VALIDATION OF DEFECTIVELY EXECUTED WILLS BY HOLOGRAPHIC TESTAMENTARY INSTRUMENT: INTEGRATION AND INCORPORATION BY REFERENCE

The integration of writings intended by the testator to be his last will and the incorporation by reference of writings lacking testamentary effect into a valid testamentary instrument are generally regarded as distinct doctrines, each limited to a separate area of application.1 Doubt as to the efficacy of any such distinction has been raised by the recent case of Johnson v. Johnson,2 to which both theories appear to apply simultaneously, leading to divergent results.3

In Johnson v. Johnson, a typewritten paper purporting to dispose of testator’s estate was invalid as a will for lack of signature and attestation. On the same paper, in the handwriting of the testator, followed: “To my brother James I give ten dollars only This will shall be complete unless hereafter altered changed or rewritten”.4 The handwriting was dated and signed. There was testimony to the effect that decedent had shown this paper to another, calling it his will, and that at such time the paper contained only the typewriting. Later, decedent said he had changed his will by codicil. In a five to three decision, the court held the paper was to be admitted to probate in its entirety. “[T]he valid holographic codicil [handwriting] incorporated the prior will [typewriting] by reference and republished and validated the prior will...”5 In dissent it was

1 Atkinson, Wills § 80 (2d ed., 1953); Evans, Incorporation by Reference, Integration and Nontestamentary Act, 25 Cal. L. Rev. 879, 888 (1925); Integration and Incorporation by Reference, 4 Baylor L. Rev. 211, 214 (1952).


3 Professor Mechem, in Integration of Holographic Wills, 12 N.C.L. Rev. 213, 221 (1934), has similarly suggested integration and incorporation may apply to the same facts and lead to contrary results, citing as an example Gibson v. Gibson, 28 Grat. (Va.) 44 (1877). There, the paper sought to be probated began in writing that was not that of the testatrix, said writing being invalid as a will for lack of attestation. In testatrix’s handwriting followed: “As Margaret is dead, I give her share to my niece Lizzie Leigh Gibson. [Signed] E. S. Holmes. December 31st, 1871.” Held: Neither portion, either singly or in combination, is admissible to probate. This case is often cited as authority for refusing to allow holographic instruments to incorporate non-holographic material. See, e.g., Malone, Incorporation, by Reference, of an Extrinsic Document into a Holographic Will, 16 Va. L. Rev. 571, 578–580 (1930).


5 Ibid., at 932. It is unclear whether the majority proceeded on the theory of incorporation by reference or on the theory of republication by codicil. See 2 Page on Wills § 552 (1941), citing In re Plumel’s Estate, 151 Cal. 77, 90 Pac. 192 (1907) and Harvy v. Chouteau, 14 Mo. 587 (1851), as examples of republication by codicil and 1 Page on Wills § 249 (1941), where the same cases are cited as examples of incorporation by reference. Nevertheless, the weight of authority would distinguish these doctrines. Incorporation by reference is applicable when the instrument sought to be validated has never had testamentary effect. Republication by codicil applies only where the instrument sought to be validated has or had testamentary life. Evans, Testamentary Republication, 40 Harv. L. Rev. 71, 72, 73 (1926). Consult also Ritchie, Alford and Effland, Cases and Materials on Decedents’ Estates and Trusts 183 (1955); Atkin-
urged that "the typewritten part is not a will and the handwritten part is not a codicil. The handwritten part is only a continuation of the typewritten part. . ." In other words, the paper is one integrated whole and as such is not admissible to probate since it is neither attested nor "entirely written, dated and signed by the hand of the testator himself."

I

The requisites for the application of incorporation by reference may be simply stated. There must be a valid testamentary instrument containing a reasonably definite reference to a writing as already existing, in such a way as to evidence an intention to incorporate that writing. Further, the writing must have been in existence before the execution of the incorporating instrument, and it must be shown that it corresponds with the description in that instrument. The presence


In accord with what is felt to be the weight of authority, incorporation by reference will be used herein as the basis, if any, for the validation of defective executed testamentary instruments which have never had testamentary life.

6 Okla., 279 P. 2d 928, 936 (1954). The dissent also urged that a holographic codicil should not be allowed to validate a defectively executed non-holographic will, a position discussed in the text infra. (Note: By non-holograph is meant any writing not in the hand of the testator. Thus, the holographic will of one person would be non-holographic as concerns another. For the meaning of holograph as is used herein see note 7 infra.)

7 Okla. Stat. (1951) Title 84, § 54. By statute, 19 states, in addition to the formal attested will, recognize the holographic will either as a distinct type of will or as a special type of will not requiring attestation. The requirements of these statutes are similar to those of Oklahoma stated in the text. Rheinstein, The Law of Decessents' Estates 204, 205 (2d ed., 1955); Atkinson, Wills § 75 (2d ed., 1953); Bordwell, The Statute Law of Will, 14 Iowa L. Rev. 1, 25 (1928).

8 This requirement is discussed in the text infra and is of paramount importance in regard to the discussion that follows.

9 Properly, the writing should never have had testamentary effect as the will of the party in question. See authorities cited in note 5 supra.
of these elements will result in the admission to probate of the writing to which
the reference is made.\textsuperscript{10}

In the \textit{Johnson} case, the handwriting alone meets the requirements set out for
holographic wills by the Oklahoma statutes.\textsuperscript{11} The reference to "this will" may
be taken to mean this ineffective will—that is, the typewriting.\textsuperscript{12} Since this re-
ference was made in the present tense, it may be regarded as to a writing then in
existence. It appears from testimony that the typewriting was in existence be-
fore the handwriting: Oral evidence also identifies the typewriting as the "will"
in question.\textsuperscript{13} Thus it would appear that the admission to probate of the paper
left by the testator in the \textit{Johnson} case is a result both justified and required by
the doctrine of incorporation by reference.

Case law concerning the validation of defectively executed non-holographic
wills by subsequent valid holographic codicil is generally considered to be in con-
flict\textsuperscript{14}—depending on whether or not the incorporated material is regarded as
actually becoming a physical part of the incorporating instrument.\textsuperscript{15} Some cases
allow validation. In \textit{In re Plumel's Estate},\textsuperscript{16} an unattested instrument not entirely
in the testator's hand, was held to be validated through incorporation by refer-
ence into a holographic writing designated "'Codicil'" and found on the back
of the invalid instrument. In support of its decision, the court cited \textit{In re Soher's
Estate},\textsuperscript{17} wherein it is said:

Now, if an attested will can refer to a document which is not attested, we can see
no good reason why an holographic will may not refer to a document which is not in
the handwriting of the testator. The only difference between an holographic and
attested will is in the form of execution. . . . [W]hatever may be done in or by the one,
may be done in or by the other.\textsuperscript{18}

\textsuperscript{10} Consult Atkinson, Wills § 80 (2d ed., 1953), wherein the cases are collected and reviewed;
Dobie, Testamentary Incorporation by Reference, 3 Va. L. Rev. 583 (1916). The writers are
collected in Ritchie, Alford and Effland, op. cit. supra note 5, at page 181 n. 7.

\textsuperscript{11} See authorities cited in note 7 supra.

\textsuperscript{12} Contrast the view stated in note 50 infra. The fact that the handwriting is on the same
page as the typewriting may of itself be sufficient reference. Cf. In re Plumel's Estate, 151
Cal. 77, 90 Pac. 192 (1907). It at least indicates which will "this will" contemplates.

\textsuperscript{13} See note 12 supra.

\textsuperscript{14} Mechem, Integration of Holographic Wills, 12 N.C. L. Rev. 213, 221 (1934); Malone,
Incorporation, by Reference, of an Extrinsic Document into a Holographic Will, 16 Va. L. Rev.
571, 572 (1930); Incorporation by Reference, 16 Tenn. L. Rev. 741, 743 (1941). "The cases
though few in number are hopelessly in conflict and no attempt will be made to reconcile
them." Ibid., at 742.

\textsuperscript{15} If the incorporated non-holographic material is regarded as becoming a physical part of
the incorporating holograph, it is clear that incorporation will not result in validation because
the holographic character of the incorporating instrument is destroyed. Compare Hewes v.
Hewes, 110 Miss. 826, 71 So. 4 (1916), with In re Soher's Estate, 78 Cal. 477, 21 Pac. 8 (1889).

\textsuperscript{16} 151 Cal. 77, 90 Pac. 192 (1907).

\textsuperscript{17} 78 Cal. 477, 21 Pac. 8 (1889).

\textsuperscript{18} Ibid., at 480-481, 9 Accord Rogers v. Agricola, 176 Ark. 287, 3 S.W. 2d 26 (1928)
(where a holographic codicil to an imperfectly attested typewritten will was held to validate
The recent case of *Hinson v. Hinson* is illustrative of cases taking the opposite view. In issue was an improperly attested typewritten will and a subsequent paper dated, signed and entirely in the hand of the testator, beginning "'Supplementary to my Last Will, it still stands as is.'" Even if such instrument [typewriting] is regarded as having been incorporated in or republished by the later handwritten memorandum and the two documents are considered together, we are still confronted with the fact that the instrument offered for probate is not wholly in the handwriting of the decedent and is not attested as required by statute. It is our conclusion, therefore, that under the clear provision of our statute the two instruments involved in this case cannot be admitted to probate. Nor was the handwriting alone admitted to probate, although it was executed in accordance with the wills statute, because it lacked any "testamentary intent."

*Scott v. Gastright* presents a similar situation. Testatrix left a typewritten will unsigned and unattested—subsequent to which she had written, signed and dated in her own hand on the back of an envelope, "'The will I dictated to L. Schear Att'y, but did not sign is my last will and as I wish it.'" The court, following *Sharp v. Wallace*, refused probate to the instruments, viewing the effect of the asserted incorporation as merging the writings together, thereby destroying the holographic character of the later writing. Again the handwriting alone, although properly executed, was not admitted to probate because it "[made] no disposition of any property."

All of the cases denying incorporation present one significant feature, which

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9 — Tex. 280 S.W. 2d 731 (1955).
20 Ibid., at 733.
21 Ibid., at 736.
22 305 Ky. 340, 204 S.W. 2d 367 (1947).
23 Ibid., at 341, 367.
24 83 Ky. 584 (1886).
25 305 Ky. 340, 341, 204 S.W. 2d 367 (1947). Other cases purporting to deny the incorporation of non-holographic material into holographic are Gibson v. Gibson discussed in note 3 supra and Sharp v. Wallace discussed in note 30 infra. Similarly, the incorporation of the will of another into a holographic instrument has been refused. Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916). The incorporation of a deed into a properly executed holograph (which by itself was not admissible to probate) has also been refused. In re Watt's Estate, 117 Mont. 505, 160 P. 2d 492 (1945). See also Howell v. Moore, 14 Tenn. App. 594, 631 (1930). Louisiana refuses to recognize the general doctrine of incorporation by reference of defective wills, Succession of Ledet, 170 La. 449, 128 So. 273 (1930), and therefore will refuse to allow a holograph to validate a defective non-holographic will. See dissent in Girven v. Miller, 219 La. 252, 52 So. 2d 843 (1951), noted in 26 Tulane L. Rev. 115 (1951).
suggests a possible mode of reconciliation. None of them admitted the incorporating holograph to probate by itself, it being felt that the holograph lacked testamentary intent,26 was too indefinite27 or failed to make any testamentary disposition.28 If it be assumed that the doctrine of incorporation by reference requires for its application not only a properly executed incorporating instrument,29 but one that is also capable of independent probate, these cases may be viewed on their facts as not presenting proper situations for incorporation by reference.30 There is surprising lack of authority on this point.

Support for this view may be found in the following quotation:

If a will may incorporate other writings and may republish and revive prior wills, it may well be held that it is because it is a valid will, regardless of whether it is holographic or attested, that it has all these effects. [Emphasis supplied.]31

More particularly, it is clear that the incorporating instrument must itself be capable of independent probate in so far as it must evidence testamentary intent, if the material to be incorporated is non-testamentary in character and merely explanatory in its nature. The more difficult question is presented by In re Anthony's Estate.32 It was there argued that a defectively dated holographic instrument testamentary in character was validated through incorporation by reference into a later holographic instrument which was properly signed and dated but lacked any testamentary intent.

The first question suggested is as to whether the [later holograph] in itself is testamentary in character, and whether it discloses on its face any intimation or

26 Hinson v. Hinson, discussed in text at note 19 supra.


28 Scott v. Gastright, discussed in text at note 22 supra. The absence of disposition of property more properly may be taken to mean that the incorporating holograph lacked any animus festandi, since it is clear that an instrument merely appointing executors may be admitted to probate. Reeves v. Duke, 192 Okla. 519, 137 P. 2d 897 (1943); Manship v. Stewart, 181 Ind. 299, 104 N.E. 505 (1914).

29 It is clear that the incorporating instrument must at least be executed according to the formalities of the local wills statute. Cf. Leech's Estate, 236 Pa. 57, 84 Atl. 594 (1912); Notes v. Doyle, 32 App. D.C. 413 (1909); Vestry v. Bostwick, 8 App. D.C. 432 (1896); Dunlap v. Dunlap, 4 Dessus. Eq. (S.C.) 305 (1812). Similarly, the testator must have been competent at the time of the execution of the incorporating instrument. Cf. Appeal of Rogers, 126 Me. 267, 138 Atl. 59 (1927); In re Will of Charolette Murray, 20 Ohio N.P. (N.S.) 305 (1917).

30 Sharp v. Wallace, 83 Ky. 584 (1866), is the only apparent exception to this statement of all the cases involving validation of defectively executed wills, since it does not appear that there were any grounds in that case for refusing to admit the holograph other than the fact it was viewed as merged with the invalid will.


32 21 Cal. App. 157, 131 Pac. 96 (1913).
intention on the part of the deceased to constitute it his last will; and finally, if it can be said to possess either of these characteristics to a satisfactory or convincing extent, then is there such a reference. . . .

Since the incorporating holograph was found to lack testamentary intent, it was held that the asserted incorporation was properly refused. 34

It is clear that although a writing is executed in accordance with the local wills statute, it is nonetheless inadmissible to probate if it lacks testamentary intent. 35 Such an instrument, as in In re Anthony's Estate, would also appear to be incapable of validating another instrument on the theory of incorporation by reference. 36 The alternative to this rule would only require that the incorporating instrument be properly executed, 37 unless the general doctrine of incorporation by reference be denied. Such a view leads to what would appear to be theoretically undesirable results. It would allow probate of a will and codicil together, neither of which could be probated alone. 38 Such a result is possible under the integration theory, 39 but only upon conditions not necessarily met by the tests for the application of incorporation by reference. 40

Statutes prescribing formalities of execution of testamentary instruments are not only designed to lessen the possibility of fraud and forgery but also "to

32 Ibid., at 160, 98.
34 Alternatively, it was held that even assuming the incorporating holograph displayed the necessary testamentary intent, there was insufficient reference to the earlier writing.

35 In regard to holographic instruments see Atkinson, Wills § 47 (2d ed., 1953). An exception to this rule would be integrated papers (although their combination is subject to the requirements set out in text). In re Estate of Skerret, 67 Cal. 585, 8 Pac. 181 (1885). "Neither the copy of the deed nor the letter, taken by itself, constitutes a will; the one is not testamentary in its character, the other has no date; but taking them together as the deceased left them, forming one document, it is complete." Ibid., at 588, 183. Papers validated by incorporation are another exception. Newton v. Seaman's Friend Society, 130 Mass. 91 (1881).

36 In re Sciutti's Estate, 371 Pa. 536, 92 A. 2d 188 (1952); Ahlborn v. Peters, 37 Cal. App. 2d 688, 100 P. 2d 542 (1940) ("A non-testamentary document cannot incorporate an incomplete writing containing only some of the essentials of a holographic will in such a way as to give the adopted paper testamentary completeness." Ibid. at 706, 546); cf. In re Loud's Estate, 70 Cal. App. 2d 399, 161 P. 2d 49 (1945); 68 C.J., Wills § 583 (1934). But cf. In re Miller's Estate, 128 Cal. App. 176, 17 P. 2d 181 (1932), wherein an instrument apparently lacking testamentary intent is held to incorporate an instrument not properly executed. The court however was careful to point out testator had said that "'he had fixed things for Minnie' coupled with the exhibition of the two documents to her, [which furnishes] ample evidence of a testamentary intent." Ibid., at 183, 184. The fact the papers were found together might also sustain them on the theory of integration. In re Merryfield's Estate, 167 Cal. 729, 141 Pac. 259 (1914). It has been cited as an integration case. Mechem, Integration of Holographic Wills, 12 N.C.L. Rev. 213, 221 (1934).

37 See cases cited in note 29 supra.
38 The logical extreme of this view has clearly been rejected. Thus, a will required to be attested by two witnesses which is only attested by one is not validated by a codicil with only one attesting witness. Consult cases cited in note 29 supra.
39 See discussion in note 35 supra.
40 The requirements for integration are stated in part II of this comment.
insure that a testator would be clearly cognizant of the testamentary disposition he was then making. To allow an instrument properly executed but lacking testamentary intent to incorporate a defective will by reference would seem to overlook the desired coincidence of formal execution and testamentary intent. In fact it is difficult to see how an instrument lacking testamentary intent can be a testamentary instrument at all.

It would thus appear that the application of incorporation by reference in the Johnson case is not only supported by authority, but that cases denying the validation of defective wills by subsequent holograph are distinguishable insofar as they lack holographs that can be admitted to probate on their own terms, under what has been herein suggested as the better rule.

II

The generally recognized formal requisites for the integration of the writings that are to be the "last will" of the testator, as have been developed in regard to attested wills, have been stated as follows:

Three criteria are commonly used by the courts in determining whether or not integration is to be permitted. These are (1) physical connection, (2) internal sense con-
nection, and (3) extrinsic evidence permitted to prove the existence at the time of execution, usually in the absence of either physical or internal sense connection. Application of these principles to Johnson v. Johnson would seem to lead to the conclusion that the paper therein was an integrated and continuous whole. The fact that the writings involved were on the same page is sufficient physical connection. Similarly, the handwriting cannot be said to be so discontinuous with the sense and meaning of the typewriting as to defeat integration, although it does not appear to continue the exact thought of the last typewritten sentence. And of course both writings were in existence and in the same room at the time Mr. Johnson signed the handwriting. Tests for the integration of unattested instruments, insofar as they differ from those applying to attested papers, are rather ill-defined. Perhaps it may fairly be stated that separate unattested writings will be regarded as the will of the testator when the court feels that he intended all such writings together to constitute his will.

Turning again to Johnson v. Johnson, the physical and possibly sense connections already discussed seem to give rise to the inference that the testator intended the entire paper to be one will. The reference in the handwriting to “this


45E.g., Hays v. Marschall, 243 Ky. 392, 48 S.W. 2d 540 (1932).

46The last typewritten sentence suggests the employment of a certain attorney, and ends “but should they not agree then my said brother and sister shall employ whomsoever they may desire, being cautious [sic] that nothing to be done without their consent and knowledge.” Okla., 279 P. 2d 928, 933 (1955). The handwriting is quoted in full in text at note 4 supra.

47“[T]hough it has been suggested that the imperativeness of having all pieces present at the time of execution becomes moot [where formal attestation is not required], the courts which have dealt with the problem would make such presence a prerequisite to integration.” Integration, 50 Mich. L. Rev. 915, 921 (1952).


49Where such intent was found: In re Moody’s Estate, 118 Cal. App. 2d 300, 312, 257 P. 2d 709, 716 (1953) (“[T]hey were obviously written for the single purpose of disposing of the testator’s estate”); In re Morrison’s Estate, 98 Cal. App. 2d 380, 384, 220 P. 2d 413, 416 (1950) (“In the instant case, it is quite clear that the two writings were intended by the testator to be his will”); In re Dumas’ Estate, 34 Cal. 2d 406, 414, 210 P. 2d 697, 702 (1949) (“Thus we clearly have an intent that all the papers were to be considered together as one continuous and complete document”); In re Swendsen’s Estate, 43 Cal. App. 2d 551, 555, 111 P. 2d 408, 410 (1941) (“The writings on the two papers unquestionably are complementary to each other and together they constitute a rounded out will”).

Where such intent was not found: In re Paull’s Estate, 208 Okla. 195, 197–198, 254 P. 2d 357, 360 (1953) (“[U]lt must be apparent . . . that the several sheets of paper should constitute one single instrument and that it be effective as his last will and testament”); In re Wunderle’s Estate, 30 Cal. 2d 274, 284, 181 P. 2d 874, 880 (1947) (“[T]here is nothing in the record to show that the testator intended that the letter and message be construed together as forming his will”); In re Bauer’s Estate, 51 Cal. App. 2d 636, 638, 124 P. 2d 630, 631 (1942) (“[T]here is nothing in the three undated letters indicating that they were to be read or construed as a part of decedent’s holographic will”).
"will" may also be regarded as expressing a similar intention. Furthermore, the typewriting ended without punctuation and cases may be cited wherein the absence of punctuation at the end of an instrument is held to give rise to the inference that it is incomplete. The handwriting may therefore be viewed as merely completing the typewriting.

Writings in cases similar to Johnson v. Johnson have been held integrated. In In re Moody's Estate, the contest concerned a sheet of paper with handwriting of decedent on both sides. At the top of the obverse side was the date November 21, 1951. The writing, containing various bequests, continued on the reverse side until the middle of the page. Then follows a new date, December 3, 1951, more handwriting, and the only signature contained on the paper. It is reasonably clear that had he not intended the writing preceding the date December 3, 1951, to be a part of his will, he would not have written that date and the provisions immediately following it on the same sheet of paper. Both parts are wholly testamentary in character; they are integrated by their context... they were obviously written for the single purpose of disposing of the testator's estate.

Thus it was held that the entire paper was to be admitted to probate as an integrated whole.

It is thus submitted that the writings in Johnson v. Johnson are arguably not "will and codicil," but constitute one integrated whole. As such they would be inadmissible to probate, for it is clearly established that unattested integrated writings must be entirely handwritten if they are to constitute a valid will.

III

In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will... On the other hand, there is incorporation by reference when one of the writings is a complete testamentary instrument, and refers to another document in a manner clearly designated to accomplish that purpose.

Under this interpretation, the phrase "this will" is a mere statement referring to the entire paper as a single testamentary document.

In re Devlin's Estate, 198 Cal. 721, 247 Pac. 577 (1926); In re Hurley's Estate, 178 Cal. 713, 174 Pac. 669 (1918); cf. In re Brook's Estate, 214 Cal. 138, 4 P. 2d 148 (1931); In re England's Estate, 85 Cal. App. 486, 259 Pac. 956 (1927); In re Bernard's Estate, 197 Cal. 36, 239 Pac. 404 (1925).

Testator wrote a will and had another copy it. Below the copy he wrote "I have read the above statement," and signed his name and date. Held: copy is not admissible to probate. In re McNamara's Estate, 119 Cal. App. 2d 182, 260 P. 2d 182 (1953). Also consult Gibson v. Gibson, stated in note 3 supra.

Consult, for example, cases cited in notes 19-25 supra, which hold the effect of incorporation by reference to be merger, and thus deny the incorporation of non-holographic matter by holographic.

In *Johnson v. Johnson*, on one hand, it appears that "two or more separate writings are intended by the testator to be his will." Yet "one of the writings is a complete testamentary instrument and [may be taken to] refer to another document."\(^5\)

The phenomenon of integration and incorporation by reference both being applicable to the same fact situation has received little judicial recognition. Courts are prone in such circumstances to apply either doctrine\(^6\)—and do not acknowledge that the one overlooked may also apply and possibly lead to an opposite result.\(^6\) Moreover, one gathers from the case law that the doctrines are mutually exclusive.\(^6\) In consequence, no express body of law has been developed to cover a situation to which both doctrines may be applied.

The only explicit recognition and proposed solution of this problem yet found is that in an article by Professor Phillip Mechem.\(^6\) It is there argued that allowing a holograph to incorporate and thereby validate non-holographic material is at variance with holding that integrated non-holographic material invalidates the holograph. The variance is highlighted by a case\(^6\) in which both theories seem to apply with equal justification—and lead to different results (as in *Johnson v. Johnson*). This dilemma is felt to "indicate that there is a fundamental error in attempting to apply the technique of incorporation to holographic wills at all."\(^6\) In solution Professor Mechem suggests that the incorporation of non-holographic material into holographic be refused. Or, alternatively, the effect of incorporation by reference is to be the same as the effect of integration.\(^6\)

\(^5\) The divergent interpretation of the phrase "this will" is basic to this dual application. Compare discussion at note 12 supra with that in note 50 supra.

\(^6\) The so-called "envelope cases," involving papers in themselves incomplete which are found within envelopes on which the missing essentials have been written, furnish a prime example of cases wherein incorporation and integration both seem to apply. Compare Alexander v. Johnston, 171 N.C. 468, 88 S.E. 785 (1916) (integration), with *In re Goods of Aliminoso*, 1 Swa. & Tr. 508 (Prob., 1859) (incorporation). See also *In re Nicholls*, [1921] 2 Ch. 11, cited by Atkinson as a proper case for either doctrine. *Atkinson, Wills* § 80 at note 4 (2d ed., 1953). Professor Mechem, op. cit. supra note 48, discusses these cases at page 229, coming to the result herein expressed.

For other cases possibly illustrating the same problem consult *In re McNamara's Estate* at note 54 supra; *Gibson v. Gibson* at note 33 supra; *In re Moody's Estate* at note 52 supra; *In re Miller's Estate* at note 36 supra; *Hurley v. Blankenship*, 313 Ky. 49, 229 S.W. 2d 963 (1950); and *In re Morrison's Estate*, 98 Cal. App. 2d 380, 220 P. 2d 413 (1950).

\(^6\) The significant feature about most cases wherein it would appear that integration and incorporation may both be applied is that the subsequent writing is attested, or both writings are holographic. Thus, application of either theory would lead to the same result. It is only where the subsequent writing depends on its holographic character for validity and the prior writing is non-holographic that the theories will lead to divergent results.

\(^5\) Consult authorities cited in note 1 supra.

\(^6\) Mechem, Integration of Holographic Wills, 12 N.C.L. Rev. 213 (1934).

\(^6\) *Gibson v. Gibson*, 28 Grat. (Va.) 44 (1877), discussed in note 3 supra.

\(^6\) Mechem, op. cit. supra note 61, at 229.

\(^6\) Cases cited in notes 19–25 supra may be cited in support of this position.
And thus it would follow that integration is to be preferred over incorporation by reference in a situation where both may be applied.

Application of this rule to Johnson v. Johnson would eliminate confusion as to which doctrine to apply—both leading to the same negative result—although the problem of whether to admit the handwriting alone might remain. Besides this certainty of application, the logical difficulty of ascribing different effects to similar doctrines vanishes. Some might also argue that the danger of fraud and forgery is lessened with the requirement that only handwritten material can be incorporated into handwritten material. Professor Mechem's solution would also tend to promote doctrinal certainty insofar as it would eliminate the variance in cases involving holographic incorporation and not integration, although in a manner different from that suggested in Part I of this comment. And thus it is said that this rule is "sound from the standpoint of analysis as well as from the standpoint of providing a tolerable and working rule."

There are several considerations, however, which would point to an opposite result. Given several writings—none of which individually meet the formal requirements of the local wills statute—their combination may in certain circumstances be admitted to probate under the doctrine of integration, if it be found that these writings, in combination, were intended by the testator to constitute his will, i.e., were intended to effectuate a disposition of his property at death. In the Johnson situation where integration and incorporation by reference both apply with only the latter resulting in validation, the use of integration, by emphasizing the "in combination" aspect of testator's intention, would operate to defeat his intention to dispose of his estate at death. This use of integration

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65 This would depend on whether Professor Mechem's view categorically refuses to incorporate non-holographic material into holographic or whether it would allow such an incorporation, but hold the effect thereof to be merger. Under the former rule, the majority in Johnson might well admit the handwriting to probate by itself under the rule in In re Emmons' Will discussed in note 42 supra. Possibly such a result may also be justified on the "surplusage" theory of integration under which it is possible to ignore anything in an instrument that may be left out without affecting the sense or completeness of the instrument. See In re Goodman's Will, 229 N.C. 444, 50 S.E. 2d 34 (1948); Gooch v. Gooch, 134 Va. 21, 113 S.E. 873 (1922); Mechem, op. cit. supra note 61, at 214–19.

66 This argument was made in 8 Vand. L. Rev. 924, 927 (1955), noting Johnson v. Johnson: It is therein concluded that the decision is undesirable because "a way will be opened for fraud in Oklahoma wills."

67 Consult cases cited in notes 16–25 supra.

68 Mechem, op. cit. supra note 61, at 230.

69 E.g., Estate of Skerrett, 67 Cal. 585, 5 Pac. 181 (1885). See also cases cited in note 49 supra.

70 See cases cited in note 49 supra.

71 This seems in accord with the commonly accepted definition of a will. "A will is a person's declaration of what is to be done after his death, which declaration is (1) revocable during his lifetime, (2) operative for no purpose until his death, and (3) applicable to the situation which exists at his death. Usually a will relates to the disposition of the maker's property." Atkinson, Wills § 1 at p. 1 (2d ed., 1953).
contrary to an intention which is basic to it and perhaps affords its principal justification would seem questionable when the alternative theory of incorporation by reference may be utilized to carry out this intention.

The "surplusage" theory of integration may perhaps afford technical support for this result. In the Johnson situation it is possible to argue that although the handwriting was intended to be a part of the typewriting, the latter may be ignored as "surplusage," leaving the handwriting to stand alone, since this would not affect the sense or completeness of the handwriting itself. It would not seem unreasonable then to hold that the handwriting can incorporate the "surplusage" typewriting, thereby validating it.

It would thus appear that giving preference to incorporation by reference over integration where both may be applied is not only in harmony with the integration theory, but that a technical means whereby this result may be reached is readily available. Furthermore, this result is in accord with the policy against intestacy expressed by many courts. And if it be assumed, as submitted in Part I of this comment, that incorporation by reference requires the existence of an incorporating instrument which itself is admissible to probate, there seems little reason to fear a way will be opened for fraud and forgery. The validity of the incorporating instrument will act as a safeguard against such contingencies. This view would support, and be supported by, the result reached in the principal case.

See, for a statement of the "surplusage" theory, note 65 supra.

E.g., In re Goodman's Will, 229 N.C. 444, 50 S.E. 2d 34 (1948), where decedent left a valid typewritten will, on which were found certain handwritten interlineations. Below was an additional handwritten paragraph, signed and dated. Held: The interlineations and the other handwriting were a valid holographic codicil. The typewriting is ignored as surplusage, leaving the handwriting to stand alone. Cf. In re Atkinson's Estate, 110 Cal. App. 499, 294 Pac. 425 (1930). As to the completeness of the handwriting itself in the Johnson case see discussion in note 42 supra.

Gooch v. Gooch, 134 Va. 21, 113 S.E. 873 (1922), is suggestive in this regard. There, the prior non-holographic will of decedent was revoked by operation of law. Subsequent handwriting, although on a printed form, was held to revive the prior will, the handwriting being "complete and entire in itself." Ibid., at 29, 876. If non-holographic material (printed form), although intended as part of the handwriting, may be thus overlooked and the handwriting have the effect of validating other non-holographic material (prior non-holographic will), why not allow the holograph to validate (i.e., incorporate) the overlooked or "surplusage" non-holographic material?

"The modern trend in states where holographic wills are recognized has been to be less insistent on formalities because that insistence would be detrimental to the policy favoring testamentary disposition of property," 3 Vand. L. Rev. 844, 845 (1950), noting In re Dumas' Estate, 34 Cal. 2d 406, 210 P. 2d 697 (1949). The Oklahoma courts have gone very far in this regard. See In re Hail's Estate, 106 Okla. 124, 235 Pac. 916 (1923). There appears to be a tendency to apply statutes generally considered to involve the construction of wills to the execution of wills. See, for a criticism of this position, Montague v. Street, 59 N.D. 618, 231 N.W. 728 (1930). Corn, J., concurring specially in the Johnson case seems to use this approach.