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Trusts--Trusts Created by Precatory Words

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to him or in his presence is sufficient to supply knowledge of those facts competent to be covered by admissions."

(c) Assuming that an officer has statutory authority to arrest for misdemeanors committed in his presence other than those which amount to a breach of the peace, the arrest must be made immediately or upon immediate and continuous pursuit.[18]

A crime is committed in an officer's presence if he is apprised of its commission by his sense of sight,[19] or hearing,[20] or smell.[21] A Federal court in the case of *McBride* v. *U. S.*, held that federal agents, who, having entered upon the premises where there was an unoccupied house, smelled fumes from a still, were authorized to arrest without a warrant after they had found a still in illegal operation.[22] Another federal case held that when an officer is apprised by any of his senses that a crime is being committeed it is committed in his presence.[23] If the officer is able to detect it as the act of the accused it is in his presence.[24] However, merely beng in sight and hearing, without the power to detect or identify the accused, or what he is doing is not sufficient.[25] Yet hearing has been held to be sufficient as where, in the night, an officer heard screams coming from an upstairs room, where he found a man beating a woman.[26]

(d) According to the common law rule an officer could not arrest without a warrant for a misdemeanor other than those amounting to a breach of the peace, except in a few cases such as "night walking" and "riding armed," for which authority to arrest without a warrant had been given by statutes so ancient that the statutory origin of the privilege had been forgotten and the privilege was regarded as substantially one existing at common law.[27]

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TRUSTS—TRUSTS CREATED BY PRECATORY WORDS.

The testator made a will that was duly executed and contained the following provision: "I will, bequeath, and devise to my beloved wife Mary A. Williams, all of my property, real and personal, to be hers absolutely. It is my desire and I request that if I pre-decease her, then before her death, she will make a will giving to her people one-half (½) of my property, and to my people the other one-half

[18] 22 Mich. L. Rev. 683; *State* v. *Lewis*, 50 Ohio St. 179, 33. N. E. 405 (1893).
[19] *Smuck* v. *People*, 72 Col. 97, 209 Pac. 636 (1922).
[20] *State* v. *Blackwelder*, 182 N. C. 899, 109 S. E. 644 (1921); *Dilger* v. *Com.*, 88 Ky. 550, 11 S. W. 651.
[21] *U. S.* v. *Barkowski*, 268 Fed. 408 (1920).
[22] *McBride* v. *U. S.*, 284 Fed. 416 (1922).
[23] *Vaught* v. *U. S.*, 7 Fed. (2d) 370 (1925).
[24] *Reed* v. *Com.*, 125 Ky. 126, 100 S. W. 586 (1907).
[25] *Hughes* v. *Com.*, 19 Ky. L. Rep. 497, 41 S. W. 294 (1897).
[26] *Dilger* v. *Com.*, 88 Ky. 550, 11 S. W. 651 (1889).
[27] 75 University of Pa. L. Rev. 485.

(½)." Near relatives of the testator claim as *cestuis que trustent* by virtue of this will. The Kentucky Court of Appeals held that this will created a valid trust as to one-half of the property in favor of those relatives of the testator who would have taken had he died intestate, the other one-half of the property to be held in trust for those relatives of he wife who would take her property should she die intestate. *Williams* v. *Williams' Committee*, 253 Ky. 30 (1934).

Trusts such as the one involved in the instant case are commonly referred to as "precatory trusts," although, as was stated by Rugby L. J. in the case of *Re Williams*, 2 Ch. 12 (1897), the phrase "is nothing more than a misleading nickname. When a trust is once established, it is equally a trust, whether declared in imperative terms by the testator, or deduced upon a consideration of the whole will from language not amounting necessarily, and in its prima facie meaning to an imperative trust."

From this statement it can be seen that the term "precatory trust" is a misnomer, and is properly spoken of as a trust created by precatory words. "Precatory words" have been defined to be, "Expressions in a will praying or requesting that a thing be done." *Words and Phrases*, Third Series, page 2653.

It is a well settled rule that in the absence of a statute so requiring, no technical language is necessary to create a trust. *Colton* v. *Colton*, 127 U. S. 300 (1887); *In Re Heywood's Estate*, 148 Cal. 184, 82 Pac. 755 (1905); *Teal* v. *Pleasant Grove Local Union No. 204*, 202 Ala. 23, 75 So. 335 (1917); *Bogert, Trusts*, p. 46; *and Lewin, Trusts*, p. 92. In view of this rule, it would seem that the real question to be solved in deciding these cases involving the use of precatory words is whether, looking at the instrument as a whole, it was the intention of the testator to impose an obligation on the legatee to carry into effect his wishes, or whether having expressed his wishes, he intended to leave it to the legatee to act on them or not at his discretion. Accordingly, words of entreaty, recommendation, desire, request or confidence addressed by a testator to a legatee, may make him a trustee for the person or persons in whose favor such expressions are used, provided: (1) The precatory words are used in an imperative sense, to the exclusion of any option of the legatee as to whether or not the expressed wish shall be given effect, (2) the subject of the trust is certain, (3) the beneficiary or object of the trust is certain.

In the early English cases, and to some extent in the early cases decided in this country, mere precatory expressions were construed as raising a trust, unless it appeared from the context to be within the power of the legatee, to whom these precatory words were addressed, to defeat the disposition of the property as indicated by the precatory expression. *Malin* v. *Keighley*, 2 Ves. Jr. 333 (1794); *Knight* v. *Knight*, 3 Beav. 148 (1840); *Kirbank* v. *Hudson*, 7 Price 212 (1819); and *Perry, Trusts*, Sec. 112. The modern tendency of the courts of both this country and England is to give to such precatory expressions the natural meaning that the testator intended them to have,

and unless it appear from other parts of the will, or from other proper evidence, that the words were intended to be mandatory they will not be held to constitute a valid trust. *Igo* v. *Irvin*, 139 Ky. 634, 70 S. W. 836 (1909); *In Re Marti*, 132 Cal. 666, 61 Pac. 964 (1901); *Hill* v. *Hill*, 1 Q. B. 483 (1897); *In Re Oldfield*, 1 Ch. 549 (1904); *Perry, Trusts*, Sec. 112; and *Rood, Wills*, Sec. 494.

The view adopted by these early English cases was seemingly adopted by the Kentucky Court of Appeals in the case of *Bohon* v. *Barett*, 79 Ky. 378 (1881). However, the more recent cases of *Webster* v. *Wathen*, 97 Ky. 318, 30 S. W. 663 (1895); and *Wood* v. *Wood*, 127 Ky. 514, 106 S. W. 226 (1895), adopt the view of the modern decisions, that is to say, the words of the testator must be construed in their natural meaning and will be held to create a trust only where the evidence clearly shows that the testator intended the precatory words to be mandatory and thereby impose a binding obligation upon the legatee.

There is no recognized formula which can be used in determining whether or not it was the intention of the testator when he executed his will, to impose a binding obligation upon the legatee or devisee. When attempting to ascertain the intention of the individual testator, we have the facts of the particular case plus a few fairly well settled principles of construction to guide us. Professor Austin W. Scott, of the Harvard Law School, in the tentative draft of the Restatement of the Law of Trusts, at Section 37, summarizes these rules as follows:

"In determining the intention of the settlor the following circumstances among others are considered:

(1) The imperative or precatory character of the words used;
(2) The definiteness or indefiniteness of the property;
(3) The definiteness or indefiniteness of the beneficiary, of the extent of his interest;
(4) The relations between the parties;
(5) The financial situation of the parties;
(6) The motives which may reasonably be supposed to have influenced the settlor in making the disposition;
(7) Whether the result reached by construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce."

When we apply these guiding principles, so ably set out by Professor Scott, to the will in the instant case, it may at first blush seem to have been the manifest intent of the testator to create a binding trust. However it is here contended that the testator by including in his will the statement, "I will, bequeath, and devise to my beloved wife, Mary A. Williams, all of my property, real and personal, to be hers *absolutely*," has precluded any possibility of this will being construed as a binding trust. It has many times been declared that no matter how strong the language of recommendation or request may be, if the testator has once made an absolute and unrestricted bequest

or devise of property to a devisee or legatee, subsequent precatory words will not be construed to show an intent to creat a trust, as this would be inconsistent and repugnant to the prior expression of the testator. *Bogert, Trusts*, p. 50; and *Perry, Trusts*, Sec. 115. This rule was recognized and followed in two recent Kentucky cases. *Gross* v. *Smart*, 189 Ky. 338, 224 S. W. 871 (1920); and *Igo* v. *Irvine, supra.* In the latter case the testator devised lands to his son absolutely, and by a subsequent provision, he requested all of his children, if they should die without issue, to will the property received from his estate, to the testator's surviving children or the issue of those dead. This subsequent provision was held insufficient to create a trust, and thus limit the fee simple title previously devised. This rule was also adopted and followed in the case of *Hess* v. *Singler*, 114 Mass. 56 (1873).

Therefore in conclusion the writer submits that by virtue of this first provision in the will granting his property to his wife absolutely, the testator created a fee simple interest in the property in his wife, which interest cannot properly be said to be in any way affected or changed by the subsequent use of precatory words in the instrument.

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TORTS—LIBEL PER SE.

Conditions obtaining in the late prohibition era gave rise to many a good newspaper yarn. But out of such conditions also flowered many a well founded suit in libel. A typical case is the late one of *Courier-Journal Co.* v. *Noble*, 251 Ky. 527 (1933).

The plaintiff, the owner and operator of a rooming house, sued the paper because of a published news dispatch which stated that A was killed "during a liquor raid on the home of Mrs. Lizzie Noble."

The officers had entered Mrs. Noble's home, not for the purpose of searching it for liquor, but for the purpose of arresting some men who had entered it. A trial before a jury resulted in a verdict and judgment of $3,100 for the plaintiff. The defendant appealed on the ground "that an innuendo cannot extend the words beyond their natural import, and that the words, 'during a liquor raid,' do not necessarily mean that the owner of the house raided was an unlawful dealer in whiskey, and that a person may be an unlawful possessor of liquor and still not be 'an unlawful dealer in whiskey.'". *Held*, the words carried with them the imputation that the plaintiff was violating the Prohibition Act in her home, and, being not only such as to injure her in her reputation and expose her to shame and disgrace, but such as to prejudice her in her business, they are libelous per se, and therefore susceptible to the meaning given them by the innuendo.

The language of the court is confusing. A publication cannot be libelous per se, and yet need an innuendo with which to explain the meaning of the words used. If the words in question are actionable