TESTAMENTARY DISPOSITION TO THE TRUSTEE OF AN INTER VIVOS TRUST

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THE problem of this paper is narrow but important in connection with testamentary dispositions. A man establishes an inter vivos trust, in writing, and later attempts by will to add to the corpus of the trust without repeating in the will the terms of the trust. In some instances he thereafter amends the trust with the expectation that the property bequeathed to the trustee will be held in accordance with the amended terms. This is a simple and convenient method of disposing of property at death and most people probably would take for granted that the disposition is effective. Yet in some situations it is almost certainly not effective as intended and in others the risk of invalidity is serious. Without adequate reason the law has departed too far from the common understanding of those whose activities it regulates. It is time to remedy the situation and a remedy will be suggested. First, however, the present state of the law needs to be reviewed.

I

A. Irrevocable and Unamendable Trust

Where the testator has no power to either amend or revoke his inter vivos trust, the testamentary addition to corpus can be accomplished in most jurisdictions without repeating the terms of the trust. Most states permit incorporation by reference, whereby a testator "incorporates" into his will the terms of an existing writing. In these states the mechanics of reference in the will to the existing trust instrument permits effective disposition to the trustee to hold pursuant to the terms of the trust. If the state rejects incorporation by reference, the use of another legal idea probably will save the bequest. The trust instrument has

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1 The subject has been discussed in the following articles: Evans, "Incorporation by Reference, Integration, and Non-Testamentary Act," 25 Col. L. Rev. 879 (1925); Evans, "Non-testamentary Acts and Incorporation by Reference," 16 Univ. Cmt. L. Rev. 635 (1949); Scott, "Trusts and the Statute of Wills," 43 Harv. L. Rev. 521 (1930); Lauritzen, "Can a Revocable Trust be Incorporated by Reference?" 45 Ill. L. Rev. 583 (1950).

2 Dobie, "Testamentary Incorporation by Reference," 3 Va. L. Rev. 583 (1916); Evans, "Incorporation by Reference, Integration, and Non-Testamentary Act," 25 Col. L. Rev. 879 (1925); Atkinson, Wills 333 (1937); 1 Page, Wills 497 (1941).

3 Est. of Willey, 128 Cal. 1, 60 P. 471 (1900); Old Colony Tr. Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935).
independent significance as evidencing the creation and embodying the terms of an inter vivos trust, or as sometimes said, its execution is a nontestamentary act. A bequest to a trustee has been upheld on the ground that meaning can be given to the will by reference to facts having "independent" or "nontestamentary" significance. On one theory or the other most jurisdictions will uphold the disposition.

The occasion for the development of these concepts has been the normal requirement that property can be disposed of at death only by a writing executed in accordance with the statute of wills. To give meaning to this requirement it is generally necessary to put the essential terms of the disposition in that writing, that is, in the paper we think of as the "will." In the case of incorporation by reference literal compliance with this requirement is lacking unless the incorporated paper is treated as an integral part of the instrument executed as the will. For most purposes this may be the effect of incorporation, but it has not been so regarded for all purposes; for example, the incorporated paper need not be present when the will is executed, though such presence is demanded in order that a paper be considered an integral part of a will. Nor is it necessary to probate the incorporated paper as a part of the will, although apparently this may be done.


5Incorporation by reference was rejected in Hatheway v. Smith, 79 Conn. 506, 65 A. 1058 (1907), where the testator attempted to bequeath property to the trustee of a living trust which apparently was neither amendable nor revocable. The opinion holding the bequest ineffective seems to rule out the possibility of using the independent significance theory to sustain the bequest, although the discussion centered on incorporation.

6"But the statute does not confer upon any one the power of disposing of his property after death by will, unless by a writing containing in itself the bequest intended to be made, denoted by language therein used, signed and attested with the prescribed public formalities. . . ." Hatheway v. Smith, 79 Conn. 506 at 521, 65 A. 1058 (1907). See also, Booth v. Baptist Church of Christ, 126 N.Y. 215, 28 N.E. 238 (1891). The New York decisions are discussed in Report of the Law Revision Commission, State of New York 431 (1935); Samuels, "Incorporation by Reference in New York Wills," 19 N.Y. Univ. L.Q. 270 (1942).

7Est. of Willey, 128 Cal. 1, 60 P. 471 (1900); Atkinson, Wills 332 (1937); Evans, "Incorporation by Reference, Integration, and Non-Testamentary Act," 25 Col. L. Rev. 879 at 888 (1925).


9In re Jones, [1942] Ch.D. 328 at 329; Newton v. Seaman's Friend Society, 130 Mass. 91 (1881); 2 Page, Wills 67 (1941). Different views concerning treatment of the incorporated paper as an integral part of the will may account for a difference of opinion on whether a holographic will may incorporate a paper which is not in the testator's handwriting. That this is not permissible was held in Hewes v. Hewes, 110 Miss. 826 at 834, 71 S. 4 (1916) ("When an extrinsic document is incorporated into a will by a reference thereto in the will, it becomes a part and parcel thereof . . . "). Accord: Mechem, "The Integration of Holographic Wills," 12 N.C. L. Rev. 213 at 225-6, 229 (1934). Contra: Est. of Plumel, 151 Cal. 77, 90 P. 192 (1907); Atkinson, Wills 338-9 (1937).
Acceptance of incorporation by reference probably has resulted in part from the pressure of the facts; people persist in writing wills this way. Moreover, the device fits into accepted lawyers' practices; for example, in drawing pleadings.

The development of the independent significance theory has been due to a recognition of certain inescapable facts concerning the interpretation of language. Courts still talk about getting the meaning of a will from within its "four corners," but it is always necessary that language be related to extrinsic facts. A simple bequest to "my daughter Henrietta" can be given effect only by identifying Henrietta. A bequest to the person who is the testator's wife at his death undoubtedly is valid, although it enables an unmarried testator to select his legatee by acts which do not meet the formal requirements of the statute of wills. Presumably his selection of a wife is influenced by factors which are "nontestamentary." A bequest to "such persons as may be in my employ at my death" is upheld though there is a possibility that the testator might use his power of selection simply as a means of naming his legatees. Still, the selection normally will be made for reasons unrelated to his will. These reasons give some assurance, usually held in the cases to be adequate, that the legatees have been freely chosen by the testator. The formalities of the statute of wills serve no higher purpose. The same reasons justify the use of this theory to support a bequest to the trustee of an inter vivos trust.

Such a bequest also might be regarded as a gift to a trustee as a legal entity with the evidence of the terms of the trust serving to identify the legatee. This approach was suggested by Cardozo, who apparently was not troubled by the fact that in connection with other problems a

10 In Allen v. Maddock, 11 Moore P.C. 427 at 456, 14 Eng. Rep. 757 at 768 (1858), where it was held that the English Statute of Wills of 1837 did not disturb the earlier recognition of incorporation by reference, the court observed that elimination of the doctrine "would have occasioned, in many cases, great inconvenience and injustice."

11 "Taking the will by the four corners and examining it to ascertain the intent of the testator, ..." George Washington Univ. v. Riggs Nat. Bank, (D.C. Cir. 1936) 88 F. (2d) 771 at 772. See generally, 9 Wigmore, Evidence §2461 (1940).

12 Metcalf v. Sweeney, 17 R.I. 213, 21 A. 364 (1891). See also Stubbs v. Sargon, 3 My. & Cr. 507, 40 Eng. Rep. 1022 (1838), upholding a bequest to the persons "to whom I may have disposed of my said business," where the testatrix was in business when the will was made and thereafter during her lifetime disposed of the business. Similar decisions are collected in a comment, 46 Mich. L. Rev. 77 at 79-80 (1947). In Langdon v. Astor's Executors, 16 N.Y. 9 (1857), the court concluded that reference may be made to a "transaction belonging to the actual business of life" (id. 26) since there "is no special danger that it may be simulated or set up by false testimony against the truth of the case" (id. 27).
trustee has not been recognized as a distinct legal personality. In any event this approach and the independent significance theory rest upon the same basic considerations. The use of the trust instrument is a part of the process of interpretation, of giving meaning to the will by reference to extrinsic facts, and the independent significance of the instrument serves as a limiting factor.

B. Amendable Trust

The trouble begins when the trust instrument reserves in the settlor a power to amend. We should consider first the case in which the power has not been exercised. Although a bequest to the trustee of an amendable trust should be upheld, it is far from certain that it will be. Even Professor Scott's statement that the bequest is effective by the

13 "In the view of the law, a corporation as an individual and a corporation as trustee are separate legal personalities. . . . A gift to a trust company as trustee of a trust created by a particular deed identifies the trust in describing the trustee. . . ." Matter of Rausch, 258 N.Y. 327 at 331, 179 N.E. 755 (1932). The personal liability of a trustee on contracts he makes in the administration of the trust [2 Scott, Trusts §262 (1939)] rests upon a failure to recognize the trustee as a distinct legal entity, as does the settled view that one may not be trustee of a claim against himself. Molera v. Cooper, 173 Cal. 259, 160 P. 231 (1916); 1 Scott, Trusts §87 (1939).

14 "... the question is one as to the admissibility of extraneous evidence to explain and make certain the language of the will and thus identify the persons who are to take the residue and define their shares." Dissenting opinion of Judge Bingham in Atwood v. Rhode Island Hospital Trust Co., (1st Cir. 1921) 275 F. 513 at 525. Objection may be made to treating the use of the trust instrument as an aspect of the process of interpretation, on the ground that the will does not contain a "sufficient expression" of the gift. [The phrase is taken from THAYER, PRELIMINARY TREATISE ON EVIDENCE 443-44 (1898)]. It may be argued that extrinsic evidence is used to identify persons and property described in the will and that a bequest to a trustee on the terms set forth in another writing simply does not contain a sufficient description of the beneficiaries and the interests they are to take. But what is the difference between a bequest to the persons "to whom I may have disposed of my said business" (Stubbs v. Sargon, supra note 12) and a bequest to the persons now or hereafter named as beneficiaries of a certain trust? The language of each will provides the means of identifying the legatees; if there is any legally significant difference between the two bequests it lies in the character of the extrinsic evidence by which the identification is made.

It has not been generally noticed that the use of the trust instrument, at least where it was executed in connection with the making of the will, must be squared with the general rule that testator's declarations of intention are not admissible in construing a will. 9 WIGMORE, EVIDENCE §2471 (1940). Neither Wigmore (id. §2471) nor Thayer (PRELIMINARY TREATISE ON EVIDENCE 414, 440) gives a wholly satisfactory explanation of the reason for this rule. I suggest that the independent significance factor is a general limitation on the use of all extrinsic evidence; that there is no special rule applicable to direct statements of intention; that such statements are not excluded as such but only because they have no substantial significance except to give meaning to the words of the will. In this view, the important problem is the same whether the extrinsic evidence is of the sort used in Stubbs v. Sargon or is the language of a trust instrument. It is the problem of determining how far it is permissible to go in giving meaning to a will by the use of extrinsic facts which were subject to a human control that could have been and perhaps was aimed at disposing of property at death.
"weight of authority" is difficult to support if one takes into account the weight to be given the views of particular courts, whether the issue was explicitly formulated and dealt with in an opinion, and similar factors.

In *Atwood v. Rhode Island Hospital Trust Co.* the decedent established an inter vivos trust with a corpus of some two million dollars, reserving the power to "annul, change or modify" the terms of the trust. The income was to be paid to the settlor for life; at his death cash amounts were to be paid to named beneficiaries and the balance of the corpus was to be held in trust to pay the income to his widow and another for their lives, with the corpus then to be distributed to other beneficiaries in stated fractional amounts. On the same day the settlor also made a will in which he left the residue of his estate to the trustee of the inter vivos trust, "to be held, managed and disposed of as a part of the principal of the estate and property held by it in trust . . . in the same manner as though [the property] had been deposited by me as a part of said trust estate." Thereafter the settlor twice amended the trust by naming additional cash beneficiaries and by eliminating a gift of $3000 to one Amelia. The effect of these amendments was not in issue. The cash gifts were paid out of the trust corpus to the named beneficiaries, including those designated in the amendments, and no issue was made with respect to this action. The effect of the attempted revocation of the gift to Amelia was not passed upon because she was not a party to the proceeding. The issue on which the court did pass was as to the validity of the entire residuary disposition. The holding against validity was based upon the fact that the settlor had reserved the power to amend the trust, not upon the fact that the power was exercised after execution of the will. This decision, coming from the Court of Appeals for the First Circuit, is powerful authority against the validity of a bequest to the trustee of an amendable trust. Moreover, it is bolstered by a similar decision of the Court of Appeals for the

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16 *Scott, Trusts* 297 (1939); *Scott, "The Law of Trusts, 1941-1945,"* 59 Harv. L. Rev. 157 at 167 (1945). Lauritzen, "Can a Revocable Trust be Incorporated by Reference?" 45 Ill. L. Rev. 583 at 600 (1950), argues that the bequest is invalid by "the weight of authority established by those American courts which have most carefully considered the problem. . . ."

17 The propriety of making these payments will be considered hereinafter.

18 Under the court's decision, however, the gift to Amelia would fail. Treating the gift as payable out of the corpus of the inter vivos trust, it had been validly revoked. Treating it as payable out of estate owned at death, the gift failed because of the holding that the entire bequest to the trustee was ineffective.
Second Circuit in Boal v. Metropolitan Museum of Art,19 where another part of the same will was held ineffective on the authority of the Atwood case.

The problem of the Atwood case is whether the bequest can be upheld either on the ground that there was a valid incorporation by reference or on the ground that the terms of the trust instrument were facts of independent significance which could be used to give meaning to the will. Apparently the court believed that the inapplicability of incorporation by reference was too clear to merit discussion. Attention was centered upon the use of the trust instrument as a fact of independent significance, with the conclusion that this theory did not save the bequest. The reason given would apply whichever theory is used. In the words of an English judge it was asserted that a “testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil.”20

This may be a useful generalization but if it is the Atwood decision is a good example of the dangers involved in the undiscriminating use of useful generalizations. The statement was used by the English judge in explaining the rejection of a bequest to a trustee to hold on the terms described in a letter prepared by the testator after execution of his will.21 There was no valid incorporation because the writing to be incorporated was not in existence when the will was executed. The independent significance theory was of no help since the sole purpose of the letter was to define the terms of the testamentary trust. The quoted statement doubtless is generally true but it has no application to the Atwood situation. There the trust instrument was in existence when the will was written so as to satisfy that requisite of incorporation; moreover, it had substantial significance apart from the attempted use of its provisions in giving meaning to the will. The power to amend should not prevent the use of either theory. If a testator provided in the body of his will for a method of changing the will without complying with the statute of wills the provision of course would be ineffective but it would not invalidate the dispositive terms of the will. Similarly, in Atwood, the attempted reservation of a similar power should at most

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19 (2d Cir. 1924) 298 F. 894.
20 275 F. 513 at 521.
21 Johnson v. Ball, 5 DeG. & Sm. 85, 64 Eng. Rep. 1029 (1851). The court in the Atwood case could see no difference between this situation and the one before it, for it relied upon the leading case of Olliffe v. Wells, 130 Mass. 221 (1881). That case invalidated a bequest to a legatee to distribute “in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him.”
be disregarded—though whether effect can properly be given to later amendments is a more serious question to be hereafter discussed.

I believe that the Atwood bequest should have been sustained as a valid incorporation by reference. It is universally recognized that the writing to be incorporated must be in existence when the will is executed, and it is commonly stated that the will must refer to it as in existence. There is reason for the first requirement. The provisions of the statute of wills, if they are to have substantial meaning, seem inescapably to prevent the use of a later writing which was not executed in conformity with the statute and which serves the sole purpose of effecting disposition at death. But the requirement of existence in fact is satisfied where the trust instrument was not amended. The second requirement, of a reference to the writing as in existence, is certainly not self-evident and strict insistence upon it probably has done more harm than good. The real need is for language in the will which expresses the purpose of incorporating a particular writing and describes

22 Bryan's Appeal, 77 Conn. 240, 58 A. 748 (1904); Newton v. Seaman's Friend Society, 130 Mass. 91 (1881); 1 PAGE, WILLS §260 (1941).

23 "... where there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose." Allen v. Maddock, 11 Moore P.C. 427 at 454, 14 Eng. Rep. 757 at 767 (1858). Accord: 1 PAGE, WILLS §257 (1941); ATKINSON, WILLS 335 (1937); Evans, "Incorporation by Reference, Integration, and Non-Testamentary Act," 25 Col. L. Rev. 879 at 881 (1925); Bryan's Appeal, 77 Conn. 240, 58 A. 748 (1904).

24 It is still possible, however, that the testator's wishes may be carried out through the use of constructive trust theory. It is generally recognized that if an outright bequest is made to a legatee who promised either before or after execution of the will to hold the property in trust, a constructive trust will be enforced against the legatee for the benefit of the intended beneficiaries. 1 Scott, TRUSTS §55.1 (1939). In England and some American jurisdictions, the same result has been reached where the will specified that the legatee was to hold in trust but did not designate the beneficiaries. Id. §55.8. However, the English decisions indicate that this will be limited to the situation in which the terms of the intended trust were communicated to the legatee before or in connection with the execution of the will. Johnson v. Ball, 5 DeG. & Sm. 85, 64 Eng. Rep. 1029 (1851); In re Keen, [1937] Ch.D. 236. The reasons given for this limitation are inadequate and the time factor has not been emphasized in the American decisions. See, e.g., Hartman's Est. (No. 2), 320 Pa. 331, 182 A. 232 (1936). The Restatement of Trusts adopted the minority American view that a constructive trust will be impressed on the property even though the will shows that the legatee takes in trust, and states that it is immaterial whether the legatee's promise was made before or after execution of the will. Sec. 55, com. k. The functional relationship of the constructive trust remedy and the doctrines of incorporation and independent significance is discussed in an excellent comment by Tolan in 46 Mich. L. Rev. 77 (1947).

25 In the Atwood case (supra note 16) the District Judge, who had upheld the bequest, observed that the "reservation of a right to change does not destroy the actual existence of the trust settlement..." 264 F. 360 at 365 (1920).
the writing with reasonable certainty.\textsuperscript{26} In terms of incorporation the
important issue in the \textit{Atwood} case is whether the language of the will
met this need.

Two situations have been presented in the cases, which should be
but have not been differentiated. Usually, the reference clause of the
will does not show that the trust is amendable. That fact appears only
from the provisions of the trust instrument. In a few reported cases the
language of the will itself attempted to make a disposition that would
adopt the terms of the trust as then written or as thereafter amended.
The \textit{Atwood} will was of the first type but the court treated it as though
it were of the second.\textsuperscript{27} It is important then to consider whether the
disposition could have been sustained under the will as the court recast
it.

In \textit{Matter of Jones}\textsuperscript{28} a bequest was made to a trustee on the trusts
contained in an instrument “executed by me bearing even date with this
my last will and testament or any substitution therefor or modification
thereof or addition thereto which I may hereafter execute.” The be-
est was held ineffective even though the trust instrument had not
been changed after execution of the will.\textsuperscript{29} The road to this result was

\textsuperscript{26} Early English decisions on incorporation emphasized this factor; thus Lord Eldon
stated: “The rule of law is, that an instrument properly attested, in order to incorporate
another instrument not attested, must describe it so as to be a manifestation of what the
paper is, which is meant to be incorporated. . . .” Smart v. Prujean, 6 Ves. Jr. 560 at 565,
31 Eng. Rep. 1195 (1801). Insistence upon a reference to the writing as in existence has
had its most destructive effect in cases where the writing was prepared after the execution
of the will but before its republication by codicil. The execution of the codicil means that
the existence in fact requirement is satisfied. If, however, the original will referred to
the writing in the future tense, this language remains the same despite republication of the
will by the codicil. There are decisions rejecting incorporation. Goods of Smart, [1902]
P. 238. See note, 39 Mich. L. Rev. 1055 (1941). A glaring example of insistence that
the testator use the correct tense is Durham v. Northen, [1895] P. 66, where the will
created a trust and directed the trustees to set apart a fund consisting of investments “which
the trustees will find noted by me for the purpose.” A paper was found listing such prop-
erties but it was dated later than the will. A codicil to the will had been executed after
the date of this paper. \textit{Held}, that the paper was not incorporated because the will “does
not refer to a document as existing.” In referring to a comparable English decision, Wig-
more commented: “why will judges be so complaisant to destroy testamentary acts which
are perfectly authentic and are obvious in their purport?” 9 WIGMORE, EVIDENCE 167, note
(1940). Some American cases have been less insistent on use of the proper tense. Simon
v. Grayson, 15 Cal. (2d) 531, 102 P. (2d) 1081 (1940).

\textsuperscript{27} The court recast the will to read: “I give the residue of my estate to said Trust
Company to be disposed of to such persons and in such proportions as I may have instructed
or shall hereafter instruct said Trust Company.” 275 F. 513 at 521.

\textsuperscript{28} [1942] Ch. 328, [1942] 1 All E.R. 642. Apparently there was no inter vivos trust
in this case. The trust instrument was prepared solely for use in connection with the will,
hence there was no possibility of applying the independent significance theory.

\textsuperscript{29} The court held that evidence concerning changes in the writing was inadmissible,
but counsel for the trustee stated in argument that the original writing had not been altered.
[1942] Ch. 328 at 329.
winding. Testator meant the property to go either by the original terms or by later alterations if any. If there were later alterations the disposition would be invalid since the later writing could not be incorporated. The court could not receive evidence to show whether or not there was a later writing, hence it had no way of knowing whether the first writing was to control. It is difficult to know how to deal with such refined nonsense. Surely there is a substantial difference between using the language of a writing to express the essential terms of a testamentary disposition, and using the absence of any such writing to validate testamentary language that is otherwise effective. The court recognized this when it suggested that the result might be different if the will directs reference to a particular writing unless another writing is thereafter substituted. 30 In the case before it, an existing writing was described and a purpose was clearly expressed of making disposition by the terms of that writing in the circumstances which occurred; this should have sufficed.

Thus, if the will in the Atwood case had used the language which the court imported, a valid incorporation should have been found, disregarding the amendments as the court did. As has been seen, however, the reference clause was of the common variety; that is, the fact that the trust was amendable appeared only in the trust instrument itself. This presents a problem of construction which will be considered later: did the testator mean to leave the residue pursuant to the existing dispositive terms of the trust, or did he mean to include later amendments? For the present the case will be discussed on the assumption made by the court that later amendments were to be included. Even though the holding in the Jones case be accepted it is suggested that the actual will in Atwood involves a controlling difference. The judge-made rules of incorporation have tended to become highly formalized; that is, they have taken on the outstanding characteristics of the rules embodied in the statute of wills. 31 In either case, if those rules are met the testamentary disposition should be sustained. This is a situation in which it should be possible to give a man almost complete assurance that if certain minimum requirements are satisfied his will is valid insofar as validity turns on form. Cases like Atwood have introduced unobtrusively a new idea.

30 A like suggestion appears in University College of North Wales v. Taylor, [1908] P. 140. In First-Central Tr. Co. v. Claflin, (Ohio C.P. 1947) 73 N.E. (2d) 388, the court sustained a bequest “pursuant to the provisions in said trust instrument and amendments thereto.”

31 The comment in 46 Mich. L. Rev. 77 (1947) demonstrates, however, that bequests are frequently upheld in disregard of the formal rules of incorporation.
into incorporation. Traditionally the emphasis has been upon the lan-
guage of the will. It must describe the extrinsic writing with reasonable
exactitude, show in some way that the testator intends to incorporate
that writing, and perhaps also describe the writing as in existence if
that can usefully be separated from the general description requirement.
The will in the Atwood case satisfied these requirements. If incorpo-
ration failed it was not because of any lack of form in the will, rather
it was because of something in the writing to be incorporated.

This departs from the basic purpose of the requirements of incor-
poration. If a will satisfies the formalities of incorporation, the terms
of the writing referred to become operative as a part of the will. The
two instruments then are construed as a whole, as in any other case in
which a legal transaction is embodied in more than one instrument.
The terms of the incorporated writing are significant in ascertaining
the testamentary disposition and they may be such that the disposition
is ineffective, but they do not defeat the incorporation of that writing.
For example, suppose that the will leaves property to a trustee on the
terms of a specified trust instrument. That instrument provides that
the trustee shall hold the property for such uses as the settlor shall from
time to time direct. The bequest fails but this is not because the incor-
poration is ineffective. It fails for the reason that the two writings, the
will and the trust instrument, do not dispose of the estate. A court
might explain the decision by saying that a testator cannot "prospec-
tively create for himself a power to dispose of his property by an instru-
ment not duly executed as a will." The explanation fits but it is wholly
unrelated to the problem of incorporation; the decision and the ex-
planation would be the same if the language of the incorporated writ-
ing had been placed in the body of the will.

This analysis appears in a recent English case, In re Edwards' Will
Trusts.32 The case has been cited as one of two recent decisions which
support the position that a revocable or amendable trust cannot be
incorporated.33 Actually the decision is one of the best authorities
available for the opposite view. The will gave the entire estate to the
trustees of a specified inter vivos trust, "to be held by them upon the
trusts and subject to the powers and provisions therein declared." The
second paragraph of the trust instrument provided that the trust funds
should be held for "such persons or for such purposes as the settlor

32 [1948] Ch. 440.
33 Lauritzen, "Can a Revocable Trust be Incorporated by Reference?" 45 Ill. L. Rev.
583 (1950).
shall by any memorandum under his hand direct and in default of such
direction upon trust to pay or transfer the same or any part thereof to
such person and for such purposes as the managing trustee shall in his
absolute and uncontrolled discretion think fit." The third paragraph
provided that "subject to the provisions of the preceding clause the
trust fund and the income thereof shall be held upon trust" for speci-

died beneficiaries. After the will was made the testator prepared a
memorandum which was intended to direct disposition under the first
part of the second paragraph. The lower court held:

1. The memorandum was not validly incorporated since it was written after the will
was executed. More broadly, the court observed that the purported
incorporation of the first portion of the second paragraph failed for the
reason that the testator attempted "to reserve power to alter his testa-
mentary dispositions by a future non-testamentary document and he . . .
subsequently . . . purported to exercise that reserved power." (2) The
power given to the managing trustee was ineffective, being a power in
trust which failed for uncertainty. (3) There was not a valid disposi-
tion by reference to the third paragraph of the trust instrument. To
hold otherwise would defeat the testator's intention since he wished the
estate to go as described in the memorandum. On appeal from the
third ruling the decision was reversed and it was held that the estate
passed in accordance with the provisions of the third paragraph of the
trust instrument.

Although the first ruling was not before the court of appeal, its
approach to the problem was quite different from that of the lower
court. In its view there was an incorporation of the second paragraph,
but the paragraph was inoperative because it contained no valid dis-
positive provisions. The Master of the Rolls said:

"The settlement here [i.e., the trust instrument] is a document
which can be perfectly well identified, and there is no rule of law
to the contrary. It can accordingly be incorporated as a piece of
writing into the testamentary disposition. Indeed, if the settle-
ment, instead of being a thing having value and force in itself, had
been merely a memorandum previously executed to which, in his
will, he referred, it could perfectly well have been admitted to
probate as a testamentary instrument. The question then would
have arisen, what provisions in this instrument are valid and what
are invalid? . . . We have now got therefore to a stage where there

85 [1948] Ch. 440 at 446-47.
is a will, part of the directions of which cannot operate... nor do I see any reason why the invalidity of a provision contained in this settlement should be any reason for excluding it from the testamentary directions of the deceased.”

The problem then became one of construing the two writings; and it was concluded that the testator meant the third paragraph of the trust instrument to be operative, not only upon failure to exercise the powers of the second paragraph but also upon invalidity of any attempted exercise.

This is a decision that an amendable trust may be incorporated. The substance of the bequest is the same as that in the Atwood case. In each case testator’s purpose was that the estate should go in accordance with the dispositive provisions of the incorporated instrument unless he exercised a reserved power to direct a different disposition. The case also is significant on a problem hereafter to be considered, that is, the effect of later amendments; but for the moment we are concerned with the effect of the fact that a power to amend was reserved. Unlike the trial court and the court in the Atwood case, the Master of the Rolls avoided the pitfalls involved in the statement that “a testator cannot prospectively create for himself a power, etc.”

So far the discussion of the Atwood case has centered on the availability of incorporation. In addition, such a bequest should be upheld on the ground that the trust instrument has independent significance. This theory is applicable where the trust is not amendable and the independent significance of the writing is no way lessened by the fact that the terms of the writing were subject to change.

After the decisions in the Atwood and Boal cases the Rhode Island Supreme Court accomplished a tour de force. It turned out that the trust instrument involved in those two decisions had been executed with formalities sufficient to satisfy the statute of wills. It was accordingly admitted to probate as a part of testator’s will. There was no need any longer for resort to incorporation by reference or the independent significance theory. The federal decisions were not controlling, for the federal courts have no jurisdiction over the probate of wills. In answer to the argument that the testator had

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37 In Boal v. Metropolitan Museum of Art, (2d Cir. 1927) 19 F. (2d) 454, it was recognized that the state court decision was controlling. The Court of Appeals for the First Circuit followed suit in Atwood v. Rhode Island Hosp. Trust Co., 34 F. (2d) 18 (1929). The jurisdictional aspects are discussed in a note, 43 HARV. L. REV. 462 (1930).
attempted to reserve the power to change his will without complying with the necessary formalities, the court observed: "is it of any importance what his ideas were as to an effective method of modifying either of these instruments so as to change the disposition of the residuary property?" 38 That is, the ineffectual attempt to reserve a power to amend in the will proper did not invalidate the dispositions made by the will. It is difficult to see why it need have a more destructive effect when made in another writing which could otherwise be used to fill out the testamentary provisions.

Apart from the opinions of able writers39 the authority supporting the Atwood type of bequest is not impressive. Some decisions which have been cited as authority actually go off on other grounds. It is always necessary to make this initial inquiry: does the will express the purpose of leaving the property solely according to the original dispositive terms of the trust instrument, or is it intended to include subsequent amendments? If the first construction is adopted the bequest should be effective to the same extent as though the trust were not amendable. This was the principal basis of decision in Old Colony Trust Co. v. Cleveland,40 where a residuary bequest to the trustee of an amendable inter vivos trust was construed to be "upon the trusts originally defined."

A bequest of the Atwood type is clearly valid in Ohio where the result is explained in terms of incorporation by reference.41 Some reliance has been placed in the Ohio decisions on a statute which authorizes incorporation by reference. But the portion of the statute which is relevant to the present problem is derived from the judge-made rules of incorporation so that the legal setting of the problem is essentially the same in Ohio as in any other jurisdiction.42 California has

38 47 R.I. 274 at 285.
39 See the articles by Evans and Scott cited in note 1; also 1 Scott, Trusts §54.3 (1939).
40 291 Mass. 380, 196 N.E. 920 (1935). This is a narrow reading of an opinion which could be and by some writers has been read in broader terms. Shattuck, for example, apparently is confident that, even though the will is construed to include later amendments, the bequest is good under the Cleveland decision "at least in relation to the trust as it stood at the time of execution of the will." Shattuck, Estate Planners' Handbook 88 (1948).
42 Ohio Gen. Code (Page 1938) §10504-4. The extrinsic writing must be "referred to as being actually in existence." The Ohio decisions regard the reference to the trust instrument as a reference to an existing writing even though the terms of the writing are subject to amendment.
upheld incorporation of an amendable trust but the value of the decision is limited by the fact that there was no discussion of the issue raised by the reservation of a power to amend. The same is true of a New Jersey decision, in which a bequest to the trustee of a revocable trust was given effect. In New York the question must be considered still open. In Matter of Rausch the Court of Appeals sustained a bequest to the trustee of a previously created inter vivos trust, with no reference to whether the trust was amendable unless Judge Cardozo was speaking to this point when he said that the trust instrument "is as impersonal and enduring as the inscription on a monument." Some lower court judges in that state have relied upon the Rausch decision to uphold disposition pursuant to an amendable trust. Others have pointed out that the trust there involved was neither amendable nor revocable and have limited the decision accordingly. In President and Directors of Manhattan Co. v. Janowitz, the most important decision in New York since the Rausch case, there is language which gives considerable support to the Atwood view; however, the major emphasis was placed upon the fact that the trust was amended after the will and the case will be discussed in that connection.

Outside of Ohio the main support for the validity of a bequest of the type under discussion comes from In re York's Estate, a recent New Hampshire case. The decedent established an amendable inter vivos trust which he amended several times before execution of a codicil to his will. The codicil bequeathed the residue of his estate to the "Trustees under a Living Trust Deed dated March 17, 1938, and amended [here followed a recital of the dates of amendments], under which I am the Donor, to be added by said Trustees to the trust estate held by them under said Living Trust Deed, as amended as aforesaid, for the benefit of the beneficiaries therein set forth, and thereupon the same shall become subject to the terms of said Living Trust Deed as so

43 Estate of Willey, 128 Cal. 1, 60 P. 471 (1900).
44 Swetland v. Swetland, 102 N.J. Eq. 294, 140 A. 279 (1928).
45 258 N.Y. 327, 179 N.E. 755 (1932).
46 In re Bremer's Will, 156 Misc. 160, 281 N.Y.S. 264 (Surrogates Court, 1935); Est. of Tower, N.Y. L.J., May 13, 1946, p. 1889, col. 7 (Surrogates Court).
47 President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S. (2d) 232 (1940). I do not know the basis for the assertion in this case that the trust involved in the Rausch case was neither amendable nor revocable. The reported opinions in the Rausch case do not disclose the fact, either in Surrogates Court (143 Misc. 101, 257 N.Y.S. 78), the Appellate Division (234 App. Div. 626, 252 N.Y.S. 129), or the Court of Appeals (258 N.Y. 327, 179 N.E. 755). See also Tillmans Est., 53 N.Y.S. (2d) 564 (Surrogates Court, 1945).
48 Supra note 47.
amended." No amendments of the trust deed were made after execution of the codicil. The court upheld the bequest, saying:

"Disposition by addition to a previously created trust, even though the trust be subject to modification, is clearly valid in relation to the trust in the form which it took at the time of execution of the will."

This appears to state the broad position that the presence of a power to amend is irrelevant at least so long as no amendments have been made after execution of the will. But the principal authority cited for the statement was Old Colony Trust Co. v. Cleveland, in which, as has been seen, the decision was placed primarily on the narrower ground that the will was not meant to include later amendments. Moreover, this is also the fair interpretation of the will in York's Estate. The emphasis on specific amendments probably should be read to mean that reference was made only to the trust deed as theretofore amended.

The California decision, like the decisions from Ohio, relied upon incorporation by reference. The New Jersey case left open the question whether incorporation was recognized in that state and upheld the bequest either on the ground that the inter vivos trust had independent significance or on the related if not inseparable theory suggested by Cardozo in Matter of Rausch that this is a simple bequest to a trustee as a separate entity. In the words of the New Jersey court "the trustee-legatee is as distinct and definite an entity as would have been an individual or corporation legatee." In York's Estate the New Hampshire court concluded that the bequest could be upheld either as an incorporation by reference or on the view that "the inter vivos trust is a fact 'having significance apart from the disposition of the property bequeathed,' which may be relied upon to control such disposition without violation of the Statute of Wills." The reason for the court's final selection of the latter ground is interesting. If viewed as an incorporation by reference the court thought it might be necessary to set up a separate testamentary trust subject to the statutes relating to such trusts. Under the theory adopted it was decided that the testamentary property was simply added to the corpus of the inter vivos trust; there was no need for a separate trust or for the application of statutory provisions relating to testamentary trusts.

51 102 N.J. Eq. 294 at 297.
52 95 N.H. 435 at 436.
53 In Bolles v. Toledo Trust Co., 144 Ohio 195 at 217, 58 N.E. (2d) 381 (1944), it was held that use of the incorporation theory did not require the establishment of a separate trust. See 1 Scott, Trusts 293 (1939).
Intent to Include Later Amendments. Reference has been made to the importance of determining whether the bequest was meant to include amendments made after execution of the will. The problem of the Atwood case arises only if the will is given this meaning. In the Atwood case this construction was adopted without discussion and a recent article on the subject asserts that such construction is “inescapable.” The problem is not this simple. As already noted, in the Cleveland case the Massachusetts court held that the testator intended the original terms of the trust to be controlling. The case is of little value on the interpretation problem since the report does not contain the actual language of the will; however, it may show an inclination to construe the will so as to uphold the bequest. In York’s Estate the language of the will is quoted and on fair reading should be said to exclude subsequent amendments. It described the original trust instrument and the various amendments already made thereto and directed disposition in accordance with the trust instrument “as amended as aforesaid.”

But the typical situation involves language comparable to that in the Atwood case, where the trustee was directed to hold the property bequeathed “in the same manner as though [the property] had been deposited by me as a part of said trust estate.” Certainly this language does not lead inescapably to either conclusion. There is no way to be sure whether the testator meant the property to go in accordance with the present or the future dispositive terms of the trust. There is some suggestion that he meant to include later amendments; more it seems than in the case of a bequest to the trustee “for the uses and purposes set forth and declared in that certain deed of trust....” But neither interpretation would be unreasonable and in such case resort must be had to any useful general ideas. One such idea derives from a fact that is more or less peculiar to wills, the fact that the instrument is executed at one time but is to be operative to dispose of the estate at a later time. The testator has made a bequest to a “trust”

56 Such preference appears in Bemis v. Fletcher, 251 Mass. 178, 146 N.E. 277 (1925).
58 The court’s conclusion that this covered subsequent amendments is supported by the Janowitz case (supra note 47) in which the same meaning was given to similar language. However, the issue of interpretation was not noticed, and this is typical of the decisions.
59 The quotation is from Estate of Willey, 128 Cal. 1 at 5, 60 P. 471 (1900).
which he has created and can shape until his death; it seems likely that he thinks of the bequest as one to the creature he leaves at his death. In doubtful cases, and this includes most cases, the more reasonable conclusion is that subsequent amendments were to be included.

C. Effect of Subsequent Amendment or Revocation

The specific problem of interpretation that was just considered in the preceding section opens up larger issues of interpretation. It will be helpful, I believe, to make a short excursion into these larger issues, for they have an important bearing on the questions now to be discussed. The interpretation of a will is a complex process because of the circumstance that it does not become operative to dispose of property at the time of execution. Despite the fact that its primary effect occurs at death, the writing takes on legal significance at the time of execution—it is not simply a piece of paper with words on it. In many jurisdictions it operates forthwith to revoke a prior will.\(^{60}\) In most of those jurisdictions the dispositive provisions themselves may have this immediate effect; that is, to revoke a prior will because of inconsistency of the dispositions where there is no express revocation clause.\(^{61}\) Even though a will does not revoke a prior will during testator’s lifetime, it nonetheless is a legal document which has meaning when executed. This is implicit in the statutory provision that it may be revoked only in certain ways.

Wigmore pointed out that the meaning of a will may be sought in a “usage or habit of the testator,” but it is suggested he was mistaken in asserting that “the time of the usage must be the time of the will’s final sanction,” that is, at death.\(^{62}\) In one sense, and a quite fundamental sense, the meaning is determined as of the time of execution. At the same time it may also be determined by relating the words to the extrinsic facts existing at death. Where this is done it is because the meaning of the words at the time they were written was that this should be done.

A bequest to "my son Jack" refers presumably to a person then living and identified in the mind of the testator as the legatee. The individual who fits the description will be ascertained primarily by reference to

\(^{60}\) I Page, Wills 865 (1941).

\(^{61}\) The cases which distinguish between express revocation and revocation by inconsistency are the subject of a note at 28 Ky. L.J. 227 (1940). The distinction is made in Michigan. Cheever v. North, 106 Mich. 390, 64 N.W. 455 (1895); Danley v. Jefferson, 150 Mich. 590, 114 N.W. 470 (1908).

\(^{62}\) 9 Wigmore, Evidence 223 (1940).
facts existing when the will was made. It might appear that testator did not then have and never had a son named Jack; but if it were shown that his habit when he wrote the will was to call his son Richard by that name the meaning would be clear and Richard would take the legacy. If after the will was written another son was born and given the name Jack would the legacy go to him? Surely not; the meaning of the will is here determined in the light of the circumstances at the time of execution. Contrary to Wigmore it is in the situations involving individual usage of the testator that circumstances at the time of execution are most likely to be controlling.

In some instances the language of the will specifies the time of reference; for example a bequest to “the persons in my employ at my

63 In Powell v. Biddle, 2 Dall. (Pa.) 70 (1790) a bequest to “Samuel Powell (son of Samuel Powell . . .)” was given to William the son of Samuel on evidence that the testator “usually, by mistake, or by way of nickname, called him Samuel.” An interesting feature of the case is that Samuel Powell actually had a son named Samuel. But William was the child of testator’s deceased daughter, whereas Samuel the son was the child of a second wife of Samuel the father, unrelated to the testator. This is an early instance of refusal to follow the plain meaning rule, a rule discussed in 9 WmMORE, EVIDENCE §§2461-63. Another interesting example of misnomer appears in Moseley v. Goodman, 138 Tenn. 1, 195 s.w. 590 (1917).

64 Certainly the books are full of statements that the meaning of a will is to be gathered “from the circumstances which surrounded the testator when the will was made.” Fritsche v. Fritsche, Executrix, 75 Conn. 285 at 287, 53 A. 585 (1902); 2 PAGE, WILLS §920 (1941). In the situation described in the text it would be possible to hold that, since the will stands at the moment of death as the expression of testator’s wishes, it should be read in the light of the circumstances at that time—though such approach would upset the accepted analysis of many problems in the field of wills. Testator might at death have intended the bequest to go to the son whose name was Jack. He clearly meant another son when the will was written and his later formed intent would, I believe, have no legal significance. The only case cited by Wigmore to support his statement quoted above in the text is Castle v. Fox, L.R. 11 Eq. 542 (1871). Testator devised his “mansion and estate called Cleeve Court”; after the will was written he acquired additional lands which he thought of as a part of his “Cleeve Court estate”; on the basis of this evidence it was held that all such lands passed under the devise. It would be possible to say that this corresponded with the meaning of the will when it was executed, that the description was sufficiently general to suggest that testator meant to devise the land comprising that particular part of his estate at his death—in short that it was not a devise of specific land owned when the will was made, as though the land had been described by metes and bounds. But the court did not purport to rest the decision on this construction; it tried to apply literally section 24 of the Wills Act of 1837 (7 Wm. IV & I Vict. c. 26) which provided that “every Will shall be construed, with reference to the Real Estate and Personal Estate comprised in it, to speak and take effect as if it had been executed immediately before the Death of the Testator, unless a contrary Intention shall appear by the Will.” Perhaps one purpose of this section was to eliminate the common law rule that a will could not dispose of after-acquired land, although this was sufficiently done by section 3 of the same act; in any event the language goes beyond this purpose. This section of the English act has been copied in only a few American jurisdictions [Bordwell, “The Statute Law of Wills,” 14 Iowa L. Rsv. 172 at 187 (1929)] and in those jurisdictions the courts probably would not apply it as the English court did [2 PAGE, WILLS 897 (1941)]. In fact it is doubtful that the decision is of much significance in England in view of In re Evans, [1909] 1 Ch. 784.
death.” Often the time of reference is not explicit in the language but is assumed to be the death of the testator because of the influence of the fact that this is when the will becomes operative. Thus a bequest of “the residue of my estate” is read to mean all of the property owned at death which is not otherwise disposed of by the will—a meaning which is reinforced by the modern rule that a will may dispose of all property acquired after its execution and owned at death. A bequest to “my children” is taken to mean those children living at testator’s death, including children born after the will was made. In all these instances, however, we relate the words of the will to the extrinsic facts at death because we construe the will as calling for such reference from the time of its execution. This is the explanation of the holdings that when there has been a revocation of a specific or general pecuniary bequest by striking out the clause, the property or sum of money covered by such bequest falls into the residue. The argument against this result has been that it gives dispositive effect to the act of striking and that while the statute of wills may permit revocation by act on the document it does not authorize disposition in this fashion. The argument has usually been rejected on the ground that the property is disposed of by the residuary clause, not by the act of striking: the meaning of the residuary clause when written was that it covered all estate owned at death which was not otherwise effectively bequeathed. In short, this meaning is determined as of the time of execution but the meaning is that the language operates in relation to estate owned at death.

Subsequent Amendments. We have considered the effect of the fact that the trust was amendable, but on the assumption that it had not been amended after execution of the will. There remains the problem of the effect of later amendments. The problem is not important of course if the mere fact that the trust was amendable defeats the attempted bequest. Nor is there a serious issue if the court construes the will as making disposition by the original trust terms alone. The

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65 Casner, “Class Gifts to Others than to ‘Heirs’ or ‘Next of Kin’—Increase in Class Membership,” 51 Harv. L. Rev. 254 at 268 (1937).

66 “As a rule, a general description of persons, or of property, shows that testator intends the persons or property as they exist at his death. A specific description of persons or of property so as to distinguish them from other persons or property as they exist when the will is made, usually shows that testator makes his will with reference to the persons, property, and the like, as they exist at the time that the will is made.” 2 Page, Wills 896-97 (1941).

67 Bigelow v. Gillett, 123 Mass. 102 (1877); Atkinson, Wills 378 (1937). Contra: Miles’ Appeal, 68 Conn. 237, 36 A. 39 (1896). Page concludes that the majority rule is opposed to the position taken in the text but of the five cases cited to support his conclusion only Miles’ Appeal does so. 1 Page, Wills 793-94 (1941).
bequest will be valid in any state which recognizes disposition by the
terms of an unamendable trust, and the amendment will have no effect
on willed property.68 Another subsidiary problem arises where an
amendment has been made after the will, but thereafter a codicil is
executed and there is no amendment after the date of the codicil.
Since the will speaks from the date of the codicil the problem now
under discussion does not arise.69

In considering the effect of later amendments, one basic distinction
should be made. In some cases it is possible to give complete effect to
the amendment by treating it as applicable only to the corpus of the
inter vivos trust. In other cases the amendment can be given complete
effect only by relating it to property passing at death. Both of these
situations were presented in Koeninger v. Toledo Trust Co.70 The
decedent placed $15,000 in an amendable living trust under which the
income was to be paid to himself for life, then to his widow for life,
and upon the death of the survivor the principal was to go to his
daughter. Two days later he executed a will leaving the residue of
his estate to the trustee of the inter vivos trust to be “disposed of in
accordance with the terms and provisions” of such trust. Nine days
later he amended the trust instrument by directing the payment of
$500 to one nephew and the transfer of certain land to another nephew.
The court upheld the residuary bequest and the $500 gift, but held
that the other amendment was invalid. The land which decedent
attempted to dispose of by amendment of the trust was not a part of
the corpus of the trust but was a part of the estate owned at death. In
order to give effect to this amendment, therefore, it seemed necessary
to hold that it was a valid testamentary disposition despite the fact that
it was not executed with the formalities required by the statute of wills.
This the court conceived was not permissible under the statute. The
$500 gift, however, was treated as a valid amendment of the inter vivos
trust, payable out of the corpus of that trust.

The court’s decision with respect to the $500 gift is eminently
sensible. Under the language of the writings the money could be paid
either out of the trust corpus or of estate owned at death. If there is
even a slight predisposition to give effect to a man’s attempted settle­
ment of his property, as surely there should be, it is a simple matter to

69 This was the situation in York’s Estate, 95 N.H. 435, 65 A. (2d) 282 (1949) and
First-Central Trust Co. v. Claffin, (Ohio C.P. 1947) 73 N.E. (2d) 388, the bequest being
sustained in each case.
70 49 Ohio App. 490, 197 N.E. 419 (1934).
support the $500 gift by treating it as an amendment of the trust terms as they related to property placed in trust during the decedent's lifetime. Money gifts by trust amendment were treated in similar fashion in Old Colony Trust Co. v. Cleveland. As the trust was written when the will was executed cash amounts were to be paid on the death of the settlor to thirty-seven beneficiaries. The settlor's will bequeathed the residue of his estate to the trustee of the inter vivos trust. After execution of the will the settlor amended the trust by increasing the amounts payable to some of the thirty-seven cash beneficiaries and by adding fifteen additional cash beneficiaries. The amendment also eliminated an income beneficiary who had died and substituted Emma Frye.

As we have seen, the court upheld the will but construed it as intended to give the residue to those named in the original trust instrument. This eliminated Emma Frye, but it did not affect the cash gifts which had been added by amendment. These gifts had become payable under the terms of the trust and the court observed that the "trustee has paid out of the original trust estate all the amounts specified." No issue was raised on appeal as to the propriety of the trustee's action but the Massachusetts court did seem to regard it as the obvious thing to do, which it was. It can be said with considerable assurance, though on slight authority, that in any jurisdiction which will sustain a bequest to the trustee of an amendable trust a later amendment of the trust which can be satisfied out of trust assets will be effective and will not affect the validity of the bequest.

This leaves the problem raised by the other amendment in the Koeninger case which could operate only in relation to estate owned at death. A closely related problem arose in President and Directors of Manhattan Co. v. Janowitz where the relevant part of the trust instrument gave a portion of the trust estate in specified proportions to named beneficiaries. The settlor's will attempted to dispose of most of his estate to the trustee of this trust. The trust instrument was amended four times and the last amendment, which clearly was made after execution of the will, changed one of the beneficiaries described above. In each case three principal choices were presented: (1) to uphold the bequest on the terms of the trust as amended; (2) to uphold the bequest on the terms of the trust as they appeared when

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72 A similar situation was presented in the Atwood case and again it was disposed of by action of the trustee without litigation. This appears in the opinion of the District Judge, 264 F. 360 at 361 (1920).
the will was executed; or (3) to invalidate the entire bequest. Briefly, at this time, it is suggested that the first choice should be made in the Janowitz situation, the second in the Koeninger situation. The subsequent amendment in the Janowitz case had independent significance, whereas that in the Koeninger case had not.

In the Janowitz situation it is Professor Scott's view that the later amendment should be given effect; but if it is not then the third solution, complete invalidity, is preferable to the second because the testator's purpose would be defeated if the property were to pass under the original trusts terms. 74 Since there is considerable doubt that later amendments will be recognized in any circumstances, the practical effect of Scott's view may be to wholly invalidate the bequest. This is what occurred in the Janowitz case. The court rejected Scott's primary position but adopted his secondary position; since the testator wanted his estate to go as described in the original trust deed and the four amendments, his intention would be "frustrated" if it were permitted to go under the original trust as thrice amended. This reasoning will be examined later but it is appropriate to observe now that the testator's intent was frustrated anyway under the court's decision.

What possibility is there in either the Janowitz or Koeninger situations of making the first of the three choices described above, that is, of giving effect to the testator's will exactly as he wished by upholding the disposition in accordance with the trust as amended? No case known to the writer has done so. Incorporation by reference is not available since the amendment was made after execution of the will, but can the amendment properly be regarded as a fact of independent significance? This idea has been used to uphold bequests which are given meaning by reference to an act of the testator occurring after execution of the will. Examples already have been given, such as the bequest to persons in the testator's employ at his death. A more extreme instance is the bequest of the "contents of my safe deposit box," a type of bequest which commonly is upheld even though it is construed as referring to the contents at death. When such a bequest, which is effective in New York, 75 is compared with the Janowitz case, it is apparent that the courts have not yet achieved a rational organization of the different parts of the total problem. The bequest in the safe deposit box


75 Matter of Thompson, 217 N.Y. 111, 111 N.E. 762 (1916); In re Le Collen's Will, 190 Misc. 272, 72 N.Y.S. (2d) 467 (1947). Other cases are cited in Atkinson, Wills 341 (1937).
case is effected by a later act of the testator which certainly has no more and probably has much less independent meaning than the amendatory act in the Janowitz case.

The refusal to give effect to later amendments seems to be the result of a failure to divorce this method of analysis completely from incorporation by reference. In incorporation a sharp distinction is drawn between writings prepared before and after execution of the will. There is a tendency to carry this distinction over into a mode of analysis where it has no place. The time of preparation of the extrinsic writing has very little to do with its independent significance. When this analysis is applicable there is nothing that compels a court to resort to ideas of incorporation. Incorporation applies without regard to whether the extrinsic writing has independent meaning. The latter concept applies without regard to whether the rules of incorporation are met. Confusion may have resulted from the functional relationship between the two, particularly the fact that in many situations a bequest can be upheld on either theory.

The nearest analogy to the present problem is the group of cases giving effect to a will which leaves property in accordance with the terms of the will of another who was then living but who predeceased the testator. The classic case is Matter of Fowles in which testator's will gave a part of his estate to trustees "pursuant to the provisions of such last will and testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last will and testament duly executed by her)." The will also provided that, in case husband and wife died under such circumstances that it could not be determined who survived, "it shall be deemed that I shall have predeceased my said wife." Had the husband died first, there would have been no serious question as to the effectiveness of the bequest since it could be sustained as a general testamentary power of

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76 This is not to say that there is no possible connection between the time of preparation of the extrinsic writing and the independent significance doctrine. If the writing was prepared before the will the testator probably did not then have in mind its use in connection with his will; if prepared after the will, the probability is the other way. But the use of extrinsic facts of independent significance is not precluded because the facts may have been molded by the testator with testamentary disposition as one of his objectives. If this were true, the theory could not be used where the trust was created in connection with the execution of the will, and even in cases where it was created earlier it would be open to inquiry as to whether at that time the testator planned to later bequeath property to the trustee. In states such as New York which purport to reject incorporation, the possibility of leaving property to a trustee would be surrounded with limitations which no one has suggested.

77 222 N.Y. 222, 118 N.E. 611 (1918).
appointment vested in the wife. But husband and wife went down with the Lusitania and there was no evidence concerning who was the survivor, nor was the situation aided in New York by any presumption. With the legatee unable to discharge the burden of proving that the wife outlived the testator, the decision must in effect rest on the assumption that she had not. The attempted bequest of a power to the wife lapsed; yet it was clear that in such circumstances the testator wished his property to go on the trusts described in his wife's will. The reference to the wife's "last will" may not have satisfied the formalities of incorporation, and in any event New York decisions had rejected that doctrine. The Court of Appeals upheld the bequest. There was no emphasis on the wife's will being in existence when the husband's will was executed, if indeed it was, and it is clear that the result would have been the same even though her will had been prepared some time later. The decision does not rest on incorporation, at least as it has been traditionally defined.

Commentators have disagreed on the theory of the decision. Actually it is possible to use more than one theory. The decision can be supported on the ground that the extrinsic language used to give meaning to the husband's will had independent significance in that it also operated to dispose of the wife's estate. Some writers have rejected this explanation, apparently because under the husband's will it was

78According to the opinion, the wills were "made at the same time," which presumably means as a part of the same transaction. This should satisfy the existence in fact requirement though the matter is not free of doubt if the wife's will was executed after the husband's. See 3 A.L.R. (2d) 682 at 688-89 (1949). The chief obstacle to the application of incorporation is that the language of the husband's will may not have sufficiently expressed the purpose of incorporating a particular instrument therein described. "He has not limited his wife," the court said, "to any particular will." 222 N.Y. at 233. However, in Bemis v. Fletcher, 251 Mass. 178, 146 N.E. 277 (1925), a bequest to the trustees "under my said husband's will" was held to incorporate a previously executed will of the husband. Cf. Curley v. Lynch, 206 Mass. 289, 92 N.E. 429 (1910).

79In addition to the court's statement that the testator "has not limited his wife to any particular will" is the fact that the court relied squarely on Matter of Piffard, 111 N.Y. 410, 18 N.E. 718 (1888)—"Piffard's case cannot be distinguished." 222 N.Y. at 232. In that case the will gave a share of the estate to a daughter, with a provision added by codicil that if the daughter predeceased the testator, the share should go "to the executors or trustees" named in her will. The daughter died before the testator and the bequest to her executors was sustained as a bequest to the legatees named in her will. The court said that testator intended to bequeath the share "to such person or persons and in such shares and proportions as by an existing will, made before or after the date of the codicil, she had determined and directed or should determine and direct in the disposition of her own property..." 111 N.Y. at 414 (emphasis added).

possible for the wife to name the beneficiaries by a provision in her will which had no other purpose. If in fact she had done so the argument would have undeniable force. In fact she did not; the residuary clause of her will created a trust to cover her own residuary estate as well as that passing to her trustee under the husband's will. The argument is reduced to the assertion that extrinsic facts which do have independent meaning may not be used if under the language of the testator's will those facts could have been molded otherwise. The decisions do not support the assertion and it is at war with the basic theory. What the courts have been interested in is whether in fact the extrinsic circumstances serve another purpose. In essentials, Matter of Fowles does not differ from the cases which support a bequest to the "executors" or

81 Scott, "Trusts and the Statute of Wills," 43 Harv. L. Rev. 521 at 552, note 85 (1930); 1 Scott, Trusts 303 (1939); comment, 46 Mich. L. Rev. 77 at 83 (1947). Scott argues (43 Harv. L. Rev., as cited above) that "since the testator did not provide that his property should be disposed of as his wife should dispose of her property but that it should be disposed of as she should appoint, the decision cannot be upheld on this ground [i.e., independent significance]." Actually, the testator's property did not pass pursuant to a power of appointment, nor did the will as construed by the court provide that it should in the circumstances which occurred. The power lapsed because the wife was not shown to have outlived the husband, and the court construed the husband's will as providing for a substituted gift to those named in the wife's will to take this part of the husband's estate. Judge Cardozo pointed out that "The question is not whether this power of appointment lapsed. The question is whether the testator has avoided the consequences of a lapse. More concretely, it is whether the law permits him to provide that if the donee's survivorship is incapable of proof, he will give his estate none the less to whomever she has named." 222 N.Y. at 230. Scott's statement goes on the assumption that the testator's will must show that the reference is to facts which necessarily will have independent significance. An underlying issue is whether it is necessary that the validity of the bequest be capable of final determination when the will is executed. It seems clear that this is not required. Thus if the bequest had been held ineffective in the Fowles case it nonetheless would have been good had the wife outlived the husband.

The question whether a will provides for a substituted gift in the event a power lapses may be a close one. In Curley v. Lynch, 206 Mass. 289, 92 N.E. 429 (1910), the will gave property "as my said wife shall in and by her last Will and Testament devise and bequeath the same." The wife having died before the husband, it was held that the power lapsed and the attempted disposition therefore failed. The will could reasonably have been construed, however, as disposing of the property to those named by the wife whether she died before or after the testator. This argument was advanced by counsel; but it was tied to the theory of incorporation by reference which the court rejected because there was no reference to the "particular will" of the wife which was in existence when testator's will was executed.

82 In Stubbs v. Sargon, 2 Keen 255, 48 Eng. Rep. 626 (1837), affd. 3 My. & Cr. 507, 40 Eng. Rep. 1022 (1838), there was a bequest "unto and amongst my partners, who shall be in co-partnership with me at the time of my decease, or to whom I may have disposed of my said business . . . ." Testatrix disposed of her business during lifetime and the bequest was held effective to give the property to the "disponees." Undoubtedly the bequest also would have been effective as to the partners, had testatrix not disposed of the business; but the matter seems irrelevant since in the circumstances that occurred the will is given meaning by relating the language to facts which do have independent significance.

"estate" of another person who was living when the will was made but predeceased the testator. The testator's property has been held in such cases to pass to the legatees named in the other person's will.\textsuperscript{86}

In \textit{Condit v. DeHart},\textsuperscript{86} however, the facts apparently presented the nicer issue as to the use of a clause in another will which served no purpose except to designate the testator's legatees. The will made a bequest "to such person or persons as my said son in his last will and testament shall name, designate and appoint." The son predeceased the testator leaving a will in which he designated his wife to receive the property, evidently in a clause which had no other purpose. The bequest was upheld with the statement that the son's will could be "referred to for the purpose of ascertaining the person to whom that estate passes by the father's will." After the son's death the father had executed a codicil which "ratified and confirmed" the will. Perhaps incorporation is a sufficient explanation; since the father's will spoke from the date of the codicil, there was then no possibility of a later will of the son and the instrument to be incorporated therefore was necessarily the existing will of the son. However, there is little in the opinion to suggest that the court was thinking in these terms.

At this point the search for a theory becomes harder. The \textit{Fowles} decision can be explained by the fact that the paragraph of the wife's will which identified the husband's legatees served the independent purpose of naming her own. It is highly questionable whether this idea would be extended to permit use of the extrinsic document simply because in another distinct part it served such a purpose. What remains is the fact that the extrinsic writing was itself a validly executed will. The objective of the statutory formalities is to give some assurance that the testator's real wishes are given effect. When the testator's will contains a provision which in effect empowers another to name his legatees, it is the writing of that person which then needs to be safeguarded. It has been, in legal theory, when executed in compliance with the statute of wills, and this should suffice. On the whole this is perhaps the most satisfactory explanation of both the \textit{Condit} and \textit{Fowles} cases.\textsuperscript{87}

Nonetheless it is believed that the \textit{Fowles} case can be treated as a warranted application of the independent significance concept, not limited by the fact that the extrinsic writing was a duly executed will.

\textsuperscript{84} Leary v. Liberty Trust Co., 272 Mass. 1, 171 N.E. 828 (1930).
\textsuperscript{85} In addition to cases cited in notes 83 and 84, see 3 PAGE, \textit{WILLS} §1041 (1941).
\textsuperscript{86} 62 N.J.L. 78, 40 A. 776 (1898). A similar decision is Murchison v. Wallace, 156 Va. 728, 159 S.E. 106 (1932).
\textsuperscript{87} This is Scott's explanation of the \textit{Fowles} case. 1 Scott, \textit{Trusts} 303-4 (1939).
It should be possible, that is, to bequeath property to legatees who will be identified by the subsequent writing of another person if the applicable language of that writing has independent significance. The central problem is whether this will be applied to a subsequent writing of the testator himself and more specifically to his later amendment of his own living trust. The few decisions directly involving the problem give little basis for belief that this will be done in any circumstances. There has been some wishful thinking on the subject with resultant bad advice. Shattuck concludes that disposition pursuant to the terms of a trust, as amended after execution of the will, "is valid in Massachusetts." He does warn that "a dictum contained in the Cleveland case remains to be corrected. . . ." When it is observed that Old Colony Trust Co. v. Cleveland is the latest word in Massachusetts, the conclusion becomes dangerously misleading if intended to provide a guide for the draftsman. But though the decisions up to now give a negative answer, they are few in number and the question is largely unsettled. There is still some reason to believe that recognition may be given to later trust amendments. Cases such as Matter of Fowles provide a forceful analogy. On the assumption that ground may be given in the decisions, it seems useful to consider the probable outer limits.

An important line of cleavage is suggested in the facts of the Koeninger and Janowitz cases. In the latter the subsequent amendment attempted to substitute one beneficiary for another. The beneficiary was to receive on the settlor's death a certain proportion of the trust corpus, whether it was property placed in trust during lifetime or property which was to go into the trust at death. The amendment was intended to operate inseparably to designate the beneficiary as to both parts, and presumably was effective as to the corpus of the inter vivos trust. It had independent meaning, as much as the wife's will in...
Matter of Fowles, and should have been given effect as to estate owned at death. On the other hand, the amendment in the Koeninger case which related to land owned at the testator’s death could have no effect except to designate the donee of such property. If this had been the whole of the amending instrument, its recognition would unquestionably be inconsistent with the requirements of the statute of wills.

The actual situation in Koeninger was that the amending instrument contained two unrelated amendments, one of which was effective in relation to the property placed in trust during lifetime. Arguably this gave the instrument as a whole sufficient independent meaning to sustain the attempted disposition of the land. However, it is unlikely that a court would go this far. The same limitation is suggested here as that discussed in connection with Condit v. DeHart. The decisions generally seem to be limited by the fact that there is independent meaning in the specific act of the testator or other extrinsic fact which is sought to be used. Beyond this, such limitation seems advisable. It is difficult at best to offer an explanation of the independent significance concept which gives much aid in marking the outer limits. In general, the extrinsic fact should give reasonable assurance that the decedent’s estate is being disposed of in accordance with his wishes. In these cases an instrument was executed in compliance with the statute. The additional facts that gave it full meaning normally will fulfill the objective of the statute if they occurred in the course of testator’s lifetime affairs. But when the fact consists of an unattested writing of the testator which is designed in part to produce testamentary consequences, the statutory requirements are particularly troublesome. Fair meaning should be given them, and it would seem that fair meaning does not permit the use of a part of an unattested writing which has as its sole purpose the disposition of property at death.

In any case wherein the court refuses effect to a later amendment the problem then arises as to the validity of the basic disposition to the corpus to $B$ on the death of the settlor. The settlor’s will left the residue of his estate, worth $100,000, to the trustee. Thereafter he amended the trust to provide that $X$ should have $20,000 out of the corpus. His purpose was that $X$ should have $20,000 and $B$ $105,000 out of a corpus consisting of $125,000. Under the Koeninger decision his wishes will be given effect since the $20,000 to $X$ can be paid out of the corpus of the inter vivos trust. Under the Atwood decision, the bequest to the trustee is invalid and the corpus consists of only $25,000. If the amendment is effective in relation to the inter vivos trust, the consequence is that $X$ receives $20,000 and $B$ $5,000. If $B$ has any remedy, which is doubtful, it would seem to rest on the theory of unjust enrichment of $X$ at $B$’s expense because of settlor’s mistake in basic assumptions in making the gift to $X$.

92 Supra note 86.
trustee. On this the Koeninger and Janowitz cases are in conflict. It is believed that the choice of complete invalidity suggested by Scott and adopted in the Janowitz case is the greater of two evils. Scott's argument, which was quoted with approval in the Janowitz case, is that "it would defeat the purpose of the testator to have the property pass in accordance with the original terms of the *inter vivos* instrument." It is not clear why this leads to the conclusion that the entire bequest fails. The testator's purpose is going to be defeated in whole or in part in any event. If the objective is, as it should be, to carry out the intended bequests as fully as possible within the legal framework, the greater likelihood is that this will be done by adopting the Koeninger rather than the Janowitz solution. On the average, changes attempted by amendment of the trust will be relatively minor, will leave intact, that is, the main scheme of disposition. Once we are faced with ineffectiveness of a later amendment, surely it is better to make the choice which will usually be closer to the testator's actual wishes.

Account also must be taken of the method of analysis used. If the problem is viewed as one of incorporation there is a technical obstacle to the result of the Janowitz case. As of the time of execution the incorporated language is treated almost as though it were contained in the body of the will. If in fact it were, the ineffective amendment would be disregarded and the estate would pass under the original terms. It is by no means easy to escape the same conclusion in the case of incorporation, though it is true that the incorporated writing is not regarded for all purposes as an integral part of the will. It is significant that the Ohio decisions, including the Koeninger case, consistently regard a bequest to the trustee of an *inter vivos* trust as presenting a problem of incorporation.

Viewed however in terms of the use of facts having independent significance this difficulty disappears. The use of the trust instrument becomes a part of the process of interpretation, and under this more flexible approach no legal doctrine stands squarely in the way of either the Koeninger or Janowitz solution. The choice can be made by considering which solution will generally come closer to carrying out the testator's wishes.

The decision in *Edward's Will Trusts*\(^1\) is relevant. The trust instrument did not use the conventional language of an amendable

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\(^{93}\) Scott, Trusts 299 (1939). There was no supporting authority when the statement was made. In addition to the Koeninger case, Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935), lends some support to the opposite view.

\(^{94}\) [1948] Ch. 440.
trust but that was the substantial effect. Beneficiaries were named to take the property if the settlor failed to designate others "by any memorandum under his hand." Such a memorandum was prepared after execution of the will but could not be used because it was unattested. It was held that the estate went to the beneficiaries originally named. In result the case is like the Koeninger case; an attempted amendment being ineffective the estate passed in accordance with the original dispositive terms of the trust. This conclusion was rested on a construction of the language of the trust instrument which made provision for later designation of beneficiaries by the settlor and then recited that "subject to" such provision the estate should be held for named beneficiaries. The court read this to mean that the named beneficiaries were to take if for any reason there was no effective designation of others.

It is true that in the ordinary case of reference to an amendable trust there is less in the language of the will or the trust instrument to furnish a basis for such an interpretation. Nonetheless this is probably the way the testator would think about the matter. This is one of those numerous situations in which the testator did not anticipate the possible invalidity of any of his attempted dispositions; or if he did, no provision was made in the instruments to cover the possibility. In such circumstances the law must do the best it can. In an analogous situation involving the application of dependent relative revocation, courts regularly assume that the testator would have preferred the will he ostensibly revoked to no will at all. For example, when he cancels one will in connection with the preparation of a later will which is not validly executed, it is held that there was no revocation.\footnote{Strong's Appeal, 79 Conn. 123, 63 A. 1089 (1906). Similarly, where the testator destroys or cancels a will in the mistaken belief that this will "revive" an earlier will, it has been held that there was no revocation. Est. of Callahan, 251 Wis. 247, 29 N.W. (2d) 352 (1947). See generally, Warren, "Dependent Relative Revocation," 33 Harv. L. Rev. 337 (1920).} The revocation of the first will was intended, the courts say, to be conditioned on the effectiveness of the second. The underlying assumption is that he would have preferred the first will to intestacy. This assumption and more particularly its mechanical application by the courts has been the subject of legitimate attack,\footnote{See Warren's article, supra note 95.} but there is stronger basis for an analogous assumption in the Atwood-Koeninger situation. Meaning is colored by the fact that the testator reserved a power to amend. It is true that the power is broad enough to permit the substitution of a wholly new scheme of disposition. In terms of ordinary ways of thinking, however,
we are closer to probable intent if it is held, as in Edward's Will Trusts, that the original terms control where the amendment is ineffective.

The facts of the decided cases bear out this conclusion. In Janowitz the original terms of the trust provided for distribution of one-third of the corpus to designated beneficiaries. The number of beneficiaries does not appear in the reports but it probably was fairly large since the size of the shares was expressed in thousandths (e.g., the widow was to receive 109/1000ths). The only amendment clearly made after execution of the will changed one beneficiary. Surely the testator would have preferred that a share go to the beneficiary he attempted to eliminate, instead of complete invalidity. In Koeninger, the original terms gave the widow the income for life with the principal to be thereafter distributed to a daughter. The ineffective amendment attempted to give ten acres of land to a nephew, a change which in all likelihood was a minor alteration of the original plan of disposition (though the size of the estate does not appear). In the Atwood case the original trust instrument provided for a large number of beneficiaries (the opinion states that one group comprised about thirty) and the only amendment relevant to the present problem canceled a $3,000 gift to one individual.

Of course the ineffective amendments might be so extensive in a particular case that complete invalidity would be preferable to the original terms. To put a simple case, the original terms may have made X the sole beneficiary with the attempt by amendment to substitute Y as sole beneficiary. Even here it is debatable whether the testator would have preferred complete invalidity to the original terms. In the situations described in the preceding paragraph it is reasonably certain that he would have chosen the original terms.

It has been assumed in the decisions and writings on the subject, and the assumption has been made in the discussion thus far, that the dispositive terms of the later amendment must be ignored in solving the problem of construction. If those terms can be taken into account they provide a guide to intelligent decision and the case can be brought within familiar ideas. Where a part of a will is invalid courts sometimes must decide whether to confine invalidity to that part or to strike down a larger scheme of disposition, perhaps the whole will. The following statement illustrates the approach: "The rule for the determination of this question is that the valid provisions will be upheld if they can be separated from those which are invalid and given effect without doing violence to the intention of the testator and destroying his scheme
for the disposition of his property." If this approach could be used a qualitative judgment could be made in each case on whether giving effect to the original bequest would be an undue distortion of the intended testamentary scheme shown by all the instruments including the later amendment. The legal objection is that the provisions of an unattested writing are being used in construing the will, an objection that does not apply when the invalid provision is in the will. This approach, for example, is never used in the case of changes in testamentary plan attempted by an invalidly executed codicil or later will. To hold otherwise would mean for one thing that in result a duly executed will might be revoked by a later instrument not properly executed.

If the instant situation is analyzed in terms of incorporation it probably will be assimilated to the case in which the original dispositive terms of the trust were written into the will. The ineffective amendment will be ignored. Under the other method of analysis the will is not regarded as containing by reference the provisions of the extrinsic writing. The revocation argument becomes inapt—this, it should be noted, finds support in the Janowitz case. The central question is whether the terms of an unattested writing which under the decisions will not be given dispositive effect can properly be considered in deciding if the property should pass under the original trust terms. In all probability the answer is negative. The legal basis for such use of the writing despite the statute of wills would be its independent significance. If a court refuses to find this sufficient for giving dispositive effect to the writing it is likely that it would also refuse to consider the writing for the other purpose. It seems unfortunate however to compound the original error, in the name of the statute of wills.

Subsequent Revocation. In Fifth Third Union Trust Co. v. Wilensky the testator gave the residue of his estate to the trustee of a revoc-

97 Easton v. Hll, 323 Ill. 397 at 422, 154 N.E. 216 (1926).
98 The distinctions become exceedingly fine. Even though dispositive effect is not given to the writing, its language cannot be wholly ignored. It was not in the Janowitz case, for only by looking at the language could the court ascertain that it purported to amend the terms of the trust. The nearest analogy which occurs to the writer is in dependent relative revocation cases. In the illustration given earlier in the text, involving cancellation of one will in connection with the ineffective execution of another, it has been assumed that the provisions of the unattested writing may be considered in deciding whether the testator would have intended the revocation to be absolute or conditional. The analogy is not good enough however; as Warren has pointed out, "there is no objection to going fully into parol evidence to ascertain his attitude, for one is not varying a writing but an act." "Dependent Relative Revocation," 33 Harv. L. Rev. 337 at 345 (1920).
99 79 Ohio App. 73, 70 N.E. (2d) 920 (1946).
able inter vivos trust. Thereafter by written instrument he revoked the trust agreement "in its entirety" without changing his will. The Ohio court held that the residuary estate passed in accordance with the original terms of the trust. It concluded that the testator intended to revoke only as to the inter vivos trust.

The framework of the problem is different under the two methods of analysis. In terms of incorporation it is a problem of revocation and it is fairly certain that, even though the revoking instrument were construed as an attempt to revoke the bequest, the attempted revocation would be held inoperative as not coming within the statutory methods for revoking a will. But considered as a problem of interpretation by reference to extrinsic circumstances the question of revocation is not presented until another issue is settled. When the will was made did the testator intend a final and definitive bequest to the designated beneficiaries; or did he intend the bequest to be inoperative in the event the trust was revoked; or did the will have a meaning somewhere between these two? As a matter of orderly analysis, that is, the first problem concerns the meaning of the will when executed rather than the meaning of the revoking instrument. Where the trust is amendable we have concluded, though the point is debatable, that the testator intended a bequest to the trust in the form it took at his death. It does not follow that a comparable meaning should be given to the revocable aspect of the trust, for this would be ascribing to him a purpose to make the residuary bequest inoperative should he thereafter revoke the trust.

If this latter meaning is given to the will, then the revocation of the trust makes the bequest inoperative without regard to whether that intent is expressed in the revoking instrument. On the other hand if the will is read as an attempt to dispose of the estate to the designated beneficiaries even though the trust is thereafter wholly revoked, it would seem that a later attempt to revoke by unattested instrument would be disregarded. The question of construction of the will is virtually unanswerable. Where the bequest is in the residuary clause, as it commonly is in these situations, the controlling factor usually should be the constructional preference for avoiding intestacy. With this factor in mind it seems to me that neither of the above interpretations should be adopted. Instead, the will should be read as though the testator had said: "If I hereafter revoke the trust I do not want this to affect the

100 "Patently, an amendment to or revocation of the terms of a trust after it had been incorporated in the will would, if given effect, be repugnant to the foregoing statute [on revocation] unless executed as required by our statute pertaining to wills." Bolles v. Toledo Trust Co., 144 Ohio 195 at 210, 58 N.E. (2d) 381 (1944).
residuary bequest unless the revoking instrument so provides.” If the instrument does “revoke” both the inter vivos trust and the bequest it should be effective, not as a revocation but rather on the theory that this gives effect to a meaning the will carried from the outset. A similar effect is achieved under a bequest of the securities in a safe deposit box where the securities are withdrawn after execution of the will.

It should be emphasized that this conclusion relates only to a later revocation of the entire trust. Subsequent amendments eliminating beneficiaries and perhaps substituting others could also be viewed as involving partial revocation. It is not possible to deal adequately with the problem of the interaction of later amendments and later revocation because of the lack of authority and the uncertainties concerning the effect of later amendments. But if it is once recognized that meaning may be given to a will by reference to later amendments having independent significance, the solution of most of the problems of “partial revocation” will result as a by-product. In essence, they will not be regarded as problems of revocation. One example will suffice.

Assume that a residuary bequest is made to the trustee of an inter vivos trust which is both amendable and revocable. The trust instrument provides that income is to be paid to the settlor for life and at his death the corpus is to be turned over to X and Y. After execution of the will the settlor amends the trust by eliminating X as a beneficiary and substituting Z. The amendment has independent significance because it changes the beneficial interests in the trust corpus. If the will is construed as a bequest to the trust in the form it took at death, as normally it should be, the residue should go to Y and Z. It is not necessary to regard the amendment as a revocation of a bequest to X.

101 In the Atwood case (supra note 16) the later amendment attempted to eliminate a gift of $3,000 to Amelia. If the primary bequest to the trustee were upheld, what would be the effect of this amendment? On the theory of incorporation, as applied in the Koeninger case, it probably would be held ineffective, so that Amelia would take. The issue is puzzling, however, on the Koeninger analysis, for it will be remembered that that court gave effect to a later amendment adding a cash beneficiary on the ground that the sum could be paid out of trust corpus. But since under the terms of the writings the amount could be paid either out of trust corpus or of estate owned at death, it would seem the Ohio court would hold that Amelia was given a legacy by the will which could not be revoked by a later unattested writing. If the full implications of the independent significance theory were accepted and applied, Amelia would not take for the reason that the disposition to the trustee was on the terms of the trust as they were written at death.

The actual outcome of the litigation in the Atwood case presumably left Amelia with $3,000. She would have taken nothing had the federal decision stood (supra note 18), but under the state decision (supra note 36), which probated the trust instrument as a will, the $3,000 gift to Amelia was a legacy which could not be revoked by the later amendment unless that amendment also complied with the formalities of the statute of wills.
a sense it was, but the fundamental meaning of the will from the outset was that the residue should go to those who were trust beneficiaries at testator's death.\textsuperscript{102} To illustrate the point, if a bequest is made to "the person who is my housekeeper at my death," we would not regard the will as making a bequest to the present housekeeper which was revoked when the testator changed housekeepers.

II

From this review of the decisions it should be clear that there are areas of uncertainty where certainty is desirable and that the solutions emerging are not satisfactory. One of the undesirable consequences of the present state of the law is that a slight measure of doubt is cast on the validity of some bequests to community foundations which use the trust device to administer for charitable purposes funds given by members of the community.\textsuperscript{103} Some states have enacted statutes to eliminate this doubt,\textsuperscript{104} but the need is demonstrated for legislation of broader scope. The following section is suggested for enactment as a part of a state's statute of wills:

"A devise or bequest in a duly executed will shall not be invalid for lack of compliance with sections \textemdash \textemdash [the sections pertaining to

\textsuperscript{102}This may appear inconsistent with the position taken earlier that, in the event the later amendment is held ineffective, it is preferable to adopt the Koeninger solution and sustain the bequest on the original trust terms; inconsistent because the assumption is made that there was a bequest on the original terms of the trust. I think there is no inconsistency. It is only necessary to recognize that under the independent significance theory the will may have more than one meaning. Thus, if the issue were whether the will revoked an earlier will because of inconsistent provisions, the question undoubtedly would be determined by reference to the terms of the trust when the will was executed.

\textsuperscript{103}Linney v. Cleveland Tr. Co., 30 Ohio App. 345, 165 N.E. 101 (1928) sustained a bequest to a trust company for the purposes set forth in a resolution of the trust company providing for a community charitable trust known as the Cleveland Foundation. [The Cleveland Foundation was the first of the community charitable trusts. 2 BOGERT, TRUSTS AND TRUSTEES §330 (1935); 3 PRENTICE-HALL TRUST SERVICE §9103]. I do not suggest that a court should or is likely to invalidate such a bequest in any circumstances, even if it accepts the Atwood decision. If the bequest is to the trustee on the terms set forth in the instrument creating the community trust, it should be effective either as an incorporation by reference or on the independent significance theory. If the testator limits the bequest to particular charitable purposes, the instrument governing the actions of the trustee and the Foundation committee provides for a departure from the limitations by action of the committee under standards much like those established by the courts for the exercise of the cy pres power. 3 PRENTICE-HALL TRUST SERVICE §9131; see also the form in 6 BOGERT, TRUSTS AND TRUSTEES §1144. This has some of the appearance of a bequest on the terms of a trust which is amendable by others than the donor, but it is apparent that the power to depart from the testator's directions has no significance until the will takes effect at death.

the formalities of execution of a will] where it is made in form or in substance to the trustee of a trust established in writing during the testator's lifetime; nor shall it be invalid because the trust may be amended or revoked or both by the settlor or any other person or persons; nor because the trust was amended after execution of the will. The devise or bequest may operate to dispose of property on the terms of the trust as they appear in writing at the testator's death, except, that any writing prepared after execution of the will which would have the sole effect of disposing of property at death shall be disregarded."

Some explanation is due as to the meaning of the proposal.

1. A bequest will not be invalid because the trust is subject to amendment or revocation or both.

2. In general later amendments may be given effect. However, where the only purpose of the amendment is to dispose of estate owned at death it will not be effective. This goes beyond the limits heretofore proposed in this paper as to the propriety of recognizing later amendments under existing statutes. If the only amendment contained in the amending instrument in the *Koeninger* case had related to the land owned at death, it would not be recognized under the proposed statute. It would, however, be recognized in the form that it took in the *Koeninger* case, being coupled with an amendment of the inter vivos trust. It is debatable whether this step should be taken, but on the whole it seems proper. The typical amendment probably is of the sort appearing in the *Janowitz* case, operating inseparably on both the trust corpus and the estate owned at death. The type of amendment used in the *Koeninger* case, with either the entire amendment or a separable part operating only on estate owned at death, presents a relatively minor problem; and if the instrument has some independent meaning there is no great danger in giving it complete effect.

Where the amendment relates only to estate owned at death it is to be disregarded but the principal disposition will be effective. This does not adopt the approach discussed in connection with the *Koeninger* and *Janowitz* cases, of attempting to determine in the individual case whether testator's intent will be more nearly approximated by complete invalidation or by upholding the bequest but ignoring the amendment. That would be a useful approach if no later amendments are to be recognized, but there is little need for it with the extensive recognition given later amendments under the proposed statute.

3. No position is taken on whether the will should be construed as disposing of the property in accordance with later amendments. The
question has not been a source of difficulty in the cases, and as a part of a larger problem of interpretation of wills it seems advisable to leave it open for judicial decision. Nor is any position taken on the effect of an entire revocation of the trust. The problem is inherently difficult but apparently arises infrequently. Where the decedent has taken such drastic action surely he will usually take care of the testamentary aspects of the matter by changing his will.

4. The proposed statute applies only where there is a valid trust during testator's lifetime. It would not apply, for example, if the testator executed an instrument naming a trustee and fully describing the terms of a trust but placed no property in the trust during his lifetime. However, the proposal does not displace common law or statutory rules of incorporation and the bequest would still be effective if those rules were satisfied.

No attempt is made to place a minimum on the amount of property which must be placed in the trust during lifetime, either absolutely or in relation to the total amount of the settlor's estate. This will make it possible for a man to create a trust with a relatively small corpus, leave property by will to the trustee, and then in effect change the terms of the will by amendment of the trust. Occasional decisions indicate that such a device has been attempted. No case known to the writer has passed on the point but it has been suggested that the device would be ineffective because the trust would lack substantial independent significance.

It does not seem advisable to prescribe a specific minimum, and the use of general language such as a requirement that the trust be "substantial" would invite litigation and thereby defeat one of the objectives of the proposal. In addition, too much emphasis has been placed in the field of wills on the technique of looking beyond the form to the substance of the transaction to defeat an attempted disposition of property. Courts have been too much concerned with attempts to "evoke"

105 Fifth-Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 70 N.E. (2d) 920 (1946).
106 I Scott, Trusts 300 (1939).
107 This appears in the occasional holdings that an inter vivos trust is invalid because it is in substance testamentary. McEvoy v. Boston Five Cents Sav. Bank, 201 Mass. 50, 87 N.E. 465 (1909); Warsco v. Oshkosh Sav. & Tr. Co., 183 Wis. 156, 196 N.W. 829 (1924). There has been a clear trend away from this view. The McEvoy case was expressly overruled in Nat. Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E. (2d) 113 (1944) and the rule of the Warsco case was changed by statute in Wisconsin (Wis. Stat., 1949, §231.205). Recent decisions indicating the trend are Rose v. Union Guardian Tr. Co., 300 Mich. 73, 1 N.W. (2d) 458 (1942); Whalen v. Swircin, 141 Neb. 650, 4 N.W. (2d) 737 (1942); Central Tr. Co. v. Watt, 139 Ohio 50, 38 N.E. (2d) 105 (1941).
the statute of wills. The approach is valid in connection with many statutes, but its use in wills cases, to defeat a disposition because it is "in substance" testamentary, loses sight of the fact that what the decedent is attempting to "evade" is a statute designed for his own protection. The present proposal, therefore, makes it possible for the decedent, if he chooses, to make dispositions by trust amendments which in substance are testamentary without complying with the formalities of existing wills statutes. The situation calls for legislation and the legislative question is whether the less exacting requirement of a written amendment of the trust is sufficient in the circumstances to guard against the dangers which the present wills statutes are aimed at. It should be found that the requirement does suffice. Written amendments of an inter vivos trust have become a regularized form of conduct and the danger that they will not express the definitive and freely formed wishes of the decedent is minimal.

5. The proposal is not limited to trusts established by the testator during his lifetime. It applies to trusts established by others, including community trusts. No attempt is made to cover bequests pursuant to the terms of the will of another, although the statute would apply if the bequest operated as a disposition to a trust created under the will of another person who predeceased the testator. The authority of the Fowles case is great enough to make unnecessary any general legislative provision on the matter.

108 "To sustain this will would be to perpetuate a fraud upon the next of kin, evade the Statute of Wills and defeat the policy of the state." Reynolds v. Reynolds, 224 N.Y. 429 at 433, 121 N.E. 61 (1918). The court refused to decree a constructive trust in favor of the intended beneficiaries where a legacy was given in trust without naming the beneficiaries in the will. The problem is discussed in note 24.