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Wills--Incorporation by Reference (Matter of Le Collen, 190 Misc. 272 (Surr. Ct. 1947))

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while engaged in apparently dangerous work on defendant's property;[28] by the fall of rigging on defendant's ship which was being used by a stevedore not under the employ of defendant;[29] and by the fall of a ceiling in an apartment in defendant's building which was leased to a tenant.[30]

The instant case falls clearly within the second grouping, for the fact that hotels do not have exclusive control over their furniture is practically a matter of common knowledge; guests have at least partial control.

A. P. D.

WILLS—INCORPORATION BY REFERENCE.—Testatrix, by a will executed in New York in May, 1938, bequeathed to five named distributees "contents of certain envelopes now in my safe deposit box," containing "securities of various kinds"; said envelopes to bear the names of her distributees. *Held,* the bequest is valid as to the envelopes which were found bearing the names of four such persons. *Matter of Le Collen,* 190 Misc. 272, 72 N. Y. S. 2d 467 (Surr. Ct. 1947).

By this decision a New York court has allowed the possible alteration of the extent of a bequest by a simple variation of the contents of certain envelopes either by the testator or anyone else. Indeed, one of the bequests seems to have been eliminated altogether from the will by the fact that no envelope was found to have the name of one particular person so mentioned in the will.

It is a well-settled rule that if a will duly executed and witnessed according to statutory requirements incorporates by reference any document or paper not so executed and witnessed (whether such paper referred to is in the form of a will, codicil, deed, or a mere list or schedule or other written paper or document), such paper, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to, takes effect as a part of the will, and is entitled to probate as such.[1] However, the contrary view has been stated to be unquestionably the law of New York: that an unattested paper which is of a testamentary nature cannot be taken as a part of a will even though referred to by that instrument.[2]

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[28] Brown v. Board of Trustees, 41 Cal. App. 100, 182 Pac. 316 (1919).
[29] Massa v. Nippon Yusen Kaisha, 264 N. Y. 283, 190 N. E. 641 (1934).
[30] Slater v. Barnes, 241 N. Y. 284, 149 N. E. 859 (1925).

[1] Bemis v. Fletcher, 251 Mass. 178, 146 N. E. 277 (1925); see also Note, 37 A. L. R. 1476 (1925).

[2] Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238 (1891); Langdon v. Astor's Exrs., 16 N. Y. 2, 26 (1857); Williams v. Freeman, 83 N. Y. 561, 569 (1881); Matter of O'Neil, 91 N. Y. 516, 523 (1883).

The problem of incorporation by reference usually arises in connection with a trust already in existence which is sought to be included within the scope of a will. In such instances New York has adhered to its general rule against incorporation,[3] although at times exceptions have been made. Additional property has been permitted to be given by a will referring to a trust already in existence,[4] and extrinsic evidence of beneficiaries indicated during the lifetime of the testatrix was allowed outside the terms of another will, thereby upholding the trust.[5]

Other examples of incorporation have been held valid in New York, as where a map on one of the sheets following the signatures of testator and witnesses was deemed constructively inserted within the will which described the land and referred to the map.[6] In *Matter of Thompson*[7] the situation was fairly parallel to the present case. There the testatrix' bequest of "the contents of my safe deposit box . . . consisting of jewelry, etc., excepting my Savings Bank Books which are therein," was held good, and the articles in the box at her death passed by the will. The court recognized that the testatrix probably left the description of the contents vague and uncertain in order that the legacy might be changed merely by varying the contents of the box, and admonishes that "This method of drafting a bequest is not to be commended for definiteness," but admits that there is no other means of determining the bequest more accurately.[8]

The present case contains a few further interesting facts. A friend of the testatrix admittedly had access to the safe deposit box during the years of the testatrix' absence. In the box were found a total of six envelopes, four of which bore the names of the beneficiaries mentioned in her will. Of the other two, one had the name of the testatrix' niece in France and the other the name of the aforementioned friend. The case does not state whether these names on the envelopes were concededly in the handwriting of the testatrix, and apparently the case was decided without regard to such evidence. Furthermore, testatrix went to France in 1939 and remained there until her death in 1945.

The possibilities for fraud implicit in such circumstances seem to have been recognized since the Surrogate decreed probate while nevertheless stating, "This court is fully aware that a legacy of the

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[3] Booth v. Baptist Church, *supra* note 2 (where the court would not incorporate a list of securities referred to in a will); Reynolds v. Reynolds, 224 N. Y. 429, 121 N. E. 61 (1918) (extrinsic evidence held inadmissible to show the identity of the beneficiaries and the instructions given by the testator to the executor).

[4] Matter of Rausch, 258 N. Y. 327, 179 N. E. 755 (1932).

[5] Jay v. Lee, 41 Misc. 13, 83 N. Y. Supp. 579 (Sup. Ct. 1903).

[6] Tonnele v. Hall, 4 N. Y. 140 (1850).

[7] 217 N. Y. 111, 111 N. E. 762 (1916).

[8] *Id.* at p. 116, 111 N. E. at 764.

'contents' of envelopes . . . opens the door wide to chicanery and mistake by others than Testatrix which the Legislature by its enactment of Section 21 of the Decedent Estate Law intended to avoid, and that the upholding of such a gift is tantamount to sanctioning a change in the will by the unattested act of the testatrix. . . ." [9] The Surrogate suggests that this situation be remedied by the legislature rather than the courts.

The general rule of New York against incorporation by reference remains the same, but it is submitted that this decision goes further toward a relaxation of the rule than previous cases.

H. B. N.

[9] Matter of Le Collen, 190 Misc. 272, 276, 72 N. Y. S. 2d 467, 471 (Surr. Ct. 1947).