The Origin and Application of the Doctrine of Precatory Trusts

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The Origin and Application of the Doctrine of
Precatory Trusts.

by

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1890.
Prominent among the varied fields of juridical science, in all systems of jurisprudence, stands the law relating to Wills and testamentary disposition. If comparisons were apt, if the lines of demarkation between the numberless branches of the law were easily traceable, the critical scrutineer would hardly experience surprise on learning that the law of Wills has extended its sphere beyond the scope of any other branch of legal science.

Unlike much of the common law, it grew up from the civil state and does not owe its inception to positive law. Its precise origin is lost in the mazes of antiquity. Tradition, however, reveals to us as the outgrowth of advancing civilization and municipal uprising. The growth of wisdom, the development of science and the gradual recognition of those principles which secure to men their inherent rights, had to do with the origin and growth of this division of the law. Thus from the hidden mysteries of distant ages evolved, like many philosophic innovations, this important factor in the
great mass of the law.

Law in its incipiency was an abstruse science. From the tiny germ grew the sturdy trunk, spread its branches over new territory and dropping there its seeds of progress to germ again and overlap new dominions. Guided by the light of modern reason, and fertilized by the metaphysical ingenuity of lawyer and judge, it has attained that degree of perfection which the state of human society demands.

A Will has been defined to be the legal declaration of a man's intentions of what he wills to be performed after his death. But a will, in its legal signification, usually has reference to a disposition of property to take effect after death.

Whence does a man acquire this right of empire, reaching beyond his mortal life, and over property which is no longer his? Again we are referred to the faded lines of tradition. Its pages tell us that Wills in the days of the patriarchs, were known among the Hebrews and are evidenced by the writings of sacred Scripture. Solon first introduced them into Athens; Sir Wm. Blackstone has written that they were unknown in Rome
before the laws of the 12 tables, but eminent authorities question the correctness of this statement, and it is believed to be erroneous. In England Wills were coeval with the first rudiments of law.

Wills, then, concern the disposition of property after the death of the testator. While, as shown, the laws governing them are the product of the civil state, they have a remote origin in that human instinct which loves the acquisition and control of property; a sentiment which, "when kept within the sphere of moderation, is the basis of social progress, but in morbid excesses, marks the progress of declension and the increase of crime."

Property and possession, in the primitive state, were confounded in one. Possession was inseparable from property and was the true test of ownership. No one could assert a better title than the one in possession. Possession was therefore equivalent to absolute ownership. The first to occupy became the rightful owner until he abandoned his possession, when in turn the next to occupy succeeded him as owner. But slowly this right of possession grew to be a substantive right—a property
in the thing— which could be transferred by the will of
the owner. Lord Chief Dawn Gilbert says the change
was produced by the necessity of the time; that the pro-
ducts of one climate became necessary in others which
were non-productive thereof and from the custom thus es-
tablished of exchanging, the right to dispose of prop-
erty gained recognition. But before the possession and
property became distinct, it will be seen that transfer
could obtain only before death; and the only analogy
to the present disposition by will was the gift causa
mortis. But then as now, men were held together by a
supernatural power. Those unseverable ties of human
affection which bind all men drew to the death bed of
the dying man his kindred, and naturally to them fell
his property, until in time this custom grew to be a
fixed and recognized rule. Lastly then in order came
the recognized right in the individual to name the object
of his bounty after his decease.

Among the primitive Romans, the familia was a spe-
cies of modern corporation, with the father as the great
head. The notable feature was the preservation of the
family compact, and in case of the approaching death of
the father without lawful heirs, he was allowed to choose, under certain conditions, a person who should succeed him as heir. In this we see the modern Will in a crude state. Devises were common among the Saxons as early as 1000 A.D. and probably were practiced by them long before. The right to make wills was established at a very early day in England, both as to realty and personalty, but vanished, especially as to the former on the incoming of the feudal system. But it was again fully established by the statutes of 32 Henry VIII and Charles II. The precedents thus gradually developed among the great nations of the orient were transplanted to America by the earliest colonial adventurers and incorporated into our national jurisprudence.

Leaving, after this superficial examination, the subject of Wills in general, we come to treat of that narrower division of the subject which concerns trusts created by the use of precatory words. It is an intricate and subtle branch of the law of wills.

The rules of law generally applicable to trusts created by deed are inapplicable here, because arbitrary rules of construction and interpretation are disregarded
in the attempt to arrive at the intention of the testator.

A testator is presumed to use words according to their ordinary meaning; technical rules may, and in some cases are, applied, in constructing the instrument. This is done only when the intention cannot be gathered from the general purport of the instrument. Liberality of meaning is always permissible, and if the object which the testator had in mind plainly appears, technical rules must yield to the intention, if the design of the testator would be defeated by the application of arbitrary rules of construction.

It is by the vigorous application of this cardinal rule of construction that the doctrine of precatory trusts, which we are to consider, has found its way into legal treatises, and become, we contend, essentially an established part of the jurisprudence of England and America.

The word "precatory" comes from the Latin "precor", meaning to supplicate, or beseech. Precatory words are those expressive of desire, wish, command or entreaty. The doctrine had its origin with the first ap-
plication of the rule of interpretation above stated. It may be said to have had a remote origin in the sanctity which is attached to wills by the Courts. The desire of the judiciary to effectuate the intentions of the testator led to the establishment of the rule (Hill on Trustees, 73). The right to make disposition of property, once doubted, had become a fixed rule of law, and of a sacred character. It often happens that a husband and father cherishes unbounded confidence in the devoted wife who for years has been his companion in life. On her, first of all, he wishes to bestow his accumulated property in its fullest enjoyment.

But he has children equally dear to him, and toward whom, by natural impulses, his generosity is directed. How can his desires be effected, doing equal justice to both classes? A limited estate to the wife, with the positive direction that upon her death the estate go to the children, would be contradictory to that true spirit of confidence which should exist between husband and wife. It would wound the sensitive feelings of the true wife on discovering that her years of faithful services had failed to win for her the confidence of her husband.
Her fidelity would be rewarded only by an unjust rebuke. It is this line of cases in which precautary words are held to create a trust, the words being only expressive of a wish, and construed to be imperative, the mode of expression being held to be only expressive of civility.

Again it may happen that children of tender age survive the parent— incompetent to manage their own affairs. It is meet and proper that the husband should pass his property to his wife, with the same civil request that she, upon her death, devise it to her children in obedience to the behest of her deceased husband. Suppose no trust were held to be created in the case just supposed; the misplaced confidence of the unsuspecting husband might be ignored by the ungrateful wife, to the detriment of those upon whom the testator had intended to bestow his property. To repudiate the doctrine under consideration would be to ignore the will of the testator and while his lips are sealed in death, his wishes are being grossly violated, because of his misplaced confidence. To form an intelligent estimate of how often his confidence is abused, we need only refer to the numberless cases in which the doctrine of
precatory trusts has been invoked. In nearly every case it will be found that the express desires of the deceased are being impugned, and an observation of them sought to be enforced.

What is believed to have been the origin of the doctrine of precatory trusts has been circumscribed. The theory seems to be founded on reason, and supported by vague yet apparent allusions of many text writers and jurists. Nevertheless it may be said to depend for support upon sentimentality, rather than logical necessity. But the rule has been ascribed to a different, and what may seem to some, more plausible, source, than the one mentioned, which merits at least a superficial scrutiny in connection with our subject.

In the Matter of Pennock's estate, (20 Pa. State, 268), the doctrine was for the first time sought to be enforced in the Supreme Court of Pennsylvania. The origin, history and application of the doctrine have received a lengthy consideration at the hands of Mr. Justice Lowrie, in which he referring to the use of precatory words in wills, said: "It is unquestionable that such modes of expression were formerly used in the Roman
and English law, in order to create a trust, and it was founded on good reason; but if that reason had passed away before the settlement of this country, then the rule which depended upon it was not imported as a part of the law which we brought from the mother country. That it remains of any force in England after the reason of it has ceased is not surprising, for it a common fate of institutions to outlive the causes which gave rise to them, and thus very often the form survives the principle which it was thus assigned to express."

Continuing, he admits the importation of the rule from the Roman to the English law, but says it had its origin in the constraint of circumstances. He shows argumentatively that the "instituted" Roman heir was compelled by accepting the estate of his ancestor to pay all his debts, and, as a compensation he could disregard the provisions of the will which gave to others; and that under such a state of things, the execution of the testator's wishes being entirely dependent on the will of his heir, words of entreaty were more efficacious and appropriate than words of command. Secondly he reasons that owing to the great complexity of the Roman Will and
the strict observance of the complex form and consequent probability of the will being defeated, a custom arose of 'entreating' the heir, by means of a codicil, to dispose of his property according to his expressed intentions in the will, if the instrument itself failed to operate as such in the hands of the law.

This learned writer alludes to no authority in support of his assertions. We submit that they are unsubstantiated by tradition or the writings of authoritative juridical commentators or historians.

It is true that the Roman heir succeeded to the entire legal position of the intestate or testator, but, says Mr. Morey, "The heir is bound to distribute the property of which he comes into possession according to the legally expressed will of the decedent. In early times this duty was absolute, so that after debts were paid, the remaining property of the estate might be entirely exhausted in legacies, leaving nothing in the hands of the heir to compensate him for assuming and administering the estate."

If the debts exceeded the value of the estate, the heir was nevertheless bound to extinguish them. As early as the Republic laws were passed to correct this
injustice. But prior to this legislation, it was common for heirs to refuse to succeed to the estate of the deceased, because the whole might be exhausted in legacies. To induce heirs to accept, the lex furia and lex voconia were enacted to limit the right of the testator to devise, but owing to looseness of construction, they failed in their purpose, and finally the lex falcidia law was passed, about 40 B. C., which prohibited a testator from devising more than three-fourths of his entire estate after his debts were paid. The remaining one-fourth enured to the heir, called the falcidian portion.

This probably served as a remuneration for the liability which the heir assumed till the time of Justinian, when he granted the inventory, (beneficii inventari) by means of which the liability of the heir was measured by the value of the estate to which he succeeded. Gaius (section 24), says: "In the old times a man might lawfully spend his whole patrimony and gifts of freedom, and leave nothing to the heir except an empty name."

The XII Tables provided: "As the legacies of what is his are, so let the law be." It thus appears that the
requirement that legacies be disposed of according to the terms were not only enforceable, but was expressly required by the All Tables. "The result of this legislation", says Hunter, "was that heirs held back from the inheritance and so many men died intestate."

After admitting the importation of the doctrine of precatory trusts from the Roman to the English law, Mr. Justice Lowrie further incoherently attempts another reason for its recognition there. He says that devises were prohibited during the feudal period, that trusts were resorted to instead, and these not being enforceable, words of entreaty were resorted to. Without attempting to elucidate the historical inaccuracy of this statement, we will only add that the fabric of civilized law in England was woven from shreds left by the Roman occupation. It paved the way for the Saxon invasion, and Roman laws, blended with the rude barbarian usages, comprised the Saxon and early English systems. To quote from a learned writer, "The inheritance of Roman wisdom was transmitted to the fierce barbarians of the west, and as they wrought the materials of the temple and amphitheatre into their own time fort-
resides and dwellings, so did they occasionally incorporate fragments of Roman laws into their own unformed and scanty jurisprudence. This, however, they sometimes did unconsciously, at and at most against their will, but when society improved, men looked on the Roman law with increasing veneration, as the surest basis of civil order. " (Philmore's Int. to Rom. Law, p. 11.)

Justly accounting the writings of these learned authors, we contend that the reasons ascribed for the institution of this doctrine by the Romans never existed among them; that at no time had the heir the right to disregard the terms of a will and take his ancestor's property as a compensation for the liability which he assumed for the payment of debts; but that, on the contrary, he was bound to observe the directions of the will in disposing of the property after debts were paid, even in cases where he was thereby entirely cut off from his right of inheritance.

But whatever may have been the origin of the doctrine, whether traceable to the genius of the stoic philosopher, to the lurid mind of the Romanized Briton or the homogeneous law of the barbarian Saxon, concerns
us but little now. If reasons for sustaining it now exist, it should be retained as a part of our jurisprudence whether they be identical with the original or not.

Perhaps on no doctrine of the English and American law have more widely different views prevailed as to its salutary effects. By some courts and writers fiercely condemned and utterly repudiated or evaded as a part of the law, while by others of equal eminence, it has received laudable commendation.

In discussing this doctrine, Mr. Justice Story says:

The doctrine of construing expressions of recommendation, confidence, hope, wish, and desire into positive and peremptory commands is difficult to be maintained upon a sound principle of interpretation of the actual intentions of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that in using the one and omitting the other, he should have a determined end in view. It will be agreed on all hands that when the intention of the testator is to leave the whole object as
a pure matter of discretion, to the free will and pleasure of the party enjoying his confidence and favor, and when his expressions of desire are entrusted as mere moral suggestions to excite and aid that discretion, but not absolutely to govern and control it, then the language cannot and ought not to create a trust”.

In Cotton vs same, in the United States District of California, 1884, the doctrine received a harsh rebuke at the hands of the Court; a testator gave all his property to his wife, and added: "I recommend to her the care and protection of my mother". The Court in its opinion said: "It is urged on the part of the claimant that in this class of cases, a wish expressed or a simple request, to the devoted and obedient wife, is equivalent to a command. This when voluntarily recognized as an obligation by the wife, in the affairs of married life, may be a very proper and salutary principle and practice in marital polity and domestic etiquette, but it is too romantic, to largely deficient in the sanctions of the obligations of positive law, too loose and uncertain to be adopted by the Courts as a rule of law, by which large estates are to be distributed in opposition to the
plain, ordinary, actual matter of fact words of a will."

It is obvious that these criticisms proceed upon an erroneous view of the reason for the establishment of the rule, to wit: to effectuate the intentions of the testator. "Intention is the polar star to guide us in the construction of wills", said Marshal Chief Justice, in Smith vs Bell, 6 Pet. 75) and as we have previously shown this is the purported universal doctrine. But we submit that it is not observed in many cases where precatory words have been held not to create a trust.

Intention cannot be distinguished from desire, within the meaning of this rule. "Intention is when the mind, with great earnestness, and of choice, fixes its view on any idea" (Locke). What can be the design of the testator in using these recommendatory words? Is it not a bending of the mind toward an idea, with a hope that it will become a realization? He may not express his intentions in positive terms, yet they are just as apparent and capable of being interpreted, as if he do. He withholds a bold command with a humane regard for the sensitiveness of those to whom he is dearly attached. Says L. d Loughborough: - "When a person recommends to
another who is independent of him, there is nothing im-
perative; but if he recommends that to be done by a per-
son whom he has a right to order it to be done, the mode
is only civility".

If there is any virtue in the rule of construction
under consideration it should be applied where only the
desire is expressed, as well as the settled intention,
admitting that there is a refined distinction, which we
doubt. A desire is but an immature intention. The one
leads to the other. A desire ripens into an intention.
If the intention is sacred, a thing to be respected, then
the same in an embryo state should be held equally sa-
cred as long as no more fixed or definite purpose appears.

As was said by Lord Resedale, (quoted in Shaw vs
Lawless, 5 Clark and Fin. 129-54 ) :- "Where a testator
having it in his power to dispose of his property, ex-
presses a desire as to the disposition thereof, and the
objects to which he refers are certain, the desire so ex-
pressed amounts to a command, and if he shows his desire,
HE IN FACT EXPRESSES HIS INTENTION, provided the objects
to which he refers are so defined that a court can act
upon the desire so expressed."

This language portrays our meaning. Starting with
the hypothesis that the doctrine of construing a will in accordance with the intention of the testator, is sound, we contend that, although the words desire and intention may have a different literal meaning, yet applying the spirit of the above rule, they should be construed as synonymous terms. A desire of the mind is in fact the intention of the mind, if no stronger desire, or more settled conviction, be expressed.

It is common for judges of the modern day to criticize the doctrine of precatory trusts and comments to the effect that the doctrine should not be extended are frequent. A careful examination of these cases will show that the doctrine is as broadly recognized to-day as it was nearly two centuries ago, and that the discrepancy between the early and modern cases arises not in a repudiation of the doctrine, not in a narrower recognition of it, but in the narrowness of the application of the rule giving effect to the intention of the testator.

A comparison of a few of the early with the later cases, keeping sharply in mind the distinction which we have pointed out, will, we think, support our conclusions. In the case of Warding vs. Glyn, 468, decided in 1739, the testator gave to his wife certain property,
but "desired" her to give it to such of his relations as she should think most deserving and approve of." Lord Hardwike, in considering the case said:—"Where the uncertainty is such that it is impossible for the Court to determine what persons are meant, it is very strong for the Court to construe it as a recommendation to the first devisee and make it absolute to him. But here the word relations is a legal description, and this is a devise to such relations and operates as a trust in the wife. "The wife having failed to execute the will according to the trust, the Court distributed it under the Statute of distributions, remarking that it was not "by virtue of the statute" but that it was a "good rule to go by" in executing the discretionary power vested in the wife, she having ignored the confidence reposed in her, and failed to execute the trust.

The modern cases, especially the New York Courts, would treat this devise as an absolute gift to the wife; can it be doubted that the disposition of the case by Lord Hardwicke was more strictly in accordance with the intention of the testator?

Again in 1782, Lord Chancellor Thurlow, in consid-
ering the case of Harlan vs. Trigg, (I Brown, 142) said: - "But whenever there are annexed to such words precise and direct objects, the law has connected the whole together and held the words sufficient to raise a trust— but then the objects must be distinct". Here we have the two testing elements which are universally applied in the modern cases, to wit: a certain subject and a certain object.


The case of Gilbert v. Chapin, (supra) is frequently cited as overruling the doctrine of precatory trusts;
but it does not. In the opinion the Court said: "The case which we are not considering does not require as a repudiation of the doctrine of recommendatory trusts; nor do we say that we would not support them in cases wherein the language of recommendation or desire very clearly imports a fixed and imperative purpose", and two of the judges dissented from this opinion. Judge Waite in his dissenting opinion said: "Whatever disposition some judges have manifested to limit the operation of the rule, no one could be found who at the present day, would resume to set it aside or refuse to apply it in a case falling clearly within the rule."

Again he says: "It is better, far better, that a rule long established and often recognized, should stand until abrogated by the legislature than that it should be made to change with the changing opinions of judges, whose business it is to apply the law as they find it, and not as they would make it were they clothed with the requisite power."

In the case of Lawrence v. Cook, the testator by one clause of his will gave all his property absolutely to his daughter. By a subsequent clause he provided: "I
commit my grand-daughter to the charge and guardianship of my daughter, in whose honesty, good will and integrity I repose the utmost confidence. I enjoin upon her to make such provision for my said grand-daughter out of my estate, in such manner, at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grand-child and her own sense of justice and christian duty shall dictate." Lawrence J., at Special Term, held there was no trust; the General Term reversed this decision, but the Court of Appeals reversed the order at General Term and affirmed the Special Term decision, holding that the provision giving the daughter the right to provide "in such amounts and at such times as she might deem expedient" was too indefinite, and vested a discretionary power in the devisee which the Court refused to perform. It is submitted that upon principles of equity and sound legal policy, the opinion of the General Term in this case is the better. It held the word "enjoin" so imperative as to distinguish the case from all reported cases, and sufficient to take it out of the general rule that an absolute disposition of property cannot be affected by subsequent words of less
imperative meaning. Can it be doubted that this testator's wishes were violated by the unscrupulousness of the daughter aided by the arbitrary will of the Court? Can a person with ordinary common sense read the words of the testator, and then say it was his intention that the grand-daughter should derive no benefits from his will? Had the Court held a trust created; made such provision for the child as would be "conducive to the welfare of said grand-daughter" and such as "a sense of justice and christian duty shall dictate", as in Harding vs. Glyn; would not this have been more in accordance with the manifest intention of the testator?

In Paul v. Compton, 8 Vesey, 375, Lord Eldon laid down the rule thus:— "The cases upon words of recommendation have, I take it, now settled upon this rule: whether the terms are those of recommendation, or precautionary, or expressing hope, or that the testator has no doubt, if the objects with regard to whom such terms are used are certain, and the subjects of property to be given are also certain, the words are considered imperative; and create a trust. But the questions are very different whether the words of a will create a trust or a power. If the words are imperative, they do not cre-
ate a power; but they execute themselves by force of the terms.

To analyze this statement, it will be seen that the question is, not what words in themselves are imperative, but what words, certain conditions existing, will be held to be imperative, by presumption. From this position the New York and other courts seem to have drifted toward holding that the words must be in their primary signification, be imperative instead of presuming them imperative. The rule is thus stated in Foose v. Whitmore, 8 a leading New York case:—

"The real question is always, whether the wish or desire, or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion."

Notwithstanding the fierce condemnation of the rule from many sources, it is given full recognition in many states at the present day: Knox v. Knox 48 A.R. 487 (Wis.). Bispham on Equity, Sec. 72. and in England, Le Merchant v. same. 18 L. R. Eq. cases, 414.
In Warner v. Bates, 98 Mass., 276, the opinion of the Court contained the following: "We see no sufficient ground for calling in question the wisdom or policy of the rule of construction uniformly applied to wills in Courts of England and most of the United States, that words of entreaty, recommendation or wish, addressed by a testator to a devisee or legatee, will make him a trustee for the persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of the trust and subject matter. Indeed, we cannot understand the force or validity of the objections urged against it if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and apply it only where the creation of a trust will only subserve that intent." In that case a widow gave her second husband certain property "In the full confidence that he will, as he has heretofore done, continue to give and afford such protection and support to my children as they may stand in need of." Held, a trust for the children.

Mr. Bispham in his work on Equity Jurisprudence, says the doctrine of recommendatory trusts as laid down
in Warner v. Bates exists in all the United States (Bispham, section 72).

Judge Lowrie, in the case discussed supra, says: "We may now add that we know of no American case where the antiquated English rule has been adopted." These diametrically opposed opinions fairly demonstrate the wide difference existing as to the present state of the doctrine.

Our analysis of this subject was based upon the hypothesis that the doctrine of construing wills according to the intention of the testator is a part of the settled law of England and America. A defense of that maxim is beyond the scope of this paper. Indeed, if repeated judicial decisions of more than two centuries are to be received as the best evidence of what the law is, the question will not admit of argument.

From our review of this subject, we submit the question whether the doctrine of precatory trusts does not exist as fully to-day as a century ago; whether the just, humane and sound legal principle on which it was originally founded does not still remain to support it, and whether the alleged tendency to drift away from it is not really a drifting away from the doctrine that
wills should be construed according to the intentions of the testator?

If a doctrine, nurtured and sanctioned by judicial decisions in every part of the universe for upward of two centuries, is to be repudiated and that, too, without legislative sanction, we say let the Courts frankly assume the responsibility, and not attempt to shield their acts behind a more popular but equally effectual reason for its overthrow.

D. V. Murphy