:, § 4 of the Statute of Frauds, as ıcted in Pennsylvania, was con- ıed, and it was held that the ısideration of a written agree- .nt to answer for the debt of ɔther need not be expressed in e writing, but might be proved other evidence.

The doctrine of Wain *v.* Warl- rs has been adopted in Colorado, elaware, Georgia, Kansas, Mary- ɔd, Minnesota, Montana, New Hampshire, New York and Wisconsin. On the other hand, it is provided by statute in Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey and Virginia that the consideration need not be stated. And that it need not be set forth is also law in Arkansas, Connecticut, Florida, Louisiana, Mississippi, Missouri, North Carolina, Ohio, Tennessee and Vermont.

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BOYLE *v.* BOYLE.[1] SUPREME COURT OF PENNSYLVANIA.

Precatory Words.

A will containing the provisions "I give and bequeath to my loving wife Roda all my property real and personal for her support during her natural lifetime; any remainder at her decease to be disposed of by her as she may think just and right among my children," gives the widow a fee, with all its incidents, including the power to sell and the power to devise. The words referring to "any remainder" are precatory and do not limit the estate. Words of trust and confidence, without more, do not create a trust or turn a devisee into a trustee. The intentions of the testator to create a trust must be apparent apart from the mere existence of words of trust and confidence, or none will be held to exist.

DOCTRINE OF PRECATORY TRUSTS.

The doctrine of precatory trusts has been traced to the Roman law, where such words as peto, rogo, volo, mando, fidei tuae, committo, were generally used in the *fidei-commissum:* Jus. Inst. 2, 24, 3: Pennocks' Estate, 20 Pa., 268. The earlier rule of English chancery was that when by will property was given absolutely to a person who

[1] 152 Pa., 108.

was by the giver "recommended," "entreated," "requested" or "wished" to dispose of that property in favor of another, the recommendation or request was held to be imperative and to create a trust, if the subject and objects were certain: Powell on Devises, 351; 2 Redfield on Wills, 419 Hill on Trustees, §113.

It was formerly said that a *prima facie* presumption of an intention to create a trust arose from the use of precatory words; or, as put by Lord ALVANLEY, "Whenever any person gives property and points out the object, the property and the way it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it:" Malim *v.* Keighley, 2 Ves. Jr., 333; Paul *v.* Comptom, 8 Ves., 375; Ford *v.* Fowler, 3 Beav., 146; Prevost *v.* Clark, 2 Mad., 458; Massey *v.* Sherman, Amb., 520; Harding *v.* Glynn, 2 L. Ca. Eq., 948 and note; Theobald on Wills, 355. At the same time there has always existed a steady opposition to the doctrine, on the part of eminent jurists: Sale *v.* Moore, 1 Sim., 534; Meredith *v.* Heneage, id., 542; Lawless *v.* Shaw, 1 Ll. & C., 154; 5 Cl. & F., 129. The criticisms of the text writers being particularly severe for the reason that to put such an artificial construction upon the words of a will is to defeat the intention of the testator in nearly every instance. "It can scarcely be presumed," writes Justice STORY, "that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that in using one and omitting the other he should not have a determinate end in view:" 2 Story's Equity Jurisp., § 1069; 2 Redfield on Wills, 423; 2 Pomeroy's Equity Jurisp., § 1017.

Courts of equity have, for many years shown a strong tendency to restrict the operation of the rule within narrow bounds, so that the doctrine of the early cases is now practically obsolete. The change has been effected through two canons of construction: first, that the intention of the testator must be ascertained by a consideration of the *whole* instrument; second, that when a devise or bequest is explicitly conveyed in a will it cannot be defeated or abridged by subsequent words which are ambiguous: Reid *v.* Atkinson, Ir. Rep., 5 Eq., 373; Sudgen on Property, 276. In Lambe *v.* Eames, JAMES, L. J., said: "In hearing case after case cited I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where, in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed:" L. R., 6 Ch. App., 596. This declaration marks the change in the current of decisions in England with regard to precatory trusts: Stead *v.* Mellor, 5 Ch. Div., 225; *In re* Hutchinson and Tenant, 8 Ch. Div., 540. In the leading English case, *In re* Adams and the Kensington Vestry, a testator gave all his property to the absolute use of his wife and her heirs "in full confidence that she would do what was right as to the disposal thereof between his children either in her lifetime or by will." The widow took an absolute interest, COTTON, L. J., saying, "We must not extend the old cases in any way or rely

upon the mere use of particular words, but, considering all the words which are used, we have to see what is their true effect and what was the intention of the testator as expressed in his will:" 27 Ch. Div., 394; Mussoorie Bank *v.* Raynor, 7 App. Ca., 327; *In re* Diggles, 39 Ch. Div., 253. The court will not allow a precatory trust to be raised unless, on the consideration of all the words employed, it comes to the conclusion that it is the intention of the testator to create a trust: Bretts' Modern L. Ca., Eq., 13.

The rule requiring a definite subject matter and a definite object applies as well to precatory as to other express trusts: Knight *v.* Knight, 3 Beav, 148; Williams *v.* Williams, 1 Sim., N. S., 358. The rule is not often applied, however, to the extent of letting in the heir or next of kin: Jarman on Wills, 366. Uncertainty in the object, it is thought, furnishes a strong argument that the testator had no intention to raise a trust: Bernard *v.* Minshull, Johns, 276; Parnall *v.* Parnall, 9 Ch. Div., 96; Howard *v.* Carusi, 109 U. S., 725; *cf.* Atkinson *v.* Atkinson, 62 L. T. Rep., 735.

On the other hand, if it plainly appears that the testator believed he was raising a trust by the use of words of recommendation or request, his intention must prevail, and on failure for uncertainty the heir or next of kin will be let in. Once establish that a trust was intended and the legatee can not take beneficially: Briggs *v.* Penny, 3 McN. & G., 546; *In re* Foley's Will, 10 N. Y. S., 12; *citing* Willets *v.* Willets, 103 N. Y., 650; Ingram *v.* Fraley, 29 Ga., 553. Just as uncertainty of the property and object are reasons for not construing the will as erecting a trust, so, also, the fact that a trust would cause embarassment and difficulty, is a reason for coming to the same conclusion: BOWEN, L. J., in *In re* Diggles, *supra*. "It is not an unwholesome rule that if a testator really mean his recommendation to be imperative he should express his intention in a mandatory form:" Sugden on Property, 276.

In the United States there was at first a manifest disposition to apply the earlier English rule: Bull *v.* Bull, 8 Conn., 47, Coates, Appeal, 2 Pa., 129; Cole *v.* Littlefield, 35 Me., 439; Harrison *v.* Harrison, 2 Gratt.; Lucas *v.* Lockhart, 10 Sm. and Marsh., 466; Dresser *v.* Dresser, 46 Me., 58; Erickson *v.* Willard, 1 N. H., 217; Hunter *v.* Stemridge, 12 Geo., 192.

In Florida, Alabama and South Carolina the courts from the first were inclined to receive the rule with great caution, influenced by the views of Judge STORY and the change which they perceived was taking place in England: Lines *v.* Darden, 5 Fla., 51; Lesesne *v.* Witte, 5 S. C., 450. "We refuse," said the Court in Alabama, "to follow a rule of construction which many acknowledge to have been founded in error, and from which they would gladly recede if they could:" Ellis *v.* Ellis, 15 Ala., 296, *c. f.* McRee's Exrs. *v.* Means, 34 Ala., 349. The Court in Connecticut, it may be added, took an early opportunity of reconsidering their former dicta and adopted a more restricted rule: Gilbert *v.* Chapin, 19 Conn, 351; Harper *v.* Phelps, 21 Conn., 257. In the main the courts have kept pace with the change of view in England, and the doctrines adopted in the two countries are substantially the same.

In Pennsylvania the doctrine of precatory trusts has not met with favor. Coates' Appeal (*supra*), which upheld such trusts, was formally reversed, the Court declaring that "the old Roman and English rule on this subject was not part of the Common Law of Pennsylvania:" Pennock's Estate, 20 Pa., 268. A review of the principal cases that have sustained and extended the ruling in Pennock's Estate will be found in the opinion of WILLIAMS, J., in Boyle *v.* Boyle, the case annotated: Burt *v.* Herron, 66 Pa., 400; Janretche *v.* Proctor, 48 Pa., 466; Church *v.* Disbrow, 52 Pa., 219; all leading to the conclusion that the intention of the testator must be apparent apart from the mere existence of words of confidence or no trust will be held to exist. In Bolby *v.* Thunder, testator devised all his property to his wife "in the fullest confidence . . . that she will carry my intentions, as to the ultimate distribution, into effect." It was held that having made an unqualified devise of his property, no precatory words addressed to the devisee could defeat the estate previously devised: 105 Pa., 173; Hopkins *v.* Glunt, 111 Pa., 287. In Good *v.* Fichthorn, where the words were "I do hereby enjoin and direct," it was said that words of command were as ineffectual as precatory words to reduce an estate in fee to an estate for life. In Oyster *v.* Knull, however, where testator devised a farm in the following words: "To my son N. for his support and if he should be spared to have a family I desire the above estate to go to the use of his children," it was held that the word "desire" was not precatory but mandatory, and that the son took an estate for life. 137 Pa., 448. Where the words of recommendation or request are used in direct reference to the estate they are *prima facie* testamentary and imperative, and not precatory: Board of Missions *v.* Culp, 151 Pa., 467; see Wood *v.* Camden Trust Co., 44 N. J. Eq., 419.

In addition to Pennsylvania, the latest decision in a number of States show a tendency to restrict the operation of the doctrine within narrow limits. In California a testator devised real property "recommending" the devisee to leave his portion, after his death, to his children, and if none survived then to Harvard College. The gift, it was decided, was absolute to the devisee. If the testator had intended to create a trust he would have said so in plain language, such as he used in other clauses of the same will. *In re* Whitcomb, 86 Cal., 265. South Carolina has fortified the ruling in Lesesne *v.* Witte, *supra*, by decisions that lay down the principle that "precatory trusts or recommendatory words imply discretion, and must be so construed unless a different sense is irresistibly forced upon them by the context:" Rowland *v.* Rowland, 29 S. C., 54; Howze *v.* Barber, 29 S. C., 466.

The Court of Chancery of Delaware, in construing the following clause: "I do request my wife, if she should not require the whole of my estate as a support, that she will will at her death the remainder to the children of my brother C." *held*, that no trust arose in favor of the children; the Chancellor noting the fact that this was the first time that the question had been raised in Delaware: Bryan *v.* Milby, 24 Atl. Rep., 333. A similar result

was attained in Nevada: Hunt *v.* Hunt, 11 Nev., 442; and Iowa: Bulfer *v.* Willingrod, 71 Ia., 620; Bills *v.* Bills, 80 Iowa (where the words might have been regarded as testamentary since they referred directly to the property).

In Indiana, the reluctance of English chancellors to follow the early decisions has been discussed and the doctrine that an absolute gift is not to be limited by subsequent precatory words considered and approved: Fullenweider *v.* Watson, 113 Ind., 18; Van Gorden *v.* Smith, 99 Ind., 404; *cf.* Elliott *v.* Elliott, 117 Ind., 380. So too in Missouri the Court, referring to *In re* Adams, *supra*, has refused to carry out the declared wishes of the testator unless he has manifested a clear intention to create a trust: Corby *v.* Corby, 85 Mo., 371. But the surrounding circumstances of the parties must be taken into consideration together with the language of the will: Noe *v.* Kern, 93 Mo., 367 (a case where unusual hardship would have resulted from a failure on the part of the court to raise a trust).

In Illinois the courts have shown an inclination to favor precatory words, raising a trust from the following clause in a will: "Reposing implicit confidence in the goodness and kindness of my dear wife, I rely upon her to make all needful provisions for my brother." Blanchard *v.* Chapman, 22 Ill. App., 341. But in Giles *v.* Anslow, where the words were "I have full confidence in my beloved wife M., that she will do what is best and proper with my effects," and declaring that she was to be free from all restraint, it was held that the widow took a fee. "If the intention of the testator be doubtful precatory words will not be construed into a declaration of trust:" 128 Ill., 187; Mills *v.* Newberry, 112 Ill., 123; Jones *v.* Jones, 124 Ill., 254. In Randall *v.* Randall, 135 Ill., 398, it was said that no trust can be implied from words that merely indicate the motive which induced the gift, and this is particularly the case when the donee is the parent: Seamonds *v.* Hodge, 15 S. E. Rep. (W. Va.), 156. Where testator gave all his property to his wife "for the purpose of raising her children," it was held that no precatory trust was created or implied thereby for the children: Wilmoth *v.* Wilmoth, 34 W. Va., 426; Rhett *v.* Mason, 18 Gratt 541, *cf.* Young *v.* Young, 68 N. C., 309.

In Kentucky, a testator devised and bequeathed property to his brother, requesting him to settle $10,000 upon L., and added: "These requests are not to be legally binding, but I desire to leave the same to his discretion, and to make no requirement of him that would be legally binding upon him in a court of equity or elsewhere." The Court, nevertheless, taking all the facts into consideration, decided that a trust was created in favor of L.: Bohon *v.* Barrett, 79 Ky, 378. Later decisions have distinguished this case: Sale *v.* Thornberry, 86 Ky., 266; Enders *v.* Tasco, 89 Ky., 17.

A decision that may produce a reaction in favor of precatory trusts is that in Colton *v.* Colton, by the Supreme Court of the United States. The testator, after a gift of all his estate to his wife, continued: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." It was

suggested that the subject matter of the trust was so indefinite as to raise the inference that no trust was intended. The Court, however, decided that the subject matter was sufficiently definite, and, as the widow had declined to exercise her discretion, it would be the duty of the court to determine what provision would be suitable, under the circumstances: 127 U. S., 300. In the opinion two Massachusetts decisions are quoted with approval. In Warner *v.* Bates, the most important of these, testatrix gave the income from her estate to her husband, "in full confidence" that he would give her children such protection and support as they might need. The Court, in holding that the words raised a trust, pointed out the merits of the doctrine of precatory trusts, and vigorously defended the rule, but held that the recommendatory clause must be so expressed as to warrant the inference that it was designed to be peremptory on the donee: 98 Mass. 274.

In Hess *v.* Singler, 114 Mass., 56, the testator, after a gift to his son, signified his desire and hope that he would, by will or otherwise, provide for certain relatives. The creation of a trust, the Court thought, would have been inconsistent with the purposes of the testator. In none of the Massachusetts cases has the court shown any inclination to force the doctrine, making it a matter of fair construction: Sears *v.* Cunningham, 122 Mass., 538; Barrett *v.* Marsh, 126 Mass., 213; Bacon *v.* Ransom, 139 Mass., 117; Fiske *v.* Joy, 141 Mass., 309. The words, "My said wife is fully acquainted with my reasons for this disposal of my estate, and will, by her own last testament, do what is right and just to my children and their natural heirs," did not create a trust, but stated the motive of the testator in not doing so: Sturgis *v.* Paine, 146 Mass., 354.

Van Duyne *v.* Van Duyne, 14 N. J. Eq., was the first important discussion of the question in the Court of Chancery of New Jersey. The Chancellor criticised adversely the doctrine of precatory trusts, and declined to raise a trust under the will in question. His decision, however, was, on appeal, reversed by the Court of Errors and Appeals (15 N. J. Eq., 503), and, although no opinion was filed, the reversal has always been regarded by the bar and bench as an expression of preference on the part of the court for the older English law: Cox *v.* Wills, 49 N. J. Eq., 130, 573. In Eddy *v.* Hartshorne, a legacy "to A., with the request that upon his death he leave the same to B. and C.," was held to raise a trust in favor of B. and C., not defeated by the death of A. in testator's lifetime: 34 N. J. Eq., 419.

Where a testator gave property to his wife "to dispose of as she will elect," and added, "I would however recomand her to increase the donation to B." so as to make her share equal to that left to C., a trust was created in favor of B. The Ordinary, although convinced that the current of the later cases in this country and in England is against the adoption of this rule, nevertheless felt bound to regard it as binding upon him: Eberhart *v.* Perolin, 48 N. J. Eq., 592.

The New York reports contain a number of interesting discussions of this question. In Foose *v.* Whitmore a disposition was shown to restrict the rule in conformity with Lambe *v.* Eames (*supra*), 83 N. Y.,

405. So, also, in Lawrence *v.* Cooke, where, after a gift to the wife, testator added: "I enjoin upon her to make such provision for said B out of my estate in such manner, at such times and in such amounts as she may judge to be conducive to the welfare of B," the Court decided that it was beyond the power of any court to substitute its discretion for that of the legatee, and no trust was created. On the other hand, in Phillips *v.* Phillips, 112 N. Y., 197, where the will, after a gift to the wife, provided: "If she find it always convenient to give my brother the interest on $10,000, I wish it to be done," a charge was imposed in favor of the brother. The provision contemplated, not the wife's discretion, but her pecuniary condition each year: Riker *v.* Leo, 115 N. Y., 93; Rose *v.* Hatch, 125 N. Y., 427. The one important and vital inquiry is, whether the alleged bequest is so definite as to amount and subject matter as to be capable of execution by the court, or whether it so depends upon the discretion of the general devisee as to be incapable of execution without superceding that discretion: Phillips *v.* Phillips (*supra*).

The case of *In re* Ingersoll is important, from its relation to the law imposing restrictions on charitable bequests. Testatrix, after a gift, "relied" upon the legatee to carry out certain charitable purposes set forth in the will. The Court held that the legatee took the sum individually and absolutely to be used in his discretion for the general objects mentioned: 59 Hun., 571; compare *In re* Foley's Will, 10 N. Y. S., 12. More important still is *In re* Keleman's Will. Testatrix, by her will, gave legacies to four charitable institutions. Four days later she added a codicil, as follows: "Doubts having arisen as to the validity of the bequests made for charitable purposes in my will, I hereby modify my will by making W my residuary legatee, and hereby request him to carry into effect my wishes with respect thereto, but this is not to be construed into an absolute direction on my part, but merely my desire." This codicil was added to prevent the failure of the legacies, should testatrix die (as in fact happened) within two months of the execution of the will. The Court held the bequest to W absolute, and, therefore, on the face of the will, valid.

In Wisconsin, the Court, while disinclined to go to the length of the older cases in establishing trusts upon the strength of precatory words, is not disposed to repudiate the whole doctrine of such trusts: Knox *v.* Knox, 59 Wis., 172; and a similar view prevails in Texas: McMurry *v.* Stanley, 69 Tex., 227; see also, Low *v.* Low, 77 Me., 171; and Cockerill *v.* Armstrong, 31 Ark., 580. In Ohio it was said in a recent case that while the decisions may have been influenced by the sympathy of individual chancellors they generally agree that the intentions of the testator, gathered from the will in all its terms, will be given effect whether the terms be dispositive, peremptory, or precatory only: Ide *v.* Clark, 5 Ohio C. C., 239.

By way of summary it may be said that the courts of this country, as well as of England, exhibit the same general tendency to limit, rather than extend, the doctrine of precatory trusts, and to construe words of recommendation or desire according to their natural and ordi-