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COMMENTS

INCORPORATION BY REFERENCE AND INDEPENDENT LEGAL SIGNIFICANCE IN THE NEW YORK LAW OF WILLS

In the substantive law of wills two theories of law are traditionally relied upon to permit consideration of extrinsic documents in the construction or expansion of a will. These two theories are the common law doctrines of incorporation by reference and independent legal significance. It is the purpose of this comment to analyze these theories of law in a dual aspect, first, to define the doctrines, applying them to their logical legal conclusions, and second, to assess the validity of various writings under existing New York law.

THE COMMON LAW DOCTRINES

It was not until the enactment of Section 21 of the Decedent Estate Law in 1828,¹ providing for the requirement of due execution of a will,² that problems relating to the effect of extrinsic documents upon a will were encountered.³ Only with the enactment of a statute requiring the formalities of subscription and attestation do considerations of incorporation by reference and independent legal significance become pertinent.

Incorporation by Reference

Basically, incorporation by reference is a judicial device employed to enlarge the written content of a validly executed will.⁴ The result is that the document incorporated takes effect as part of the dispositive provisions, as fully as if it had been set forth within the actual four corners of the will. The extraneous document is therefore probated with the will.⁵

The generally recognized requirements for the incorporation of a writing, not executed according to the statutory requirements, are: (1) the document to be incorporated must be in existence at the time of the execution of the will,⁶

1. 2 N.Y. Rev. Stat., ch. VI, § 40, at 63 (1829), currently N.Y. Deced. Est. Law § 21.

2. The present New York rule for due execution requires: (1) subscription by the testator at the end of the will; (2) subscription made by the testator in the presence of each of the attesting witnesses or acknowledged by him to have been so made to each of the witnesses; (3) at the time of the subscription, or at the time of acknowledging the same, a declaration by the testator that the instrument so subscribed is his will; and (4) two attesting witnesses, each of whom must sign at the end of the will at the testator's request. N.Y. Deced. Est. Law § 21.

3. But see *Jackson v. Babcock*, 12 Johns. R. 388 (N.Y. Sup. Ct. 1815), where a question of incorporation was raised and the court held that a will may be construed in connection with an instrument to which it refers.

4. The majority of states adhere to the doctrine of incorporation by reference. See 2 Page, Wills § 19.17 (Bowe-Parker rev. 1960).

5. In re *Dimmitt*, 141 Neb. 413, 3 N.W.2d 752 (1942); *Dreibach Estate*, 384 Pa. 535, 121 A.2d 74 (1956); *Merrill v. Boal*, 47 R.I. 274, 132 Atl. 721 (1926). But see *In the Matter of Willey*, 128 Cal. 1, 60 Pac. 471 (1900).

6. See, e.g., *Estate of McNamara*, 119 Cal. App. 2d 744, 260 P.2d 182 (Dist. Ct. App.

(2) it must be identified by clear and satisfactory proof as the writing referred to by the reference in the will,⁷ and (3) there must be a manifested intention on the part of the testator to incorporate the document. There is disagreement as to whether or not the intention must be expressly declared.⁸

After the enactment of the due execution provision of the Decedent Estate Law in 1828, New York cases permitted incorporation by reference.⁹ *Booth v. Baptist Church*,¹⁰ however, reversed the earlier cases for no apparent reason, and with even less authority to substantiate it. In the *Booth* case, the testator bequeathed stock to be selected from his securities in accordance with a memorandum located among his papers. The court found the memorandum to be testamentary in character and declared that "it is unquestionably the law of this state that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument."¹¹ To support this reasoning, the court cited three cases, none of which stood for the proposition advanced.¹² The *Booth* ruling on the doctrine of incorporation by reference, though now accepted as a holding, was very probably a dictum since there was no proof that the memorandum involved was in existence at the time of the will.¹³

A trilogy of New York cases, however, plays havoc with any absolute rule derivable from the *Booth* case. In *In the Matter of Piffard*,¹⁴ decided three

1953); *Wagner v. Clauson*, 399 Ill. 403, 78 N.E.2d 203 (1948); *Jordan v. Virginia Military Institute*, 296 S.W.2d 952 (Tex. Civ. App. 1956); *Lawless v. Lawless*, 187 Va. 511, 47 S.E.2d 431 (1948).

7. 2 Page, Wills § 19.18 (Bowe-Parker rev. 1960).

8. The usual situation is where the testator expressly states that he "hereby incorporates said document into the will." Where no such statement is found in the will, the question of intention is doubtful. See *Dobie*, Testamentary Incorporation by Reference, 3 Va. L. Rev. 583 (1916). It is sometimes stated as an additional requirement that the reference must expressly refer to the writing as being in existence. This requirement, however, would appear to be only a further refinement of the others. See Note, 17 Minn. L. Rev. 527 (1933).

9. *Caulfield v. Sullivan*, 85 N.Y. 153 (1881); *Tonnele v. Hall*, 4 N.Y. 140 (1850); *In the Matter of Storms*, 3 Redfield's R. 327 (N.Y. Surr. Ct. 1878); *Wood v. Vandenburg*, 6 Paige Ch. R. 277 (N.Y. Surr. Ct. 1837).

10. 126 N.Y. 215, 28 N.E. 238 (1891).

11. *Id.* at 247-48, 28 N.E. at 242.

12. The cases were: *In the Matter of O'Neil*, 91 N.Y. 516 (1883) (decided on subscription at the end of will, not on incorporation); *Williams v. Freeman*, 83 N.Y. 561 (1881) (involved parol declarations); *Langdon v. Astor's Ex'rs*, 16 N.Y. 9 (1857) (independent significance).

13. 126 N.Y. at 247, 28 N.E. at 242. It might further be argued that no intent to incorporate was present. See note 8 *supra*. Yet, even in view of the unsubstantial nature of the *Booth* case, it remains the leading case in New York for the proposition that incorporation by reference is not generally recognized. See, e.g., *In the Matter of Brown*, 6 Misc. 2d 803, 160 N.Y.S.2d 761 (Surr. Ct. 1957); *In re Snyder*, 125 N.Y.S.2d 459 (Surr. Ct. 1953); *In re Tobin*, 113 N.Y.S.2d 831 (Surr. Ct. 1952); *In re Leldemer*, 113 N.Y.S.2d 808 (Surr. Ct. 1952); *In the Matter of Menken*, 180 Misc. 656, 44 N.Y.S.2d 164 (Surr. Ct. 1943); *In re Welcke*, 33 N.Y.S.2d 735 (Surr. Ct. 1942).

14. 111 N.Y. 410, 18 N.E. 718 (1888).

years prior to *Booth*, a father directed in his will that his daughters, in the event that they should die during his lifetime, should have the power by their wills, theretofore or thereafter executed, to dispose of the shares of his estate given them by his will. One of the daughters died testate during the father's lifetime. The father thereafter executed codicils to his will, wherein he re-affirmed his will and the disposition to his daughter. The court held that the daughter's executors took under the father's will, saying that "her will, therefore, is referred to, not as transferring the property . . . but to define and make certain the persons to whom and the proportions in which the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime."¹⁵ It seems that this language is insufficient to sustain the doctrine of incorporation by reference since the court never did consider the time factor. If the daughter's will were not an existing instrument at the time of execution of the father's will, an essential requirement for incorporation was lacking. The theory of incorporation, however, could have been applied because the father's codicils republished his will as of the time of their execution. At that time, the will of the daughter was in existence. This reasoning has been accepted in other jurisdictions.¹⁶

The second case in the trilogy is *In the Matter of Fowles*.¹⁷ There the testator bequeathed half his estate, to be disposed of pursuant to the will of his wife. His will further provided that if it could not be determined which one predeceased the other, he would be deemed to have predeceased his wife. Both perished in a common disaster and it was impossible to tell which one predeceased the other. Both had executed their wills simultaneously. In her will, however, the wife had exercised the power given by her husband's will. Chief Judge Cardozo, speaking for the majority of the court of appeals, stated that the doctrine of incorporation by reference was not accepted in New York. He ruled, however, that there was not, on the facts before the court, any opportunity for fraud or mistake and that, therefore, there was no reason why the testator's directive should not be given effect. Here again, as in *Piffard*, the facts do not sustain incorporation by reference. The court did not attempt to fit the facts of the case into the doctrine of incorporation. The vital requirement that the document incorporated be in existence at the time of the drawing of the will was not even discussed by the court.

Since the *Fowles* and *Piffard* cases dealt with references to wills presumably duly executed in accordance with the statutory requirements, as a matter of pure theory, the doctrine of incorporation should not be pertinent. The doctrine applies strictly to unattested documents.¹⁸

15. *Id.* at 415, 18 N.E. at 719.

16. *Simon v. Grayson*, 15 Cal. 2d 531, 102 P.2d 1031 (1940); *Shaw v. Camp*, 163 Ill. 144, 45 N.E. 211, (1896).

17. 222 N.Y. 222, 118 N.E. 611 (1918).

18. It might further be suggested that with respect to the wills of third persons, since the possibility of fraud is virtually nonexistent, the requirements of incorporation should be proportionately relaxed. See generally *Samuels, Incorporation by Reference in New York Wills*, 19 N.Y.U.L. Rev. 270, 291 (1942).

Still later, however, the court decided *In the Matter of Rausch*, which is said to stand for the proposition that New York recognizes incorporation to a limited extent.¹⁹ There the testator bequeathed a part of the residuary estate in trust for the benefit of his daughter "under the same terms and conditions embodied in the Trust Agreement made between myself and the said New York Trust Company. . . ."²⁰ The will contained words expressly incorporating the existing trust agreement. The bequest of the inter vivos trust was upheld by the court, but the reasoning was not at all clear. It is evident from the facts of the case that the requirements of incorporation were satisfied. The trust was in existence at the time of the will, it was clearly referable as the trust to be incorporated, and there was an express intention to incorporate it. Yet, some commentators doubt that the decision was based on incorporation.²¹ The court observed that quite often it is necessary to resort to factors extrinsic to the four corners of the will. "Here the extrinsic fact, identifying and explaining the gift already made, is as impersonal and enduring as the inscription on a monument."²² To this extent, it is clear that the court was thinking in terms of independent significance. On the other hand, in comparing the facts of the case with *Hatheway v. Smith*,²³ and distinguishing the latter on the ground that Hatheway's will and trust were executed simultaneously, the court was concerned with the time element, which is pertinent only in incorporation.

These three leading cases leave a strong doubt as to whether New York does in reality adhere to the common law doctrine of incorporation even where inter vivos trusts or wills are involved. Each of the cases is sustainable on some other ground and the alternative ground explains the case more adequately. Each is within the purview of the concept of independent legal significance.²⁴

Independent Legal Significance

Incorporation by reference, as a legal fiction, is relied upon only when the writing under consideration is testamentary in nature.²⁵ If a writing is found to be nontestamentary, the necessity for fulfilling the requirements for incor-

19. 258 N.Y. 327, 179 N.E. 755 (1932).

20. *Id.* at 330, 179 N.E. at 756.

21. Note, 6 U. Cinc. L. Rev. 295 (1932); Note, 32 Colum. L. Rev. 917 (1932); Note, 21 Cornell L.Q. 492 (1936); 1 Scott, Trusts § 54.3 (2d ed. 1956).

22. *In the Matter of Rausch*, 258 N.Y. 327, 332, 179 N.E. 755, 756 (1932).

23. 79 Conn. 506, 65 Atl. 1058 (1907). Connecticut is generally considered the most stringent state in its position against incorporation. See 1 Page, Wills § 252 (3d ed. 1941); Comment, 27 Miss. L.J. 220 (1956). The law in that state, however, was recently changed to provide for incorporation by reference of trusts under certain conditions. Conn. Gen. Stat. § 45-81 (1958).

24. It is to be observed that a particular case can present facts which can fulfill the requirements for the operation of both doctrines. See N.Y. Law Revision Comm'n Rep. 431, 440-41 (1935).

25. This is not to say, however, that a nontestamentary document cannot be incorporated into a will. See *Pickering v. Young*, 282 Mass. 292, 184 N.E. 727 (1933); *Allday v. Cage*, 148 S.W. 838 (Tex. Civ. App. 1912). If it in fact is testamentary, then the only approach available is the theory of incorporation.

poration is not encountered. A nontestamentary paper is not incorporated into the will but rather it is used merely to identify or ascertain the legacy, the amount of the legacy, or the beneficiary.

Hence, in a jurisdiction such as New York, where incorporation is not favored, it becomes imperative to determine whether or not a writing is testamentary. The distinction is often difficult.²⁶ Most acts of an individual performed during his lifetime are not testamentary in nature, but ultimately they may have an effect upon his will. They may affect the beneficiaries or may determine what is to be taken by a particular beneficiary. Thus, for example, the will may make a bequest to the one taking care of the testator at his death,²⁷ or it may bequeath the contents of a room or a house.²⁸ In these situations, resort must be had to some extraneous fact in order to fulfill the bequest, and yet the will is not invalid. When the testator employs a servant to care for him, he does not hire the servant for the purpose of making him the legatee under his will. The act of hiring is nontestamentary. If the testator removes an article of furniture from his house because it is old and worn, clearly it is not a testamentary act. In each of these situations, however, the testator is in reality altering his will without the formality of a duly executed codicil. Atkinson observes, however, that "if the act referred to is palpably specified for the purpose of allowing subsequent control through unattested act and has no other real significance, the gift is invalid."²⁹ The act, consequently, must have significance independent of the will, *i.e.*, it must have meaning when viewed by itself, and not be understandable only when read with the will. In a situation where bequests are made to those listed on a slip of paper in the testator's safe, the slip of paper has no meaning by itself. Its meaning is completely dependent upon the will.

Under this doctrine, the independent fact can exist at, before, or after the execution of the will. There is no time factor involved, as there is with incorporation.³⁰ Furthermore, the independent act does not have to be within the control of the testator.³¹

Little difficulty is encountered in the cases where the sole factor of independent significance is an act. When writings are involved, the case becomes more difficult since the writing may come very close to being dispositive in nature. Thus, for example, if the will devises all the testator's property to the person in his employ at his death, and that person is to possess a writing as evidence of his employment, what is the effect of the writing? Is it testa-

26. See generally Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, 25 Colum. L. Rev. 879 (1925); Note, 27 Ky. L.J. 431 (1939).

27. *Dennis v. Holsapple*, 148 Ind. 297, 47 N.E. 631 (1897); *Lear v. Maner*, 114 Me. 342, 96 Atl. 240 (1916); *Glasgow's Estate*, 243 Pa. 613, 90 Atl. 332 (1914).

28. *Buchwald v. Buchwald*, 175 Md. 103, 199 Atl. 795 (1933); *Appeal of Magoohan*, 117 Pa. 238, 14 Atl. 316 (1887).

29. Atkinson, *Wills* § 81 (2d ed. 1953). See also *In the Matter of Angle*, 147 Misc. 445, 264 N.Y. Supp. 29 (Surr. Ct. 1933).

30. Atkinson, *Wills* § 144 (1st ed. 1937).

31. *Ibid.*

mentary or not? The rule applicable to this situation would hold that for independent significance to apply, the act must be the salient feature and the writing only incidental.

In the early case of *Langdon v. Astor's Ex'rs*,³² the will provided that if any inter vivos gifts were charged on the testator's books of account against any of the beneficiaries named in his will, then their respective legacies should be reduced proportionately. The court allowed the reduction in the bequests as evidenced on the books. The fact of the gifts was the relevant consideration; the notations in the book only secondary. On this basis, it can be argued that the fact of an existing will or inter vivos trust is the primary consideration and the writing is only secondary, and merely evidence of the fact. But the New York cases do not proceed on that theory, at least not expressly. They do in fact apply the theory, but speak in terms of incorporation by reference.³³ Again, referring to the three leading New York cases,³⁴ it is apparent that independent legal significance is sustainable in each of them. Clearly, the will of another has an existence independent of the will of the testator attempting the incorporation. For the testator, it is only evidence of the beneficiaries who are to take under his will, although testamentary in relation to the individual who executed it. It is equally apparent that an inter vivos trust has independent significance. The establishment of such a trust is not testamentary in character. Thus, *Piffard*, *Fowles*, and *Rausch* are sustainable without resort to incorporation by reference, if the existence of the fact, will, or trust is paramount to the writings which created them.

The New York Rule

It has been suggested that New York recognizes incorporation when there is some ground to uphold it, *i.e.*, independent legal significance.³⁵ As a technical result, this would mean that although the document is actually referred to as one of independent significance, it, in effect, becomes part of the will as if it were incorporated by reference. The distinction is merely one of form because it makes little difference whether the document is only referred to or actually made part of the will, so long as the intention of the testator is fulfilled.

It is reasonable to conclude that there is no rule of incorporation operative in New York, but only the rule of independent significance, which permits inclusion of the writing referred to for the purpose of probate.³⁶

32. 16 N.Y. 9 (1857). The New York cases give full adherence to independent legal significance when an act alone is involved. See *Givens v. Whitney*, 233 N.Y. 665, 135 N.E. 961 (1922) (per curiam); *Harrington v. Abberton*, 115 App. Div. 177, 100 N.Y. Supp. 681 (1st Dep't 1906); *Matter of Altman*, 115 Misc. 476, 188 N.Y. Supp. 493 (Surr. Ct. 1921); *Matter of Mitchell*, 114 Misc. 370, 186 N.Y. Supp. 666 (Surr. Ct. 1921).

33. *Samuels*, op. cit. supra note 18, at 290-92.

34. In the *Matter of Rausch*, 258 N.Y. 327, 179 N.E. 755 (1932); In the *Matter of Fowles*, 222 N.Y. 222, 118 N.E. 611 (1918); In the *Matter of Piffard*, 111 N.Y. 410, 18 N.E. 718 (1888).

35. *Samuels*, op. cit. supra note 18, at 290-92.

36. Thus, in *Rausch*, 258 N.Y. 327, 179 N.E. 755 (1932), the trust agreement was

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Trust Agreements

Under the authority of *Rausch*,³⁷ an unamendable and irrevocable inter vivos trust instrument referred to by a will may be incorporated therein. If *Rausch* is a case of independent significance, then it should not make any difference whether the trust comes into existence before or after the will as long as it is operative before the testator dies.³⁸ *In re Snyder*³⁹ held that, even though the inter vivos trust was amendable, a testamentary bequest to the trustee was valid because the trust had not in fact been amended since the execution of the will.

On the question of an amendment to the inter vivos trust subsequent to the execution of the will, there is a divergence of holdings in the various states.⁴⁰ In *President and Directors of Manhattan Co. v. Janowitz*,⁴¹ the testator modified the trust subsequent to the execution of the will. The appellate division held that the provisions of the will leaving the bequest to the trustee were wholly invalid. The court found that the bequest could not be upheld upon either the theory of incorporation or of independent significance. It distinguished the case from *Rausch* on the ground that the *Rausch* trust was unamendable and irrevocable. It is interesting to note that, in view of the judicial reliance upon the alleged fact that the *Rausch* trust was unamendable, the trust did in fact provide for a conditional amendment.⁴²

The court in the *Janowitz* case went on to say that "the reservation of power to amend the trust indenture and its repeated exercise eliminated all independent significance that might be attached to the trust indenture."⁴³ This reasoning would seem to misconstrue the theory of independent significance, since the ability to change the instrument has no relevancy if it is nontestamentary. The holding in the *Janowitz* case, however, has been modified to an extent by *In the Matter of Ivie*.⁴⁴ In the latter case, the trust, subsequent to the execution of the will, was amended so as to eliminate the

incorporated into the will, not because it fulfilled the requirements of incorporation but rather because it was a factor of independent significance and there was expressed an intent to include it in the will. When it is observed that much written in wills is not truly testamentary, yet probated with the will, such a position is not so startling.

37. *Ibid.*

38. If the trust were not operative at the testator's death, its existence as a fact would be illusory.

39. 125 N.Y.S.2d 459 (Surr. Ct. 1953).

40. *Atwood v. Rhode Island Hosp. Trust Co.*, 275 Fed. 513 (1st Cir. 1921) (the trust failed); *Old Colony Trust Co. v. Cleveland*, 291 Mass. 380, 196 N.E. 920 (1935) (trust disposed of in accordance with the way it existed at the time of the making of the will). See also *Koeninger v. Toledo Trust Co.*, 49 Ohio App. 490, 197 N.E. 419 (1934); 1 *Scott, Trusts* § 54.3 (2d ed. 1956).

41. 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940).

42. *In the Matter of Rausch*, 143 Misc. 101, 102-03, 257 N.Y. Supp. 78, 79 (Surr. Ct. 1930).

43. 260 App. Div. at 179, 21 N.Y.S.2d at 237.

44. 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958).

settlor's power to amend or alter the trust. The court found that the fact of minor administrative changes after the execution of the will did not offend the rule of "incorporation by reference." This observation clearly shows the extent of the confusion in New York. Strictly speaking, any type of change in the writing to be incorporated defeats incorporation. Consequently, *Ivie* is inconsistent with incorporation. If, on the other hand, the theory is independent significance, then there is no need to distinguish the nature of the change, so long as it is not testamentary. With independent significance, the testator always retains the power to change substantially his bequests or beneficiaries by altering the independent factor.

Unattested Memoranda

Unattested memoranda cannot be incorporated in New York in the sense of being probated with the will. They may, however, be referred to in order to clarify bequests or beneficiaries, if they are nontestamentary, under the theory of independent significance. The difficulty here is to show that the memorandum is not testamentary in character. It is suggested that such a determination is quite often a question of semantics.

In *In the Matter of Le Collen*,⁴⁵ the testatrix bequeathed the contents of certain envelopes in her safe deposit box to the persons named thereon, and then named the beneficiaries, but not the specific securities given each. The court upheld the bequest, stating that "a nontestamentary extraneous paper may be resorted . . . to . . . for the limited purpose of identifying the thing intended to be given."⁴⁶ The case could be considered a receptacle case of independent significance, if the bequest had been "all my securities in my safe deposit box I give to Smith." The fact of the writing on the envelopes, however, brings the case under scrutiny in order to determine the weight to be given the writing. Conceivably, the envelope itself may be looked upon as a receptacle. It is logical also to say that the names on the envelope are identical with the means of identification such as "the green envelope." In the typical receptacle case, the fact that the testator gives all the personality in his house to a beneficiary does not defeat the bequest simply because it is necessary to read the house address to determine the correct house. It is to be observed, however, that if the testatrix had failed to name the beneficiaries in her will, the bequests would have failed since, then, the names on the envelopes would be testamentary in character and have significance only in relation to the will.

On the other hand, the court stated that the rule against incorporation of unattested memoranda, testamentary in nature, "is applicable whether the instrument is required to be resorted to to identify the beneficiary or the quantum of his benefit."⁴⁷ Cannot the envelope with the beneficiary's name on it be said to identify the quantum of the benefit? The distinction is, indeed, elusive and Chief Judge Cardozo pinpointed that elusiveness when he stated that "the

45. 190 Misc. 272, 72 N.Y.S.2d 467 (Surr. Ct. 1947).

46. *Id.* at 275, 72 N.Y.S.2d at 470.

47. *Ibid.*

two classes of cases run into each other by almost imperceptible gradations."⁴⁸

A New York case illustrating this imperceptible gradation is *In the Matter of Gibbons*,⁴⁹ wherein the court invalidated a provision in a will to pay the outstanding checks of the testator at his death. The court did not treat the case as one of independent significance but it clearly is such. The fact of the money owing or the purported gift is the primary factor; the check is merely evidence.

Essentially, it should not make any difference what the writing contains, *i.e.*, whether it identifies the beneficiary, the bequest, or the amount, so long as its significance is not solely dependent upon the will.

Wills

Where it is necessary to refer to the will of another to determine the beneficiaries or the quantum of the estate, such reference is valid in New York and sustainable by independent significance.⁵⁰

CONCLUSION

It has been suggested that New York's approach is empirical, taking each case on its facts.⁵¹ Obviously, such a rule is no rule of law but a question of fact. A clear judicial statement that New York is in full accord with independent significance is necessary for clarification. If independent significance can be accepted in New York, there is no sound reason for not accepting incorporation by reference. Both serve an equitable purpose and both possess adequate safeguards. A rule of law founded upon a dictum in a case where the rule was not applicable to the facts, and substantiated by three cases which do not support the contention advanced, speaks for itself.⁵²

It is submitted that the New York courts should have more regard for the words of Chief Judge Cardozo, that the primary consideration is to prevent "fraud and mistake."⁵³

48. *In the Matter of Rausch*, 258 N.Y. 327, 332, 179 N.E. 755, 756 (1932), quoting *In the Matter of Fowles*, 222 N.Y. 222, 233, 118 N.E. 611, 613 (1918).

49. 234 App. Div. 153, 254 N.Y.S. 566 (3d Dep't 1931).

50. *In the Matter of Fowles*, 222 N.Y. 222, 118 N.E. 611 (1918); *In the Matter of Piffard*, 111 N.Y. 410, 18 N.E. 718 (1888).

51. Samuels, *op. cit.* supra note 18, at 290-92.

52. See notes 10 and 12 supra.

53. *In the Matter of Fowles*, 222 N.Y. 222, 232, 118 N.E. 611, 613 (1918).