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Incorporation by Reference in Illinois Wills Law

C. E. Fox Jr.

NOTES AND COMMENTS

Incorporation by Reference in Illinois Wills Law

The doctrine of incorporation by reference unquestionably forms a part of the Illinois law on wills. As such it is of some practical importance to the profession, since it may be used expediently in draughting wills, as well as in their construction and interpretation. Although several Illinois decisions have produced a definition in the form of a set of lucid rules, unfortunately, argument has often arisen concerning the applicability of those rules to a given case.

The sources of these rules, and the manner of their adoption in Illinois have a bearing on their interpretation by our courts. The doctrine came into existence after the original English Wills Act[1] of 1585, which for the first time permitted a devise of land, and required that devise to be in writing. Under this statute arose the case of *Molineux* v. *Molineux*,[2] where the will provided "that my younger children . . . shall have such several annuities or annual rents as be expressed in several writings signed with my hand, and sealed with my seal, according to the true meaning of my said writings." The court "held that this will devising such rents, which are mentioned in such writings under his hand and seal, is a good devise of the rents themselves: for it refers to the writing, whatsoever it is, as if it were specifically limited in that will; and it is a good devise to them of the several rent charges. Tanfield therefor resembled it to the case where a man devises that his executors shall sell his lands, and the executors afterwards sell them; it is a good devise of the land itself by that will. And upon this reason, in *Fairfax's Case,* in the Court of Wards, it was resolved by the opinion of the Chief Justices and the counsel of that court, that where one makes a deed of feoffment to divers uses, and makes no livery, and after by his will devises the land to such persons and in such manner as he appointed by his deed of feoffment, it was a good devise of the land."[3]

The first English Wills Act was a part of the common and statute law of England of the fourth year of James II (1607) which was adopted as the basic law of Illinois.[4] But our legislature also passed its own Wills Act, which requires not only a writing, but, among other things, the signature of the testator

[1] 32 Hen. VIII, c. 1.

[2] Cro. Jac. 144, 79 E. R. 126 (1607).

[3] Ibid.

[4] Ill. State Bar Stats. (1935), Ch. 28, ¶ 1.

and of two witnesses able to prove the testator's capacity.[5] Obviously, in 1607, when *Molineux* v. *Molineux* was decided, there was no common law touching the power of a testator to include an extrinsic document in such a will as this.

In 1677, the English Statute of Frauds[6] was passed, requiring devises of land to be in writing, signed by the testator, and by "three or four credible witnesses." Under this statute a long series of English decisions developed the elements of the doctrine permitting the incorporation of extrinsic papers into a will by reference in the will, substantially as it is now known.[7] In general, the decisions under the English Wills Act of 1837 followed the earlier cases upon the subject decided under the Statute of Frauds.[8]

Illinois expressly adopted the law as it existed at the time of *Molineux* v. *Molineux,* but the courts were not bound further than that. However, their approval of the doctrine as evolved in the later English and American cases may be justified by the application of the familiar legal principle that a jurisdiction having no case law construing a statute will consider decisions of another jurisdiction having a similar statute.[9]

Certainly there can be no doubt that Illinois follows the doctrine. In *Keeler* v. *Merchants Loan and Trust Company, Executor, et al.,*[10] the Supreme Court observed: "The rules authorizing extrinsic writings to be incorporated by reference to them by the testator in his will, so as to entitle them to be given testamentary effect, will be found stated in all textbooks on the subject of wills and in many judicial decisions. There is no conflict in the authorities and there can be no misunderstanding as to the rules of law on this subject, but their application to the will in this case is controverted."[11] The opinion proceeds with quotations from four text writers on the subject, the first from Page, whose analysis will be considered later.

The court's statement will bear close scrutiny. In the first place, the assertion that there is no conflict in the authorities seems intemperate. As Page himself observed, Connecticut has

[5] Ibid., Ch. 148, ¶ 2.

[6] 29 Car. II, c. 3.

[7] Jarman on Wills (7th ed., London: Sweet & Maxwell, Ltd., 1930), I, 123-128, and cases there cited.

[8] Ibid. For earlier cases, see also: Sanford v. Raikes, 1 Mer. 646, 35 E. R. 808 (1816); Denn v. Taylor, 2 Chit. 681 (1770); Smart v. Prujean, 6 Ves. 560, 31 E. R. 1195 (1801).

[9] 59 C. J. 1065, sec. 627, and cases.

[10] 253 Ill. 528, 97 N. E. 1061 (1912).

[11] Ibid., p. 535.

repudiated the doctrine unequivocally,[12] and the courts of New York, New Jersey, and Arkansas have expressed an aversion for it, and refused to apply it in several close cases.[13]

In the Connecticut case of *Hatheway et al.* v. *Smith*,[14] an attempt was made to probate a deed of trust and a paper signed by the decedent and witnessed by three parties in compliance with the Connecticut Wills Act. The paper purported to revoke all former wills and dispose of the decedent's property in accordance with the deed, which was specifically identified. The court, after examining the development of the doctrine of incorporation by reference in English decisions, denied probate and ruled that the public policy of Connecticut prevents its application there. The view of the court was clearly stated: "The estate of a person upon his death comes into the custody of the law, and is disposed of in pursuance of statutes framed in accordance with existing public policy. That public policy determines the general rule for the disposition of each estate by distribution to the next of kin of the deceased, and allows to every person the privilege of controlling by will the disposition of his estate in a different manner, in accord with his individual fancies. Unless the intention to avail himself of this privilege is expressed in the manner required by law [that is, upon a paper duly signed and attested], the estate must be disposed of in accordance with that general rule determined by public policy."[15]

The opinion continued with a curious statement: "The public policy now recognized by American courts . . . treats the power of giving force after death to one's personal fancies . . . by means of a paper inoperative for any purpose and subject to his control during life, as a privilege granted by the state, and existing only to the extent implied in the law which grants the privilege. The public policy indicated by the English courts in construing their statute of wills treats this power of post-mortem control as . . . a natural right . . . which should not be restricted unless by the clear and explicit words of a statute. The meaning and effect of the 'doctrine of incorporation by reference,' as applied to a will, depends largely upon a choice between these two policies."[16]

[12] 1 Page on Wills (2d ed., Cincinnati, O.: W. H. Anderson & Co., 1926), sec. 245. See also: Hatheway v. Smith, 79 Conn. 506, 65 A. 1058 (1907), discussed further in this article, and Bryan's Appeal, 77 Conn. 240, 58 A. 748, 68 L. R. A. 353 (1904).

[13] 1 Page on Wills (2d ed.) secs. 244, 246, 247, and cases there cited.

[14] 79 Conn. 506, 65 A. 1058 (1907).

[15] Ibid., p. 518.

[16] Ibid., p. 519.

This opinion accurately states the theory employed by American courts in construing their several statutes on wills.[17] But the English courts seem to have required as strict a compliance with the terms of the Wills Act of 1837[18] as that exacted in America.[19] Moreover, the great preponderance of American authority undoubtedly is committed to the doctrine of incorporation as part of the law of wills.[20]

Indeed, only three of the other states have judicially repudiated the theory.[21] Of these, the adjudications of two, Arkansas and New Jersey, might have been duplicated upon the same facts by any court which applies the doctrine. New York, the third, whose recent decisions indicate a leaning toward the Connecticut policy of strict compliance, quite definitely adopted the theory in several early cases.[22]

Hence, it must be apparent that there is at least a mild "conflict of authorities" upon the subject. If the Illinois court, in saying that there is no conflict, meant that no inconsistency appears in the decisions in Illinois, its statement is unassailable. But what has the Illinois court done toward developing the "three cardinal rules" which it has said "govern the incorporation of an extrinsic writing in a will"?

The "three cardinal rules" are those found in Page on Wills, and are repeated almost verbatim in the only four Illinois decisions[23] on the subject rendered since that author formulated them. They read: "From the proposition that a will may be written upon different pieces of paper, connected only by the sense, it follows that a will may by reference incorporate into itself, as completely as if copied in full, some other paper which in itself is not a will for lack of execution. In order so to incor-

17 1 Page on Wills (2d ed.) 37, sec. 22, and cases cited.

18 7 Wm. IV & 1 Vict., c. 26. Section 9 of this statute provides that "No will shall be valid unless it shall be in writing, and executed in the manner herein-after mentioned; [that is to say] it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

19 1 Jarman on Wills (7th ed.), 93 et seq.

20 1 Page on Wills (2d ed.) 418, sec. 242, and cases cited.

21 Ibid., secs. 244, 246, 247.

22 2 Col. L. Rev. 148, and cases there discussed. See also, In re Lawler's Will, 185 N. Y. S. 726 (1920).

23 Keeler v. Merchants Trust Company, 253 Ill. 528, 97 N. E. 1061 (1912); Newhall v. Newhall, 280 Ill. 199, 117 N. E. 476 (1917); Bottrell v. Spengler, 343 Ill. 476, 175 N. E. 781 (1931); Eschmann v. Cawi, 357 Ill. 379, 192 N. E. 226 (1934).

porate, three things are necessary: (1) The will itself must refer to such paper to be incorporated (a) as being in existence at the time of the execution of the will, and (b) in such a way as to reasonably identify such paper in the will, and (c) in such a way as to show testator's intention to incorporate such instrument in his will and to make it a part thereof. Thus, a paper placed with a will is not a part thereof where the will shows no intention to incorporate it. (2) Such document must, in fact, be in existence at the time of the execution of the will. If this were not the rule, a testator could, by executing a will and incorporating therein a document to be executed in the future, create for himself a power to dispose of his property in a testamentary manner not executed in accordance with the Statute of Wills. (3) Such instrument must correspond to the description thereof in the will and must be shown to be the instrument therein referred to. In discussing incorporation by reference it must first be observed that these three requisites must co-exist in order to incorporate a foreign paper into the will. The absence of any one of them will prevent such incorporation. The will must refer to the instrument to be incorporated as in existence. A reference in the will to the instrument incorporated as 'made or to be made' does not refer to it clearly as being in existence, nor does a reference to it as a schedule of property 'hereafter named.' Since the document to be incorporated must be referred to in the will as in existence at the date of executing such will, it follows that in the absence of such reference parol evidence is not admissible to show that the document was in existence at the time of executing the will.''[24]

How closely do the Illinois decisions follow these rules? The earliest case on the subject was *Duncan et al.* v. *Duncan*,[25] in which both the will and a later codicil were written on the same piece of paper, and both were signed and duly attested. The codicil specifically referred to certain provisions in the will. Both were probated together as one will. The court cited a formidable list of early authorities, and said, "This codicil refers to, and makes the will a part of itself."

In *Hobart* v. *Hobart*[26] some of the parties questioned whether a will, properly signed and attested, could be regarded as proved, when attesting witnesses had proved only the execution of a codicil. The codicil was on the same sheet of paper, and was also

[24] 1 Page on Wills (1st ed., Cincinnati, O.; W. H. Anderson & Co., 1901), 276-7, secs. 162, 163. These rules have been slightly modified in the author's second edition, sec. 248.

[25] 23 Ill. 364, 76 Am. Dec. 699 (1860).

[26] 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151 (1895).

signed and witnessed, and read: "The within will . . . I hereby will or give or direct that the property willed to my wife . . . in the within instrument, after her decease I give to my son. . . ." The court remarked, "When the codicil is written on the same paper as the will, or clearly and unmistakably refers to the will so as to preclude all doubt of its identity, proof of the codicil establishes the will without further proof, except such portions thereof as are revoked or altered by the codicil."[27]

The will in *Fry* v. *Morrison*[28] was also properly signed and witnessed. Again, on the same paper, the testatrix added a codicil providing for an annuity out of her estate. The codicil was properly executed. In probate, the instrument was admitted, on affidavit of witnesses that they saw testatrix "sign said will and codicil in their presence." In a bill by the annuitant to compel the devisee to pay the annuity out of the rents, defendant argued that the codicil had not been admitted to probate, since codicils, as such, cannot be. The court held, of course, that they can, that the "generic term 'will' includes codicil," that the two instruments were in effect one, and had been so probated.

Again, in *Hubbard* v. *Hubbard*[29] the will was signed and attested. It included a substantial cash legacy to the testator's wife. Three weeks later he crossed this clause out, and added a codicil on the same paper, disposing of what then remained of the same fund. In deciding whether will and codicil were part of same instrument, the court said, "The publication of the codicil was a republication of the will in the form it was at the time of the execution of the codicil, and proof of the execution of the codicil established the will."[30]

The testator in the case of *Eschmann* v. *Cawi*[31] wrote and signed his will, and also signed for two witnesses. Later he pasted another sheet to the bottom of the will, and wrote, "I do hereby ratify and confirm the terms and provisions of the instrument bearing date . . . as my last will and testament." This he signed and procured to be witnessed in proper form. In probate the entire paper went in as a single instrument.

It will be observed that all these cases are closely similar in their facts. In each of the five, the instrument "incorporated" purported to be a will, and was written on the same piece of paper as the duly executed codicil. In each one the codicil was an ap-

[27] Ibid., p. 613.
[28] 159 Ill. 244, 42 N. E. 774 (1896).
[29] 198 Ill. 621, 64 N. E. 1038 (1902).
[30] Ibid., p. 624.
[31] 357 Ill. 379, 192 N. E. 226 (1934).

pendage. In view of the physical unity of each paper, it seems that each complied fully with the statutory requirements as to execution, as a complete will, without regard to the efficacy of a codicil under the doctrine of incorporation by reference. It is idle to observe that three of the cases complied strictly with all of the Page rules, and that in the other two there appeared no reference whatever to the earlier instrument. Each was, physically, a single will on a single paper, signed and attested at the foot in absolute conformity with the Wills Act. In none was the doctrine of incorporation by reference in its real meaning called into play.

The doctrine was actually applied in *Newhall* v. *Newhall.*[32] There a codicil referred to in a later one as that executed on July 31, 1914, and witnessed by Johnson, Carrington, and Frank P. Patton was held incorporated by sufficient reference, though both codicils were in fact attested by Fred, rather than Frank, P. Patton. The proof clearly established that this was the codicil which the testator intended to republish. The reference complied with the rules in speaking of the earlier codicil as in existence, and in such a way as to show the testator's intention; and the first codicil was, in fact, in existence. The case serves only to indicate how reasonably the reference must identify the paper, and how closely the instrument must correspond to the description.

The court found the facts in *Bottrell* v. *Spengler*[33] insufficient to invoke the doctrine. The will in that case read, in part: "I hereby authorize my hereinafter named executors to obtain from my safe deposit box, after due compliance with the state laws, certain deeds of conveyances of real estate which I have heretofore prepared under date of . . . and distribute as follows. . . ." There followed reference to several specifically described deeds, to the property attempted to be conveyed by them, and to the persons to whom delivery was to be made. The grantees sought to have the deeds probated with the will, as being incorporated therein by reference. This the court refused, finding all the essentials present save "testator's intention to incorporate such instrument in his will and make it a part thereof." Upon this point, the court observed: "The intention of the testator in this respect is to be determined from the language of the instrument itself, read in the light of the circumstances surrounding the testator at the time of the making of the will, and no intention can be imported into a will which is not therein expressed."[34]

[32] 280 Ill. 199, 117 N. E. 476 (1917).
[33] 343 Ill. 476, 175 N. E. 781 (1931).
[34] Ibid., p. 479. Cf. Noble v. Tipton, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645 (1905).

We perceive here what seems to be a restatement of a familiar principle in the construction of wills, rather than a requirement peculiar to the doctrine of incorporation by reference.

The most interesting of the Illinois cases touching the subject is *Keeler* v. *Merchants Trust Company*.[35] Article nine of the will there involved provided: "It is my further will and direction that any note or notes signed by me in favor of any person or persons and made payable by the terms thereof after my decease, be recognized and treated as bequests in behalf of the payees therein, respectively, designated, and my executor and trustee is hereby fully authorized and empowered to pay the amount of the principal of such notes out of my estate and property or the proceeds thereof. I have heretofore, and may hereafter, adopt this means of designating the persons I wish to be remembered as beneficiaries under my last will and testament."

After the testator's death no notes were found. There was ample testimony, however, to show that he had made some before executing the will, and some proof that they were in existence shortly before his death. Persons who identified themselves as the payees of these notes presented claims for their amounts in probate (as directed by the will). They sought to prove that the widow had destroyed the notes after her husband's death. But the proof established neither the existence of the notes at the testator's death, nor the destruction by the widow. There remained a strong possibility that the testator himself had destroyed them. The court held this fatal to the claims, making only a very brief comment on this phase of the case.

The doctrine of incorporation by reference was incidentally involved in this decision. The opinion pointed out that the reference in the will satisfied the Page rule in speaking of the notes as already in existence, even though the testator had added that he might make more in the future. The court was "of opinion that the will did refer to the notes as then in existence, and if they were, in fact, in existence at the time of the execution of the will and were not subsequently destroyed by the testator, they were sufficiently described so as to be identified and entitle them to be given effect as testamentary bequests."[36]

As the decision rested upon the failure of claimants to prove that the notes were not destroyed by the testator, all of the discussion of the doctrine of incorporation by reference is beyond the scope of the decision, and without value as direct authority.

[35] 253 Ill. 528, 97 N. E. 1061 (1912).

[36] Ibid., p. 540.

Nor does the case add to the rules a fourth requisite—that the extrinsic instrument must be extant at the testator's death. It assumes that the notes were incorporated into the will, but denies their efficacy because proponents could not prove that testator did not revoke them by destruction.

Hence, this decision may well be grouped with the first five Illinois cases discussed, as properly decided without resort to the Page rules. Certainly none of the six cases did anything toward developing or clarifying the doctrine. The only other Illinois decisions found upon the subject are *Bottrell* v. *Spengler*[37] and *Newhall* v. *Newhall*,[38] considered above. The former was decided by the application of an elementary principle used in the construction of wills, namely, that the intention to dispose of certain property in a certain way must be expressed. The only question in the latter was one of identification; and since the earlier codicil was there admitted to probate, the case is authority only to illustrate what is a sufficient identification. The decision rested mainly upon the determination of a question of evidence. Clearly, neither of these cases can be said to have added much to the elements as outlined by Page, though both follow and confirm them.

However, from these two cases, and from the Supreme Court's liberal quotations from text writers in the others discussed, we may gather that Illinois is definitely committed to the general doctrine. As has been remarked, it comes to us not from the common law, as expressly adopted by our legislature, but rather in the form of judicial construction of our Statute of Wills, following earlier English and American decisions under similar statutes.[39] The rules formulated by Page, and repeatedly quoted by our court, simply restate the principles developed in these decisions.

What of the court's assertion that "there can be no misunderstanding as to the rules of law on this subject"? It would seem vitally important that there be, in fact, no misunderstanding—important not only to the courts, but especially to the practitioner, who may frequently be faced with the necessity of draughting a will in a form which will give testamentary effect to an extrinsic document. A brief analysis of the rules as stated by Page may clarify this matter. The first main requisite, divided by Page into three parts, relates to the form of the reference only. First, the will must refer to the paper to be incorporated as in existence. The testator need not go to the length of saying that

[37] 343 Ill. 476, 175 N. E. 781 (1931).
[38] 280 Ill. 199, 117 N. E. 476 (1917).
[39] 59 C. J. 1065, sec. 627.

the paper referred to has been executed. He may do so by implication. He does this when he makes a codicil, and confirms the terms "of my last will."[40] There is room for inference that he has made the will.

Second, the reference must be made in such a way as reasonably to identify such paper in the will. The cases indicate that any reference which indicates that the paper may be identified is adequate. Thus, a reference to a paper as "my last will," without any further identification, has been held sufficient.[41] The real difficulty in this matter in practice is one of proof. The more explicit the testator makes the reference, the easier is the proof for his legatees. But as a requisite to the application of the doctrine, the identification of the document is one properly considered not as a requirement for the form of the reference, but rather as one of evidence.

The third requirement of the reference is that it must show the testator's intention to incorporate such instrument in his will. Obviously, a reference to a letter "expressing my wishes as to the said sum, but such sum shall not form a part of my will" negatives any intent to incorporate the letter.[42] In *Bottrell* v. *Spengler*[43] the testator, by authorizing the delivery of certain deeds, did not show an intent to devise the property by will. His act could be construed only as an attempt to make delivery of a deed after his death. He could easily have said, in his will, "I wish certain described property to go to the parties named in certain deeds, executed on a certain date, and found in my safe deposit box." This matter of expressed intention is one of construction in the final analysis. The testator must make such a reference as will not prevent the court from finding that by that reference he meant to pass property by his will in accordance with the extrinsic writing.

All of these three elements of the first main requisite concern only the form of the reference. The two remaining principal requirements relate to matters of substance. The document must in fact be in existence at the time of the execution of the will, because the Wills Act in effect provides that a will shall not be valid unless signed, or his signature acknowledged, by the testator in the presence of two witnesses.[44] These witnesses must prove

[40] Allen v. Maddock, 11 Moo. P. C. 427, 14 E. R. 757 (1858); Bemis v. Fletcher, 251 Mass. 178, 146 N. E. 277, 37 A. L. R. 1471 (1925).

[41] Allen v. Maddock, 11 Moo. P. C. 427, 14 E. R. 757 (1858).

[42] Murray v. Lewis, 94 N. J. Eq. 681, 121 A. 525 (1923).

[43] 343 Ill. 476, 175 N. E. 781 (1931).

[44] Ill. State Bar Stats. (1935), Ch. 148, ¶ 2.

testamentary capacity at the time of the execution of the will. Thus, to allow a testator to incorporate into his will by reference, a writing executed after the will, would be to thwart one of the chief purposes of the statute, and dispense with a valuable safeguard against fraud—perhaps even to the extent of forcing the courts to give effect to the will of a wholly incompetent person.

The final requirement, that the document must correspond to the description thereof in the will, is purely a matter of identification in practice, and in the decision of a case must depend wholly upon the evidence before the court. And it seems that evidence *dehors* the will is admissible for identification, if the court can see from the reference itself that the document may be capable of identification.[45]

What then, from the viewpoint of the lawyer drawing a will, are the difficulties or peculiarities of the doctrine as it appertains to wills? First, the will should indicate that the paper referred to already has been executed. The safest method, of course, is to state this in express terms. But cases hold that at least the will must allow the court ground for an inference that the document was in existence. Second, the outside paper must in fact be in existence; the Wills Act will not permit even a will which expressly designates the other paper as in existence, to embody in itself an instrument not yet executed in fact. Given the assurance that the extrinsic paper has been executed, the draughtsman can hardly fail to embody it in the will, and impart to it true testamentary effect, if he only mentions its approximate date, describes it clearly and fully, and expressly states that it is to be a "part of this will."

C. E. Fox, Jr.

[45] Allen v. Maddock, supra, note 40; 1 Jarman on Wills (7th ed.) 125, and cases. See also: English and Empire Digest, Vol. 44, pp. 240-245.