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Cover Page Footnote

Professor of Law, Fordham University.

I BY R 1, 2, 3, 5, 7 . . .

ROBERT A. KESSLER*

STRANGE as it may seem, the title to this article may some day constitute a contract, a certificate of incorporation or even a will. If it does, the reason, of course, will be incorporation by reference: individual adoption of "prefabricated" form terms. The possibility is hardly Orwellian. All that would be required would be a statute setting forth the provisions in full and authorizing an individual to adopt those chosen by numerical reference.

Lawyers have always used "forms," and, although many law students graduate without ever hearing of them, form books usually become the most important part of their law libraries when they finally encounter the "real world" of law practice. Rarely have forms from such books been ideal. Often they get into the books because they have been set out in full in judicial opinions, and, hence, are easy to copy. Often the reason they were quoted in the opinions was because they were so ambiguously drafted that only judicial construction could ascertain what the parties "meant." Of course, once the courts have defined the language the form can be safely used to produce the same result, even if the language doesn't seem, to the uninitiated, to say it.

Once forms have been pronounced as "safe" by the courts, the tendency has been to use them even if they do not make sense. Judicial construction rarely, however, makes any form absolutely safe. The opinion will, e.g., say that a form does not apply to a particular situation.¹ This does not guarantee its sufficiency as to others not passed upon.

In recent years, "official forms" have appeared. Notable examples are the forms for use under the Federal Rules of Civil Procedure and the local Uniform Commercial Code financing, continuation, termination, etc., statement forms which have been adopted in many states enacting the Code.² These, although they do not guarantee that the desires of their users will be completely effectuated, and hence are not ideal either, at

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1. See, e.g., *Sands Point Land Co. v. Rossmore*, 43 Misc. 2d 368, 251 N.Y.S.2d 197 (Sup. Ct. 1964), holding that a restrictive provision in the corporate charter controlling the sale of shares applied only to voluntary sales and not where a shareholder was dissenting from the sale of corporate properties. (This probably created a loophole in the agreed-upon arrangement.) Examples could be multiplied.

2. For example, all the following states have officially approved U.C.C. forms: Alabama, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, West Virginia, and Wisconsin. See Uniform Commercial Code § 9-402(3) which itself prescribes a minimum statutory form of financing statement.

least give the assurance of legal acceptability. Although the Federal forms cover the most common situations³ and supply patterns easily modifiable to suit others, the voluminous unofficial Federal form books indicate that they too are not ideally comprehensive.

Ideal or not, lawyers are quite used to taking packaged language and incorporating it in individual documents for their clients. Typically, the language must be copied from its source. Typically also, there must be a combining of parts of various forms, and numerous modifications in order to attempt to have the words produce the desired result. There are always dangers. Even otherwise excellent form paragraphs may prove immiscible. The problem is especially great with regard to complex contracts and wills, and few official forms are available in these areas.

Lawyers are used to forms, and to adopting them for the individual case, but, unfortunately, there are too few ideal forms. Obviously, such ideal forms are a sine qua non for any successful incorporation by reference method. Basically, this is the principal problem, since, in effect, incorporation by reference and the use of forms are generically related, because, as will be seen on consideration, incorporation by reference is merely the use of an abbreviated symbol for the operational modality symbolized in a typical form by the more conventional symbols of language.⁴

I. THE NECESSITY FOR IDEAL FORMS

Language is the lawyer's tool. And the word "tool" is appropriate, since the lawyer's use of language is operational, i.e., the lawyer is more interested in consequences than concepts.

Thus, when e.g., he drafts a will, the lawyer ascertains what consequences the client desires, in this case what disposition of his property, and then picks the words which will supposedly guarantee these consequences. Usually these are words which the courts have interpreted to yield the desired result, i.e., are operationally related to it. For example, the words, "I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever nature and wherever situate, to my wife X," will usually produce the result that, if there are no other bequests or devises, the husband's property passes to X on his death, after the usual payment of debts, funeral costs and administration expenses. This cluster of words is, therefore, a symbol for the

3. There are only sixteen official Complaint forms. See Appendix of Forms to Fed. R. Civ. P., Forms 3-18. Many of these are in specialized fields not frequently encountered by the average practitioner.

4. Use of symbols in the law is quite old. Wholly apart from the symbols of its majesty and power (exemplified, e.g., by the judges' robes and the assize ritual), we have the seal, a symbol of voluntary assent in an illiterate age, and the peppercorn ritual, a clear example of incorporation by reference of the law of conveyancing.

desired disposition: operating in and through the social situation, it is causally related to that result.

But a complete disposition of the property must take into consideration all reasonably foreseeable possibilities. Thus, if *F*, a widower, has sons *S1* and *S2* to each of whom he wants to leave half of his estate, the possibility of either *S1* or *S2* predeceasing the father must be considered. If *S1* has three children, and *S2* has only two, the father may well decide that if either son predeceases him, the half which would have gone to either son should be divided up among that son's children. I recall, shortly after graduating from law school being asked to draft a will for just such a situation. After providing for the division of the estate into two parts, and giving one part to each son, I continued: "If my son *S1* should predecease me, I direct that the share which he would otherwise have taken be divided equally among his three children, *G1*, *G2* and *G3*." A corresponding provision was added for *S2*'s two children. *S1* was considerably older than *S2*, and there was a possibility that his eldest child would be married and have his own child or children in the not too distant future. Should the lawyer try to provide for the remote contingency of the death of *S1* and his eldest child, too, prior to *F*'s death? Very complicated provisions would result if this were attempted. Also, what if *S1* and *S2* each had more children, as was likely in *S2*'s case, after their father's will was executed? My senior partner suggested that instead I use "my issue per stirpes and not per capita." The operational consequences of this expression also covered both the possibilities of additional grandchildren, and great grandchildren. Few lawyers are concerned with the meaning, much less the etymology, of the lawyer's terms "my issue per stirpes and not per capita." What they do care about is the operational effect of this symbol. It could just as readily be "ugh," as long as the chosen disposition resulted. Indeed, to a certain extent "ugh" would be preferable, since it is shorter. The symbol, then, is unimportant as long as the results are guaranteed.

Shorthand expressions are particularly desirable where, as in the example, a number of alternative contingencies must be provided for. Whether or not a compressed form is used, it is obvious that all foreseeable alternatives must be anticipated for adequate drafting. Complete systems, or modalities,⁵ must be contrived, and more, *alternative* ideal modalities must be devised.

The drafting problem is a difficult one, but, at least for the more common modalities, not an impossible one. Thus, a young married man,

5. The term "modality" as here used is designed to mean a complete system, a complete "estate plan" in the case of wills, a complete life history for a partnership or corporation, a contract which provides explicitly and adequately for all contingencies in a commercial agreement, etc.

even if he has children (these will presumably be quite young), with only a moderate estate, will probably desire to leave all of his property to his wife, and only if she predeceases him or dies in a "common disaster" with him, to the children. Joint ownership of all property, including bank accounts, is sometimes chosen to accomplish this. Where a will is chosen, the provisions are fairly standardized. A wealthy older man (i.e., safely in the Federal Estate Tax bracket) will ordinarily want to take advantage of the marital deduction. Here, perhaps because the legal situation has not been current as long, the forms to accomplish the tax benefit are not as standardized, but are, of course, available.⁶ Other common situations are equally isolable.⁷ In each jurisdiction there are a finite number of possible deed forms. As a result many states have adopted "statutory forms" for such instruments.⁸ Many states also have mandatory insurance policy forms.⁹ Local banks often agree on required mortgage provisions. There are certain modalities which are desirable in other legal situations. Thus, e.g., a corporation owned by one man will have as its desired operational congeries an arrangement under which all powers will be confided to the sole owner.

In most instances, although the desired modalities are discoverable, and hence could be "drafted," i.e., the appropriate symbols set out for a complete system of operation so that the desired results would follow, this has not been done. The reason that more "contracts of adhesion" (as the Continentals would say) have not been developed is probably not so much due to a contrary policy decision by State legislatures, as to the lack of imaginativeness on the part of lawyers, the difficulty inherent in such complex draftsmanship, and, to a certain extent, the possessive pride of authorship (and a desire to preserve the economic fruits of such authorship) on the part of those lawyers who are skillful enough to develop their own ideal forms for such common lego-problematic situations.

The law is growing ever more complex. It is impossible for a lawyer to keep abreast of all of the law of even a single jurisdiction. He cannot be a specialist in all the fields in which he may be called upon to act for a client. Yet, unless the general practitioner is to become obsolete, he must

6. See, e.g., 4 P-H Wills ¶ 21,312, ¶ 21,313 (1965).

7. See, e.g., the problem of the man with two sons, *supra*.

8. See, e.g., Alaska Stat. § 34.15.030 (1962); Cal. Civ. Code § 1092 (West 1954); Colo. Rev. Stat. Ann. § 118-1-13 (1963); Del. Code Ann. tit. 25, § 121 (1953); D.C. Code Ann. § 45-301 (1961); Mass. Gen. Laws ch. 183, Appendix (1932); Mont. Rev. Codes Ann. § 67-1602 (1947); N.Y. Real Prop. Law § 258; N.D. Cent. Code § 47-10-06 (1960); Okla. Stat. tit. 16, § 40 (1961); S.C. Code Ann. § 57-251 (1962); S.D. Code § 51.1403 (1939); Utah Code Ann. §§ 57-1-12, 57-1-13 (1953); Va. Code Ann. § 55-48 (1959); Wis. Stat. § 235.06 (1961); Wyo. Stat. Ann. § 34-42 (1957).

9. See, e.g., Cal. Ins. Code § 2071 (West 1955); Conn. Gen. Stat. Ann. § 38-98 (1958); Iowa Code § 515.138 (1968); La. Rev. Stat. § 22-691 (1950); Minn. Stat. Ann. §§ 65.A.01-04 (1946); N.C. Gen. Stat. § 58-176 (1965); N.D. Cent. Code §§ 26-03-26 to 26-03-31 (1960).

act in a wide variety of such fields. He must be prepared to draft wills, deeds, and all manner of contracts and other business documents. He must rely to a large extent on the expertise of others in order to do this. In short, he must rely on forms prepared by others. Unfortunately, many of these, as indicated above, are far from ideal in the calibre of their draftsmanship. As will be discussed below,¹⁰ even well-drafted forms are often not ideal in the sense that the desired consequences cannot be guaranteed. Accordingly, the development of a multiplicity of ideal modalities for at least all of the most common consensual legal problems is obviously desirable from the point of view of service to the public.¹¹

II. NECESSITY FOR STATUTORY AUTHORIZATION

For a modality to be ideal, it is, of course, necessary that the consequences of the symbols be absolutely predictable.¹² Thus, if a will reads "per stirpes," its draftsman does not want the words to be interpreted "per capita," the logical opposite. The only way to guarantee against misinterpretation is through an advance conditioning of the organs of legal consequence creation, the courts.¹³ The best way of doing this is through use of unambiguous language symbols in a statute.

The denotative force of many words is ambiguous. Thus, the term "children" in the original will example is not really clear. Does it include adopted children? The term has occasionally been held to include grandchildren, as in the hypothetical.¹⁴

Indefinite references (levels of meaning) are, of course, virtues in poetry. Note, e.g., Housman's use of the word "sleep" in three different senses in his poem "The Lancer."¹⁵ Sometimes, legislation is deliberately

10. See "Necessity for Statutory Authorization," *infra*.

11. See "Objections," *infra*.

12. This is not to say that some forms could not be improved upon from the point of view of more effective accommodation of public need.

13. Thus, Fed. R. Civ. P. 84 provides: "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."

14. *Enz v. Bowan*, 98 N.J. Eq. 514, 131 A. 159 (Ch. 1925).

15.

I 'LISTED at home for a lancer,
 Oh who would not sleep with the brave?
 I 'listed at home for a lancer
 To ride on a horse to my grave.
 And over the seas we were bidden
 A country to take and to keep;
 And far with the brave I have ridden,
 And now with the brave I shall sleep.
 For round me the men will be lying
 That learned me the way to behave,
 And showed me my business of dying:
 Oh who would not sleep with the brave?
 They ask and there is not an answer;
 Says I, I will 'list for a lancer,
 Oh who would not sleep with the brave?

drawn using vague terms, in order to accommodate the changing content necessary to meet the requirements of justice in a multiplicity of situations. Obvious examples are the words "due process" in the United States Constitution,¹⁶ and the use of "reasonable" in the Uniform Commercial Code.¹⁷ In most documents and statutes, however, no vagueness is desirable. So far as possible terms should have a fixed and invariant meaning to avoid the logical fallacy of "equivocation." While legal words, to a surprising extent, do not have a fixed meaning—they are the skins of living ideas,¹⁸ and everything alive changes—the desideratum, generally, is certainty of reference.

One way of insuring such fixity of meaning is through elaborate specificity using simple terminology. Thus, e.g., a statutory modality for the disposition of an estate of a widower, could take the form of specific alternatives for each possible contingency: "if the deceased is survived by one living son or daughter, the entire estate after payment of the amounts set forth in section *X* (funeral expenses, etc.) shall belong to said son, or daughter; if the deceased is survived by two sons or two daughters or a son and a daughter, the entire estate after payment of the amounts set forth in section *X* shall be equally divided between said two sons, or daughters or said son and daughter, as the case may be . . . ; in the event that the deceased is survived by a son and a son of a deceased son. . . ." Every possible permutation for any possible number of children, deceased children and surviving grandchildren, great and great great grandchildren could be set forth.¹⁹ Some simplification is, of course, possible (e.g., through use of symbols for the children, "*A, B, C,*" additional symbols for grandchildren, "*Aa, Bb, Cc,*" etc., each adequately defined) to conserve space.

And I with the brave shall be sleeping
 At ease on my mattress of loam,
 When back from their taking and keeping
 The squadron is riding at home.
 The wind with the plumes will be playing,
 The girls will stand watching them wave,
 And eyeing my comrades and saying
 Oh who would not sleep with the brave?
 They ask and there is not an answer;
 Says you, I will 'list for a lancer,
 Oh who would not sleep with the brave?

A. E. Housman, *Collected Poems* 103 (1959). Copyright, 1922 by Holt, Rhinehart and Winston, Inc. Copyright 1950 by Barclays Bank Ltd. Reprinted by permission of Holt, Rhinehart and Winston, Inc.

16. U.S. Const. amend. V, XIV § 1.

17. Uniform Commercial Code §§ 1-102(3), 1-105, 1-204, 1-205, 2-602(1), 2-609(4), 3-304(3)(c), 3-503, 3-505, 7-309.

18. Holmes, J. in *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

19. Intestate Succession Laws are in a sense ideal modalities for elective selection through inaction. Although their unpopularity is in part explained by the higher cost, through bond premiums, of intestate administration over many testate probate proceedings, the principal reason for the widespread choice of wills would seem to be the inadequacy of the default

Such specificity as to each modality may well be unnecessary, as indicated above, in this situation, since the words "per stirpes" may be sufficient to insure the desired result with regard to this problem. However, for many other problems greater detail is desirable and can be supplied in a statute, especially if the provision can be individually adopted by a mere reference to the law, much more conveniently than if the language must be set forth explicitly in the individual document utilized for the particular clients. An obvious example would be the complete management, voting, dissolution and share transfer restriction structure of a close corporation, with, e.g., 2 shareholders, a corresponding modality for such a corporation with three, and others for those with additional numbers of shareholders. A separate adoptive modality for a one-man corporation is an obvious desideratum.

Even in areas such as those of testamentary disposition, where the special word symbols have a more definite meaning, and hence can be used as abbreviations even in the statute, their rejection in favor of greater specificity may be desirable. Thus, the author remembers a will which made dispositions to certain persons "or their legal representatives." The testator, a judge, undoubtedly was sure of the meaning of those words. An intestate distribution statute used the expression "by representation" to mean a stirpital distribution. A number of cases agreed that this was the meaning to be ascribed to a distribution to "legal representatives." Nonetheless, "legal representatives" also means executors and administrators. Different people would, or might, take depending on the interpretation. We as "representatives" of the executors of the judge's estate could not be certain enough to choose for them without the safety (and cost) of a judicial construction. Drawn out alternative provisions in layman's English would have avoided the problem, at the expense of prolixity in the will. If, at the time the will was executed, the statute had been clear that "legal representatives" had its stirpital meaning in testamentary documents, the judicial construction would have been unnecessary.²⁰

Unfortunately, not even the lawyer's most technical terms, his "words of art," have an absolutely fixed meaning. An obvious example is "cause of action" which has been given a different meaning in the code requirement that a complaint "must state a cause of action," from that used in determining when a plaintiff has "split his cause of action." Even such

law to meet the dispositional desires of a large portion of the population. Elective modalities in this realm would then, in a sense, merely give more alternatives than are presently available under such statutes. See note 42 *infra*.

20. The problem of possible change in statutory language through amendment must also be dealt with in any promulgation of ideal modalities. If, e.g., "Section 347" of a statute is incorporated by reference as my Will, it should be clearly provided whether it means that section as it existed when I "adopted" it, or, as amended, when I die.

dichotomies as "substance" and "procedure" sometimes overlap.²¹ One has only to thumb through "*Words and Phrases*" to discover the diverse meanings given to the same term. Only a slight change ("to X for life and then to his heirs") in the formula "to X and his heirs" caused the problem in *Shelley's Case*,²² and the necessity for widespread legislative activity to overrule the decision.

The uncertainty of consequences flowing from use of even those words which supposedly have a fixed meaning argues in favor of detailed, if prolix, enunciation in simple non-legal language for any elective modalities. Thus, there should, e.g., be an ideal statutory Will for a married man with one child, another for a married man with two, etc., and additional ones for each category where different dispositions are intended, e.g., an older man with only one child and a substantial estate may want to leave a portion to his child, as well as to his wife, etc.

This is not to say that shorthand expressions are not desirable. This can be the function of incorporation by reference. Someplace, however (and a statute can perform this function admirably) the exact, detailed meaning (consequences) of every alternative reasonably imaginable should be spelled out. A shorthand reference to a statute section (if that section is itself precise) can be much more certain in predictability than use of any so-called term of art.

III. IDEAL MODALITIES INCORPORATED BY REFERENCE

An important example of incorporation by reference is found in the American Arbitration Association's Commercial Arbitration Rules. By simply providing for "arbitration in accordance with the rules of the American Arbitration Association," the parties to a business agreement can avail themselves of a complete procedure for settling any dispute arising under the contract, including the selection of an arbitrator²³ and enforcement of his decision.²⁴

An interesting example of a similar incorporation by reference of a procedure analogous to arbitration is found in "The New York Simplified Procedure for Court Determination of Disputes."²⁵ The statute provides: "The procedure in any action commenced under this section shall constitute 'The New York Simplified Procedure for Court Determination of Disputes' and it shall be sufficient so to identify the procedure in any contract or other document referring to it."²⁶ This incorporation by reference has, it will be noted, the advantage, discussed above, of

21. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

22. 76 Eng. Rep. 199 (K.B. 1581).

23. American Arb. Ass'n Rules 12 (1951).

24. *Id.* 39.

25. N.Y. C.P.L.R. §§ 3031-3037.

26. N.Y. C.P.L.R. § 3031.

statutory authorization, as an assurance that the parties will definitely get the results they desire.

This is also a virtue of the welcome new Connecticut statute "Incorporation by Reference of Certain Powers in Will or Trust Instruments."²⁷ The Act, it will be noted, also expressly applies to wills.

Section 45-100a(a) of the new statute provides:

By an expressed intention of the testator or settlor so to do contained in a will, or in an instrument in writing whereby a trust estate is created inter vivos, any or all of the powers or any portion thereof enumerated in section 45-100b, as they exist at the time of the signing of the will by the testator or at the time of the signing by the first settlor who signs the trust instruments, may be, by appropriate reference made thereto, incorporated in such will or other written instrument, with the same effect as though such language were set forth verbatim in the instrument. Incorporation of one or more of the powers contained in said section by reference to that section shall be in addition to and not in limitation of the common law powers or other statutory powers of the fiduciary.

Subsection 45-100a(b) limits the exercise of the powers to prevent loss of tax deductions, unless otherwise provided by the testator or settlor, notably the marital deduction under the Internal Revenue Code, and provides that the statute shall not be construed to prevent a similar incorporation by reference of the enumerated powers in other instruments than those set forth in subsection 45-100(b).

Section 45-100b of the Act, its heart, enumerates and details the extent of the following powers with regard to property of the estate or trust, all of which may be the subject of incorporation by reference: (1) to retain property, (2) to sell or exchange property, (3) to invest or reinvest, (4) to invest without diversification, (5) to continue the business, (6) to form a corporation or other entity, (7) to operate a farm, (8) to manage real property, (9) to pay taxes and expenses, (10) to receive additional property, (11) to deal with other trusts, (12) to borrow money, (13) to make advances, (14) to vote shares, (15) to register securities in the name of a nominee, (16) to exercise options, rights and privileges of securities or other property, (17) to participate in reorganizations, (18) to reduce the interest rates of obligations owed to the estate or trust, (19) to renew or extend obligations, (20) to foreclose and bid in on mortgages, etc., (21) to insure, (22) to collect rents, income, etc., (23) to litigate, compromise or abandon claims, (24) to employ and compensate agents, etc., (25) to acquire and hold property of two or more trusts undivided, (26) to establish and maintain reserves, (27) to distribute in cash or kind, (28) to pay to or for minors or incompetents, (29) to apportion and allocate receipts and expenses, and (30) to make contracts and execute instruments.

Section 45-100c provides:

27. Conn. Gen. Stat. Ann. § 45-100a to c (Supp. 1968).

"This chapter shall be known as the Powers in Trust Instruments Act and any reference thereto by name or by words of similar import shall be deemed to include statutory powers therein prescribed as of the time of signing the will or trust instrument."

In short, the statute allows a testator or the settlor of a trust to incorporate by simple reference what would amount to about ten type-written pages of boiler plate powers, or any portion of them desired, in his will or trust indenture. The advantage to the lawyer of having a set of ideal powers provisions from which to choose, and to his secretary in not having to type them, is obvious.

An interesting variation on statutory incorporation by reference is found in the Uniform Testamentary Additions to Trusts Act, adopted in a number of states.²⁸ The statute, in effect, allows a will to incorporate by reference the terms, existing or subsequent, of an inter vivos trust. It allows devises or bequests to a trust "identified in the testator's will" even though the "trust is amendable or revocable, or both, or . . . was amended after the execution of the will or after the death of the testator."²⁹

Other examples are, of course, available.³⁰ However, as with the ideal statutory modalities for which no express authorization for shorthand adoption is given, many more would be desirable.

IV. THE CORPORATE TRUST INDENTURE PROJECT

A recent American Bar Association project, the Corporate Trust Indenture Project,³¹ embodies all of the desiderata discussed above: (a) ideal modality, (b) statutory authorization, and (c) incorporation of carefully drafted details by simple reference. The project is particularly important because corporate trust indentures have gotten ever longer, ever more complex.³² As a result, they are rarely even read until, of course, there is a default. Judge Frank's charming story is apropos:

One of my favorite lawyer stories is relevant. A lawyer friend of mine—call him Mr. Inquisitive—represented a corporation which was about to borrow a million dollars on mortgage-bonds. One of the leading New York law firms—call them Messrs. Big, Keen & Snappy—represented the bankers. They sent Mr. Inquisitive a sixty-

28. According to 9c Unif. Laws Ann. 167 (Supp. 1967) the Act is in force in nineteen states: Arizona, Arkansas, California, Connecticut, Idaho, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, and West Virginia.

29. Uniform Testamentary Additions to Trusts Act § 1.

30. E.g., incorporation by reference of the terms of a master deed has recently been permitted in Washington, Wash. Rev. Code Ann. § 65.08 (Supp. 1967); of the terms of a master mortgage in individual mortgages in Wyoming, Wyo. Stat. Ann. § 34-48.1 (Supp. 1967); and Nevada, Nev. Rev. Stat. § 111.353 (1967). See also Nev. Rev. Stat. §§ 106.010-106.050, 107.030 (1967), allowing incorporation by reference of statutory mortgage covenants.

31. For a description of the project, its aims and accomplishments, see Rodgers, *The Corporate Trust Indenture Project*, 20 Bus. L. 551 (1965). See also *Sample Incorporating Indenture and Model Debenture Indenture Provisions—All Registered Issues* (1967).

32. *Id.* at 552-57.

page printed draft of the mortgage trust deed for his client to sign. My friend, it happens, hadn't had much experience in such matters. So he read through the proposed document with exceeding care. Then he phoned Messrs. Big, Keen & Snappy.

"I can't," he said, "understand the meaning of pages 42 to 51. What is it all about?"

"Oh," they replied, patronizingly, "that is our usual form. We have used it just that way for the last four years. At least a billion dollars of bonds are issued and outstanding under similar instruments."

"All right," said Mr. Inquisitive, "I'll admit I am stupid. But, for my peace of mind, just write me a few lines telling me the meaning of those pages."

A day later, on the phone, he received this surprising answer from Big, Keen & Snappy: Two years before, in getting out a trust deed in a hurry, the printer had dropped three pages and spoiled the sense of some dozen other pages. The error, undetected, had been perpetuated ever since.

Well, there they were—about a billion dollars of bonds issued by divers corporations and sold to the public under defective instruments. Now how many law-suits did that mistake occasion? Probably none. For most people don't go around looking for law-suits. The absence of such litigation cannot be said to be due to what was done by the lawyers who drafted those mortgages. It was in spite of their work that court-fights did not occur.³³

Obviously, the adequacy of a document cannot be dependent on the fact that it is so complicated that no one bothers to read it. Sooner or later, when the trouble starts, which is the only time that its draftsmanship becomes relevant, someone *will* read the document; accordingly, the incentive for the Corporate Trust Indenture Project. The Chairman of its Steering Committee has set forth its purposes:

The basic objectives of the project are (1) to draft, in simple and direct language, workable and generally acceptable model provisions for such portions of debenture indentures as may appropriately be standardized because they do not generally involve matters requiring bargaining or negotiation, (2) to draft a similar set of model provisions for mortgage indentures, (3) to devise a workable method of incorporating such model provisions by reference, (4) to draft sample forms of debenture and mortgage indentures illustrating how the model provisions may be incorporated by reference and showing their relation to the negotiated provisions of the incorporating indenture, (5) to prepare annotations and commentaries explaining the model provisions and discussing, and illustrating by actual examples, the purposes and appropriateness under particular circumstances of various types of negotiable provisions, (6) in view of the trend away from coupon bonds and debentures, to draft alternate model provisions for use in cases where only fully registered bonds or debentures are to be issued, with commentaries on the problems raised by the elimination of interest coupons, and finally, if time and the budget permit, (7) to prepare a form of long-term corporate note and loan agreement and possibly to prepare a typical closing memorandum for a fairly complicated bond issue.

It is also proposed that after the project results are published and the forms have stood the test of use, appropriate statutes, both state and federal, be devised to permit recordation of the model mortgage indenture provisions and their incorporation by reference so that thereafter, there will be no requirement of re-recordation of such provisions with each incorporating mortgage indenture.

The underlying intention is to reduce unnecessary, time-consuming and costly consideration of needless variations in documentation, to shorten the time between

33. J. Frank, *Courts on Trial* 29-30 (1949).

the inception of a transaction and its consummation, and to reduce the printing and ultimately the recordation expenses incurred in corporate debt financings.³⁴

Under the plan as it was developed, the negotiable provisions, i.e., those which would vary from indenture to indenture, depending on the bargaining position of the parties, were isolated from the boiler plate, or standard provisions generally acceptable to all parties.³⁵ (The determination as to the latter was made on an impartial basis.)³⁶ In the drafting, simplification of the language and removal of anachronisms were guiding principles.³⁷ The decision was made that "the indenture would consist of the financial terms and negotiated covenants and would incorporate by reference, from a preprinted exhibit thereto, the standardized, boiler plate provisions."³⁸ Special techniques to make the incorporation by reference easier have also been utilized.³⁹

The statutory authorization, still to be accomplished, would allow "the recording of a comprehensive form of mortgage containing standardized provisions which can then be incorporated by reference in short form mortgages executed and filed thereafter. For appropriate transactions, the possibility of a similar federal statute may also be explored."⁴⁰

34. Rodgers, *supra* note 31, at 551-52.

35. *Id.* at 562-63.

36. *Id.* at 568.

37. *Id.* at 564-66.

38. *Id.* at 560.

39. *Id.* at 564(c):

The method of incorporation by reference and recommended techniques for making any desired amendments in the Model Provisions are fully illustrated in the Sample Incorporating Indenture which accompanies the Model Provisions. In order to distinguish the Model Provisions readily from the specially drafted provisions of the Incorporating Indenture, two numbering systems are utilized. The section numbers of the Model Provisions are designated in the hundreds, e.g., Section 205, while the corresponding sections in the Incorporating Indenture are designated in a hyphenated form, e.g., § 2-5.

A cross-reference within a section of the Model Provisions to another section is naturally made in the numbering system used in the Model Provisions. To avoid any ambiguity that the dual numbering system might otherwise create in the case of such cross-reference and especially in instances in which the referenced section is modified by the Incorporating Indenture, the Incorporating Indenture provides that any reference in the Model Provisions to any particular section of the Model Provisions which is incorporated in the Incorporating Indenture shall be a reference to the section of the Incorporating Indenture incorporating such particular section.

Procedures were also developed to avoid blank spaces within the Model Provisions. Frequently, an entire article in an indenture will be boiler plate except for one or two slight variables. For example, in Section 513 of the model Article on Remedies, there is a provision for the waiver of defaults by a certain percentage of the debentureholders. This percentage is often a simple majority in public issues where the debentureholders may be widespread and unknown and 66 2/3% in direct placements where the debentureholders are limited in number and known to the company, the Trustee and each other. Although it would be simple enough to leave a small blank in the Model Provision for the insertion of the percentage, reference is made instead to the percentage stated for the purpose in the Incorporating Indenture. Thus the indenture may incorporate, without change, all of the provisions dealing with remedies contained in Article 500 of the Model Provisions and then merely state that the percentage referred to in Section 513 shall be a majority or 66 2/3% as the case may be.

40. *Id.* at 570(c).

There is no reason why the same techniques of draftsmanship by a committee of experts in the particular fields involved cannot result in similar modalities for other commercial agreements, for the operation of corporations and partnerships, for the disposition of estates, etc. If, e.g., the efforts in the past few years by the individual states to draft new local corporation statutes had been pooled and devoted to drafting complete elective *modi operandi* for individual types of corporations (e.g., one-man, two-man equal ownership, public issue, etc.) wherever located, rather than general statutes for the individual states, we might already have ideal modalities generally available for choice by businessmen desiring to do business in the corporate form.⁴¹

V. TOWARDS DEVELOPMENT OF THE NEW STATUTORY MODALITIES

The Corporate Trust Indenture Project shows that ideal modalities can be developed if we are willing to devote the time, effort and money to do so. A great deal of imagination is also required to contrive ideal forms to satisfy all of the most common desires.

Some modalities are, however, obvious. Thus, in a one man corporation, i.e., one in which all the stock is owned by one person, at most one director and one officer is necessary, and dissolution at will is desirable. Probably a simplified procedure under which all contracts and other corporate action are approved by the sole shareholder as such, i.e., in which the corporation would be bound by all action taken without regard to formal meeting requirements appropriate to other corporations, would be even better. The entire congeries of provisions could be incorporated by reference to the section of the authorizing statute in the certificate of incorporation for the one-man entity. The statute could contain provisions automatically shifting the corporation into another modality, e.g., the two man equal participation system, or the three man unequal ownership mode in the event of transfers of the shares.

Similarly, the form will for married-man-with-estate-under-Federal-Estate-Tax level could be provided. The statute could provide for default dispositions for each number of children and children of deceased children⁴² in the event of the wife's death. The will could consist merely of the testator's signature properly witnessed and a reference to "section X

41. The A.B.A. Model Business Corporation Act was drawn up in this spirit, and has had considerable influence on the individual corporation statutes of the country. Even this statute is not a set of modalities from which to choose, however, but speaks in general terms. Even the special provisions of the advanced South Carolina corporation statute designed to allow close corporations to determine their own mode of operation (S.C. Code Ann. § 12-16.22 (Supp. 1967)) merely allow an agreement but do not set forth the terms which it might contain, i.e., the desirable contents of such an agreement.

42. Such form statutory wills would not be quite the same as amending the intestate succession laws since, in each case, the modality, including contingent provisions, would not only be optional but consciously selected.

of the Statutes," or "Will Mode I," etc. Optional provisions (e.g., as to adopted children) could also be added. E.g., "I, John Smith elect Will Mode I plus optional provision 1, on this — day of —, 19—." ⁴³

The statute could also provide for optional election of an alternate disposition if the estate exceeded a certain sum. Thus, an optional additional provision, which could again be incorporated by reference ("optional provision 2"), might provide that if the estate exceeded \$120,000, the issue would share in a certain percentage.

For those who did not fit within the categories proposed, or did not choose to elect them, of course, the provisions of present law would be carried over. Thus, e.g., a man would be free to draw his will with all of the elaborate provisions setting forth his own desired modality of disposition current under present law. ⁴⁴

Though we all like to think of ourselves as unique, most of us fall into groups or categories ⁴⁵ with common isolatable problems and common adequate solutions for those problems. Sir Henry Maine's theory was that "the movement of the progressive societies has hitherto been a movement from Status to Contract." ⁴⁶ A logical inference from this is that freedom of choice to make our own consensual arrangements is an essential of progressive society. The validity of Maine's statement has been challenged. ⁴⁷ But, whether it is true or not, the fact remains that there are many instances in which status is more important than individual bargaining. Even if we are not moving back from contract to status, there are a number of situations in which even contracts are more manifestations of status (contracts of adhesion) than the results of individual negotiation between the parties. The basically non-negotiable bank mortgage, and "standard" lease are, of course, typical examples. We are often constrained into the category of "tenant" or "mortgagor" with certain fore-

43. The date is important in the event of statutory amendment subsequent to election of the modality. Of course, especially as to minor amendments, it could be provided that the testator would be presumed to elect the modality as amended. In any event, the law should be express as to this matter.

44. The greater certainty of effectuation under statutorily sanctioned modalities should be noted, even if they are copied off fully rather than incorporated by reference, a distinct advantage over the uncertainties often present under current law.

45. An especially frightening example is provided by the television industry's manner of categorizing viewers: "The housewife watching a scatter-plan rerun of an old show thinks of herself as a viewer. She doesn't know that somewhere an agency man is telling his client, 'On the basis of the Nielsen ratings, we are getting daytime women for \$1.47 a thousand,' and that she is a .147-cent daytime woman." Eck, *Why TV Is The Way It Is*, *Reader's Digest*, May 1967, at 78, 80. ◊

46. H. Maine, *Ancient Law* 165 (3d Am. Ed. 1887).

47. See, e.g., E. Hoebel, *The Law of Primitive Man* 328 (1954): "[T]here is in reality a good deal more of status left in modern law than the contract enthusiasts who followed Maine allowed for."

ordained legal-relation attributes. Offensive to our egos as it may be, there is a sufficient number of people in each common legal-relational subgroup to make categorization, and hence modality creation, possible and useful.⁴⁸

Determining the standard modality which would be commonly enough desirable to merit being offered for elective adoption by reference, as to each legal problem determined to be significant enough to merit the effort, should, of course, be a cooperative effort, in certain instances, between lawyers and members of the other social sciences, or at least, statisticians. Thus, e.g., although it would not seem important enough from the point of view of the numbers of people involved to set forth an ideal will modality for persons who wanted to leave all of their money for the care of stray cats, the relative amounts to be left by a man should he die at any particular age survived by a wife and son (perhaps as opposed to daughter) of various ages might bear study, so that at least the most common desired disposition could become the basic form, to which alternatives could be given for modifying election. Study might indicate, e.g., that most men leaving x dollars would desire all to go to the wife if the children were under 14, but, perhaps, half to a son who was unmarried and attending college even though slightly over 21, etc.

An average complete dispositional setup with all reasonably foreseeable variables could then be offered for each of the will groups. These groups would, of course, themselves be constructed by an analysis of what variables (as to income, age, etc.) proved significant in the sense of reflecting the presence of different dispositional desires. It might turn out, e.g., that most men would desire a certain percentage split of their estates where their children were of a particular age regardless of the amount of money involved. Obviously, if such were the case, it would be foolish to enact a large number of will modalities, each one for a different sized estate.

VI. OBJECTIONS

There are three possible objections to the plan suggested, other than the difficulty in drafting the ideal modalities. All three seem to have some validity.

The first objection is that the clients will not understand what they are agreeing to, since the "documents" they execute will only be a list of shorthand expressions. They can, of course, be given photostatic copies of the various statutory provisions to which they have agreed. This may always, however, pose some problem of proof: Was X really aware of the meaning of what he agreed to? It can, of course, be argued that clients today do not understand the meaning of the documents they sign. (How

48. This is, e.g., the premise of current intestate succession laws.

many must rely, to take a simple example, on the lawyer's explanation of the meaning of "per stirpes" in the simple wills they execute?) Hence, they are no worse off, the argument can continue, and can legitimately be held to have "intended" what they have "agreed to," even though by reference to provisions they may not have actually studied.

The form "acknowledgment" of today's law, as well as the attestation clause on wills and the formalities required (i.e., appearance before a notary or execution before the witnesses) are at least designed to insure the voluntariness of the commitment to the executed document. As with any commitment, we may not fully understand what we're getting ourselves into. But, and this is the essence of "commitment," as the term is now used in our society, we agree, voluntarily, to take the chance.

As with all present day wills, an executed will modality, even if the will itself consists of holes on a computer punch-card, should require the same attestation formalities. Perhaps all incorporation-by-reference documents that do not require will formalities should be acknowledged as an assurance of the voluntariness of the parties' commitment to the modality exemplified by the symbols utilized. To make clear the nexus of consent between approval of the symbols and the congeries of legal consequences thus chosen, the acknowledgment could state that the party "has read the statutory language symbolized" and "voluntarily consents to be bound by it."

To hold him under such circumstances would not seem unfair. It is still sometimes held that individuals, even though illiterate, are bound by what they sign.⁴⁹ Certainly a literate person who signs a document, and acknowledges his having read the language it symbolizes (which hopefully will be clearer than the language to which he now binds himself in individual documents), can justly be held to the consequences of his commitment.

This objection, then, can be met, and, with the correctives suggested, symbolic incorporation should prove no more of a problem as to the voluntary acceptance of the provisions of a particular arrangement than is encountered under our present procedures.

The second objection is, oddly enough, the opposite: the new procedure will be so simple that clients will no longer be clients: they will do it all for themselves—or, at least try to, a la Dacey.⁵⁰ It is unlikely that the modality system will bring us much closer to Bentham's ideal of a layman's law than we have come so far. What if it does? A layman's law must be clear and simple. If our modalities succeed in such clarity and comprehensibility, the benefit will accrue to lawyers as well, since, as

49. See 1 Williston, *Contracts* § 35, at 97 (3d ed. 1957) and cases cited.

50. N. Dacey, *How to Avoid Probate* (1965).

indicated above, the present law has become too complex even for lawyers to master. They will be able to make intelligent choices for their clients more quickly and accurately. Laymen who attempt to choose modalities without a lawyer's guidance will probably end up as they do today, a lucrative source of income for the lawyer, since disentanglement is usually so much more complex and fee-worthy than proper initial planning. In short, the lawyer has nothing to fear from simplicity; it will help him. If the modalities are able to yield greater simplicity, so much the better.

The final objection, and perhaps the most cogent, basically resolves itself into: Why bother? There is no need, the argument runs, for statutory forms which can be incorporated by reference, when reproduction of individual documents is so easy. Today, not only can form paragraphs be combined into a single document by laying the pieces together for a combined single sheet photocopy, but now the complete form can be *individually* typewritten (with only the names, addresses and dates actually typed by a human) from a tape or a combination of tapes. This ease of reproduction of the complete verbiage does mean that use of shorthand symbols for the agreed-upon documents is not an absolute necessity. Complete mechanical reproduction may also be more desirable than incorporation by reference because it meets the unintelligibility objection in a manner traditionally considered acceptable.

On the other hand, as was stated above, the means whereby the desired existential consequences are translated into verbal symbols is not the most significant matter. The more important need is the ready availability of ideal modalities. Obviously, the option would always be given to the draftsman of the individual document to set forth the statutory provisions verbatim rather than by reference.

Not all lawyers can presently afford the most advanced means of reproduction. For them, permission to type a half-page shorthand expression of a multi-page document would be extremely useful in cutting down on expenses. For those who can afford the more advanced equipment, the system suggested meshes well with the mechanical techniques available. Thus, the statutory modalities can be placed on the typewriter tapes. The statutory incorporation-by-reference-symbols can be used as the reference symbols for retrieving the particular forms.⁵¹ Documents can be placed

51. See Address by Vico E. Henriques, *Variety of Present and Future Uses of Computers, in Law and Computers in the Mid-Sixties*, 11 at 16 (1966):

I mention the information retrieval use and capability of computers because of their logical ability. If I have a key, a reference, number, if you will, I can reach into a file of information with the computer and bring back that item and all related items. Information retrieval and storage can be a simple thing such as, let's see if it's in stock. Most inventory control problems involve information retrieval. It also can be a little more sophisticated such as, give me everything you have about a specific thing. For example, the abstracts of technical papers can be stored in a large memory device, a magnetic drum, a series of magnetic tapes, something of this sort, and I want to find out everything about copper and ceramics. I'm interested in bonding ceramics and copper together. I can put these two words

on signed computer punch cards through use of the same symbols, and copies of the documents retranslated into ordinary English reproduced at any time they are needed. To facilitate this use, the statutory format should, of course, be drafted in consultation with the manufacturers of electronic data retrieval equipment.

The data retrieval machines are, after all, only complicated examples of incorporation by reference, themselves. The incorporation by reference features of the modality plan can profitably be used in conjunction with them. However, they are really only subsidiary. The main feature of the plan is the availability of ideal, complete forms for voluntary legal arrangements. Regardless of the means whereby adherence to them is manifested, the desirability of having such forms to which adherence can be given, with confidence in the consequences of the choice, is ample justification for the expenditure of effort in their creation.

VII. CONCLUSION

Statutes dealing with consensual matters should be, so far as possible, forms—patterns of governance to be individually selected. They should be ideal, both in the sense of insuring that the desired consequences for which they were chosen actually eventuate, and in the sense that the patterns offered are those which, accommodated by alternative provisions also offered, meet the average needs of the majority of persons faced with the legal problem involved. The plans should be comprehensive, taking account of all foreseeable factual contingencies which may arise. The burden of the detail thus necessitated can be alleviated by allowing the use of shorthand references to clusters of provisions, the full text of which are set forth in the statute.

The law must keep up with the needs of the people if it is to continue to enjoy their respect and confidence. The system advocated will, it is submitted, go a long way in the modernization required to meet these needs.

into a program and, say, list everything that you have, that is, the abstract for every paper in the last ten years that dealt with both of them, not one or the other, but both. The computer can search however many abstracts there are, and print only those for me that deal with the thing that I'm looking for. Based on this, then, I could go back and say, now give me specifically the full text, and, with a specific citation, list the numbers or names and retrieve this kind of information.