TRUSTS—CREATION BY PRECATORY WORDS.—Testatrix used the following language: "I wish to will my property to my husband, asking that he in turn leaves it equally to my two children." *Held*, that the will created a precatory trust under which the husband took only a life estate. *Commonweath ex rel State Tax Commission v. Willson's Admr.* (Ky. 1929) 21 S. W. (2d) 814.

The early tendency in England was to hold all precatory expressions in wills as absolutely binding trusts because the precatory words were merely a courteous means of creating a duty. *Malim v. Keighley* (1794) 2 Ves. Jr. 333; *Knight v. Knight* (1840) 3 Beav. 148. But the court in *Portsmouth v. Shackford* (1866) 46 N. H. 423, said: "The current of American authority and the later English cases is against converting the discretion of the donee into an absolute trust, and in favor of giving effect more fully than formerly, to the intention of the testator, giving to his words their natural and ordinary sense." In accord: *In re Pennock's Estate* (1853) 20 Pa. 268; *Hughes v. Fitzgerald* (1905) 78 Conn. 4, 60 Atl. 694; *Sands v. Waldo* (1917) 100 Misc. Rep. 288, 165 N. Y. S. 654.

The question as to whether or not a trust has been created is largely one of interpretation. Some writers have attempted to classify the decisions according to the particular precatory word used by the testator as "wishing," "requesting," "feeling confident," "hoping," etc., but the more practical rule seems to be to disregard the particular word used since "the use of any particular precatory word will not determine the question of intent." Bogert, Trusts (1921) 48. There are, however, certain guides which help to determine intent. A requirement imposed by some courts is that there be certainty in the precatory clause as to the parties who are to take and what they are to take. *Floyd v. Smith* (1910) 58 Fla. 12, 51 So. 537; *Coulson v. Alpaugh* (1896) 163 Ill. 298, 45 N. E. 216. Other courts, however, are not the least bit daunted by the fact that discretion in selection within a named class is left to devisee. *Cox v. Wills* (1891) 49 N. J. L. 130, 22 Atl. 794; *Weber v. Bryant* (1894) 161 Mass. 400, 37 N. E. 203.

From the standpoint of the present day tendency, the *Willson* case is, perhaps, to be criticized because it fails to question the sagacity of enforcing mere precatory words as a trust. The decision, however, is probably to be justified on the ground of giving effect to the testatrix's intent, evidence of which probably appeared in the trial in the lower court. G. E. S., '31.

WILLS—COMPETENCY OF WITNESSES—REVOCATION OF PRIOR DISINHERITING WILL.—A witness who subscribes a will under which he is beneficially interested is generally, by statute, declared competent, though the bequest to him is void unless there is a sufficient number of other witnesses. The application of these statutes in cases where the witness is indirectly interested under the will, or under a writing revoking a prior will, presents a problem on which a variety of results has been reached. In a recent Nebraska case it was held that a will revoking prior wills was not invalidated because one of the subscribing witnesses was an heir who had been disin-

herited under the first will. *In re Charles' Will* (Neb. 1929) 225 N. W. 869. *C.* died leaving four heirs who had been disinherited by a will made several years before. Shortly before death, *C.* made a will revoking all prior wills, with the express intent that his property pass by intestacy. One of the two necessary witnesses to this document was one of the heirs. The Nebraska statute provides that "all beneficial devises, legacies, and gifts to a subscribing witness shall be void unless there are two other competent witnesses." Comp. Stat. (1922) sec. 1248. It was held that inasmuch as there was no express law disqualifying an interested witness, such witness is competent. By expressly leaving open the question of the forfeiture of the heir's intestate share, the court recognizes the possibility of direct application of the statute to this case through forfeiture of the witness' beneficial interest, *i. e.*, his intestate share.

An opposite result was reached under similar facts in *Pfaffenberger v. Pfaffenberger* (1920) 189 Ind. 567, 127 N. E. 766. An heir witnessed a document which revoked a will under which he had been disinherited. It was held that his interest, not being such as could be forfeited under the statute, rendered him incompetent as a witness, and since there were not sufficient other witnesses the revocation was held void and the former will established.

Under similar circumstances *Murphy v. Clancy* (1914) 177 Mo. A. 429, 163 S. W. 915, reached practically the same result as the principal case in holding that the heir was a competent witness since there was no gift to him in the document that he witnessed. This case goes farther than the principal case, however, in declaring that the indirect interest which will not disqualify a witness will not be reached by the statute so as to work a forfeiture of this interest.

The opinion in the principal case closely follows that of *Hayden v. Hayden* (1922) 107 Neb. 806, 186 N. W. 972, in which it was held, *inter alia*, that a spouse may be a competent witness to a will under which the consort is a devisee. This situation presents a related problem to that of the heir witnessing a revocation of a will under which he is disinherited. In both the principal case and *Hayden v. Hayden* the question of the validity of the indirect gift to the witness is left open, thus indicating that the statute may work a forfeiture of the bequest to the spouse of the witness in the one case, and of the intestate share of the witnessing heir in the other. This result was reached in *Jackson d. Cooder v. Woods* (N. Y. 1799) 1 Johns Cas. 163, where it was held that a bequest to the husband of a witness was void, and the wife thus became a competent witness.

A different result was reached in *Sullivan v. Sullivan* (1871) 106 Mass. 474, 8 Am. Rep. 356. The whole will was declared void where the spouse of a witness was a legatee under the will. By analogy, this decision supports the view taken in *Pfaffenberger v. Pfaffenberger*, above.

A third result was reached in *White v. Bower* (1913) 56 Colo. 575, 136 Pac. 1053, Ann. Cas. 1917A, 853, in which it was held that a bequest to the husband of a witness did not render the witness incompetent nor create such an interest as to render the bequest void. This decision, which represents

the prevailing rule, supports *Murphy v. Clancy, supra,* in holding that the statute cannot be extended so as to nullify an indirect interest in the witness, and that, therefore, such an interest neither disqualifies the witness, nor works a forfeiture of the gift in which he is so interested. This view has been termed the most logical. See Evans, *The Competency of Testamentary Witnesses* (1927) 25 MICH. L. REV. 238.

The principal case reaches the same result as *Murphy v. Clancy* on the question of competency of the indirectly interested witness. The question of the validity of the "gift" or intestate share is not decided. So far as there is any indication of the attitude of the court on this question it points towards the conclusion that the statute provides forfeiture of "devises, legacies, and gifts" only, and that it would not be extended so as to work a forfeiture of the heir's share by descent and distribution. T. G. J., '31.