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Constitutional Law - Marriages - Laws Prohibiting Racial Intermarriage

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CASE NOTES

CONSTITUTIONAL LAW — MARRIAGES — LAWS PROHIBITING RACIAL INTERMARRIAGE. Mandamus proceedings were brought by a White female and Negro male in the California Supreme Court to compel issuance of registry certificate and marriage license by county clerk. Said county clerk invoked Sec. 69 of the Cal. Civ. Code which specifies ". . . no license may be issued authorizing the marriage of a white person with a Negro," etc. The code further expressly declares such miscegenous marriages to be illegal and void. Cal. Civ. Code, Sec. 60 (Deering 1941). The court in a four to three decision, two of the majority strongly concurring, *held* that the writ should issue and that Secs. 60 and 69 of the Cal. Civ. Code are unconstitutional, for in "restricting the individual's right to marry on the basis of race alone, they violate the equal protection of the laws clause of the United States Constitution." In addition the majority found the statutes too vague and indefinite in their failure to define the term Negro. *Perez et al. v. Lippold*, 198 P. 2d 17 (Cal. 1948). Rehearing denied Oct. 28, 1948.

The prohibition of Negro-White intermarriage is statutory, no such prohibition existing at Common Law. *Hart v. Hoss*, 26 La. Ann. 90 (1874); MADDEN, DOMESTIC RELATIONS 38 (1931); 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS 24 (6th ed. 1921); 32 Cal. L. Rev. 269 (1944). However, today the majority of states have statutes forbidding Negro-White marriages. Ala. Code, tit. 14, Secs. 360-361 (1940), Ala. Const. Sec. 102; Ariz. Code Ann., c. 63, sec. 107 (1939), amended Sess. Laws, c. 12 (1942); Ark. Stat., tit. 55, secs. 104-105 (1947); Colo. Stat. Ann., c. 107, secs. 2, 3 (1935); Del. Rev. Code, c. 85, sec. 1 (1935); Fla. Ann. Stat. secs. 741.11 - .12 (1944), Fla. Const. Art. XVI, sec. 24; Ga. Code Ann. secs. 53-106, 53-9902-03 (1937); Idaho Code sec. 32-206 (1947); Ind. Stat. Ann. sec. 44-104 (1933); Ky Rev. Stat. sec. 402.020 (1946); La. Civ. Code art. 94 (1945); Myd. Code Ann., art. 27, sec. 445 (1939); Miss. Code Ann. sec. 459 (1942), Miss. Const. sec. 5700 Mo. Rev. Stat. secs. 3361, 4651 (1942); Mont. Rev. Code Ann. sec. 5700 (1945); Neb. Rev. Stat. sec. 42-103 (1943); Nev. Comp. Laws secs. 10197-98 (1929); N. Car. Gen. Stat. sec. 51-3 (1943), N. Car. Const. Art. XIV, sec. 8; N. D. Rev. Code sec. 14-0304 (1943); Okl. Stat. tit. 43 (1941); Ore. Comp. Laws sec. 63-102 (1940); S. Car. Code sec. 8571 (1942), S. Car. Const. Art. III, sec. 33; S. D. Code sec. 14.0106, subd (1939); Tenn. Code sec. 8409 (1938), Tenn. Const. Art. XI, sec. 14; Tex. Stat. art. 4607 (1949); Utah Code secs. 40, 41, 42 (5, 6) (1943); Va. Code Ann. sec. 5087 (1942); W. Va. Code Ann. sec. 4701 (1943); Wyo. Comp. Stat. Ann. sec. 50-108 (1945).

Much respectable authority, in accord with the principal case, maintains that these laws are without scientific basis, KROEBER, ANTHROPOLOGY 205 (1948); REUTER, THE AMERICAN RACE PROBLEM 95 (1927); 58 Yale L. J. 472 (1949); 36 Yale L. J. 858 (1927); 22 Cal. L. Rev. 116 (1934), but instead are the result of prejudice and the desire to maintain White socio-economic superiority. 1 VERNIER, AMERICAN FAMILY LAWS, sec. 44 (1931). Despite these criticisms, prior reported decisions have uniformly held that these restraining statutes are valid regulations enacted by

the state within its power to prescribe who may marry. *Stevens v. United States*, 146 F. 2d 120 (C. C. A. 10th 1944); *Ex parte Francois*, 9 Fed Cas. 699, No. 5,047 (C. C. W. D. Tex. 1879); *In re Hobbs*, 12 Fed. Cas. 262, No. 6,550 (C.C.N.D. Ga. 1871); MADDEN, DOMESTIC RELATIONS 5 (1931); 32 Calif. L. Rev. 269 (1944). The instant case illustrates a change in the law, for prior decisions have also uniformly held that these statutes do not deny equal protection of the laws as guaranteed by the Fourteenth Amendment. *State v. Tutty*, 41 F. 753, 7 L. R. A. 50 (C. C. S. D. Ga. 1890); *Ex parte Kinney*, 14 Fed. Cas. 602, No. 7, 825, 3 Hughes 9 (C. C. E. D. Va. 1879); *In re Hobbs*, 12 Fed. Cas. 262, No. 6, 550 (C. C. N. D. Ga. (1871); RODGERS, DOMESTIC RELATIONS 49 (1899). The basis for these prior holdings is that both racial groups are equally prohibited from intermarrying and thereby receive equal treatment of the laws. *Pace v. Ala.*, 10 U. S. 583 (1882); *State v. Hairston*, 63 N. C. 439 (1869); *State* v. Jackson, 80 Mo. 175, 50 Am. Rep. 499 (1883); 20 So. Cal. L. Rev. 80 (1946). However, these decisions have overlooked the fact brought out in the principal case that the right to marry is individual, that marriage is one of the basic civil rights of man," *Skinner v. Okla.*, 316 U.S. 535 (1936); 6 UNITED NATIONS GENERAL ASSEMBLY BULLETIN 6, Art. 16 (1949), and that the Fourteenth Amendment was especially designed to protect individual rights. *McCabe v. Atchison Topeka & Santa Fe*, 235 U. S. 151 (1914); *State of Mo. ex rel. Gaines v. Canada, Reg. of Mo. Univ.*, 305 U. S. 337 (1938). The impairment of individual rights on the basis or race alone has been expressly declared to constitute a denial of equal protection of the laws, *Hurabyashi v. United States*, 320 U. S. 81 (1943); *Hill v. Texas*, 316 U. S. 400 (1942); *Yu Cong Eng. v. Trinidad*, 271 U. S. 500 (1926); *McCabe v. Atchison Topeka & Santa Fe*, 235 U. S. 151 (1914); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), and to be "odious to a free people." *Hurabyashi v. United States*, 320 U. S. 81 (1943). Aside from the technical question of equal protection of the laws, the critics of anti-miscegenation laws add to their potent argument by pointing out that historically the Fourteenth Amendment "was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," *Railway Mail Assn. v. Corsi*, 326 U. S. 88 (1945), and to place the colored race in respect to civil rights upon a level with the White race. *Ex parte Virginia*, 100 U. S. 313 (1879). The framers of the Fourteenth Amendment were primarily concerned, as stated by Chief Justice Vinson in a recent opinion, with the "establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part af the states based on considerations of race or color." *Shelley v. Kraemer*, 334 U. S. 1 (1947); *Strauder v. W. Va.*, 100 U. S. 303 (1880); See also the *Slaughter-house Cases*, 16 Wall. 36 (1880).

North Dakota has substantially the same statutory prohibition as California, N. D. Rev. Code (1943) Sec. 14-0304, except that the term Negro is defined in Sec. 14-0305. North Dakota, with Negroes comprising only .03% of its total population, Vol. II, part 3, 16th Census of the United States (1940) page 426, has no reported case on miscegenation,

but the influence of the instant case casts doubt on the constitutionality of all anti-miscegenation laws.

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SECOND YEAR LAW STUDENT.

CONSTITUTIONAL LAW — SEPARATION OF CHURCH AND STATE — FIRST AMENDMENT TO THE FEDERAL CONSTITUTION — RELIGIOUS CLASSES IN PUBLIC SCHOOLS. A program was instituted by the local school board of Champaigne, Illinois, whereby pupils compelled by the state compulsory educational system to attend school for secular education, were released temporarily from secular study on condition that they attend religious classes conducted in the public school classrooms by religious teachers from the various denominations. Petitioner, self-acclaimed atheist, applied to the Circuit Court of Champaigne County for a Writ of Mandamus to compel the Board of Education to enforce regulations prohibiting all instruction in and teaching of religious education in all public schools and buildings under its jurisdiction. The petition was denied and on appeal to the Supreme Court of Illinois, it was *held*, that the judgment dismissing the petition be affirmed. This ruling was upheld under the State Constitution which provided, "nor shall any preference be given by law to any religious denomination or mode of worship," *Art. II, Sec. 3*, the Court considering that a reasonable interpretation of the Federal and State Constitutions would not render voluntary religious classes unconstitutional, the Court directing attention to the fact that the classes were voluntary by consent of the children's parents, conducted without expense to the school board, and did not interfere with regular education. On appeal to the Supreme Court of the United States, it was *held*, that the decision be reversed, on the ground that the system involved a utilization of tax-established and tax-supported public school system to aid religious groups to spread their religious faith, thus violating the establishment of religion clause of the First Amendment made applicable to the states by the Fourteenth Amendment. *People ex. rel. McCollum v. Board of Education of School District No. 71*, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

This decision casts a shadow on the legality of the secular-religious systems that are integrated into many school programs in the United States. The decision is based almost entirely on the principle set forth in the free-bus transportation for parochial school children case, *Everson v. Board of Education of the Township of Ewing*, 330 U. S. 1, 67 S. Ct. 504 91 L. E. 711 (1947) where it was held, that free-bus transportation provided for by law in New Jersey for parochial school children was constitutional and did not violate the 14th Amendment, being a furtherance of public purpose, the court dividing in a 5-4 decision. Here the foundation for the *McCollum Case* was laid. Mr. Justice Black stated, "Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." The *McCollum Case* is the latest Supreme Court interpretation of the First Amendment which states, "Congress shall make no law

respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court delved deeply into the historical background surrounding the adoption of this Amendment, depending much on the "wall of separation" theory advocated by Thomas Jefferson, and practically turning a mere figure of speech into a rule of law. The dissent in the *McCollum Case* noted that Jefferson himself did not exclude religious education from the University of Virginia, an institution that he founded. *12 Corpus Juris 941*, note 46; *The Writings of Thomas Jefferson*, Memorial Edition, 449, (1904). James Madison primarily proposed the First Amendment as it now stands, *Reynolds v. U. S.*, 98 U. S. 145, 63 S. Ct. 893, 25 L. Ed. 244 (1878).

The Supreme Court has applied the First Amendment to the states through the Fourteenth Amendment. *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943). Mr. Justice Roberts has recently stated, "The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U. S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 987 (1940). The Amendment has been explained as meaning that nothing inimical to religion is intended. *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (1892). It has also been held that no parent has the right to demand that the interests of the children should be sacrificed for the interest of his child. *Trustees of Schools v. People ex. rel. Allen*, 87 Ill. 303 (1887). A Supreme Court case held that it was unconstitutional for a state to force children by law to accept public school instruction only. *Pierce v. Society of Sisters*, 268 U. S. 510, 45 S. Ct. 571, 9 L. Ed. 1070 (1925). Throughout the history of the nation this issue has been presented again and again to the Supreme Court for its answer as to the true meaning of establishment of religion. This new viewpoint of the court in the *McCollum Case* opens the path for much litigation on the "released time" programs existing in America.

One commentator questions the power of the Supreme Court on this subject and queries as to whether or not the Supreme Court has usurped the power of the state courts in the interpretation of state laws regarding the establishment of religion. Owen, *The McCollum Case*, 22 Temple Law Quarterly 159 (1948). In *Brunswick-Balke-Collander Co. v. Evans*, 228 Fed. 991 (1916) the court referred to this issue as a matter to be left exclusively to the state constitution and laws enacted in pursuance thereof. This was the holding of the Supreme Court before passage of the Fourteenth Amendment. *Permoli v. New Orleans*, 44 U.S. 589, 11 L. Ed. 739 (1845). In New York and Illinois it has been held that pupils attending public schools may be excused for the purpose of attending religious education classes in their own churches, no use of public school classrooms being made. *People ex. rel. Lewis v. Graves*, 245 N.Y. 195, 156 N.E. 663 (1927); *People ex. rel. Latimer et. al. v. Board of Education of City of Chicago*, 394 Ill. 228, 68 N.E. 2d. 305 (1946). The "child benefit" theory of filling a public need and serving a public purpose where "incidental benefit to the private institution is immaterial, the prime benefactors being the children" *Board of Education of Baltimore County v. Wheat*, 174 Md. 314, 199 A. 628 (1948), was applied to upholding free bus transportation of pupils other than those attend-

ing public schools, following *Nichols v. Henry*, 301 Ky. 655, 191 S. W. 2d 930 (1945) and *Adams v. St. Mary's County*, 26 A. 2d 377 (Md. 1942). This theory has been applied in bringing the supplying of free textbooks to pupils enrolled in private schools within constitutional limits, *Borden et. al. v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929) and on appeal to the Supreme Court of the United States it was held that the judgment be affirmed. *Cochrane et. al. v. Louisiana State Board of Education*, 281 U. S. 374, 5. S. Ct. 335, 74 L. Ed. 913 (1930). For a discussion that this type of aid is merely assistance to the children in their compliance with the compulsory laws of their states, see *16 N. Y. L. Quarterly Review* 142 (1938-39) and *22 Notre Dame Lawyer* 192 (1946-47). This doctrine of benefit to the child was recognized in *Chance v. Mississippi State Textbook R. and P. Board*, 190 Miss. 453, 200 So. 706 (1940) where the textbooks were regarded as a "loan" to the children and remained the state's property and could therefore be used by pupils in private as well as secular schools. However, the rule will not be applied to tuition fees, *People v. Board of Education*, 13 Barb. 400, N. Y. (1851); *Otken v. Lankin*, 56 Miss. 758 (1879). In *Quick Bear v. Leupp*, 210 U. S. 50, 28 S. Ct. 690, 52 L. Ed. 954 (1909), the Supreme Court of the United States allowed money appropriated by Congress for the use of Indians to be used in support of Indian denominational schools, where a contract between the Indian Commissioner and the schools existed. Contra to the above doctrine is *Smith v. Donahue*, 195 N. Y. S. 715, 202 App. Div. 656 (1922) where it was held that a parochial school might not receive the benefit of use of public textbooks, and in *Judd v. Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576 (1938) free bus transportation was held unconstitutional, but later the New York State Constitution was changed so as to permit free bus transportation for all school children. Nuns employed as teachers in the public schools of North Dakota, were upheld in their constitutional right to give a portion of their earnings to the religious group that they represent and to wear distinctive religious garb in *Gerhardt v. Heid*, 66 N. D. 444, 267 N. W. 127, (1936). However in 1948, an initiated measure was approved by the electorate banning religious dress in North Dakota schools. And in the latest case to come before the state courts on the issue of released time, the New York plan for release of public school pupils from regular attendance for the purpose of religious instruction, has successfully met its first test of unconstitutionality in *Lewis v. Spaulding*, 85 N. Y. S. 2d 682, (1949).

So it now appears that even though the State and Federal Supreme Courts look at the question from a different viewpoint, the Supreme Court is now well on the road to maintaining the wall of separation "high and impregnable," as set forth by Justice Black. It would seem that the Supreme Court will now be faced with an increased amount of litigation involving its new construction of the "establishment" clause of the First Amendment and the position in which it places the state courts in interpreting their respective constitutions.

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CRIMINAL LAW — EVIDENCE — COMPULSORY UTTERANCE FOR PURPOSE OF VOICE IDENTIFICATION AS VIOLATING THE PRIVILEGE AGAINST SELF-INCRIMINATION. — The accused, a negro, while in a police lineup with other negroes was compelled to repeat certain words which the prosecutrix had previously stated were used by the person who assaulted her. The defendant was convicted. On appeal it was *held* that the conviction be reversed and a new trial granted. The supreme court of South Carolina concluded that the testimony as to identity of the accused based on the forced repetition, prior to trial, by accused of words alleged to have been used at the scene of the crime was inadmissible as violating the constitutional privilege against self-incrimination. *State v. Taylor*, 49 S. E. 2d 289 (S. C. 1948).

The privilege against self-incrimination is embodied in the constitutions of all but two states, Iowa and New Jersey. In these two it is part of the common law. Section 13 of the North Dakota Constitution provides that, "No person shall be . . . compelled in any criminal case to be a witness against himself." N. D. Rev. Code (1943), Sec. 31-0109 provides that, "No person shall be compelled to be a witness against himself in a criminal action." The provisions against self-incrimination are generally considered to be a limitation upon testimonial compulsion directed against the defendant as a witness, that is, compelling the defendant himself to say or do something which has a tendency to incriminate him. The essence of the privilege is freedom from testimonial compulsion. The courts have recognized and made a distinction between self-incrimination, *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 82, 35 A. L. R. 1227 (1924) and compulsory submission to treatment which furnishes evidence for the purpose of the identification of an accused. *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323 (1890). Wigmore states, "An inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege because it does not call upon the accused as a witness, i. e. upon his testimonial responsibilities. That he may, in such cases, be required to exercise muscular action . . . is immaterial — unless all bodily action were synonymous with testimonial utterance; for not compulsion alone is the component idea of the privilege but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body but his body itself . . . Now in the case of a person's body, its marks and traits, itself is the main evidence; . . ." 8 WIGMORE ON EVIDENCE, 3rd Edition, Page 375. Wigmore also says that requiring a defendant ". . . to speak words for identification of his voice is no more than requiring a revelation of a physical mark." 4 WIGMORE ON EVIDENCE, 2nd Edition, Section 2265, Page 878. It would appear, from this latter statement added to the preceding one, that no problem would arise, at least on the face of it, in an issue such as the one before us. Mere compulsion would not of itself bring one within the privilege, because to invoke the privilege one must show testimonial compulsion and as the compulsory revelation of a physical mark is not testimonial compulsion, *Holt v. U. S.*, 218 U. S. 245,252 (1910), it would follow that compulsory statements made for purpose of voice identification would be proper. It is obvious that had the witness identified the voice of the accused from overhearing spontaneous conversation no question of testimonial compulsion would be presented and the court re-

fused to pass on the question whether the privilege would have been violated had the accused merely been required to "talk" without specifying the "words." Some courts have found the privilege violated based upon the non-existence of the evidence prior to the compelled acts of the accused. In *Beltran v. Sampson*, 53 Ph. Is. 571, an attempt was made to analogize the compulsory submission to bodily examination with the compelling of the accused to submit a sample of his handwriting. The court there said: "In reality she (the appellant who was forced to submit to bodily examination) was not compelled to execute any positive acts, much less a testimonial act; . . . all of which is very different from what is required of the petitioner in the present case where it is sought to compel him to perform a positive testimonial act; to write and give a specimen of his handwriting for the purpose of comparison. Besides, in the case of *Villaflor v. Summers*, 41 Phil. Is. 62, it was sought to exhibit something already in existence (bodily examination), while in the case at bar the question deals with something not yet in existence, and it is precisely sought to compel the petitioner to make, prepare, or produce by his means, evidence not yet in existence; in short, to create evidence which may seriously incriminate him." In *Beachum v. State*, 144 Tex. Crim. Report 272, 162 S. W. 2d 706, 809 (1942), noted in 21 Tex. L. R. 816, forced re-enactment of the crime by way of compulsory utterances was held violative of the privilege. Some courts have held evidence obtained by compulsion inadmissible on the erroneous theory of an involuntary confession. In *State v. Watson*, 49 A. 2d 174 (Vt. 1946), officers took the accused's finger prints without his consent. The defendant's counsel succeeded in persuading the court that the compulsory taking of a person's finger prints was analogous to and should be governed by the rules relating to confessions. This made it necessary for the court to find that the "confession" (i. e., the finger prints) was given voluntarily. A similar result was reached in *Beachum v. State*, *supra*, where the accused was compelled to repeat words which the perpetrator of a holdup used in commission of the crime. The court held that this compulsion was not only repugnant to the constitutional privilege against self-incrimination but also violated Article 727 of the Texas Criminal Code of Criminal Procedure, which provides: "A confession of an accused shall not be used against him if obtained while in jail or in custody unless in writing and after proper warning."

The original purpose of the protection from testimonial compulsion was "... to force prosecuting officers to go out and search to obtain all the available extrinsic evidence of an affense without relying upon the accused's admissions." However, decisions such as the principal case seem to extend the privilege of self-incrimination beyond the original purpose, thus excluding evidence that the witness was compelled to furnish, in or out of court, which tends to reveal his criminal connection with the offense where it is an integral part of the proof of guilt. *Dunagan v. State*, 102 Tex. Crim. App. 404, 278 S. W. 432 (1925); *Douglas v. State*, 99 Tex. Crim. App. 413, 269 S. W. 1041 (1925).

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WILLS — CONSTRUCTION — IMPLIED DISPOSITION — INCORPORATION OF EXTRINSIC DOCUMENTS BY REFERENCE — CONSTRUCTIVE DELIVERY OF TESTAMENTARY DEEDS. — Decedent drew a holographic will which was admitted to probate and which read in part: "For land described here in being . . . (description) . . . of Grant County, N Dak. I have prepared a Deed to my nephew one Carl Glavkee of . . . Said Deed I wish my executrix to hand to Carl Glavkee after I am death." The deed, properly executed several months previous to the execution of the will, was retained by the decedent and kept with the will where it was found at his death. The County Court ordered that the deed be probated as a part of the will. On appeal to the District Court, the decree of distribution was affirmed on the theory of incorporation of the deed by reference. On appeal to the Supreme Court it was *held*, that the judgment be affirmed. The latter court based its affirmance of the decree of distribution upon the theory of a gift by implication, not upon the theory of incorporation of the deed. *In re Glavkee's Estate*, 34 N. W. 2d 300 (N. D. 1948).

Some courts have found a delivery of deeds which were retained by the grantor or placed in escrow to be effective on his death, saying that the grantor has the fee subject to a limitation taking effect at his death. *Stone v. Duvall*, 77 Ill. 475 (1875). Other Courts say that the title passes immediately with enjoyment postponed. *Smith v. Smith*, 173 Col. 725, 161 P. 495 (1916). Since physical transfer of possession of the deed is not necessary to delivery but is merely evidence of intent to deliver under some views, such a conclusion as that drawn by these courts is entirely sound. 4 TIFFANY, REAL PROPERTY (3rd Ed. 1939) Sec. 1046, 1033, 1034; N. D. Rev. Code (1943) sec. 47-0909. The theory is supported in the case of *Payne v. Payne*, 128 Va. 33, 104 S. E. 712 (1920), where the court said that the testator's statement in the will that he had deeded property to a person indicated was cogent evidence of delivery. *Contra: Lange v. Cullinan*, 205 Ill. 365, 68 N. E. 934 (1903); *Allenback v. Ridenour*, 51 Nev. 437, 279 P. 32 (1929). But most cases support the view that the deed must pass beyond the control of the grantor before there is effective delivery. *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347 (1909); *Hayes v. Moffat*, 83 Mont. 214, 271 P. 433 (1928); *Orris v. Whipple*, 224 Ia. 1157, 280 N. W. 617 (1938). Yet, another case was found which stated that the possession of the deed by the grantor at his death merely negatived delivery and permitted the grantee to show actual or constructive delivery if possible. *Plowden v. Plowden*, 52 Ga. App. 741, 184 S. E. 343 (1935).

Courts generally have not given effect to erroneous recitals as to the legal effect of collateral instruments in wills either by way of incorporation by reference or by the method of an implied gift as was done in the instant case. Aside from the problem of incorporation of printed deeds into holographic wills, the incorporation of undelivered deeds has been denied to guard against fraud and to prevent giving dispositive effect to some document which the testator did not intend to govern disposition of his estate, unless such a document meets the three essentials of incorporation set out in the case of *Newton v. Seaman's Friend Society*, 130 Mass. 91, 39 Am. Rep. 433 (1881), and followed by *Bottrell v. Spengler*, 343 Ill. 476, 175 N. E. 781 (1931). They are, (1) that the will identify the document, (2) that the document be in exist-

ence at the time the will is drawn, and, (3) that the testator intend the document to be given effect as part of the will. However, in an effort to prevent intestacy as to part of an estate, the Supreme Court of Nebraska recently permitted incorporation of a deed which had never been delivered though the will expressly stated that the contestant was not included in the will because the testator had previously conveyed land to her by deed. *In re Dimmitt's Estate*, 141 Neb. 413, 3 N. W. 2d 752 (1942). This result was highly approved by Professor Homer Carey who asked "What does it matter that he has evidenced this intention by reference to the act of having "deeded" the property rather than to the deed itself. Does this departure in form from the rules of incorporation strike at the safeguards?" Carey, *Effect of Erroneous Recital in Will of Conveyance*, 37 Ill. L. R. 426 (1943); *see* also *In re Hogue's Will*, 135 Pa. Super. 543, 6 A. 2d 108 (1939). *Contra: Witham v. Witham*, 156 Ore. 59, 66 P. 2d. 281, 110 A. L. R. 253 (1937); *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645 (1905); *Brooker v. Brooker*, 130 Tex. 27, 106 S. W. 2d 247 (1937). *But see: In re Watt's Estate*, 117 Mont. 505, 160 P. 2d 492 (1945) which criticises the *Dimmitt Case* saying that the Nebraska Court used a non-testamentary writing to effect an intent contradicted by the will itself.

The refusal to give effect to an erroneous recital of a previous conveyance in a will by construing it as an implied gift is likewise based on the theory that if the testator attempted to dispose of his property by non-testamentary means, he cannot have intended that such property pass under the will and that therefore the property should be distributed according to the dictates of statute. *Brooker v. Brooker, supra.* An instrument not complying with the requirements for testamentary documents, and not incorporated by reference into the will, should not be imported into and considered as part of the will. *In re Rath's Estate*, 10 Cal. 2d. 399, 75 P. 2d. 509, 115 A. L. R. 836 (1938). Where a testator erroneously recites that he has previously disposed of property or directs delivery of a deed, such a recital is merely an incorrect description of the effect of an instrument extrinsic to the will and may not operate as a gift by implication. *Noble v. Tipton, supra; Witham v. Witham, supra; Hunt ex rel Streator v. Evans*, 134 Ill. 496, 25 N. E. 579 (1890). *But see: In re Dimmitt's Estate, supra; In re Hogue's Will, supra; Arrington v. Browne*, 235 Ala. 196, 178 So. 218 (1938). Surrounding circumstances cannot be resorted to for the purpose of importing into the will, any intention which is not there expressed. *Bingel v. Volz*, 142, 31 N. E. 13, 16, L. R. A. 321 (1892); *Calloway v. Calloway*, 171 Ky. 366, 188 S. W. 410 L. R. A. 1917A 1210 (1916). *But see: Jennings v. Reeson*, 200 Mich. 559, 166 N. W. 931 (1918). The instant case is one of the first impression in the jurisdiction. It reaches a result which gives effect to the testator's undoubted purpose and yet allows the safeguards attached to the making of wills to be maintained.

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