of the former may be treated as embodied in the latter, and both may be treated as if executed and published at the same time."

39. 126 N. Y. 215, 28 N. E. 238 (1891). It has been pointed out that all the essential requisites for the application of the doctrine of incorporation were not present in this case. See note 5 *supra*. However, there has been sufficient affirmance of the *dictum* of the *Booth* case, if *dictum* it be, to establish in New York a firm stand against incorporation. See *Matter of Fowles* 222 N. Y. 327, 331, 179 N. E. 755 (1932).

40. *Matter of Campbell*, 170 N. Y. 84, 62 N. E. 1070 (1902); *Cook v. White*, 43 App. Div. 388, 60 N. Y. Supp. 153 (2d Dep't 1899).

41. *Matter of Campbell*, *supra* note 40; *Caulfield v. Sullivan*, 85 N. Y. 153 (1881); *Newhall v. Newhall*, 280 Ill. 199, 117 N. E. 476 (1917).

But where a codicil attempts to incorporate a will which has not been executed with all the statutory formalities, probate of the latter will be denied.<sup>42</sup>

*Incorporation of Wills of Other Persons and Trust Deeds*

The will of another person may be incorporated by reference provided all requisites for application of the doctrine are met. However, such incorporation is subject to defeat if the third person alters his will after the execution of the will offered for probate.<sup>43</sup> Prior to the *Booth* case, in *Matter of Piffard*<sup>44</sup> the New York Court of Appeals permitted such an incorporation. This case was, however, affirmed, subsequent to the *Booth* decision, in *Matter of Fowles*.<sup>45</sup> In the latter case the testator left property in trust for his wife with provision that a part of the remainder interest be distributed "pursuant to the provisions of such last Will and Testament as my said wife may leave". The court held that the wife's will, insofar as it disposed of this trust property, could be read into the husband's. The startling factor in this and in the *Piffard* cases, the factor which Judge Crane selected as the basis for his dissent,<sup>46</sup> was the adaptability of *any* will the beneficiary might leave to the reference in the testator's will. The doctrine of incorporation by reference requires that the document referred to be in existence at the time the will is executed. The departure from this standard formula made in the two cases under discussion can be explained only by terming it a special type of incorporation by reference, which permits reference

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42. *Matter of Emmons*, 110 App. Div. 701, 96 N. Y. Supp. 506 (1906); *Matter of Lawler*, 195 App. Div. 27, 185 N. Y. Supp. 726 (1920).

43. See *Bemis v. Fletcher*, 251 Mass. 178, 186, 146 N. E. 277 (1925), where the incorporation of a husband's will as part of his wife's will was permitted but the court indicated that in so deciding it was of great importance to them that the husband's will was *in existence* when the wife's was made. "She had in mind and referred to an existing will of her husband, a will of which she had knowledge. She did not refer to any will her husband might execute in the future. . . . We need not, therefore, consider what construction should be given to her will if her husband had made another will after 1910." See also, *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371 (1900); *Clark v. Dennison*, 283 Pa. 285, 129 Atl. 94 (1925).

44. 111 N. Y. 410, 18 N. E. 718 (1888). The testator provided in his will that the property he devised to his daughters should, if one of them predeceased him, be turned over to their executors to be distributed as they might provide in any will they should leave. One daughter did predecease the father and upon probate of his will the court referred to her's to determine how the property devised to the daughter should be distributed.

45. 222 N. Y. 222, 118 N. E. 611 (1918).

46. *Id.* at 242. The reason for Judge Crane's conclusion is, undoubtedly, that such an arrangement appears to leave a will unfinished and dependent upon some future act for its completion, and such a state of affairs conflicts with the basic purpose of statutes regulating and controlling the execution of wills; which is to direct definitely, though not irrevocably, the disposition of the testator's property to be made after his death. But the outward appearance is deceptive. Upon closer examination it appears that the testator's will is complete on the day of execution, because it is his wish that another person shall be free to dispose of certain property. His will is final. Only the exact recipient of that portion of his property cannot be named on the day of execution.



to wills of other persons whether in existence at the time of reference or not,<sup>47</sup> or by deciding that it is really not an incorporation at all and create a new name for it, which the Law Revision Commission has done.<sup>48</sup> The Law Revision Commission calls it the doctrine of "non-testamentary act", which "allows a testator to prescribe in his will that conduct which occurred before, or which shall occur after the execution of his will, shall be material in determining his dispositions, *provided* that such extrinsic conduct shall have an 'independent legal significance'."<sup>49</sup>

Judge Cardozo, speaking for the majority of the court in *Matter of Fowles*, points out that the New York rule against incorporation by reference is only a judicial doctrine and not a statutory prohibition and, therefore, should be kept within bounds which are "wise and just". Then, in giving reasons why no need is present in *Matter of Fowles* for the application of the rule, the doctrine of non-testamentary act is developed although no name is given to it or no attempt is made to differentiate it from the doctrine of incorporation by reference. It should be noted that by reason of the *Fowles* and *Piffard* cases,<sup>50</sup> the New York

47. "Where however, the testator's intention is declared in an instrument properly executed as a will in which he disposes of the property in accordance with the terms of another instrument also properly executed as a will, the evil intended to be obviated by the requirements of the Statute of Wills is obviated." And in footnote 85 on the same page: "The decision in (*Matter of Fowles*) can be supported . . . on the ground that incorporation by reference of the will of another is permitted even though incorporation by reference of other instruments is not permitted and even though the will referred to was not necessarily in existence at the time of the execution of the testator's will." Scott, *Trusts and The Statute of Wills* (1930) 43 HARV. L. REV. 521, 552.

48. LAW REVISION COMMISSION, REPORT, RECOMMENDATIONS AND STUDIES (1935) 440.

49. *Ibid.* The phrase "independent legal significance" is taken from the opinion in the case of *Langdon v. Astor's Executors*, 16 N. Y. 2 (1857), in which it was decided that the account books of a testator could be referred to in order to determine the amount of a legacy when the testator had provided that any advances made by him to his son should be charged off against the amount of the legacy given to his son. Such payments were held to have independent legal significance since they were not done solely for the purpose of altering the will. The opinion contains a thorough discussion of the problem of whether or not it is permissible to make the consummation of a testamentary gift dependent upon the happening of an event in the future.

1 JARMAN, WILLS (6th ed. 1893) 130, discusses the situation which arises when the act of a third person determines the beneficiary of a bequest; as where testator bequeathed to such one or two persons as shall not become entitled to an estate from a third person; or when the beneficiary is described by an indefinite designation such as, wife at the time of my death, or servant at time of my death. The events which determine the vesting of such gifts have independent legal significance.

50. In his dissenting opinion Judge McLaughlin distinguished the case before him from *Matter of Piffard* on the ground that in the *Fowles* case the testator directed that his executors turn over his estate to the persons named by his wife, whereas in the *Piffard* case the property of the testator was to be turned over to the daughter's executors to be distributed in accordance with the terms of her will. *Matter of Fowles*, *supra* note 45 at 246. Judge Cardozo, in the majority opinion, asserts that there is no substance in the distinction. *Matter of Fowles* *supra* note 45 at 231. *But see* *Curley v. Lynch*, 206 Mass. 289, 92 N. E. 429 (1910) which held that where a power of appointment is to be exercised by an appointee

position with relation to reference to extrinsic wills is more liberal than the position taken by states which recognize the doctrine of incorporation by reference.<sup>51</sup>

A further and perhaps more substantial relaxation of the rule against incorporation by reference is found in *Matter of Rausch*.<sup>52</sup> The testator devised one-fifth of his residuary estate to a trust company to be held under the same terms and conditions as were embodied in a prior trust agreement entered into between the testator and the trust company and which agreement was made part of the will by reference. The Court of Appeals reversed the Appellate Division<sup>53</sup> and permitted the incorporation. Although several reasons are advanced to support the decision, greatest reliance is placed upon the ground that "here the extrinsic fact, identifying and explaining the gift already made, is as *impersonal and enduring as the inscription on a monument*."<sup>54</sup> This case has been followed in a number of decisions.<sup>55</sup> It can best be explained by the doctrine of non-testamentary act. No statement was made in the *Rausch* case to indicate that the decision might have been different if the trust was not irrevocable. In the recent case of *The Manhattan Co. v. Janowitz*,<sup>56</sup> the Appellate Division interpreting the reference to the enduring nature of the trust in *Matter of Rausch* to mean that the irrevocability of the trust was the basis for the decision, refused to allow incorporation of an amendable trust which was altered twice after the execution of the will which referred to it.<sup>57</sup> It is, of course, possible that the Court of Appeals may decide the problem differently. It is suggested that it is not important or desirable to make this distinction between revocable and

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in her will, the power fails if she predeceases the testator and the provisions of her will may not be incorporated by reference in the will of the testator.

51. See note 43 *supra*.

52. 258 N. Y. 327, 179 N. E. 755 (1932). *Accord*: Swetland v. Swetland, 102 N. J. Eq. 294, 140 Atl. 279 (1928). *Contra*: Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907).

53. *Matter of Rausch*, 234 App. Div. 626 (2d Dep't 1931).

54. *Matter of Rausch*, note 52 *supra* at 332. (Italics inserted). The court also stated, "The rule against incorporation, well established though it is, is one that will not be carried to a 'drily logical extreme' (*Matter of Fowles*, 222 N. Y. 222, 233). It is one thing to hold that a testator may not import into his will an unattested memorandum of his mere desires and expectations, his unexecuted plans (*Booth v. Baptist Church of Christ*, 126 N. Y. 215, 247). It is another thing to hold that he may not effectively enlarge the subject matter of an existing trust by identifying the trust deed and the extent and nature of the increment." *Id.* at 331.

"The rule against incorporation is not a doctrinaire demand for an unattainable perfection. It has its limits in the considerations of practical expediency that brought it into being. Here the identification of the donee is itself an expression of the gift, the discovery of the one, being equivalent to the ascertainment of the other." *Id.* at 333.

55. *Matter of Hilliard*, 154 Misc. 872, 278 N. Y. Supp. 675 (Surr. Ct. 1935); *Matter of Barlow*, 144 Misc. 210, 258 N. Y. Supp. 451 (Surr. Ct. 1932); *Matter of Andrus*, 156 Misc. 268, 281 N. Y. Supp. 831 (Surr. Ct. 1935).

56. 260 App. Div. 174, 21 N. Y. S. (2d) 232 (2d Dep't 1940).

57. *Contra*: *Matter of Tiffany*, 157 Misc. 873, 285 N. Y. Supp. 971 (Surr. Ct. 1935); *Matter of Bremer*, 157 Misc. 221, 281 N. Y. Supp. 264 (Surr. Ct. 1935).

irrevocable trusts.<sup>58</sup> Under the doctrine of "non-testamentary act," the act, event or document referred to may come into existence or occur either before or after the execution of the will; all that is required is that it have independent legal significance. Certainly a trust deed although revocable has independent legal significance.<sup>59</sup>

### Conclusion

The doctrine of incorporation by reference arose from the desire of the courts to alleviate the evils arising from the failure of wills under a strict construction of the various Statutes of Wills. Courts which repudiate the doctrine do so for the reason that they do not wish to open avenues of fraud which have been closed by the legislatures.<sup>60</sup> However, in the long run greater damage is done by a strict interpretation of the statutes than by adoption of the rule of incorporation.<sup>61</sup> The doctrine is surrounded with sufficient safeguards to make the practice of fraud upon testators an exception rather than the rule.

New York stands today against incorporation by reference of any informal unattested paper, in a will. However, it permits incorporation of a *valid* will, which has become inoperative for some reason, in a subsequent codicil, and it permits incorporation of wills of other persons and of trust deeds. Rules relating to the category of cases involving documents or acts of independent legal significance are still to be formulated. Many harsh decisions are avoided by the exceptions already recognized. The view of the Law Revision Commission is that no legislation with reference to the New York law in point is desirable at present.<sup>62</sup> Unless abolition of the doctrine is desired, it is, in their opinion, better to leave the law as it stands and let it continue to be shaped by interpretations of the courts. A statute would tend to make the law inflexible in an area in which rigidity is not yet desirable.

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58. See dissenting opinion, *The Manhattan Co. v. Janowitz*, *supra* note 56 at 237.

59. "This would seem merely a logical application of the modern doctrine of incorporation by reference as defined in *Matter of Rausch's Will*, . . . which appears to be that incorporation of any document in this manner is permissible so long as it is clearly identified and is of a variety which excludes any reasonable possibility of 'chicanery or mistake.'" *Matter of Comey*, 173 Misc. 377, 17 N. Y. S. (2d) 949, 953 (Surr. Ct. 1940). This *dictum* however is overruled by the *Manhattan Co. v. Janowitz*, note 56, *supra*. The *dictum* goes too far since thereunder *any* document answering the conditions would be admissible, which amounts to adopting the rule of incorporation, a step which the *Rausch Case* did not take.

60. See note 5 *supra*.

61. The doctrine of incorporation by reference "operates only to prevent fraudulent additions to testamentary instruments, and not as security against wills forged in their entirety. We think the decisions of the courts of this State will be examined in vain in the attempt to find six cases of alleged fraudulent additions to wills, or even half that number; and it must be conceded that as to this supposed danger the remedy has proved in practice far worse than the disease. In England a statute similar to our own, and construed as strictly by the courts of that country as our statute has been construed by our courts, was passed in 1837, (1 Vic. Ch. 26). The evils resulting from it proved so great that in 1853 (15 & 16 Vic. Ch. 24) it was modified." *Matter of Field*, 204 N. Y. 448, 454, 97 N. E. 881 (1912).

62. LAW REVISION COMMISSION, REPORT, RECOMMENDATIONS AND STUDIES (1935) 448.