NONTESTAMENTARY ACTS AND INCORPORATION BY REFERENCE

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IT IS generally acknowledged that the usual statute of wills requires that a testamentary disposition comply with certain formalities. Thus a valid will must be in writing, signed or subscribed by the testator, and attested by two or more witnesses. The complete realization of the testamentary scheme, however, often makes it necessary to give some consequence to acts and events extraneous to the will. Several different—although frequently confused—doctrines exist whereby such a fulfillment of the testator's purpose may sometimes be achieved. This paper will analyze the manner in which the more important of these doctrines have been applied by the courts and will suggest possible alternatives to the confusing approach with which the text writers in the past have provided the courts.

The distinction between the doctrine of incorporation by reference and that of nontestamentary acts, or, as Professor Scott prefers to say, "acts having independent significance," has given rise to much speculation during the last quarter of a century. In the second edition of his casebook on property, Professor Gray introduced the subject, "Incorporation by Reference," with the following note:

The power of a testator to incorporate writings into his will by reference is a subject so closely connected with the power of a testator to make provisions in his will which are dependent on his own future acts that some cases on this latter subject are included in this subdivision.¹

However, only one case of the latter character was given, and it dealt with advancements to be made in the future which were to be deducted from the legacies created in the will. It thus appears that the concept of the nontestamentary act received little or no development at the hands of Professor Gray. Professor Chaplin indicated that there was no problem in this field save for the determination of the rules for incorporation by reference.² A later writer, Professor (now Judge) Dobie, while contenting himself generally with the traditional requirements of incorporation, went on to distinguish that doctrine from "the use of extrinsic documents to

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¹ 4 Gray, *Cases on Property* 99 (2d ed., 1906).

² Chaplin, *Incorporation by Reference*, 2 Col. L. Rev. 148 (1902).

establish a testamentary trust.”³ Unfortunately, Professor Dobie stated that “any discussion of the latter topic [was] beyond the scope of [his] article.” He then proceeded to discuss under the heading of incorporation the fact that certain arrangements in writing, made by the testator subsequent to the making of the will, might determine the identity of the beneficiary, and that such arrangements were not in violation of the statutory requirement of an attested writing.

Inasmuch as it is believed that it is a socially desirable policy to permit the testator's intention to be realized whenever possible, it is not surprising that in recent years the area of subsequent arrangements to which testamentary significance will be given has been expanded. It should be clear that, while a writing not in existence at the execution of the will cannot be incorporated, not even metaphorically, it may sometimes be given effect as a nontestamentary act of independent significance. To state the distinction briefly: By incorporation by reference, a writing not attested and subscribed in conformity with the statute may be metaphorically included in a will if, by the provisions of the will, the writing is both referred to as being in existence and intended to be included. By the concept of a nontestamentary act, on the other hand, either a legacy or a legatee may be identified by an act or event, occurring either before or after the execution of the will, which must have a significance separate from the testamentary disposition. For instance, if all beneficiaries must be accurately described and fully identified as of the date of the execution of the will, a testamentary contingent remainder could not exist. No testator could provide for his unborn grandchildren. Thus, when it is realized that future events not susceptible of incorporation by reference may determine either the legacies or legatees, a way is opened for the idea that if the event by which the beneficiaries or the property devised is to be identified is not under the control of the testator, the event has independent significance and is accordingly nontestamentary in character. Since the event does not happen for the purpose of implementing the will the policy underlying the requirement of the Statute of Wills is not applicable. Even though the future act is within the testator's control, it does not appear that such an act should be denied effect if the testator did not thereby intend to supplement his will.

The entire problem of giving the testamentary scheme its fullest effect can perhaps best be viewed by an examination of the various rationales

³ Dobie, *Testamentary Incorporation by Reference*, 3 Va. L. Rev. 583 (1916). My own article, *Incorporation by Reference, Integration and Nontestamentary Act*, 25 Col. L. Rev. 879 (1925), came next in point of time.

adopted by the courts in relation to the idea of the nontestamentary act. Such events or acts may be recognized in various combinations throughout the cases, but all of them fall into one or more of the following classes:

a) Uncontrolled events not dependent upon the testator's volition, as, for example, "to such children of my son as shall hereafter be born," or "to such woman as shall hereafter marry X."⁴

b) Future acts of the testator performed for a purpose independent of the will, as, for example, a provision for deducting future advancements from legacies made by will. The testator may also determine the beneficiaries to be identified in the future by his own acts, in concert with acts of others, as, for example, a gift to his partners existing at his death, or to his employees who are such at that time, or to such person as shall care for him in his last years. The later advancement as well as the contract have independent significance apart from the will.

c) The testator may transfer securities to a trustee under a trust scheme to which additions are to be made by his will. The trust scheme is frequently alterable and revocable and subject to being modified by later inter vivos settlements. These later additions may either precede or follow the will. In the first instance, they are not merely created or performed for a purpose independent of the will, but may also be incorporated by reference. The fact that they are incorporated does not prevent them from having at the same time an independent purpose. If they are made subsequent to the will, as is to be shown later, still they were created for the purpose of modifying an earlier trust, or if no earlier one exists, they were created for an independent purpose. A prior settlement subsequently altered may reasonably be regarded as identical with one which is wholly subsequent.

I. THE DILEMMA OF THE FOWLES CASE: THE WRITINGS OF ANOTHER PERSON

The written acts of another person may have independent significance and thus qualify the testator's will. For example, if A gives his property to such persons as shall be the beneficiaries of B's will, it is difficult to argue that B made his will in order to implement A's will. The uncertainty as to the beneficiaries of A's will is not measurably greater than it would be if the gift were to B's heirs. A power of appointment, however, created in A's will, to be performed by the testamentary act of B, would be, when exercised by B, an act performed for the purpose of implementing A's will and the appointment is valid.

⁴ 3 Rest., Property § 348, comments c to f (1940).

The famous New York case of *Matter of Fowles*⁵ arose out of this problem of whether the will of another person may be considered as a nontestamentary event by which the beneficiaries of a given will could be identified. The testator and his wife were about to sail on the *Lusitania*. In view of the dangers of ocean travel, each executed a will. The testator wished to leave part of his property to the beneficiaries of his wife's will, and to this end he conferred on his wife the "power to dispose of the said property by last will and testament duly executed by her." He provided for the possibility that this provision of his will might fail due to their death in a common disaster, by stipulating that in such an event he should be deemed to have died first.

If the testator intended to create a power of appointment, and only a power formula appears applicable, then the power must fail since it was not created prior to its exercise. It seems only fair, however, to interpret the provision so as to give effect to the obvious intent of the testator. To follow the wish of the testator that part of his property go to the beneficiaries of his wife's will, a court is not required to go very far afield. Here a gift on condition may be construed as a trust if a trust interpretation will accomplish the intent of the testator-settlor.⁶

It is not clear what rationale Cardozo relied on in upholding the will in the *Fowles* opinion. However, he talked about incorporation as if that doctrine were applicable, indicating that the difficulty consisted of getting around the New York rule against incorporation by reference, the ambiguities of which will be discussed below. In commenting on the case, Professor Scott was, at least earlier, of the opinion that the wife's will could not be said to constitute an act with independent significance inasmuch as the husband's will contained a power of appointment which could not be exercised before it was created by the will at the time of his death. "It would seem," says Scott, "that since the testator did not provide that his property should be disposed of as his wife . . . should appoint, the decision can not be upheld on this ground."⁷ Professor Scott stated, however, that the case might be "supported . . . on the ground that incorporation by reference to 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." The view that the case could not be supported on the principle of the nontestamentary act has also

⁵ 222 N.Y. 222, 118 N.E. 611 (1918).

⁶ *Woodward v. Walling*, 31 Iowa 533 (1871).

⁷ Scott, *Trusts and the Statute of Wills*, 43 Harv. L. Rev. 521, 552 n. 85 (1930).

been recently expressed,⁸ although Dean Rowley⁹ and Professor R. R. Powell¹⁰ take the position that it is not impossible to construe the wife's will as a nontestamentary act.

It is not apparent from his later treatise whether Professor Scott has now changed his position with respect to the *Fowles* case. He does not cite the case under incorporation by reference, nor does he use it under the section on acts of independent significance.¹¹ Nevertheless, he appears to break down facts of independent significance into additional types, such as "disposition by will in accordance with *inter vivos* trust," and "disposition in accordance with directions of a third person." The *Fowles* case is cited under the latter heading. He observes that the "result makes good sense."

It seems to this writer, however, that Professor Scott does not reach the "good sense" result by careful analysis. Perhaps he would urge that to insist upon a tag is unduly mechanical and conceptualistic. It would be easier for the courts to reach a "good sense" result if the rationale to be applied could be clearly stated by the text writers. The concept of incorporation has a great deal of utility which should not be destroyed by the exception that a will can be incorporated into another will, when at the time of incorporation it may not have been in existence.

Professor Bogert applies a doctrine that is "somewhat similar, though distinct, [from incorporation], which permits the use of informal evidence outside the will to supplement the will as to the description of the donees or the property given."¹² The statute requires that the will be in compliance with the formalities discussed above; and, thus, if the will is insufficient and needs to be supplemented by an additional writing not attested, there is perhaps no adequate reason why a subsequent list prepared by the testator should not suffice. Professor Bogert's approach, however, leaves the matter largely to the discretion of the courts. It seems inadequate, in view of the alleged adherence to the statute of wills, to say merely that such evidence is admissible to show the position and state of mind of the testator and thus to complete an incomplete will. Professor Scott has offered an alternative in his statement that a will, a sealed instrument, or one attested and subscribed, may be incorporated without violating the statute and without leaving the matter entirely at the discretion of the

⁸ Wills—Incorporation by Reference—Comparison with Secret Trusts and Acts of Independent Significance, 46 Mich. L. Rev. 77, 83 (1947).

⁹ Rowley, A "Relaxation of the Requirement of Self-sufficient Integration," 6 U. of Cin. L. Rev. 295 (1932).

¹⁰ Report of the Law Revision Commission of New York for 1935, at 444.

¹¹ 1 Scott, Trusts §§ 54.1, 54.2 (1939).

¹² Bogert, Trusts and Trustees § 106 (1935).

courts. In fact, the comment has been made that this is an area where certainty is neither possible nor perhaps desirable; that there may for good reason be a blurring of the concepts of incorporation and nontestamentary acts.¹³ It is submitted that a loose analysis is not helpful to busy courts. Such a blurring of these two concepts is neither necessary nor useful, even though it has manifestly occurred in New York and perhaps Ohio.

The comment cited above is excellent in its presentation of the confusion in New York. The general rule against incorporation is still maintained there. If the act identifying the beneficiary is a writing, such as a properly executed will or deed, the New York courts speak loosely of incorporation though the will or deed be a future act. Thus in the recent case of *Matter of Comey*,¹⁴ where the reference was "to such of the descendants of Miriam Comey Adams . . . as she may by her last will and testament designate and appoint," it seems unjustifiable for the court even to mention incorporation by reference. Had the rationale of the nontestamentary act been utilized, the court need have found no violation of the New York rule.¹⁵ The tenor of the New York decisions is confusing to say the least.¹⁶ While the rule against incorporation is said to be in effect, it is not followed in the case of a future will or an inter vivos trust which is neither alterable nor revocable. Thus the New York courts, by allowing the incorporation of arrangements made subsequent to the will, seem to have misunderstood the distinction between nontestamentary acts and incorporation by reference.

The necessity of employing the doctrine of nontestamentary acts is peculiarly observable in its frequent use in the case of distributions to "employees at my death" or "to my partners" or "to those who shall have cared for me in my last illness."¹⁷ The courts usually approve its application in those cases, although they do not define it. There is in fact no effective substitute unless the testator wishes to accomplish his purpose by an inter vivos trust. Thus a legacy to a person who should be living with the will-maker as her companion is good.¹⁸ Even in New York, where the doctrine of nontestamentary acts has never been adequately explored,

¹³ Incorporation by Reference, op. cit. supra note 8, at 77.

¹⁴ 173 Misc. 377, 17 N.Y.S. 2d 949 (1940).

¹⁵ *Matter of Rausch*, 258 N.Y. 327, 179 N.E. 755 (1932).

¹⁶ *Matter of Comey*, 173 Misc. 377, 380, 17 N.Y.S. 2d 949, 953 (1940).

¹⁷ Incorporation by Reference, op. cit. supra note 8, at 79, n. 17, 18, 19.

¹⁸ *Allan v. Brown*, 61 R.I. 56, 199 Atl. 753 (1938); *In re Hollingsworth's Estate*, 37 Cal. App. 2d 432, 99 P. 2d 599 (1940); *Howe v. Sands*, 141 Fla. 813, 194 So. 798 (1940); *Oggier's Estate*, 153 Pa. Super. 216, 33 A. 2d 439 (1943); for a recent English case, see *In re Keen* (1937) 1 Ch. 236.

this type of case is frequent.¹⁹ It is difficult to understand why this particular issue must be threshed over again and again in judicial decisions.

II. TRUST SETTLEMENTS, INCORPORATION, AND NONTESTAMENTARY ACTS

In the *Fowles* case, the court spoke loosely of incorporation by reference, appearing to make a special exception to the New York rule where the so-called incorporated instrument was a will, though it was not necessarily in existence when the incorporating will was made, and was referred to in words of the future. Some years later, the New York rule respecting incorporation was more severely tested by the *Rausch* case,²⁰ where a prior nonrevocable and inter vivos trust had been created and was referred to in the will and identified. Again the court talked about incorporation, saying that the rule against it would not be carried to "a drily logical extreme." In both these cases it is believed that the New York rule need not have been violated. A different rationale was possible. If one analyzes the concept of the nontestamentary act so that theorizing along this line becomes familiar to the courts, something will have been done to relieve a patently difficult situation. There are five fairly recent cases which are worthy of comment.

The first one here presented is *In re Jones*,²¹ an English case. The testator gave a legacy to a certain investment trust company, as trustee "appointed or to be appointed under special declaration of trust . . . executed and bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute." (Italics added.) The deed of trust was in fact in existence and identified. Must the declaration of trust fail because a later substitution was possible? The court noted three situations, the first involving incorporation, the second arising where an attempt is made to modify the will by documents not yet written, and the third, the type of problem occurring and becoming increasingly frequent, where an existing document, such as a trust instrument, is referred to and which is expressly made alterable and perhaps revocable.

The *Jones* case was of the third type, and the court believed there were two alternatives before it, either to admit incorporation of the document in existence at the time and disregard the provision for alteration and substitution, or to hold that the whole provision failed. It was decided that

¹⁹ See *In re Menken's Will*, 180 Misc. 656, 44 N.Y.S. 2d 164 (1943); *In re Collier's Estate*, 45 N.Y.S. 2d 773 (1943); *In re Utter's Will*, 173 Misc. 1069, 20 N.Y.S. 2d 457 (1940).

²⁰ *Matter of Rausch*, 258 N.Y. 327, 179 N.E. 755 (1932).

²¹ [1942] 1 Ch. 328, [1942] 1 All E.R. 642.

the possibility of substitution and alteration was as much a part of the testator's expressed intention as was the remainder of the present existing document, and hence, since a court's chief purpose is to carry out the testator's intent if possible, it could not accept the first alternative. The court thought that there might be a distinction between a document referred to "unless he should substitute another" (but did not) and the present case.

An editorial note in the *All England Reports*²² points out that there is a real difficulty in the law of wills where the testator has founded a charity which he anticipates he will develop during his lifetime. He is naturally not anxious to tie it down to a trust deed which may turn out to be quite unsuited to its state of development in a few years' time. Neither does he desire to set out the terms in his will. As things now stand, if he wants to modify the settlement after the date of his will, he is obliged to execute an incorporating will or codicil later.

The English courts and text writers seem never to have identified by a category or tag the concept of the nontestamentary act. Jarman and Williams are wholly unconscious of any problem outside that of incorporation by reference, though some commentators have noted the comparable problem of secret or one-half secret trusts.²³

Similar to the *Jones* case is *President and Directors of Manhattan Co. v. Janowitz*.²⁴ The case shows how cautious a lower New York court is in extending "exceptions" to the denial of incorporation by reference. The case is similar to *Matter of Rausch*²⁵ save that the trust agreement was not only amendable but in fact was amended three times, twice prior to the date of the will and once thereafter. The widow, beneficiary, attacked the theory of incorporation and claimed the property under the residuary clause. The court restricted the consequences of the *Rausch* case to its particular facts and reaffirmed the New York position on incorporation generally. An amendable settlement cannot be incorporated.²⁶

This case perfectly illustrates the perplexities confronting an inter vivos settlor-testator mentioned above in the *Jones* case. A man desires to develop a scheme of disposition of his property by establishing a trust in

²² [1942] 1 All E.R. 642.

²³ In re Boyes, 26 Ch. D. 531 (1884); *Blackwell v. Blackwell*, [1929] A.C. 318; R.E.M., 59 L. Q. Rev. 23 (1943).

²⁴ 260 App. Div. 174, 21 N.Y.S. 2d 232 (1940).

²⁵ 258 N.Y. 327, 179 N.E. 755 (1932).

²⁶ The case was noted at various stages in 39 Col. L. Rev. 1256 (1939); 26 Corn. L.Q. 172 (1940); 50 Yale L.J. 342 (1940). See *Incorporation by Reference-New York Modification*, 10 Fordham L. Rev. 82 (1941).

his lifetime, but as the future is unknown and likewise the variations in his fortunes, he makes an alterable and revocable transfer in trust, relying on his reserved power to change it. The will may or may not be the last document involved in the scheme. If it is the last act, it may well incorporate (save in some states) the prior settlements. If he desires, however, to make a subsequent variation in the trust deed, he would be required not only to alter his previous dispositions but also to republish his will. The large number of cases which have arisen shows that this difficulty is not fanciful. Why should not the court hold that the subsequent alteration was an act having independent significance? What additional risk of fraud is involved? In fact, there is a greater risk in the cases involving containers, future charges, or determination of the beneficiaries by future contracts. Yet all of these extraneous factors are given consequence in determining the testator's intent. No new theory is needed here if the courts will bear in mind the wide variety of situations to which the rationale of the non-testamentary act can be applied. In fact, a very important development in this direction may well be looked for so long as it is currently believed that it is a socially desirable policy to permit a settlor's desires to be fulfilled whenever possible.

In *Koeninger v. Toledo Trust Co.*,²⁷ a settlor created an alterable trust, then executed a will incorporating the trust agreement, and expressly provided that the administration of the residue of his estate passing under the will should be conducted according to the terms of the trust. Thereafter, he made an alteration in the trust agreement by directing that certain land be held for the benefit of one nephew and \$500 be shifted to another nephew. The plaintiff beneficiary took the view that the original trust was incorporated, but that since this trust was modified after the date of the will, a merger of the two resulted and the whole trust agreement became a subsequent instrument incapable of incorporation. It was held that though the original settlement was incorporated, such property as was conveyed by it was subject to reassignment under the later trust, but that the land which passed under the will and not by an inter vivos conveyance could not be thus reassigned to an additional beneficiary. This later trust could not directly modify the will.

It is believed that the court reached a sound result in holding that the settlor in making an additional gift of land had, in effect, attempted to alter the will rather than the prior trust. Sustaining the alteration by

²⁷ *Koeninger v. Toledo Trust Co.*, 49 Ohio App. 490, 197 N.E. 419 (1934); noted in 21 *Corn. L.Q.* 492 (1936), 49 *Harv. L. Rev.* 498 (1936). The briefs for both sides are worthy of study.

which an additional beneficiary of \$500 was inserted by deed also appears sound. It is clear that if the land had been conveyed in the original trust agreement, and not by the will, an alteration could have been made by the later trust. A testator can thus modify the effect of his will either by a later testamentary document, or by a removal of property by way of ademption. It is difficult, however, to follow the court when it says that the "power to vary the original trust agreement was waived by the incorporation of it into the will." The court might very well have looked upon the later addition of a beneficiary as a nontestamentary act so that the sum assigned could have been paid out of any funds in the trustee's hands. A more simple solution would have been to execute a codicil to the will rather than to attempt to modify the trust agreement.

In the fourth case, *Bolles v. Toledo Trust Co.*,²⁸ the trust purpose had been worked out and there was an intimate connection between the alterable settlements and the will. The first or original trust inter vivos in this case has no significance for the purpose of this discussion. The second inter vivos transfer in trust was made prior to the execution of the will. Its close connection with the will was shown by the fact that the deed transferred only \$4,000 in value while it was charged with the payment of \$500 per month from the income to the testator's widow. If the income should prove insufficient for that purpose, the trust agreement authorized an invasion of the corpus. Although the will had been executed subsequent to the trust agreement, both instruments had been drawn up as part of the same general transaction. The will contained a residuary clause which gave the residue to the same trustee mentioned in the trust instrument, and passed sufficient property so that it would become possible to effectuate the provisions of the trust deed. This deed was, however, held by the court to be illusory so far as it affected the widow, because of the high degree of control retained by the settlor, and because of the fact that there was no relation between the value of the securities transferred and the demands made upon them.

A third settlement which transferred additional securities worth \$80,000 to the same trustee was made subsequent to the execution of the will. This sum was to be administered in accordance with the earlier inter vivos trust. It was conditioned to the effect that if the widow should disclaim the provisions made for her under the will, the trust was to terminate and all benefits to her were to be cancelled. The point of the case for our purpose seems to be that the court's main attention was directed to the question whether the earlier trust was necessarily incorporated into

²⁸ 144 Ohio St. 195, 58 N.E. 2d 381 (1944).

the will and whether the settlement subsequent to the will could be regarded as an act of independent significance. The conclusion appears to have been that one procedure was exclusive of the other, and no clear understanding of the latter question was indicated. The independent significance doctrine was not applied.

The last case is *Fifth-Third Union Trust Co. v. Wilensky*,²⁹ also from Ohio. The settlor settled \$500 on the trustee by deed, making detailed provisions for the beneficiaries, specifying the terms of administration, and reserving the powers of alteration and revocation. Since this was but a very small sum settled on the trustee, it is evident that the scheme was to be expanded by other transfers and by will. The will subsequently expanded and completed the scheme of distribution first set out in the deed. Thereafter, by a later deed, the original trust was revoked. It was held that the earlier deed was incorporated and so was unaffected by the revocation.

Unless this result is necessary on principle, it seems to be in conflict with the proposition that a settlor can modify or revoke a gift made in trust if he reserves the power to do so when the trust is created. That this outcome is contrary to the one intended appears manifest. Though the will cannot be revoked technically by the nontestamentary revocation, yet the subsequent acts of the settlor may affect the application of the will. Just as a subsequent conveyance of Blackacre will destroy the prior devise of it, so the subsequent nullification of the terms of the trust under the reserved power removes the basis for the operation of the will, and the will fails not because it was revoked directly, but because the terms for its operation were effectively cancelled by an act having independent significance. The effect on the will was merely consequential. There appears to be no adequate reason for the argument that this rationale would cause an undue risk of upsetting wills validly created. The policy which would avoid the result reached by the court seems clear.

It would appear that recent developments in inter vivos trust-will cases involving the possible application of incorporation and also the nontestamentary act are unsatisfactory. Incorporation is so firmly established in Ohio that it is applied whether or not the testator's general scheme is thereby promoted. If the scheme of disposition contemplates the possibility of future acts after the date of the will, incorporation fails and so does the entire plan. These cases presumably represent the law in England, New York, and Ohio. The doctrine of independent nontestamentary acts is not yet understood.

²⁹ 70 N.E. 2d 920 (Ohio App., 1946); see *Incorporation by Reference—Comparison with Secret Trusts and Acts of Independent Significance*, 46 Mich. L. Rev. 77 (1947).

III. THE INCORPORATION OF DEEDS

A father desires to make a fair distribution of his property, and, not wishing to postpone the undertaking entirely until his death, deeds to some of his children portions of his land. He may wish to retain a life interest for himself, but instead of inserting such a provision in his deeds, he simply retains possession of the deed until his death. At that time he has disposed of the balance of his property by will, carefully avoiding a devise of the land which was the subject of his deed. In many cases he explains the dispositions made in his will by saying that he has already conveyed certain lands to certain children, and he shows an intent to avoid what would otherwise be an unequal distribution.

By the great weight of authority, the land which could not pass *inter vivos* for lack of delivery of the deed, does not pass to the grantees as devisees under the doctrine of incorporation of the deed by reference. It is said that the deed, though adequately identified, cannot be incorporated because there was not an intent to incorporate it.³⁰ The testator meant that the land should pass by deed rather than by will, and no intention can be imported into the will which is not expressed in it.

Thus, if the testator disposes of the residue "not heretofore deeded away by me" and the deed is inoperative as a conveyance, it is nevertheless not incorporated into the will.³¹ So if he says, "I give to my son 'in addition to what I have given him by deed,' " there is said to be no incorporation of the contents of the deed.³² Similarly, if a testator expressly declares an intention to make an equal distribution and, to effectuate it, refers to his prior deeds, there is still no incorporation.³³

The courts have been astute to show that such language does not result in a gift by implication. In order to imply a gift, the two references to the subject matter must be in the same instrument and not by separate deed and will.³⁴ The question of incorporation may be raised where the action

³⁰ *Bottrell v. Spengler*, 343 Ill. 476, 175 N.E. 781 (1931); see *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011 (1899); 1 Scott, *Trusts* § 56.1 (1939); 1 *Bogert, Trusts and Trustees* § 103 (1935).

³¹ *Chambers v. McDaniel*, 28 N.C. 169 (1845).

³² *Bailey v. Bailey*, 52 N.C. 35 (1859).

³³ *Witham v. Witham*, 156 Ore. 59, 66 P. 2d 281 (1937); *Stodder v. Hoffman*, 158 Ill. 486, 41 N.E. 1082 (1895). Cf. *Allenbach v. Ridenour*, 51 Nev. 437, 279 Pac. 32 (1929); *Koger v. Koger*, 29 Ky. L. Rep. 687, 92 S.W. 1167 (1906); *Noble v. Tipton*, 219 Ill. 182, 76 N.E. 151 (1905); *Benson v. Hall*, 150 Ill. 60, 36 N.E. 947 (1894); *Hunt v. Evans*, 134 Ill. 407, 25 N.E. 579 (1890).

³⁴ *Smith v. Smith*, 113 Md. 495, 77 Atl. 975 (1910); *Benson v. Hall*, 150 Ill. 60, 36 N.E. 947 (1894); *Harris v. Harris*, 3 Ir. R. Eq. 610 (1869). But cf. *Holton and Huckle v. White*, 23 N.J.L. 330 (1852); *Marsh v. Hague*, 1 Edw. Ch. 174 (N.Y., 1831).

is one to set aside a deed, delivered after the maker's death, for fraud in obtaining it. The fact that the deed is specifically referred to in the will does not help the grantee in such cases.³⁵

In Arkansas, where incorporation by reference is not recognized, it was held in the case of *O'Leary v. Lane*³⁶ that the deeds could be referred to for purposes of identification of the land if they were sufficiently designated. This seems to be an obscure way of saying that although the deed may not be incorporated, it may have independent significance if one can be sure of its identity. In the *O'Leary* case, the deeds had not been delivered, and the court declared that the deeds were not adequately identified for incorporation. The words of the will were:

It is my will and desire that the deeds heretofore by me executed to the heirs of my estate, deeding to them real property that I desire each to have at my death, which are now in my safety deposit box in the Farmers' and Merchants' Bank . . . be by my executor . . . delivered to said heirs mentioned in said deeds, which property I give and bequeath to each of said heirs as conveyed in said deeds.³⁷

Four deeds to four grantees were found in the designated container. It appears that such identification should be quite sufficient for incorporation in even the most exacting states which recognize the doctrine. Further, the testator also devised the lands which he had intended to convey. It seems a travesty to hold that the gifts must fail for lack of identification.

In Massachusetts,³⁸ a testator executed a conveyance and put the deed into his chest. By will he gave to the beneficiary the chest and its contents. The devise failed. Thus, by a mechanical application of the requirement of delivery, the plain intent of the testator was frustrated. A deed directed to be delivered under a will is not delivered until too late and therefore is not incorporated into the will. In another case, an injunction was granted to prevent the delivery of a deed after the death of the maker, though the will referring to the deed showed clearly that the testator meant to retain the land within his estate until his death.³⁹

There has been all along, however, a dissent which has waxed encouragingly with the years. In 1865, in a Pennsylvania case,⁴⁰ a testator had executed a conveyance of certain land to his sister, but had not delivered

³⁵ *Zimmerman v. Hafer*, 81 Md. 347, 32 Atl. 316 (1895); cf. *Hunt v. Evans*, 134 Ill. 496, 25 N.E. 579 (1890).

³⁶ *O'Leary v. Lane*, 149 Ark. 393, 232 S.W. 432 (1921). Compare 1 Bogert, *Trusts* § 106, at 347 (1935): "The reference to the deed is not for the purpose of incorporating . . . it into the will, but merely to describe the legal and equitable donees under the will."

³⁷ *O'Leary v. Lane*, 149 Ark. 393, 398, 232 S.W. 432, 433 (1921).

³⁸ *Parrott v. Avery*, 159 Mass. 594, 35 N.E. 94 (1893).

³⁹ *Richardson v. Byrd*, 166 S.C. 251, 164 S.E. 643 (1932).

⁴⁰ *Thompson's Executors v. Lloyd*, 49 Pa. 127 (1865).

the deed. In his will he devised to her certain lands together with the other lands which "I have already conveyed by deed to her." This was held to constitute an incorporation. Following this precedent, a lower Pennsylvania court held in 1939 that when a testator declared in his will that since he had already deeded, he did not devise the lands in question, the grantee-devisee took under the will.⁴¹ It is observable that although the testator declared that he did not intend to devise the land, a devise is the only method by which the intent can be effectuated. Indiana also has held that an undelivered deed, referred to in a later will, was incorporated, since the testator showed his intention to pass title at death only.⁴²

The best discussion of the matter is found in a recent Nebraska case.⁴³ The testator recited in his will that he had already deeded a certain tract of land to his wife's niece "and for that reason I do not devise any real estate to her." The deed not having been delivered, the question of construction was whether she could take by either deed or will. The testator had expressly negated any intent to transfer by will, and the deed as such was ineffective. Great hardship was shown to result if the devise should fail and there was no doubt of his intent that she should have the land. The deed was held to have been incorporated. Thus the court avoided a mechanical, conceptualistic interpretation and carried out the testator's intent, which can fairly be read into the language of the will.

This result has been approved by commentators.⁴⁴ It has been suggested that this outcome could be reached either by the theory of incorporation, or as a gift by implication, or by the doctrine of constructive delivery of the deed.⁴⁵ If one applies the theory of incorporation, he must omit the formal requirement of an intent to incorporate. He will have to urge that a formal and actual intent is not required if in fact incorporation is to be allowed in order to accomplish the testator's evident purpose. The language used may be interpreted thus: "I have given my son Blackacre by deed and I therefore do not devise it to him. If, however, I had not already conveyed it to him, I would now devise it to him." That, I

⁴¹ *Hogue's Estate*, 135 Pa. Super. 543, 6 A. 2d 108 (1939); cf. *Hourigan v. McBee*, 130 S.W. 2d 661 (Mo. App. 1939); *Arrington v. Brown*, 235 Ala. 196, 178 So. 218 (1938); *White v. Reading*, 293 Mo. 347, 239 S.W. 90 (1922); *Sharp v. Hall*, 86 Ala. 110, 5 So. 497 (1889).

⁴² *Mortgage Trust Co. v. Moore*, 150 Ind. 465, 50 N.E. 72 (1898). See *Jennings v. Reeson*, 200 Mich. 559, 166 N.W. 931 (1918). In *Loring v. Sumner*, 23 Pick. 98 (Mass., 1839), the testator declared in his will that he had given his son \$1,000 by note as his full share of the estate. The note was invalid but the court interpreted the language as creating a legacy.

⁴³ *In re Estate of Dimmitt*, 141 Neb. 413, 3 N.W. 2d 752 (1942).

⁴⁴ *Ibid.*, noted in 41 Mich. L. Rev. 751 (1943); 37 Ill. L. Rev. 425 (1943); 22 Tex. L. Rev. 87 (1943).

⁴⁵ 22 Tex. L. Rev. 87, 92 (1943).

think, could be construed as a gift by implication. Looked at in this light, the inferences may be said to arise from the will.

In spite of the argument that there can be no implication save where the inferences arise within the same instrument, it appears that there are analogies which might lead to a gift by implication in these cases. Thus, where there has been a revocation by a mistake clearly appearing on the face of the will, a revocation will not be enforced. It is true that by the doctrine of dependent relative revocation there is a distinction between failing to do an act through mistake, and failing to undo one for the same reason. In the latter case, however, the revocation has occurred in form and we wish to learn what effect should equitably be given to it. So, in the principal case, the deed appearing by incorporation into the will is not revoked within the same will by the mistaken declaration that the testator does not therewith devise the land to the grantee. There is no reason why both incorporation and gift by implication may not be available to the interpreter.

In a recent Nevada case, *In re Garrison's Estate*,⁴⁶ it was held that a bequest should be implied in the will.⁴⁷ The testator recited in his will, "My estate amounts to about \$6,000 after the deduction of \$700 for my wife, which I have signed papers to prove." A statement appeared in the record that a settlement between the testator and his wife had been made by which she was to receive \$700. It may be that the court, if pressed, would have admitted that the written statement about the settlement was sufficiently identified by the reference to it in the will.

IV. FUTURE MEMORANDA

A testator may contemplate supplementing his will by a future memorandum or descriptive list.⁴⁸ This procedure seems to be distinguishable from 1) interpreting language as of the date of death, and perhaps from 2) the container cases in which no verbal amendment is contemplated and no evidence is admissible with respect to the act of adding to or subtracting from the contents of the container, and the legatee gets the final residue. It is also distinguishable from 3) a subsequent act or trust settlement which gives significance to the will but is not done or does not happen for that purpose. Thus, in *Gibbon's Will*,⁴⁹ the testator directed that

⁴⁶ 59 Nev. 302, 91 P. 2d 818 (1939).

⁴⁷ Compare *In re Smith's Estate*, 46 Misc. 210, 94 N.Y.S. 90 (1905), where it was held that a statement in a will that "I want [B] to have an equal share with my brothers and sisters after all my debts are paid" resulted in a bequest by implication to the brothers and sisters.

⁴⁸ *Hastings v. Bridge*, 86 N.H. 247, 166 Atl. 273 (1933).

⁴⁹ *In re Gibbon's Will*, 234 App. Div. 153, 254 N.Y.S. 566 (1931).

any checks made by himself and outstanding at his death should be treated as valid claims. This case seems somewhat analogous to each of the three distinguished doctrines. The checks issued after the execution of the will resemble subsequent memoranda, but were probably not made for the purpose of altering the will directly, and any evidence of the testator's secret purpose should not be admitted. The court refused to allow claims based on the checks so issued.

The charging of future debts and legacies on land, which once was approved, is also analogous. This was done at the time when devises had to be attested and subscribed, but legacies did not (the period between the Statute of Frauds and the Wills Act). Thus, a charge on land of a legacy, having been created, was upheld though the legacy might be later set up.⁵⁰ An American court has sustained a provision for future charges for board and room to be deducted from a legacy.⁵¹ The amount of the yearly deduction was fixed in the will, the only uncertain thing being the number of years for which the charge would run.

The classic requirements for incorporation are that the writing must be presently existing and must be referred to as existing and be identifiable.⁵² It is often said also that the will must expressly show the testator's intention to incorporate the separate writing. This requirement is illustrated particularly in deed cases and has been developed more fully above. Suppose the will refers to a future instrument which, however, comes into existence prior to the execution of a codicil. The codicil bringing the will down to date, and without reference to the future writing, still uses language of the future. Some courts have thought that it was not necessary in such a case to insist upon the requirement of reference to any existing instrument if the incorporated paper was clearly indicated.⁵³ If such writing is unmistakably identified, it seems rather mechanical it is argued to insist upon a reference to its present existence.

V. CONTAINERS

It is the common practice to associate the bequests of all items found in containers (where the contents may change from time to time and the containers may be a catch-all) with acts subsequently occurring which

⁵⁰ Evans, *Incorporation by Reference, Integration, and Non-testamentary Acts*, 25 Col. L. Rev. 879, 891 n. 60 (1925).

⁵¹ Smith v. Smith, 113 Md. 495, 77 Atl. 975 (1910).

⁵² Evans, *op. cit. supra* note 49. See Chaplin, *Incorporation by Reference*, 2 Col. L. Rev. 148 n. 2 (1902); Dobie, *Testamentary Incorporation by Reference*, 3 Va. L. Rev. 583 (1916); *In re Keen*, [1937] 1 Ch. 236; *Riley v. McMaster*, 313 Mass. 739, 49 N.E. 2d 240 (1943).

⁵³ *Simon v. Grayson*, 15 Cal. 2d 531, 102 P. 2d 1081 (1940), noted in 29 Calif. L. Rev. 94 (1941).

affect the substance of the gift. The late Professor Joseph Warren, in discussing the problem of the nontestamentary act, in a letter to the writer, posed this issue: A testator had made a will giving all his long-tailed horses to his son Robert and all those with bobbed tails to his son Samuel. Later on, becoming enraged at Robert, he bobbed the tails of all his long-tailed horses. Does Samuel profit thereby? The identical problem arises where a testator bequeaths all the contents of a chest or drawer to a beneficiary and later removes the contents, or a part, because of his displeasure toward the beneficiary. The subsequent act might be performed for the purpose of changing the will or it might have a wholly independent purpose. However, this seems to be only an illusory difficulty. The rule that a will speaks as of the date of death unless a contrary intent is manifest would probably govern such cases, and evidence would likely not be admitted to prove the true state of the testator's mind not appearing in the will.

*In re Le Collen's Will*⁵⁴ dealt with a bequest of certain envelopes, then in the testator's safe, which contained various securities. Of the six envelopes, four were identified by the addresses of persons whose names were mentioned in the will as legatees. These extraneous items were resorted to "for the purpose of identifying the thing intended to be given." The court observed that each case rests on its own facts—some extraneous papers are testamentary, while others are not, and they "run into each other by almost imperceptible gradations." Here the question could well be raised: How can they be used for identification unless they are nontestamentary? If, however, the will speaks only from death, they might be said to be included within the testamentary act. That, however, would not harmonize with the New York rule. Furthermore, this case seems to involve incorporation rather than the question of from what date the will speaks, and further illustrates the embarrassments which accrue from the application of the New York rule.

Somewhat parallel to the container cases is a recent Kentucky case.⁵⁵ The testator declared in this will: "I always expect to keep two automobiles. I want E. O. Magruder to have choice, Mrs. Charlotte Mills, the other." It was not known whether the testator owned any auto at the time the will was made, but at any rate he owned none when he died. Those he owned, if any, when he drew his will, were not identified specifically and a later act of acquisition of ownership would have been sufficient to pass two autos if he owned them at death. The identification could thus occur

⁵⁴ 72 N.Y.S. 2d 467 (Surr., 1947).

⁵⁵ *Threlkeld v. Synodical Presbyterian Orphanage*, 307 Ky. 234, 210 S.W. 2d 766 (1948).

by a later and probably a nontestamentary act. It is conceivable that he might purchase two autos for the express purpose of implementing the will. The will, however, would speak from his death.

Suppose that the testator in the Kentucky case had made a valid contract for the purchase of a Lincoln and of a Ford auto. Could it be urged that the later contract, made for independent reasons, had identified the two gifts? In fact, the testator had made an oral contract for two autos, which was not provable under the statute of frauds. Since the testator gave two autos only if he owned them, it appears to be the correct conclusion that the executor was under no obligation to complete the purchase at the behest of the legatees. The analysis, however, suggests that it is sufficient to apply the rule that the will speaks as of the date of death.

A different problem arises where the testator makes a specific gift which is later adeemed and is replaced by an article describable in the same terms as the one adeemed.⁵⁶

VI. SECRET TRUSTS

A perhaps similar problem arises where the testator seeks to create a trust for another, the beneficiary to be identified not by an act of independent significance, and often not by a writing, but by oral designation. It is the beneficiary, and not the property, who is relegated to this plight. There is no problem of integration of written and spoken language. The courts have, as Professors Bogert and Scott indicate,⁵⁷ either felt that they must let the devisee keep, or must enforce upon him a constructive trust, and have scarcely considered the possibilities of a resulting trust. An English writer divides the cases into a class of secret trusts and half-secret trusts, where in the latter case the trustee knows he is a trustee

⁵⁶ *Moxon v. Crossley*, [1927] 1 Ch. 364; *Waldo v. Hayes*, 96 App. Div. 454, 89 N.Y.S. 69 (1904); *When a Will Speaks as to After-acquired Property*, 23 Iowa L. Rev. 380 (1938). The more common issue which courts have to determine relates to the kind of contents which should pass. Thus, it is said that bonds are not included because they do not imply locality. *Moore v. Moore*, [1781] 28 E.R. 1030. The same has been held of savings bank pass books. *Meegan v. Brennan*, 63 R.I. 298, 7 A. 2d 663 (1939); *Old Colony Trust Co. v. Hale*, 302 Mass. 68, 18 N.E. 2d 432 (1939). But see *Goff v. Cornwallis*, 219 Mass. 226, 106 N.E. 860 (1914). Auto policies which have a surrender value and insurance policies have been treated similarly. It is often said that choses in action do not pass because they are evidence rather than property. *Smith v. Smith*, 113 Md. 495, 77 Atl. 975 (1910). Yet there is a tendency to the view that choses pass which consist of specialties such as savings bank pass books, bonds, and other securities which in common understanding have been regarded as property in themselves. This seems to be the better view. In *re Robson*, [1891] 2 Ch. 559; *Buchwald v. Buchwald*, 175 Md. 103, 199 Atl. 795 (1938); *Appeal of Magoohan*, 117 Pa. 238, 14 Atl. 816 (1887); *Lock v. Noyes*, 9 N.H. 430 (1838). Particular language and situations might even exclude money and other items. *Creamer v. Harris*, 90 Ohio 160, 106 N.E. 967 (1914); *Meegan v. Brennan*, 63 R.I. 298, 7 A. 2d 663 (1939). Whether given contents are to pass is a question of law. *Dozier v. Bailey*, 185 Ga. 666, 196 S.E. 420 (1938).

⁵⁷ 3 Bogert, *Trusts and Trustees* § 4995 (1935); 1 Scott, *Trusts* § 55.1 (1939).

because the will says so, but the benefit for a third person is not created by a proper writing. There are, as has often been said, three cases: 1) where the intended trustee does not even know he was expected to hold for another prior to the settlor's death; 2) where he has been only orally informed that he is a trustee, and the beneficiary is orally indicated; 3) where the will shows he is a trustee but does not identify the beneficiary. Neither Professor Bogert nor Professor Scott is satisfied with the conclusions reached by the courts of last resort in this situation.

It is apparent that there is no persuasive analogy between these secret and half-secret trusts on the one hand, and incorporation or nontestamentary act or a power of appointment on the other. It is believed that the Statute of Wills is not violated by these three latter devices. On the other hand, at least in form, the secret trust does violence to the statute. If the statute should be reworded so as to avoid this impingement, it would probably impair the significance attached to incorporation. Whether the statute should be so revised depends much upon the question whether the creation of secret trusts by the courts has on the whole functioned serviceably.

VII. POWERS

In dealing with the organization and structure of wills, much attention has been given to various doctrines, such as incorporation by reference, integration, nontestamentary acts which affect the results to be reached by the will, and secret trusts where some violence is done to the statutory requirement of a writing, and to the question whether a will speaks as of the date of its execution or at the time of the death of the testator. Even here, the English courts and writers seem to avoid any consideration of nontestamentary acts.

Our own commentators also have scarcely observed that the exercise of a power may be a function quite similar to some of these concepts. This fact, so far as this writer knows, had not been adverted to in any adequate fashion until the publication of the Restatement on Property.⁵⁸

A good illustration of such a function of a power appears in *McKallip's Estate*.⁵⁹ The testator there inserted into his will the following: "I leave Ida Crum Campbell authority to change my will according to her personal dictation—boat sailing." Ida's "dictation" after the testator's death changed the will in a manner entirely satisfactory to herself. The lower court felt that this was the same as allowing one person to make a will for another, but on appeal the provision was accurately interpreted as creat-

⁵⁸ 3 Rest., Property § 348 (1940).

⁵⁹ *McKallip's Estate*, 324 Pa. 438, 188 Atl. 343 (1936).

ing a general power. The use of powers for such purposes had long been known.⁶⁰ The will is later implemented, not by an incorporation, nor by an act with independent significance, nor by secret promises enforceable in equity, nor by construing it as of the date of the maker's death, but by an act of another whose only purpose is to complete the testator's scheme of distribution.

VIII. CONCLUSION

We conclude that although the statute requires a will to be in writing, there are many situations to which it cannot be applied. It is the business of courts to work the matter out as rationally as possible. As concerns incorporation, the matter of writing causes no difficulty unless the statute is interpreted so that the *whole* writing must be present when the will is executed. Future memoranda, though in writing, are not acceptable unless they assume a form similar to charges, which charges should not be at large but should be susceptible of proof of their correctness. Undelivered conveyances made prior to the will and referred to in it usually indicate the maker's intent that the grantee should have the property at the latter's death. It does not appear to be too great an evasion of principle to allow the incorporation of them and thus carry out an evident purpose shown in the will. A power of appointment is quite outside the provision of the statute which requires writing. The secret trust is on its face a violation of the statute, though it may now be recognized almost as well as is the power of appointment, to be outside the statute.

We have not been astute in following through those acts which add significance to a will but are performed independently of it. If such an act constitutes an already executed inter vivos trust, it could in most states be incorporated by reference. That, however, would not affect its independent significance. A settlement made later is also independent. So, too, the will of a second person may affect a prior testator's will, but be independent of it. Thus, no apology need be made in either case, nor need there be any hedging here because of the requirements of incorporation.

⁶⁰ 1 Simes, *Future Interests* § 245 (1936).