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be beyond his knowledge, it also assures the defendant that if he can prove he was not negligent no liability will attach. Both results are desirable.

The Kentucky rule might be criticized in that recovery would be allowed plaintiff in spite of the fact that defendant proved he was not negligent.

The federal rule is soundest of all technically but in actual practice is likely to result in injustice to a plaintiff who might be totally unable to prove the particulars of defendant's negligence after the dissipation of the general presumption.

The Massachusetts rule places plaintiff in a position where, even though the defendant may have been guilty of gross negligence, plaintiff will be denied recovery because he is in no position to prove the particular acts of defendant.

ROBERT EDWIN HATTON, JR.

TRUSTS—THE CREATION OF A TRUST BY THE USE OF PRECATORY WORDS.

At the outset, suffice it to say, that the particular type of trusts dealt with in this brief note are those that are created wholly by testamentary disposition of property, and not those trusts which arise upon a conveyance inter-vivos.

As the foundation of our study a recent decision by the Kentucky Court of Appeals has been chosen, which shall hereinafter be termed the Williams case. *Williams, et al. v. Williams' Committee, et al.* 253 Ky. 30 (1934). The will in the *Williams* case contained the following language: "I will to my wife all my property to be hers *absolutely*. It is my desire and I request she will to her people one-half of my property and to my people the other one half". These words were deemed sufficient to constitute a trust. The question now for our consideration is whether the court acted properly in so holding.

To begin, let us consider only the last sentence without regarding the first in which the property is given to the wife *absolutely*. The writer is of the opinion that even in this instance the words are not sufficient to show that the testator intended to create enforceable duties by the use of such *precatory* words. To hold otherwise would reach a result in direct conflict with the modern trend of the courts. However, if such a result had been obtained a century or two ago in an English jurisdiction it would probably have been correct. *Harding v. Glyn*, 1 Atk. 469 (1739). Although even prior to this it was stated by the court in *Palmer v. Schibb*, 2 Eq. Ca. Abr. 291, pl. 9, where "J. S. devises the residue of his estate to his wife, and desires her to give all her estate at her death to his or her relations" that if testator had desired his wife by his will to give at her death *all the estate which he had devised to her*, to his or her relations, there the estate devised to her ought to go after her death to his and her relations." But,

since the testator's intention was not clear, the court held there was in fact no trust created. We have stated enough of the opinion to show that whether or not a trust is raised depends solely upon the intention manifested by the will.

Hence, *The Restatement of The Law of Trusts. Tentative Draft No. 11*, Section 37, provides: "No trust is created unless the settlor manifests an intention to create enforceable duties". Mr. Scott, author of the Restatement, states in the comments to the above section, "that 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 or 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". This note will deal only with subdivision (1), *viz.*, The imperative or precatory character of the words used.

In *Harding v. Glyn, supra*, the decision was based upon the "intention" of the testator because the court said, "there are not technical words in a will, but the manifest intent of the testator is to take place. . . ." However, it seems that the *Williams* case, *supra*, is a great deal stronger than what we have been talking about, since in one clear sentence the testator gave to his wife "absolutely".

At this juncture it seems proper to insert a portion of the decision of Ross, J. in *In re Humphrey's Estate*, 1 I. R. *21 (1915) as follows: "The testator in clear words gives all his property to his wife, and appoints her executrix. He then expresses a wish that she should dispose of it in a certain way for the benefit of his children. I am sure the testator himself would have been amazed if the mere expression of his wish for the guidance of his wife should have the effect of creating a legal obligation of the strictest character, tying up all the property and preventing her from providing for any children that might be born after the making of the will. After a devise and bequest in clear and explicit terms, if a trust is intended to be created one would expect that this would be done in terms equally clear and explicit. When we come to consider the innumerable decisions in which the Courts of equity have displayed their benevolent astuteness in imposing an obligatory meaning upon words merely expressive of desire, the mind is reduced to a condition of perplexity and confusion. Trusts have been held to be created by the following expression:—'I desire him to give', 'I advise him to settle', 'It is my dying request', 'It is my will and desire', 'I recommend', 'Well knowing', and such like. All these one would think impose at most a moral obligation. On the other hand, an expression of hope that the devisee would con-

tinue the estate in the family has been held to create no trust. I think it is quite impossible to reconcile the cases. However, that may be, there is no doubt that the tide has turned and is running strong against precatory trusts."

Let us now consider a few Kentucky decisions in order to ascertain whether or not the *Williams* case is backed by authority. We think it is not. At the end of the decision in the *Williams* case the court lists a number of cases affirming the view taken in that case, and none of which seem to do so upon careful examination. The first is *Major, etc. v. Herndon*, 78 Ky. 123 (1879). Here, however, the settlor did not give the property to his wife "absolutely", but "to my beloved wife . . . during her life time or while she remains my widow, which I desire she shall manage and control for the benefit of herself and mine and her children." It is obvious that the settlor did intend to create enforceable duties in this case. In *Barrett v. Barrett*, 79 Ky. 378 (1881), another case cited in support of the view adopted in the *Williams* case, the decision does not express the modern and correct view. There it is expressly stipulated that "but it is my request (*but not as a condition upon which this devise is to take effect*) that he take charge of . . . etc". The court cites from Perry on Trusts, Section 112, as follows: "Implied trusts are those that arise when trusts are not directly or expressly declared in terms; but the courts, from the whole transaction and the words used, imply or infer that it was the intention of the parties to create a trust. Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed through the medium of a trust." In this case, can it fairly be implied that the testator intended to create a trust? We think not.

The case of *Curd, etc. v. Field*, 103 Ky. 293 (1898), appears to be in harmony with the modern view. There the testator provided: "I then will all my land or farm to my son, John C. Curd, to do with as he may think proper, requiring him to pay my little niece, Bessie Curd Field \$500.00 when she arrives at the age of twenty-one or when she gets married." Nothing appearing to modify or change the context of this provision, there is no doubt but that it was the intention to fix upon the property given to John C. Curd an enforceable duty to the extent of \$500.00. In the next case, *Whittingham v. Schofields Trustees*, 23 Ky. L. R. 2444, the will provides: "The object of this bequest is not only to make a provision for the said Martha, but enable her to assist in the support of her father and mother . . . as long as they shall live, and this duty I strictly enjoin upon her". Again it is very plain that the settlor intended to create a trust.

It will be noticed that all the cases cited here are comparatively old and the last case is fairly recent. Notwithstanding this, none of them can rightfully be cited as upholding the view reached in the *Williams* case.

In the case of *Shaver v. Weddington, et al.*, 247 Ky. 248 (1932) the will provided: "Then I request that she divide any earnings she and I have accumulated during our marriage between her people and mine, either by gift or by will as she may deem proper". The court said in construing this passage, "We have a line of cases holding that, where property has been devised absolutely, any limitation sought to be imposed upon its disposition or provision repugnant to the fee, will be construed as void." This seems to be absolutely binding and should have formed the basis of a different result in the Williams case.

An exceedingly well written opinion and one which reviews most of the former cases is *Wells v. Jewell*, 232 Ky. 92, where the devisee is given unlimited power to dispose of property, it is generally placed in this class as being a devise in fee.

Consequently, from the above statements, it is almost impossible to see wherein the court found sufficient ground upon which to base the decision of the Williams case.

H. W. VINCENT.

CRIMINAL LAW—RIGHT TO WAIVE JURY TRIAL OVER THE OBJECTION OF THE STATE'S ATTORNEY.

In the recent case of *The People v. Scornavache*, 347 Ill. 403, 179 N. E. 909 (1931) the defendant pleaded not guilty to an indictment for murder and moved for a trial without a jury. The state's attorney objected to this motion and moved that the cause be tried by a jury. The court sustained the latter motion. Upon being convicted, the defendant appealed and claimed that the court erred in refusing to hear the case without a jury. The Supreme Court of Illinois affirmed the decision of the lower court and thereby refused to allow the accused to waive his constitutional right of trial by jury.

There are three very important problems raised by the case. (1) What is the effect of the motion by the accused to waive his right of trial by jury? (2) Must the state's attorney always agree that the jury be waived? (3) May the court use its own discretion in allowing the jury to be waived in criminal cases? These questions are discussed in the light of legislative silence and under a constitution which contains the usual wording that "The right of trial by jury shall remain inviolate".

It has become well established by a long line of decisions that the constitutional guarantee of the right of trial by jury may be waived by the accused at his election. *Murphy v. Commonwealth*, 1 Melcalf (Ky.) 365 (1858); *State v. Worden*, 46 Conn. 349 (1878); *Patton v. United States*, 281 U. S. 276, 74 L. Ed. 855 (1929); *People v. Fisher*, 340 Ill. 250, 172 N. E. 722 (1930). In all of these cases there was either an agreement between the accused and the prosecuting attorney to waive the jury or a statute allowing the same. The *Scornavache* case was decided on the theory that the right to waive a trial