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WILLS-INCORPORATION BY REFERENCE-COMPARISON WITH SECRET TRUSTS AND ACTS OF INDEPENDENT SIGNIFICANCE

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WILLS—INCORPORATION BY REFERENCE—COMPARISON WITH SECRET TRUSTS AND ACTS OF INDEPENDENT SIGNIFICANCE—In one sense a will is a message to a court from one deceased. As such, it must use the medium of written words, and is handicapped by the universal difficulty of translating words into the real world of persons and things. A statute insists that one must make final disposition of his property by "will" if he wishes to avoid intestacy. Testatrix gives to "my children"; after her will is executed another child is born. Her act of child bearing greatly changes the amount of the bequests as well as adding another legatee—she is really changing the literal effect of a disposition without drawing another instrument in conformity with the statute. Should the disposition fail? When we answer "of course not," we are admitting that ". . . some reference to matters extrinsic is inevitable. Words are symbols, and we must compare them with things and persons and events. . . . It is a question of degree. . . ." ¹ How far are we to deviate from a literal application of the statute?

Legal doctrines have been developed to define the extent to which events outside the will itself may control the testamentary dispositions. Incorporation by reference, acts of independent significance, and secret trusts are related in their concern with testators' attempts to determine major parts of testamentary schemes by acts not written on the attested paper first presented for probate.² The present discussion investigates the degree to which the courts adhere to the definitions of these doctrines and the traditional distinctions between them.

I

Incorporation by reference. A document not executed according to statutory formalities will operate as a legal part of a valid will (1) if

²⁹ *Boyer v. Nesbitt*, 227 Pa. 398, 403, 76 A. 103 (1910); *Ringling v. Ringling Bros.-Barnum and Bailey Com. Shows*, (Del. Ch., Newcastle Co. 1946) 49 A. (2d) 603, noted in 60 HARV. L. REV. 651 (1947); 159 A.L.R. 307 (1945).

¹ Cardozo, J., in *Matter of Fowles*, 222 N.Y. 222 at 232, 118 N.E. 617 (1918).

² Dean Evans points out that the problem of integration is really unrelated to the matters discussed here. "Incorporation by Reference, Integration, and Non-Testamentary Acts," 25 COL. L. REV. 879 (1925). Yet in states requiring testator's signature at the end of the will, the logical problem of "incorporating" matters found beneath the signature is the same. But the courts have treated the problems as distinct. Compare *Matter of Field*, 204 N.Y. 448, 97 N.E. 881 (1912), with other New York cases listed below, notes 48 to 70. But cf. *Baker's Appeal*, 107 Pa. 381 (1884).

the will refers to and identifies the document with reasonable accuracy, (2) if it shows an intent to make the document part of the will, (3) if it refers to the document as in existence when the will is executed, and (4) if the document is actually in existence when the will is executed. So the doctrine is traditionally stated.³ Do the courts in fact enforce the requirements?

In *Hughes v. Bent*,⁴ testatrix left the residue of her estate "as a sacred trust to my daughter . . . knowing that she will faithfully carry out my wishes regarding it." No other reference to the "wishes" appeared. The Kentucky court held that a paper attached to the will could be incorporated therein by reference. The Missouri court⁵ permits incorporation of a deed when the reference is to "the real estate I have this day deeded to him." Similar language in Michigan,⁶ Indiana,⁷ Kentucky,⁸ Nebraska⁹ and Kansas¹⁰ yields the same result. Numerous cases hold that reference in a codicil to "my first will"¹¹ or "my last will"¹² or simply "my will"¹³ works incorporation and validates the will actually found.

In the famous New York case, *Matter of Fowles*,¹⁴ testator expressly gave his wife a power to dispose by will of half of the corpus of a testamentary trust fund, and provided that the trustees should pay the corpus "pursuant to the provisions of such last will and testament as my said wife shall leave." Testator and his wife died in the Lusitania disaster, and no evidence of survivorship appeared. The court held that the trust corpus did pass according to the wife's will.

³ 1 PAGE, WILLS, §§ 250, 256, 257, 263, 264 (1941); ATKINSON, WILLS, § 142 (1937). There is no comprehensive A.L.R. or L.R.A. annotation. The problem is briefly considered in 144 A.L.R. 714 (1943) and 1 Ann. Cas. 395 (1906). Limited aspects of the doctrine are discussed in 37 A.L.R. 1476 (1925), incorporation of the will of another; 54 A.L.R. 935 (1928), incorporating letters; 110 A.L.R. 261 (1937), conveyances; and 45 A.L.R. 843 (1926), 80 A.L.R. 103 (1932), 164 A.L.R. 881 (1946), inter vivos trusts. The "revival" of an invalid will by valid codicil is treated in 87 A.L.R. 836 (1933).

⁴ 118 Ky. 609, 81 S.W. 931 (1904). See note 43.

⁵ *Ray v. Walker*, 293 Mo. 447, 240 S.W. 187 (1922). See also *White v. Reading*, 293 Mo. 347, 239 S.W. 90 (1922).

⁶ *Jennings v. Reeson*, 200 Mich. 559, 166 N.W. 931 (1918).

⁷ *Mortgage Trust Co. v. Moore*, 150 Ind. 465, 50 N.E. 72 (1898).

⁸ *Hall v. Hall*, 153 Ky. 379, 155 S.W. 755 (1913).

⁹ *In re Dimmitt's Estate*, 141 Neb. 413, 3 N.W. (2d) 752 (1942), noted in 41 MICH. L. REV. 751 (1943).

¹⁰ *Shulsky v. Shulsky*, 98 Kan. 69, 157 P. 407 (1916).

¹¹ *Derr v. Derr*, 123 Kan. 681, 256 P. 800 (1927).

¹² *Rogers v. Agricola*, 176 Ark. 287, 3 S.W. (2d) 26 (1928).

¹³ *Watson v. Hinson*, 162 N.C. 59, 77 S.E. 1089 (1913); *Pollock v. Glassell*, 43 Va. (2 Gratt) 439 (1846); *Stover v. Kendall*, 41 Tenn. (1 Cold.) 557 (1860); *Taft v. Stearns*, 234 Mass. 273, 125 N.E. 570 (1920).

¹⁴ 222 N.Y. 222, 118 N.E. 617 (1918).

Can these cases be explained away? Some decisions do refuse incorporation because the traditional tests are not met.¹⁵ But surely the many cases cited above flaunt all the rules but the one requiring a document in fact in existence. Are the rules then fictional?

2

Acts of independent significance. Identification of a legatee or legacy may be made to depend upon the testator's "non-testamentary" act performed before or after execution of the will. The act must have a significance apart from its testamentary import.¹⁶

An easy case is the common provision that those employed in the testator's business at the time of his death shall receive a bequest. Courts have uniformly upheld the disposition,¹⁷ although it is possible that the testator chose this condition solely to have power to change the legatee-employees without making another will. The same applies to legacies to servants;¹⁸ and to the person or persons who care for the testator during his last days.¹⁹ No trouble is apparent when the subject

¹⁵ *Allenbach v. Ridenour*, 51 Nev. 437, 279 P. 32 (1929) [intent and identifications (deeds)]; *Richardson v. Byrd*, 166 S.C. 251, 164 S.E. 643 (1932) (same); *Witham v. Witham*, 156 Ore. 59, 66 P. (2d) 281 (1937) (same); *Hunt v. Evans*, 134 Ill. 496, 25 N.E. 579 (1890) (same); *Blackett v. Ziegler*, 153 Iowa 344, 133 N.W. 901 (1911) (intent and identification, where no reference at all appeared in the will); *Triplett's Executor v. Triplett*, 161 Va. 906, 172 S.E. 162 (1934) (no reference to document as in existence); *In re Estate of Reynolds*, 273 Mich. 71, 262 N.W. 649 (1935) (insufficient identification). *Bryan's Appeal*, 77 Conn. 240, 58 A. 748 (1904), is often cited to sustain one or more of the rules, but its authority seems very weak since Connecticut wholly rejects incorporation by reference (see note 47, *infra*). The North Carolina court thinks the doctrine is there stated "in somewhat more exacting terms than in some of the other decisions." *Watson v. Hinson*, 162 N.C. 59, 81, 77 S.E. 1089 (1913). By the same argument, it is possible to reject the authority of *Allenbach v. Ridenour*, the first case cited in this footnote, since Nevada has no adjudication in favor of incorporation. See note 87, *infra*.

¹⁶ See *Evans*, "Incorporation by Reference, Integration, and Non-Testamentary Acts," 25 COL. L. REV. 879 (1925); *ATKINSON, WILLS*, § 144 (1937).

But in theory, the nontestamentary act doctrine does not extend to written words. Evidence may not be introduced to complete a will incomplete on its face—e.g., to fill in blanks the testator accidentally left in the document.

¹⁷ *Cowell v. Minkel*, 167 Cal. 228, sub. nom. *In re Cowell's Estate*, 139 P. 84 (1914); *Clark v. Campbell*, 82 N.H. 281, 133 A. 166 (1926); *Abbott v. Lewis*, 77 N.H. 94, 88 A. 98 (1913); *In re Klein's Estate*, 35 Mont. 185, 88 P. 798 (1907).

¹⁸ *White v. Mass. Institute of Technology*, 171 Mass. 84, 50 N.E. 512 (1898), per *Holmes, J.*; *Industrial Trust Co. v. Alves*, 46 R.I. 16, 124 A. 260 (1924); *Ginter's Exrs. v. Shelton*, 102 Va. 185, 73 S.E. 401 (1903); *Raines v. Osborne*, 184 N.C. 599, 114 S.E. 849 (1922); *Catto v. Plant*, 106 Conn. 236, 137 A. 764 (1927); *Frazer v. Weld*, 177 Mass. 513, 59 N.E. 118 (1901).

¹⁹ *Moss v. Axford*, 246 Mich. 288, 224 N.W. 425 (1929); *Allan v. Brown*, 61 R.I. 56, 199 A. 753 (1938); *Will of Mangan*, 185 Wis. 328, 200 N.W. 386 (1925); *Bosserman v. Burton*, 137 Va. 502, 120 S.E. 261 (1923); *Dennis v. Holsapple*, 148

of the gift is "a trunk and all its contents,"²⁰ or the "contents of my bank box,"²¹ although theoretically the testator might radically alter the amount and character of a legacy by a subsequent act "not in conformity with the statute."

Most opinions are not concerned with the possibility of avoiding the statute;²² the cases deal largely with certainty and construction problems. If the subsequent act has no significance independent of the will—is testamentary, to put it in another way—it is said that courts would and should refuse to enforce the legacy.²³ Yet no case has been found which reaches this result, and the facts in the leading American case discussing the subject seem of the border-line variety. In *Dennis v. Holsapple*,²⁴ testatrix devised her entire estate to whoever should, at her request, take care of her "during the time of my life yet, when I shall need the same," but only if the person or persons doing so "shall have a written statement signed by me to that effect." Testatrix then wrote a letter to the plaintiff asking her to come and stay with her. "I don't think I can live many weeks . . . If you don't come you will rue it. I have made my will and whoever stays with me at my last hours gets everything I have. . . . If you don't come I will try and get some of Lina Clark's to stay. . . . I want you to have everything I have after my death." Rejecting the argument that testatrix had attempted to reserve the power to name a legatee without observing statutory formalities, the court held for the plaintiff by admitting the letter in evidence.

Ind. 297, 47 N.E. 631 (1897); *Lear v. Manser*, 114 Me. 342, 96 A. 240 (1916). See *Reinheimer's Estate*, 265 Pa. 185, 108 A. 412 (1919). A New York surrogate case is *contra*, *In re Farmer's Will*, 99 Misc. 437, 163 N.Y.S. 1089 (1917), but seems to be based on a misapprehension. The decision is grounded on the authority of *Harrington v. Abberton*, 115 App. Div. 177, 100 N.Y.S. 681 (1906). This case held the gift bad only because of *uncertainty*: testator lived in a boarding house, and it was impossible to determine what one person took care of him. See also *Summers v. Summers*, 198 Ala. 30, 73 S. 401 (1916), where similar circumstances produced a like result.

²⁰ *Lock v. Noyes*, 9 N.H. 430 (1838); *Appeal of Magoohan*, 117 Pa. 238, 14 A. 816 (1887); *Succession of Simo*, 205 La. 592, 17 S. (2d) 889 (1944).

²¹ *Hastings v. Bridge*, 86 N.H. 172, 247, 164 A. 906, 166 A. 273 (1933); *Succession of Maginnis*, 158 La. 815, 104 S. 726 (1925); *Succession of McBurney*, 162 La. 758, 111 S. 86 (1926).

²² Of the cases listed in notes 16 through 21, only the following discuss the problem: *Hastings v. Bridge*, 86 N.H. 172, 247, 164 A. 906, 166 A. 273 (1933); *Bosserman v. Burton*, 137 Va. 502, 120 S.E. 261 (1923); *Dennis v. Holsapple*, 148 Ind. 297, 47 N.E. 631 (1897), which is cited as "very similar to the case at bar" in *Lear v. Manser*, 114 Me. 342, 96 A. 240 (1916). See also *Stubbs v. Sargon*, 3 M. & C. 507, 40 Eng. Rep. 1022 (1838).

²³ Evans, "Incorporation by Reference, Integration, and Non-Testamentary Acts," 25 COL. L. REV. 879 (1925); ATKINSON, WILLS, § 144 (1937).

²⁴ 148 Ind. 297, 47 N.E. 631 (1897).

A 1943 case²⁵ involved the construction of this provision in a will: "I have made notations upon a yellow envelope in my lock box at the National Deposit Bank in Owensboro directing certain gifts to those who are named in the notations or recitations just referred to. I devise the property to such ones as are so named according to the notations. . . ." Since there was possibility that the envelope did not exist when the will was drafted, incorporation by reference was refused. But the envelope was admitted in evidence to "identify" the legatees, and those named on the envelope took accordingly.

Ademption by satisfaction is a label attached to two situations: First, when a will asks that advances noted in a book of accounts be deducted from a legacy;²⁶ second, when no request for deduction is made in the will, but evidence shows an intent to treat certain inter vivos transfers as pro tanto satisfaction of the bequest or devise.²⁷ The first situation

²⁵ *Daniel v. Tyler's Executors*, 296 Ky. 808, 178 S.W. (2d) 411 (1943).

²⁶ Cases are collected in 165 A.L.R. 899 (1946). See Evans, "Incorporation by Reference, Integration, and Non-Testamentary Act," 25 COL. L. REV. 879 (1925). Cf. the statutes listed infra, note 27.

²⁷ The cases agree that the statute law of advancements applies only to intestate estates, 32 A.L.R. 730 (1924), but by analogy the same results are reached. See 94 A.L.R. 26 at 190 (1935); 4 PAGE, WILLS, § 1533 et seq. (1941); ATKINSON, WILLS, § 242 (1937); and good discussions in *Richards v. Humphreys*, 32 Mass. (15 Pick.) 133 (1833); *In re Estate of Bush*, 155 Kan. 556, 127 P. (2d) 455 (1942). A few states hold contra, saying that the intention to satisfy must appear in the will. *Estate of Pardee*, 240 Wis. 19, 1 N.W. (2d) 803 (1942); *Stanton v. Stanton*, 134 Neb. 660, 279 N.W. 336 (1938); *Kuhne v. Gau*, 138 Minn. 34, 163 N.W. 982 (1917); *Little v. Ennis*, 207 Ala. 111, 92 S. 167 (1922).

If a statute provides for satisfaction, of course the problem disappears. One type states that "a provision for or advancement to any person shall be deemed a satisfaction, in whole or in part of a devise or bequest to such person . . . in all cases in which it shall appear from parol or other evidence to be so intended." Va. Code (1942) § 5237; D. of C. Code (1940) § 19-109; W. Va. Code (1943) § 4053; Ky. Rev. Stat. (1946) § 394.370. Another variety provides that advances "are not to be taken as adoptions of general legacies unless such intention is expressed by the testator in writing." Mont. Rev. Code (1935) § 7050; Utah Code Ann. (1943) § 101-2-35; see Cal. Prob. Code (Deering, 1944) § 1050. In Louisiana satisfaction is allowed by the code and is called "collations." See *Jordan v. Fillmore*, 167 La. 725, 120 S. 275 (1929), construing La. Code (Dart, 1945) Arts. 1227-1288. In Georgia, however, a third kind of provision appears, to the effect that while a memorandum may be evidence of the fact of advancement, it is not conclusive unless the will says so. Ga. Code Ann. (1937) §§ 113-1014, 113-817, construed in *Roberts v. Wilson*, (Ga. 1946) 36 S.E. (2d) 758.

English cases are in some confusion. Compare *In re Deprez*, [1917] 1 Ch. 24 [cited as controlling by Evans, "Incorporation by Reference, Integration, and Non-Testamentary Acts," 25 COL. L. REV. 879 at 893, note 65 (1925)] and *Fowkes v. Pascoe*, 10 Ch. App. 343, 44 L.J. (n.s.) (Ch.) 367 (1875), with *In re Eardley's Will*, [1920] 1 Ch. 397; *Bennet v. Bennet*, 10 Ch. D. 474 (1879); *Cartwright v. Cartwright*, [1903] 2 Ch. 306; and 13 Halsbury's Laws of England, 2d ed., 1611 (1934).

obviously bears on the rules considered here. Dean Evans feels that satisfaction, when prescribed in the will, is simply an act of independent significance; that the basic intent is made clear by the will, and the testator's decision to "satisfy" the bequest simply accelerates the date of taking.²⁸ The early New York case of *Langdon v. Astor's Executors*²⁹ contains a thorough discussion of the problem and reaches the same conclusion. Provision for satisfaction is a conditional bequest, Chief Justice Denio writes; the legatee will receive \$100,000 if the testator does not pay her the same amount during his life.

An essential consideration is whether the "book of advancements" is to be conclusive evidence that the legacy is satisfied. If it is, the testator might easily enter an unattested advancement that never took place and wipe out the legacy. Following a dictum in the *Langdon* case, the New York courts hold that the mere entry will not satisfy the gift, but that evidence aliunde is needed.³⁰ But of the four other cases found which consider the problem, three hold that parol evidence is inadmissible to contradict the advances noted.³¹

The non-testamentary act doctrine may be viewed as part and parcel of the larger idea that circumstances surrounding the testator at the date of his death are always admissible in evidence.³² Some cases can be explained by reference to this rule of law alone, although inclusion of extrinsic data might be grounded on the incorporation or the non-testamentary act doctrines. An example is a provision that a testator's property shall pass according to the statute of descent and distribution.³³ The facts here are covered by all of the formulae. Distinctions are made when the situation is supposedly covered by only one doctrine. The line usually drawn between incorporation by reference and acts of independent significance is that in the former the document must be in existence when the will is drawn and be referred to as such, while the

²⁸ Evans, "Incorporation by Reference, Integration, and Non-Testamentary Acts," 25 COL. L. REV. 879 at 893 (1925).

²⁹ 16 N.Y. 9 (1857).

³⁰ *Lawrence v. Lindsay*, 68 N.Y. 108 at 114 (1877); *Marsh v. Brown*, 18 Hun. 319 (1879); *In re Potter's Will*, 251 App. Div. 679, 297 N.Y.S. 295 (1937).

³¹ *Younce v. Flory*, 77 Ohio St. 71, 83 N.E. 305 (1907); *Estate of Wells*, 184 Wis. 242, 199 N.W. 52 (1924); *In re Lear's Estate*, 146 Mo. App. 642, 124 S.W. 592 (1910). *Contra*: *Harris v. Harris's Estate*, 82 Vt. 199, 72 A. 912 (1909), dictum. *Hoak v. Hoak*, 5 Watts (Pa.) 80 (1836), might also be listed contra, but here testator did not make the entries.

³² 4 PAGE, WILLS, § 1624 (1941), and cases cited; 9 WIGMORE, EVIDENCE, § 2458 (1940).

³³ E.g., *Marvel v. Sadler*, (Del. Ch. 1941) 18 A. (2d) 231; *In re Smith's Estate*, 16 Del. Ch. 272, 145 A. 671 (1929); *Bridgeport City Trust Co. v. Shaw*, 115 Conn. 269, 161 A. 341 (1932).

latter requires a "non-dispositive" or "non-testamentary" act.³⁴ *Matter of Fowles*, considered above,³⁵ has been explained on this basis,³⁶ but the language there did not suggest that the persons chosen as the wife's legatees would also, as an incident, be the husband's. It was a separate power, with the only significance the choice of the husband's donees.³⁷ When we consider *Matter of Fowles* and other cases cited in the first two sections, the distinction between the doctrines becomes hazy indeed.³⁸

As indicated at the beginning of this comment, the three doctrines discussed here have a central foundation: they are formulae permitting the testator to make his dispositions more exact by referring to an extrinsic act. Each case presents the problem of weighing the importance of testamentary motives with that of non-testamentary motives. If the latter predominate, we uphold the disposition. We begin with the class gift—to "my children." But we consider child-bearing so obviously an act in which non-testamentary significance dominates that we rarely think that the disposition involves a problem of this nature. What of gifts to "employees"; to "the man I invite to dinner next Sunday"; to "the first person with whom I shake hands tomorrow morning"; and finally to "the persons listed on the piece of paper on which I will write"? The testamentary motive becomes more and more significant until, in the last case, it so dominates that the courts ignore the obviously negligible non-testamentary significance, call the attempted disposition "incorporation by reference," and establish more exacting rules for its use. But surely the question is one of degree; and when this is realized, deviation from strict rules becomes understandable.

Secret Trust. If the testator relies on the legatee's promise to use the bequeathed property in a certain way, and wills to him absolutely,

³⁴ Evans, "Incorporation by Reference, Integration, and Non-Testamentary Acts," 25 COL. L. REV. 879 (1925); ATKINSON, WILLS, § 144 (1937); Cardozo, J., in *Matter of Fowles*, 222 N.Y. 222 at 232, 118 N.E. 617 (1918); Peaslee, C.J., in *Hastings v. Bridge*, 86 N.H. 172, 247, 164 A. 906, 166 A. 273 (1933).

³⁵ Section one, note 14.

³⁶ E.g., Evans, "Incorporation by Reference, Integration, and Non-Testamentary Acts," 25 COL. L. REV. 879 (1925).

³⁷ The same result on nearly identical facts, using language of "identification": *Matter of Piffard*, 111 N.Y. 410, 18 N.E. 718 (1888). A power lapses at death. [1 SIMES, FUTURE INTERESTS, § 264 (1936)], and the claimant is without evidence to sustain the burden of proof in survivorship, so that the decision cannot be explained on this ground. But see note 81, below, indicating that the RESTATEMENT OF PROPERTY agrees with the *Fowles* and *Piffard* cases.

³⁸ In *Roseman v. Nienaber*, 100 Kan. 174, 166 P. 491 (1917), reh. den., 101 Kan. 260, 166 P. 491 (1917), Judge Burch, unable to fit the case into either doctrine according to the precise rules, nevertheless sustained the admission of the extrinsic document.

equity will enforce the promise.³⁹ But if the language of the will suggests that the bequest is not absolute, yet the trust purposes or beneficiaries are not disclosed, the gift will fail, and any promise by the legatee is useless.⁴⁰ So runs the distinction established by many American courts. Its rationale is that in the case of an absolute devise, equity will relieve against the "fraud" of a devisee in breaking his promise to the testator. The statute of wills is not flaunted: equity acts not because of the gift, but because of the "fraud."⁴¹ But where the trust and not the terms thereof appear on the face of the will, there will be no trust enforced; it would be a fraud on the residuary legatee or the heirs and next of kin, according to this theory, if equity did not declare a resulting trust for them and refuse to follow the testator's directions.⁴²

Several strong decisions flatly reject the distinction, arguing that it is based on faulty logic and leads to an incongruous result.⁴³ These courts would enforce the promise whether or not the trust character appeared on the face of the will.

Whatever the rule adopted, the decisions seem to have disastrous effect on the rules of incorporation by reference and non-testamentary acts. If the bequest is absolute, enforcement of the trust is, in effect, permitting incorporation without reference. If the will's statement that the gift is in trust does not prevent enforcement, the guarantees that the testamentary instructions to the "trustee" cannot be changed

³⁹ See case in 66 A.L.R. 156 (1930); 155 A.L.R. 106 (1945), and the authors in note 43, *infra*.

⁴⁰ *Olliffe v. Wells*, 130 Mass. 221 (1881); *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S.W. 382 (1892); *Sims v. Sims*, 94 Va. 580, 27 S.E. 436 (1897); *Seymour v. Sanford*, 86 Conn. 516, 86 A. 7 (1913); *Saylor v. Plaine*, 31 Md. 158 (1869); *Bryan v. Bigelow*, 77 Conn. 604, 60 A. 266 (1905); *Kurtz v. Kurtz*, 123 Ohio St. 425, 175 N.E. 694 (1931); *Wilcox v. Attorney-General*, 207 Mass. 198, 93 N.E. 599 (1911); *Reynolds v. Reynolds*, 224 N.Y. 429, 121 N.E. 61 (1918). The last three cases cited analyse the problem as a rule prohibiting incorporation of oral instructions by reference. See the writers in note 43, below.

⁴¹ See, for example, *Cardozo, J.*, in *Golland v. Golland*, 84 Misc. 299, 147 N.Y.S. 263 (1914).

⁴² *Reynolds v. Reynolds*, 224 N.Y. 429, 121 N.E. 61 (1918); *Olliffe v. Wells*, 130 Mass. 221 (1881).

⁴³ *In re Hartman's Estate* (No. 2), 320 Pa. 331, 182 A. 232 (1936); *Curdy v. Berton*, 79 Cal. 420, 21 P. 858 (1889); *Linney v. Cleveland Trust Co.*, 30 Ohio App. 345, 165 N.E. 101 (1928); and see particularly *Blackwell v. Blackwell*, [1920] A.C. 318; 1 TRUSTS RESTATEMENT, § 55, comment e (1935); 1 SCOTT, TRUSTS, § 55.8 (1939); and RESTITUTION RESTATEMENT, §§ 184, 186 (1937). Professor Bogert argues that in neither case should equity enforce the promise. 3 BOGERT, TRUSTS AND TRUSTEES, § 501 (1946). The problem is thoroughly discussed, *id.*, §§ 498-501; 1 SCOTT, TRUSTS, §§ 55-55.9 (1939); Scott, "Trusts and the Statute of Wills," 43 HARV. L. REV. 521 (1930); Costigan, "Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession," 28 HARV. L. REV. 237, 366 (1915). See also *Hughes v. Bent*, 118 Ky. 609, 81 S.W. 931 (1904), note 4, *supra*.

at the testator's whim are swept away, since the trustee's promise may come at any time, before or after execution of the will.⁴⁴ Gone too are any requirements of definite description. To invoke the trust doctrines, of course, the property must be given to one not intended to take beneficially,⁴⁵ which is unnecessary in the other two doctrines considered above. And although the fraud is fictional, consisting only of a broken promise, the trustee must at least lead the testator to believe that he intends to perform the trust, so that reliance is justified.⁴⁶ But are these distinctions significant enough to take the place of all the supposed safeguards of incorporation by reference and non-testamentary acts? The remedial names differ, but certainly the results are the same.

3

Examination of New York decisions may prove valuable in determining the relationship of the doctrines considered above. New York is one of the four states⁴⁷ which reject the usual scope of the incorporation by reference doctrine.

⁴⁴ *Brook v. Chappell*, 34 Wis. 405 (1874); 1 SCOTT, TRUSTS, § 55.2 (1939), and cases cited.

⁴⁵ See the articles cited in note 43. The requirement that there be a trustee may be considered a corollary of the necessity for reliance on the promise of another, note 46.

⁴⁶ *Ives v. Pillsbury*, 204 Minn. 142, 283 N.W. 140 (1938); and the exhaustive review in 3 BOGERT, TRUSTS AND TRUSTEES, § 499 (1946).

⁴⁷ The others: Connecticut, New Jersey, Louisiana.

Connecticut is the only state with a clear holding unqualifiedly rejecting the doctrine. *Hatheway v. Smith*, 79 Conn. 506, 65 A. 1058 (1907), reaffirmed in dictum in *Peyton v. Wehrhane*, 125 Conn. 420, 6 A. (2d) 313 (1939). The usual rules in re secret trusts are followed: *Dowd v. Tucker*, 41 Conn. 197 (1874); and *Buckingham v. Clark*, 61 Conn. 204, 23 A. 1085 (1891), enforcing oral promise after absolute devise; while *Bryan v. Bigelow*, 77 Conn. 604, 60 A. 266 (1905); and *Seymour v. Sanford*, 86 Conn. 516, 86 A. 7 (1913), refuse enforcement when trust character appears on the face of the will. Dictum admitting that acts of independent significance are admissible appear in the *Hatheway* case, id. at 519, and *Catto v. Plant*, 106 Conn. 236, 137 A. 764 (1927), holds the same way. See also note 63, below, in re "revival" of an invalid will by codicil.

Louisiana. "All the French authorities agree" that incorporation is not permissible, the court said, obiter, in *Succession of Ledet*, 170 La. 449, 128 S. 273 (1930); but see *Hessmer v. Edenborn*, 196 La. 575, 199 S. 647 (1940), noted in 40 MICH. L. REV. 492 (1942), where evidence to "identify and describe" the will revoked by reference to it was admitted. See also the revival cases in note 63, below.

New Jersey. Dictum (since it was a list of debts which "will be found" with T's will) against incorporation appears in *Hartwell v. Martin*, 71 N.J. Eq. 157, 63 A. 754 (1906). The language of Jayne, V.C., in the 1943 case of *First-Mechanic's Nat. Bank of Trenton v. Norris*, 134 N.J. Eq. 229, 34 A. (2d) 746, is not very helpful: "[The doctrine] . . . should not be ignored, nor should it be dilated beyond its logical and beneficial limits. In the nature of things there must be circumstances beyond its apparent generality. Words are symbols and are presentational, and some reference in a will to matters extrinsic is not only common but inevitable." Id. at 234.

John Guy Vassar bequeathed to the Vassar Institute, inter alia, "ten thousand dollars in one share par value of some good railroad or coal company guaranteed, to be selected from my securities as its own. . . . Among my papers will be found a memorandum of the various securities I have selected for the payment of the several legacies." In *Booth v. The Baptist Church*,⁴⁸ the court of appeals held the memorandum inadmissible and allowed the gift to fail. "It is unquestionably the law of this state that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to in that instrument."⁴⁹

The *Booth* case was decided in 1891. Since then the doctrine of incorporation by reference has had an unsteady career in New York. Part of the confusion was caused by realizing that the language quoted above was dictum, for, according to the strict rules of incorporation, the disposition would fail whether or not the doctrine was rejected.⁵⁰ Two decisions of Justice Cardozo have also contributed to the uncertainty. One is *Matter of Fowles*, considered above.⁵¹ ". . . We are not to press the rule against incorporation to a 'drily logical extreme,'" the court said. "We must look in each case to the substance. We must consider the reason of the rule, and the evils which it aims to remedy."⁵²

In *Matter of Rausch*, testator left a will giving one fifth of his residuary estate to a specified trust company, to be held in trust under the same agreement made between testator and the trust company of a specified date, "which agreement is hereby made part of this my will, as if fully set forth herein." Sustaining the disposition,⁵³ Judge Cardozo quoted liberally from his opinion in *Matter of Fowles*, saying that ". . . much will depend upon the extent to which the door is likely to be opened to chicanery or mistake if there is relaxation of the requirement of a self-sufficient integration. The rule against incorporation is not a doctrinaire demand for an unattainable perfection. It has its limits in the considerations of practical expediency that brought it

A trust deed was thereupon admitted as incorporated in the will. Compare *Matter of Rausch* and *Matter of Fowles*, discussed below, and the various explanations for the New York rule. See the revival cases in note 63, below. The acts of independent significance doctrine is upheld, *In re Moore*, 61 N.J. Eq. 616, 47 A. 731 (1900); *Swetland v. Swetland*, 102 N.J. Eq. 294, 140 A. 279 (1928); and secret trusts enforced if the devise is absolute, *Sick v. Weigand*, 123 N.J. Eq. 239, 197 A. 413 (1938).

⁴⁸ 126 N.Y. 215, 28 N.E. 238 (1891).

⁴⁹ *Id.* at 247, 248.

⁵⁰ The time requirements were not met, certainly, and the identification is flimsy indeed.

⁵¹ 222 N.Y. 222, 118 N.E. 617 (1918). The facts are set out in Section 1.

⁵² *Id.* at 232.

⁵³ *Matter of Rausch*, 258 N.Y. 327, 179 N.E. 755 (1932), noted sub/nom. In *re Locke* in 32 COL. L. REV. 917 (1932).

into being.”⁵⁴ Notice that the “surrounding circumstances” or “act of independent significance” theorems could be employed to sustain the gift here,⁵⁵ without resorting to incorporation by reference. But the opinion seems to be framed on an incorporation basis. Here, of course, the facts meet the most exacting construction of the rules of that doctrine.

Lower New York courts have variously interpreted the two cases. In dictum, the appellate division has nearly limited them to their facts.⁵⁶ Four opinions (also dicta if the strict incorporation rules are followed) state flatly that incorporation by reference is not law in New York.⁵⁷ Tremors of doubt appear in some decisions refusing incorporation: “. . . The law of this state does not accept the doctrine even though it may be said with some logic that certain exceptions have been approved.”⁵⁸ A 1942 decision suggests that the exception approved in the *Fowles* case simply allows incorporation of the will of another.⁵⁹ A 1935 holding permits inclusion of a trust deed, construing *Matter of Rausch* as relaxing the rule to that extent.⁶⁰

Does incorporation in New York depend on the subject-matter incorporated—a will or trust deed? Formal logic dictates a negative answer: the statute of wills is “invaded” as long as the extrinsic document is not executed according to the required formalities. Yet analogous New York cases spring to mind: a line of decisions beginning with *Brown v. Clark*⁶¹ in 1879, when a will revoked by testator’s marriage and birth of issue, was held revived by a subsequent codicil. The case also contained obiter approval of “revival” in all instances of wills invalid in their inception.⁶² In 1902 the courts discovered that such a

⁵⁴ Id. at 333.

⁵⁵ As was done, for example, in *Swetland v. Swetland*, 102 N.J. Eq. 294, 140 A. 279 (1928).

⁵⁶ *Pres. and Directors of Manhattan Co. v. Janowitz*, 260 App. Div. 174, 954, 21 N.Y.S. (2d) 232 (1940).

⁵⁷ *In re Stern’s Estate*, (Sur. Ct. 1945) 56 N.Y.S. (2d) 631; *In re Gibbons’ Estate*, 139 Misc. 658, 249 N.Y.S. 753 (1931); *In re Menken’s Will*, 180 Misc. 656, 44 N.Y.S. (2d) 164 (1943); *In re Perry’s Will*, 126 Misc. 616, 214 N.Y.S. 461 (1926).

⁵⁸ *In re Angle’s Will*, 147 Misc. 445 at 447, 264 N.Y.S. 29 (1933), noted in 43 YALE L. J. 150 (1934).

⁵⁹ *In re Welcke’s Will*, (Sur. Ct. 1942) 33 N.Y.S. (2d) 735.

⁶⁰ *In re Bremer’s Will*, 156 Misc. 160, 281 N.Y.S. 264 (1935), *affd.*, 157 Misc. 221, 283 N.Y.S. 159 (1935).

⁶¹ 77 N.Y. 369 (1879).

⁶² The dictum was followed in *In re Douglass’ Will*, 38 Misc. 609, 78 N.Y.S. 103 (1902), when the prior will had not been signed.

The whole doctrine of incorporation by reference as a separate entity may have developed from the “republication” idea. *Brown v. Clark*, 77 N.Y. 369 (1879), leaned heavily on *Kip v. Van Cortland*, 7 Hill 346 (1843), which had simply de-

position was inconsistent with the rule against incorporation,⁶³ and limited revival to cases of wills revoked by operation of law, or where the testator was under restraint when the will was executed.⁶⁴ The formalities of execution must be observed. And notice that the formalities of execution were observed in the *Fowles* case; that they were observed by another testator may be unimportant in this area of ethereal dialectic: Can it be said that a testator under restraint when executing his first will is intending to execute *his* will? Yet revival by subsequent codicil is permissible in such a case.⁶⁵

Perhaps a more fundamental explanation of the New York rule can be found. Three surrogate court opinions merit careful consideration. In *Re Andrus' Will*⁶⁶ the incorporation of an inter vivos trust was permitted, the court saying that the rule was based largely on "common sense." The "character of the identifying instrument referred to and the circumstances surrounding its execution"⁶⁷ are the important

cided that a codicil republished a *valid* will for the purpose of speaking from the *date* of the codicil. The language of incorporation was applied to a wholly different situation in *Brown v. Clark*. And the well-acknowledged doctrine of republication seems to be in the background in *Allen v. Maddock*, 11 Moo. P.C. 421, 14 Eng. Rep. 757 (1858), the leading case in England. The leading American case, *Newton v. Seaman's Friend Society*, 130 Mass. 91 (1881), uses *Allen v. Maddock* as its main authority.

⁶³ Aided, perhaps, by an incisive article by Professor Chaplin, "Incorporation by Reference," 2 COL. L. REV. 148 (1902).

In New Jersey (see note 46) the full "revival" rule is observed, despite the uncertainty in the usual incorporation doctrines. If the document incorporated looks like a will, the estate passes according to the extrinsic document. *McCurdy v. Neall*, 42 N.J. Eq. 333, 7 A. 1086 (1886); *Smith v. Runkle*, (N.J. Prerog. 1915) 97 A. 296, *affd.*, 86 N.J. Eq. 257, 98 A. 1086 (1916); *In re Trieb's Will*, 114 N.J. Eq. 227, 168 A. 404 (1933).

In Connecticut the only decisions concern revival of a will invalid according to the common law rule against perpetuities, but valid by the statutory rule in force when the codicil was executed. Revival was granted in *Morse v. Ward*, 92 Conn. 408, 103 A. 119 (1918); and *Westport Paper-Board Co., Inc. v. Staples*, 127 Conn. 115, 15 A. (2d) 1 (1940).

In Louisiana, an early case allowed revival of a will improperly executed, *Gaude v. Baudoin*, 6 La. 722 (1834); and a will revoked by birth of issue was held revived in *Succession of Ledet*, 170 La. 449, 128 S. 273 (1930).

⁶⁴ *Cook v. White*, 43 App. Div. 388, 60 N.Y.S. 153 (1899), *affd.*, 167 N.Y. 588, 60 N.E. 1109 (1901).

⁶⁵ *Ibid.* Revival of a will revoked by operation of law has justification on other grounds than incorporation by reference. It might be considered the remnant of the older theory that the subsequent events merely raised a rebuttable presumption of testator's intent to revoke. See *Durfee*, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator," 40 MICH. L. REV. 406 (1942). For statutes see *Bordwell*, "The Statute Law of Wills," 14 IOWA L. REV. 283 at 290-310 (1929). But no theory seems plausible as an independent ground for revival of a will executed when testator is under duress.

⁶⁶ 156 Misc. 268 at 293, 281 N.Y.S. 831 (1935).

⁶⁷ *Id.* at 294.

matters to consider. Surrogate Wingate permitted incorporation when the reference was "to such of the descendants of said Miriam Comey Adams . . . as she may by her last Will and Testament designate and appoint."⁶⁸ The court says that "this would seem merely a logical application of the modern doctrine of incorporation by reference, as defined in *Matter of Rausch* . . ., which appears to be that incorporation of any document in this manner is permissible so long as it is clearly identified and is of a variety which excludes any reasonable possibility of 'chicanery or mistake.'"⁶⁹ A 1946 case uses nearly identical language in construing the two court of appeals decisions.⁷⁰ Formal distinctions are dethroned by an appeal to judicial discretion. Does this solve the New York puzzle?

We have already seen that the New York rule of ademption by satisfaction is consistent with a denial of incorporation.⁷¹ Nor have the courts handed down other decisions out of line with the theory of acts of independent significance,⁷² save *Matter of Fowles*. But the puzzle is complicated by the presence of the usual rules on secret trusts—if the devise is absolute, the trust will be enforced.⁷³ As indicated above,⁷⁴ the effect of such holdings is incorporation without reference and without a pretense at the traditional requirements of incorporation. The same is true in Connecticut, which totally rejects incorporation.⁷⁵

4

An attempt must be made to find a common denominator—one that can be applied to New York as well as to the cases in jurisdictions permitting incorporation as a matter of course. We have seen that in a

⁶⁸ *In re Comey's Will*, 173 Misc. 377, 17 N.Y.S. (2d) 949 (1940).

⁶⁹ *Id.* at 381.

⁷⁰ *In re Eldridge's Will*, (Sur. 1946) 64 N.Y.S. (2d) 234, 235.

⁷¹ See section 2, above, and note 30.

⁷² See *Lafrinz v. Whitney*, 233 N.Y. 107, 134 N.E. 852 (1922) (bequest to servants); *In re Mitchell's Estate*, 114 Misc. 370, 186 N.Y.S. 666 (1921) (to employees); *In re Altman's Estate*, 115 Misc. 476, 188 N.Y.S. 493 (1921), same, and here the issue is discussed. See also *Holmes v. Mead*, 52 N.Y. 332 (1873).

⁷³ *Williams v. Fitch*, 18 N.Y. 546 (1859); *O'Hara v. Dudley*, 95 N.Y. 403 (1884); *Edson v. Bartow*, 154 N.Y. 199, 48 N.E. 441 (1897); *Amherst College v. Ritch*, 151 N.Y. 282, 45 N.E. 876 (1897) (in each of the foregoing cases, decision went against the beneficiary on other grounds); *Jimmerson v. Ferguson*, 57 Misc. 504, 109 N.Y.S. 845 (1908); *Re Mintern*, 5 Demarest (S.C.) 508 (1887); *Golland v. Golland*, 84 Misc. 299, 147 N.Y.S. 263 (1914), per Cardozo, J.; *Peters v. Peters*, 137 App. Div. 635, 122 N.Y.S. 363 (1910); *La Vin v. La Vin*, 17 Misc. 1000, 39 N.Y.S. (2d) 317, affd., 266 App. Div. 674, 41 N.Y.S. (2d) 180 (1943). If the devise is not absolute, the trust will not be enforced. *Reynolds v. Reynolds*, 224 N.Y. 429, 121 N.E. 61 (1918).

⁷⁴ Section 2.

⁷⁵ See note 47 above for Connecticut and New Jersey cases in accord.

variety of cases the strict rules are not followed and that the adjudications under comparable formulae are at odds with any theory of rigid enforcement. "The books abound in nice distinctions."⁷⁶ Can we sustain the traditional requirements of incorporation and non-testamentary acts merely by weighting them with classes of exceptions?

Return to the suggestion that the subject matter of the incorporation is the determining factor. One type excepted must be the testator's former, invalid will: the subsequent codicil need have little or no accuracy in identification, and the requirement of intent to incorporate seems wholly lacking.⁷⁷ Another group of cases suggests that in many jurisdictions the certainty and intent requirements of incorporation do not apply to deeds.⁷⁸ The only two cases found where the question has been raised point to the conclusion that the will of another is immune from the requirement that there be a reference to an existing document.⁷⁹ Or, if justification of the results seems best under the non-testamentary acts doctrine, we may say that in the classes of cases described the document need have no independent significance.⁸⁰

Even if we accept this classification, of course, we are left with the results reached under a constructive trust theory. But from a rational point of view, there seems little justification for this distinction. Perhaps the explanation lies in the psychological effect of terms such as "unjust enrichment," "constructive fraud," and "unconscionable conduct"; or in the gradual extension of the trust remedy into fields of unintentional fraud without a sidelong glance toward the supposedly rigid and encrusted doctrines already occupying the area.

Has the classification merit in other ways? In strict logic, it is senseless—unless the courts are willing to probe the requirements of the doctrines for their real reasons. If the reason is simply to avoid "chicanery and mistake," exceptions become plausible; surely wills, even though lacking one of the formal requirements at the outset, run less risk of fraudulent substitution than ordinary papers.⁸¹ Certainly deeds,

⁷⁶ Cardozo, J., in *Matter of Rausch*, 258 N.Y. 327 at 332, 179 N.E. 755 (1932).

⁷⁷ Notes 11, 12, and 13 above.

⁷⁸ Notes 5-10 above.

⁷⁹ *Matter of Fowles*, 222 N.Y. 222, 118 N.E. 617 (1918); *Matter of Piffard*, 111 N.Y. 410, 18 N.E. 718 (1888).

⁸⁰ Contrary to this analysis is *Atwood v. R. I. Hospital Trust Co.*, (C.C.A. 1st, 1921) 275 F. 513, holding that the amendment or revocation of an inter vivos trust referred to in the will is a testamentary act. But see 1 SCOTT, TRUSTS § 54.3 (1939), where the decision is criticized and said to be "contrary to the weight of authority." And see *Industrial Trust Co. v. Colt*, 45 R. I. 334, 121 A. 426 (1923).

⁸¹ In 3 PROPERTY RESTATEMENT, § 348, comment f (1940), the Fowles Will view is adopted. Analysis is from the powers viewpoint, and deviation from the usual rules is justified by the character of the instrument incorporated: a document executed according to the statute of wills.

which often must be signed and attested by the grantor,⁸² can be similarly classed. What of cases such as *Hughes v. Bent*,⁸³ *Daniel v. Tyler's Executor*⁸⁴ and *Dennis v. Holsapple*?⁸⁵ It is possible to consider them anomalous, of course. The cases have an interesting feature in common: the direction held admissible was in testator's handwriting. Does this import another class of exceptions? Assuredly not;⁸⁶ yet it adds a flavor of certainty, an ingredient which may have led the court to believe that in the particular case before it chicanery and mistake were precluded without resort to strict rules.

The last statement seems to mean that the common denominator is judicial discretion, pure and simple. It recalls Surrogate Wingate's answer to the New York riddle.⁸⁷ It suggests that while some courts, notably New York's, are more strict than others, the basis of disagreement is not a set of rules but a greater or less willingness to run the risk of chicanery and mistake.⁸⁸

"Pure and simple" judicial discretion, as the common denominator, is an overstatement. But there is much to be said for a position which includes the discretionary element. Certainty is desirable, of course, particularly in the law of wills, but two considerations involved here make it doubtful that certainty is as useful or necessary as elsewhere in the law. First, the exercise of judicial discretion to deviate from the rules is always an expansion of them. Discretion does not defeat an incorporation, for example, which follows the set rules of that doctrine. Discretion simply brooks incorporation when the rules have not been followed. The careful testator seeking advice in drafting his will is thus unaffected by the uncertainty of the judicial discretion. Secondly, as a corollary, most of the cases of incorporation and acts of independent significance concern homemade wills. Lawyers are hired not as counselors but as advocates after the testator's death. Again certainty is not nearly as essential; the consequences of a low score in predicting judicial results are less alarming.

⁸² 4 TIFFANY, REAL PROPERTY, 3d ed., §§ 1023, 1024, 1026 (1939).

⁸³ 118 Ky. 609, 81 S.W. 931 (1904).

⁸⁴ 296 Ky. 808, 178 S.W. (2d) 411 (1943).

⁸⁵ 148 Ind. 297, 47 N.E. 631 (1897).

⁸⁶ See *In re Estate of Reynolds*, 273 Mich. 71, 262 N.W. 649 (1935).

⁸⁷ Notes 68 and 69, *supra*.

⁸⁸ Examination of authority for the strict requirements is revealing. Professor Page, for example, cites a number of cases which sustain the usual rules, but much of the authority is weak: some cases are in jurisdictions which do not accept incorporation by reference; others where the question has not been decided; others are purely dicta; a great number where strong language is used in the most extreme cases. 1 PAGE, WILLS, §§ 250, 256, 257, 263, 264 (1941). Clear authority for the requirements is limited. See note 15 above.

The classification of "exceptions" attempted above⁸⁹ is not wholly fruitless. The use of discretion must be methodized; few courts would be willing to adopt Surrogate Wingate's solution without some qualification. Deviations from any classification must be expected depending on the peculiar circumstances of the case at bar, but in general, deeds and wills are admitted most freely although the rules of incorporation are not met.⁹⁰ Yet the ultimate answer seems to be that of Judge Cardozo: deviation from the statute is a question of degree; in controlling the deviation, "we must look in each case to the substance."⁹¹ Classes of cases considered under set doctrines "run into each other by almost imperceptible gradations,"⁹² and the nice distinctions are "tests to guide the judgment rather than invariable rules or standards."⁹³ The policy of hewing to legislative commands and that of achieving justice in the particular case come into sharp conflict. If the "requirements" are considered as guides, they methodize discretion and become the "usual rule." But if they are thought of as ends in themselves their function is distorted, their reliability deceptive.

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⁸⁹ Section 4, second paragraph.

⁹⁰ See notes 5 through 14, *supra*.

⁹¹ Cardozo, J., in *Matter of Fowles*, 222 N.Y. 222 at 233, 118 N.E. 617 (1918).

⁹² *Ibid.*

⁹³ Cardozo, J., in *Matter of Rausch*, 258 N.Y. 327 at 332, 179 N.E. 755 (1932).