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ETHICAL VIEW OF TESTAMENTARY RIGHTS
VS. THE CALIFORNIA LAW.

The right to make a will is essentially a property right. The entity with which a will is concerned is the testator's property and there is a very close relation between the right to acquire property when alive and the right to say who will get one's property when one is gone.

Seeing, therefore, that wills and property are so closely allied, in order to better understand the ethical view of testaments and testamentary rights, it would be well to give a brief resume of the ethical view of property and property rights.

Property is generally defined as that which can be owned, and as nothing can be owned that cannot be controlled, it follows that all property must be controlled. Property is divided into real property, land and its appurtenances, and movable or personal property, and these two classes of property are, from the very nature of things, subject to different rules of ownership.

Man was placed upon this earth by his Creator that he might eventually find perfect happiness, and the means to obtain happiness is by the observance of order. In the observance of order, man is bound to make use of nature and the fruits of nature in order to keep himself alive, and secondly, to acquire enough of the products of nature to take care of his family and provide for old age; but as property always consists of either some natural substance, or the product of natural substance, it follows that the ownership of at
least a certain amount of property of some sort or other is absolutely necessary to the well-being of mankind, and if it is necessary to possess a certain amount of property, it follows that it is not wrong to possess a greater amount, unless in that possession other people were denied the right to sustenance. Now it naturally follows that when a man dies leaving a surplus of property after payment of debts, the remainder has to go to someone or other.

Under some systems of law, the balance reverts to the State; under others to the children, or to the eldest son; a third is that the testator may will away personal property, but the descent of real property is fixed by law; and our present day system which provides that, with the exception of leaving a certain percentage of the community property to the wife, the testator may will any kind of property to anyone he chooses.

In the State of California, however, there are just two limitations on the right to give by will: one is that if a man has relatives, he may leave only one-third of his estate to charity, and the other is that if he dies within sixty days after making a Will giving any part of his fortune to charity, those gifts can be set aside on application of the heirs or the legatees of the estate. It is to discuss the morality of these two provisions of our law that this thesis is written.

In England, the enjoyment of the right to pass property by will is of comparatively recent origin. Until the Industrial Revolution did away with the last vestiges of the feudal system, the principal wealth was in land, the only personal property of any great monetary value being either gold, silver, gems or animals.
3) The title to real property was held from the king or from an overlord under the condition of rendering certain services—generally of a military nature, and upon the death of the father, the father's oldest son came into possession of the lands, on condition that he fulfilled the same obligations towards the overlord as his parent had done before him. The personal property could be willed away.

At first sight, therefore, the law as it looks to-day would seem to respect to a much greater degree the rights of the individual to do with his property as he sees fit than did the law of the middle ages. But, however, upon a close examination of the situation, it will be seen that the old law was in reality much more just than that which exists to-day.

Now a man accumulates property in two ways: either by inheritance or by his own effort. The latter method of acquiring property is much more common and we will confine our remarks to it exclusively.

A man's efforts to amass a fortune may remain within legitimate bounds, or he may use as a means the various forms of theft such as fraud, short measure, or even actual stealing.

Now if a man be the father of a family, and his wife and children have economized and co-operated in order to secure the fortune, they are certainly entitled to receive the money or property after the father's death and their claim has priority over any claim in charity that an institution of one kind or another might possess. So, in cases of this kind, a law which prevents a parent who is harsh with his children, or who would like to have his name carried down the ages as the foundation of some sort or
4) The right of a charitable institution from depriving his wife and children of a legitimate expectancy is a good law, provided that in doing away with this evil it does not cause another greater evil.

Now in order to be absolved from the sin of theft in any of its forms, a man must make restitution, and in the case of a man who has lived a life of cheating people indiscriminately, it is absolutely impossible to on his death bed remember the names of all the people he has wronged. But the man has acquired his property illegitimately and restitution must be made in some manner or other before absolution for his sin can be obtained. How is this to be done? The only way is to give up his enjoyment of the property by handing it over to a worthy charity that will help the poor who, if not downtrodden by this man, have been oppressed by some other man. In a case such as this, the law should permit the possessor of such wrongfully acquired property to give it to some charity or other in order to make proper restitution for his past offenses against the seventh commandment.

Now then here comes the great question. The law has to be uniform, as it cannot determine in each particular case whether the testator was guilty of the sin of theft or not. So therefore, what is the law to do? Shall it say we must protect the children in what is their rightful expectancy and therefore the amount of property that may be given to charities and the way in which it must be given shall be greatly restricted? Or, on the other hand, should the law say "We cannot restrict in any manner the right of a man to leave by will his property to any organization for chari-
table purposes, even if in many cases the children are deprived of what, by reason of their self-sacrifice and helpful co-operation, rightfully should be theirs?"

Here is a dilemma. Which way is the State to act? As the welfare of the people is in its hands, it makes the decision one way or the other, and which way is it to decide?

The State in deciding this question has looked over the pages of the history of the common law of England and has decided that since the earliest days up until quite a recent date the State greatly restricted the right of man to make a will and, therefore, now the State has a right to restrict the making of wills to the extent necessary for the protection of the heirs-at-law. But in reviewing the history of the common law, there were several things which the honorable members of our Legislature did not take into consideration. These were:

First, the nature of property.

Second, the grantor and the conditions under which it was granted.

Third, the obligations assumed by those who inherited.

As was said in the early part of this thesis, the great bulk of the wealth consisted in real property, and men always had the right to will away personal property.

Secondly, land was granted to one's ancestors by the king as a reward for the performance of a past service, and on the condition that future services would be performed. Except perhaps in Kent, land could not be bartered, sold or exchanged, a man could
not gain a parcel of real property by robbing someone and using the money to buy it. He could rob another, yes, but the only way in which land could be acquired was by a grant from an overlord and all England was parceled out within a very short time after the Battle of Hastings as a reward for military services. So while it was possible to obtain a grant from an overlord for a money consideration, the occasions were very very rare, and consequently it was very rare for men to obtain real property by illegitimate means.

In those days a large number of people lived on the lords' estates as tenants, who went with the land and who could not be put off. They performed certain services for the lord and as a reward had the right to gather wood, farm a piece of land for themselves, pasture their cattle, and fish in the streams—all in the lord's estates. The principal opportunity the wealthy classes of people had in the early days for depriving other people of their rightful possessions was the opportunity the lord had to oppress his tenants and deprive them of some of their rights on his land, or else evict them from the estate.

The tenants had an adequate remedy against their lord in this matter and the lord could make restitution without giving away his realty. Restitution could easily be made by ordering that they should be permitted to return to the estate and that as compensation for being kept out of possession for a certain length of time they should be allowed extra privileges and be relieved from some services.

Another point is that if the lord were permitted to will his real property away, these same tenants would be deprived of sustenance and support by having the estates cut into small parcels,
so that if the estates were cut up for the purposes of restitution, tenants who were attached to the land and who were absolutely innocent of any wrongdoing would be deprived of the only means of support possessed by their families and themselves; for one thousand acres might easily support one hundred families, if the ranch were kept as a whole, with the end in view of co-operating toward the support of these tenants, plus the support of one landlord's family. But if the ranch were divided into one hundred small ranches of ten acres each, with a tenant and his family living on each plot, the question would be a very different one. In this case, owing to the divided interest, there would be a great deal of waste on account of duplication of effort and in addition, each tenant, instead of contributing along with ninety-nine other tenants towards the support of one landlord, would have to, out of his plot of ground alone, entirely support a landlord. In other words, if the ranch were split up instead of having one hundred tenants and one landlord, there would be one hundred tenants and one hundred landlords, a situation that could not be coped with. Therefore, in order to secure to the tenants their contract rights, and as they worked for their possessions, and as they gained no profit from the lord's wrongful dealings with other men, it was entirely proper that the State should forbid the willing away of real estate.

Another reason why the old rule of not willing away real estate did not violate the rules of justice and prevent the possessor from making restitution for sins of theft was the fact that in those days the eldest son upon inheriting his father's property was charged with paying off all the moral obligations of the father. For example,
the daughters and younger sons did not inherit and yet the first son was bound to see that his brothers and sisters were properly looked out for. People who had claims against the father could look to the son for payment, and also if the father charged the son with an obligation, the son was bound to fulfill. If the father wished to make restitution, he could direct his son to pay a certain amount of the income to some particular charity every year until the stated sum was fully paid.

Now, however, things are very different. A father cannot tie up his property in trust with the direction that the income be paid to charity beyond a limited extent. If in his will he leaves the property to a son, unless he makes the payment of a sum to charity an absolute condition for the son's taking the property, the son is not bound, if he does make such a bequest a condition and it is over a certain sum the will may be broken and the son would inherit as if there were no will. In other words, there is really no way in which a father can make restitution upon his death-bed for the sins of theft committed during his life.

But the State says we must protect the children and the reason we must is this:--

Men are presumed to be honest and the number of honest men is greater than the number of dishonest men. In perhaps the majority of families, the wife and children co-operate to the fullest extent with the father in the accumulation of a family fortune. Most men accumulate money, not merely on account of superior business ability, but also because that man's wife was hard-working and economical and self-sacrificing, and because the children have either
practised economy themselves or else have actually gone to work at an early age and have turned into the family coffers, which is always kept by the father, their little might. Also it is very frequent and examples are seen every day, where the sons go to work in the father's business, work hard, get small salaries, and greatly help to build up the business, while the legal title to everything remains in the father's hands.

In cases such as these, the wife and children certainly have claims to the family fortune that are ahead of those of charities, and it is certainly very hard to see a family struggle for years to get along in life and by means of strict economy and willing co-operation secure a modest fortune of say one hundred thousand dollars only to have the father in his old age, either out of a vain desire to perpetuate his name, or because he imagines his children do not appreciate him, endow a hospital, or a school, or a library with the great bulk of his fortune. The only answer to a case of this kind is, it isn't right and ought by law to be prevented, but as has been said several times in this essay, the big question is, how should it be prevented.

Here we have these two evils resulting from the different systems: one the evil resulting from absolute freedom that is cutting wives and children off from what is theirs according to every rule of right and justice; the other system that greatly restricts the amount of and manner in which money may be left to charity deprives men from receiving absolution on their death beds. Now that the first half of this thesis has been devoted to a narration of the good
and evil resulting from each system, the remainder will be devoted to an attempt to prove that the rules dealing with the disposition of property to charity as they exist in California to-day are ethically wrong.

From the premises laid down, we are forced to pick between two apparent evils, and so must find what is real and what is apparent.

While it is very true that if freedom to give to charity were permitted by will, some families would be deprived of what is rightfully theirs, yet for this there are a number of remedies.

First, if the father makes the bequest when he is old, testy, and irresponsible, the will can be broken on the grounds of insanity. Because if the father forgot the natural objects of his bounty, or did not appreciate them at all, one of the two conditions of the state of mind necessary to make a will would be strikingly lacking. These two things are an appreciation of the extent and size of a man's property, and the knowledge of the natural objects of one's bounty.

If in old age, out of being hoodwinked into giving a share of his estate to the pet charity of some friend or confidential advisor, the estate is disposed of, the wife and children may, under the existing laws, break the will on the grounds of undue influence.

Of course, the cry will immediately go up that the process of fighting will contests in courts is long and expensive, but just in order to save a little expense and trouble to a very small fraction of a per cent of the population is no reason for denying to the great majority freedom in making a will.
But suppose the father is not old, feeble minded and weak and out of some passing notion or other makes such a will, what remedy do the children have then? To this question, we have two answers. First, that it is very seldom that such a thing happens, and, secondly, if it does happen, the children suffer only a temporal loss, and in most cases, not a very serious one. While on the other hand, if a man is denied the right to leave money to charity, he may suffer the loss of his soul.

If the loss of money were weighed against the loss of a soul, the latter would be found to be infinitely heavier and consequently if the preserving of a lesser right means the losing of a greater, it is better to lose the lesser.

What right have I to claim the passage of a statute to protect the succession of money or property to me when the passage of this statute would cause some other man to suffer for eternity the pains of hell? If there were no other way to protect my expectant interest in my father's property and even if I were sure that were it not for the passage of such an Act, I would not come into the property, I don't think even then I would be morally justified in taking a step whose consequences may be so disastrous to the other party. But in the case of the laws here discussed is much weaker than this, for laws of this nature are not passed to stop a real abuse, but rather are passed to prevent someone from attempting to abuse the right to bequeath by will.

The number of cases has never been very large in which men have abused the will-making power, and yet in the attempt to
secure for a very small minority of the people a certainness of succession to property, which in many cases they would be better off without, and which in no case is absolutely necessary to temporal preservation, the government makes a law which may be the means of sending men to hell. Nothing further need be said to show the unjustness of such a measure.

This subject has been discussed with the intention of putting the law in its most favorable light, that is, putting it on the ground of securing to the children what by right should be theirs. This supposes that the law really does secure the children from the imposition by designing persons of their wills upon the testator, and it has been upon this supposition that the question has been considered.

These laws, as a matter of fact, however, do not protect the children from the inroads of designing persons, as the limitation placed does not limit devising by will generally, but only devising by will to charities. This shows the foolishness of the law.

The people liable to gain an influence on a man are his friends, his personal attendants, and his business associates. If these acquaintances are of such character as to attempt undue influence, they are going to attempt undue influence for motives of personal gain and not for the motives of charity towards others. What man is going to violate the moral law by preying upon a man whose mind is not quite clear for the purpose of inducing him to give to a school or hospital over which the influencer, if that term may be used, has neither control nor pecuniary interest?
It is a principle of philosophy that the will always tends towards a good either real or apparent, and that it will not consent to an evil act unless some apparent present good is to be obtained. What good would be obtained for a man who would unduly influence his friend or prey upon a feeble-minded friend to give to charity. His own pocket would not be fattened, he would not gain fame, he would not gain honor, he would not gain applause, and certainly he would gain no heavenly reward, for a good end never makes bad means good. No: the only reason that in an appreciable number of cases, men are induced to use sinister actions in matters such as this, is the reason of gaining personal wealth, and this evil the present law does not guard against.

No matter what may be the circumstances, the justification or the reason, a man can cut his sons and daughters off from every cent and deprive his wife of everything but a share of the community property determined by law. I could die leaving ten thousand dollars of community property, a wife and four children. Outside of the five thousand my wife would be entitled to by law, I could deprive both wife and children of the remainder of my estate, no matter how badly they might need it.

If the law limited all cutting off of wives and children, then the arguments of those who advocate a limitation of the rights of testamentary disposition might be sound. But why the distinction between charities and ordinary persons? A man may leave his money to the worst profligate in the world, but the finest and most worthy charity can only take one-third.
The reason for this distinction is probably some oversight on the part of the legislature, but it is a fair example of what happens in most cases when general and permanent laws are passed to remedy what are at worst only occasional evils. In other words, although the old system may have worked an injustice in some cases, at the same time, the instances were comparatively few and in the evil is sought to be done away with by law a new evil, namely depriving men of the opportunity to make atonement, results, and also a most unjust distinction is made in which worthy charities are denied the right to receive by will while at the same time any unworthy individual may still inherit just as easily as he could before. For these reasons, this phase of the testamentary laws in California is unethical and should be changed.

There is a great tendency on the part of governments which has largely developed during the last twenty-five or thirty years to seek to bring under control of public officers a great many matters of regulation which are not of great moment, consequence, or importance to the people as a whole, and which, at the same time, are of great importance to the individual, who is deprived of freedom when these matters are taken out of his hands and placed in those of a State official.

Man has a free will, a right to acquire property, a right to marry, a right to rear a family, a right to sell property, and a right to give property to others either by deed or by will, and restrictions on these rights should be limited very strictly to only those cases wherein the exercise of a right would clearly mean the depriving of another of his right, or would cause a wrong to be
done to the people as a whole.

Applying this doctrine to the question of wills, we find that the California law as it stands today, without including the Statute with regard to charities, amply protects the wife in that she can be positively certain of obtaining half the community property, and unless cut off by her husband's will, can inherit one-third of the separate property, or if left everything by will, she may acquire the whole estate. The children are protected in that unless positively cut off by will, they inherit all that the wife does not inherit. If children are forgotten or proper provision is not made for the wife, the will may be broken. If the husband is not of sound mind or has been unduly influenced, the will may also be broken. These provisions should amply protect the heirs-at-law of any man.

It is hardly conceivable that there are an appreciable number of instances in which a father or a mother who have taken the trouble to rear, and look after, and educate children should cut them off without enough to live on. It isn't natural and it isn't done. Why then this rule against giving more than a third to charity or giving to charity within sixty days of death?

The only reason by which this rule may be explained is that the State is distrustful of the charitable institutions that exist within its borders.

But, however, there is absolutely no rhyme or reason for this mistrust. If ever a State possessed worthy and good charities that State is California. None of them--neither Catholic, Protestant
norsecular has ever had the slightest stain of suspicion cast upon them of graft, greed, or bad treatment of those unfortunates in their care.

These charities are incorporated under the laws of the State for the express purpose of ministering to the corporal and spiritual needs of those who are unable to help themselves. They have always been encouraged by the State. They do a great good to the people of the State. Is it just then to deprive them of a right to be named legatees in wills on an equal basis with private persons not blood relations of the testator? The answer is clearly no.