

NEW-JERSEY

COURT OF ERRORS AND APPEALS.

HIRAM VANDUYNE, Appellant,
and
JAMES M. VANDUYNE, JOHN
M. VANDUYNE, et. als.,
Appellees.

On Appeal from
an
Interlocutory Decree
of
Court of Chancery.

STATE OF THE CASE.

This appeal is brought to reverse the Interlocutory Decree of the Court of Chancery made on the fifteenth day of September, eighteen hundred and sixty-three, in a cause therein depending, wherein the said Hiram Vanduyne is complainant, and James M. Vanduyne, John M. Vanduyne, et, als. are defendants. Bill filed 7th December, 1861.

To the Honorable HENRY W. GREEN, Chancellor of the
State of New Jersey :

Humbly complaining, shows unto your Honor, your orator Hiram Vanduyne, of the township of Pequanaac, in the county of Morris, and State of New Jersey, that Martin I. Vanduyne, late of the said township of Pequanaac, now deceased, in his life time, and at his death, was seized and possessed of the lands hereinafter described or mentioned, and that in his life time and on or about the twenty-eighth day of April, eighteen hundred and forty, the said Martin I. Vanduyne made and published his last will and testament in writing, in due form of law, and so executed as to pass and convey real estate bearing date the day and year aforesaid, and that in and by the second and third items or clauses of his said will, the said testator did give and devise, as follows :

Second. " I give and devise to my son, James M. Vanduyne, and to my daughter Hetty Vanduyne, equally, all my homestead farm whereon I now live, containing eighty one acres, and sixty-one hundredths of an acre, contained in two deeds from Abraham Vanduyne and Rachel his wife, dated the first day of December, 1795, and one from Adam DeMout, dated the third day of May, 1771—to them, their heirs and assigns forever, hoping and believing they will do justice, hereafter, to my grandson, Hiram Vanduyne, to the amount of one-half of the said homestead farm."

"Third. I give and devise to my sons, Cornelius M. Vanduyne, John M. Vanduyne and James M. Vanduyne, and Hetty Vanduyne, equally, a tract of land in Pequanae, aforesaid, of eighty-four acres and twenty-eight hundredths of an acre, which I purchased of Jacob Vanduyne, by deed dated the seventeenth day of May, 1797, to them, their heirs and assigns forever, hoping and believing that my son James M. Vanduyne and my daughter Hetty Vanduyne, will hereafter do justice to my grandson, Hiram Vanduyne, to the amount of one-fourth part of the said eighty-four acres and twenty-eight hundredths of an acre."

10 And your orator further shows that in and by the said will the said testator did also devise in fee simple to the said Cornelius M. Vanduyne, John M. Vanduyne, James M. Vanduyne and Hetty Vanduyne, in equal shares, five other lots of land situate in the said township of Pequanae, namely :

1. A wood lot of four acres and seventy-eight hundredths of an acre.
2. A lot called "the bog and fly lot," containing twelve acres.
3. A lot of sixty-three acres and eighty-one hundredths of an acre ; and
4. A lot of ten acres, both of which last mentioned lots were purchased of John M. Vanduyne.

20 5. A wood lot of twenty acres, purchased of Richard Vanduyne. And you orator further shows that the said testator, in and by his said will also devised, in fee simple, to the said James M. Vanduyne and Hetty Vanduyne, equally, two other lots of land situate in the said township of Pequanae, namely :

A lot of five acres and sixteen hundredths of an acre ; and also a lot of nine acres and forty-hundredths of an acre, of chestnut woodland purchased of Richard B. Faesch and William H. Robinson.

And your orator further shows that the said Martin I. Vanduyne, soon after the date of the said will, departed this life without having revoked the said will, and leaving the same in full force as his last will and testament, and afterwards, and on the seventh day of July, 1840, the said will was duly proved
30 before the Surrogate of the county of Morris, and was recorded in Book E, of Wills, in the office of said Surrogate, pages 287 &c., as by reference to said record or a duly certified copy thereof, to which your orator prays leave to refer, if necessary, will more fully and at large appear.

And your orator further shows that he is the same person named and referred to in said will as the said testator's grandson, Hiram Vanduyne, and that your orator's mother, who was a daughter of the said testator, died in the life time of the said testator and before the making of said will.

And your orator further shows that at the death of the said Martin I. Vanduyne, the devisees in his will named became seized in law, and in fact of all
40 the lands devised to them in and by the said will and took and had possession thereof.

And your orator further shows that afterwards, by deeds bearing date the twenty-fourth day of November, 1840, acknowledged on the sixteenth day of December, 1843, and recorded in the office of the Clerk of the County of Morris, on the 26th of December, 1843, the said Cornelius M. Vanduyne, John M. Vanduyne, James M. Vanduyne and Hetty Vanduyne, made partition of the lands mentioned and devised in said will as follows :

The said Cornelius Vanduyne, James M. Vanduyne and Hetty Vanduyne, by their deed, which is now recorded in the Record of Deeds of the said county of Morris, in Book C, pages 649 &c., conveyed certain portions of said lands in said deed particularly described, to the said John M. Vanduyne, to have and hold in severalty. And the said John M., James M. and Hetty Vanduyne, by their deed, which is recorded in the same Registry Office, in Book D, 4, pages 1 &c, conveyed certain other portions of said lands in said last mentioned deed described, to the said Cornelius M. Vanduyne, to have and to hold in severalty. And the said Cornelius M. Vanduyne and John M. Vanduyne, by their deed, recorded in the Registry aforesaid, Book C, 4, pages 651, &c., conveyed a certain other portion of said lands particularly described in the said last mentioned deed, to the said James M. Vanduyne and Hetty Vanduyne, so that said James and Hetty had and held, until the death of said Hetty, the lands described in said last mentioned deed, together as tenants in common in equal shares.

* * * * *

And your orator further shows that the said Hetty Vanduyne was never married, and that on or about the twenty-fourth day of May, 1861, she died intestate, at the said township of Pequanae, leaving her surviving as her heirs at law, the said James M. Vanduyne, John M. Vanduyne and the children and heirs at law of said Cornelius M. Vanduyne, (who died 29th November, 1859,) namely: Ebenezer Vanduyne, Catharine, the wife of Thomas Doremus, Sarah, the wife of John Lisingwell, Caroline, the wife of John Wilson, Mary, the wife of Charles Sharp, and Jane, the wife of Edward McNorton.

And your orator further shows that he has been advised and he humbly submits that the second and third items, or clauses, of the said will vested in the said Hetty Vanduyne, and in the said James M. Vanduyne, each one-half of the lot mentioned and described in the second clause of the said will and in the lot mentioned in the third item, or clause, of said will vested in said James and Hetty, each one equal, undivided one fourth part, for their use and benefit, respectively and severally, during his or her life and in trust to and for the use of your orator in fee after the death of said Hetty and after the death of the said James M. Vanduyne, respectively, so that at the death of said Hetty your orator became entitled to have and to hold, in fee simple, for his own use forever, one equal, undivided one-half part of the said Hetty's moiety of the said lot mentioned and described in the said second item or clause of said will, and also to have and to hold in fee simple, for his own use forever, the equal, undivided one-half part of the said Hetty's one-fourth part of the said lot or tract of land mentioned and described in the third clause or item of said will, and that the heirs at law of the said Hetty are bound to convey to your orator his said shares of, in and to said two tracts of land.

* * * * *

And your orator further shows, charges and humbly submits that he is seized of the lands and premises mentioned and described in the partition deed from Cornelius M. Vanduyne and John M. Vanduyne to James M. Vanduyne and Hetty Vanduyne herein before mentioned, as follows:

1. That by virtue of the second clause or item of the said will of Martin I. Vanduyne, your orator is seized of and entitled in fee simple unto one equal undivided one-fourth part of the homestead farm of the said testator, containing eighty-one and sixty-one hundredths acres, mentioned in said will and in said last mentioned partition deed.
2. That by virtue of the two deeds from James M. Vanduyne, to your orator, herein before stated, your orator is seized in fee of and entitled unto another share and part, to wit: One equal, undivided one-twelfth part of the said homestead farm of the said Martin I. Vanduyne.
- 10 3. That by virtue of the said trust deed from James M. Vanduyne, to Jabez D. Burnet, your orator is entitled to the use and benefit for and during his natural life, after the death of said James M. Vanduyne, of the equal undivided one-half part of the said Homestead farm, so that your orator, in manner aforesaid, is interested in and entitled unto ten-twelfths of the said Homestead farm.
4. That by virtue of the third item or clause of the said last will and testament, your orator is seized of in fee and entitled unto one equal, undivided one-eighth part of the lot of eighty-four and twenty-eight hundredths acres in that clause of said will mentioned.
- 20 5. That by virtue of the two deeds from the said James M. Vanduyne to your orator herein before mentioned, your orator is seized in fee of and entitled unto another part of said last mentioned lot, to wit: To one equal, undivided one twenty-fourth part thereof.
6. That by virtue of the said trust deed from the said James M. Vanduyne to the said Jabez D. Burnet, your orator is entitled to the use and benefit for and during his natural life, after the death of the said James M. Vanduyne, of an equal, undivided one-fourth part of the said last mentioned tract of land, so that your orator, in manner aforesaid, is seized of or interested in ten twenty-fourth parts of the said last mentioned lot.
- 30 7. That by virtue of the said two deeds from the said James M. Vanduyne to your orator, your orator is seized in fee and entitled unto, for his own use, of one equal undivided one-sixth part of all the other lands described in the said partition deed from Cornelius and John M. Vanduyne to said James M. and Hetty Vanduyne, and of any and all other lands whereof the said Hetty Vanduyne was seized at the time of her death.
8. And that by virtue of the said trust deed from the said James M. Vanduyne to the said Jabez D. Burnet, your orator is entitled to the use and benefit, for and during his natural life, after the death of said James M. Vanduyne, of said James' equal, undivided one-half part of all the lands described in the said last mentioned partition deed, beyond and over and above the two tracts mentioned and referred to in the second and third items or clauses of said will, and of all other lands whereof said James was seized at the making of said trust deed.
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And your orator further shows that since the death of the said Hetty Vanduyne, the said James M. Vanduyne, John M. Vanduyne and the said heirs of Cornelius M. Vanduyne. as well as your orator have been and are desirous that a fair partition and division of the said lands whereof the said

Hetty was seized at the time of her death should be made between the parties entitled to the same in such shares and proportions as they are by law, severally entitled to and that each one's share shall be allotted to him or her in severalty, in fee simple and for that purpose application has been made to and by the said parties to have such partition and allotment made, but inasmuch as there is a difference of opinion between your orator and the said parties as to the meaning, construction and legal effect of the said second and third clauses of said will and as to the extent of the right and estate in and to said lands vested in your orator by said will; no partition has been made or can be arrived at or made by the said parties between and among themselves, said partition cannot be made except by the intervention of this honorable Court. In tender consideration whereof and forasmuch as your orator cannot be fully relieved in the premises, but by the aid of a Court of equity, where matters of this nature are properly cognizable and relieveable. 10

To the end, therefore, that the said James M. Vanduyne, John M. Vanduyne, Ebenezer Vanduyne, Thomas Doremus and Catharine his wife, John Lifingwell and Sarah his wife, John Wilson and Caroline his wife, Charles Sharp and Mary his wife, and Edward McNorton and Jane his wife, may, upon their several and respective corporal oaths, true, full and perfect answers make to all and singular the said premises as fully and particularly as if the same were here again repeated and they thereunto particularly interrogated paragraph by paragraph, and whether said Hetty Vanduyne, at the time of her death, was seized of or entitled to any lands except those described in the last mentioned partition deed, and if so, what and where they are and to fully and particularly describe them, that your orator may be decreed to be entitled in fee simple, for his own use, by virtue of the second item or clause of the said will of the said Martin I. Vanduyne, to the equal one-fourth part of the said tract of land in that item or clause mentioned, and by virtue of the third item or clause of that will to an equal one-eighth part of the said lot or tract mentioned and referred to in the said third item or clause; that the share, right, title and interest of every one of the defendants to this suit in and to the said lands in the said last mentioned partition deed described, and of all the other lands whereof Hetty Vanduyne died seized, may be ascertained, decreed and declared by this honorable Court, and that a partition and division of said lands, with the appurtenances, may be made into such equal parts or shares as this honorable Court shall decree and declare the parties to this suit severally and respectively entitled unto, and that a commission of partition may issue out of and under the seal of this honorable Court, directed to proper persons as commissioners, for the purpose aforesaid, that your orator's share of said lands may be allotted to him, his heirs and assigns forever, in severalty, according to his and their rights, and that the shares of the defendants to this suit, respectively, may be allotted to them, their heirs and assigns, respectively, in severalty, according to their several rights, and that proper deeds for conveying the several shares to the parties respectively entitled, may be made by the other parties to this suit, your orator being ready and willing to join in making all or any deeds directed by this honorable Court; or that said lands may be sold and conveyed under the order and decree of this honorable Court, 20 30 40

pursuant to law and equity, and the proceeds of such sale to be divided among the parties to this suit in proportion to their several rights, interests and estates in the said lands, or that Your Honor will make such other order or decree in the matter aforesaid as to Your Honor shall seem meet and the circumstances of this case shall require, and as shall be agreeable to equity and good conscience.

ANSWER OF JOHN M. VANDUYNE.

After the usual, formal, introductory part, the answer sets out the whole will of Martin I. Vanduyne, as follows :

10 IN THE NAME OF GOD, AMEN. I, Martin I. Vanduyne, of the township of Pequannac, in the county of Morris, and State of New Jersey, being weak in body, but of sound and disposing mind and memory, for which blessing I do most devoutly thank my God; do this twenty-eighth day of April, in the year of our Lord one thousand and eight hundred and forty, make and publish this my last will and testament in manner and following—that is to say :

First. I do order, and it is my will, that all my just debts and funeral expenses, be duly paid and satisfied, as soon as conveniently can be after my decease, by my Executors, hereinafter named.

20 Second. I give and devise to my son, James M. Vanduyne, and to my daughter, Hetty Vanduyne, equally, all my homestead farm, whereon I now live, containing eighty-one acres and sixty-one hundredths of an acre, contained in two deeds, one from Abraham Vanduyne and Rachel his wife, dated the first day of December, 1795, and one from Adam Demout, dated the third day of May, 1771, to them, their heirs and assigns forever, hoping and believing they will do justice hereafter to my grandson, Hiram Vanduyne, to the amount of one-half of the said homestead farm.

30 Third. I give and devise to my sons, Cornelius M. Vanduyne, John M. Vanduyne, James M. Vanduyne and Hetty Vanduyne, equally, a tract of land in Pequannac aforesaid, of eighty-four acres and twenty-eight hundredths of an acre, which I purchased of Jacob Vanduyne, by deed dated the seventeenth day of May, 1797, to them, their heirs and assigns forever, hoping and believing that my son James M. Vanduyne, and my daughter Hetty Vanduyne, will hereafter do justice to my grandson, Hiram Vanduyne, to the amount of one-fourth part of the said eighty-four acres and twenty-eight hundredths of an acre; also, I give and devise to my sons Cornelius M. Vanduyne, John M. Vanduyne, James M. Vanduyne and Hetty Vanduyne, equally, the small wood lot, of four acres and seventy-eight hundredths of an acre, which I purchased of Benjamin Howel, adjoining the eighty-four and twenty-eight hundredths acres, before devised to them, to them, their heirs and assigns forever; also, I give and devise to my sons James M. Vanduyne, Cornelius M. Vanduyne, and John M. Vanduyne, and my daughter Hetty Vanduyne, equally, the bog and fly lot I purchased of Robert Campbell, Esq., containing twelve acres, to them, their heirs and assigns forever; also, the lot of land of sixty-three acres and sixty-one hundredths of an acre; also the ten acre lot I purchased of John Vanduyne and wife, the sixty-three and sixty-one hundredths of an acre I purchased of my father, James Vanduyne, equally to the said

Cornelius M. Vanduyne, John M. Vanduyne, James M. Vanduyne and Hetty Vanduyne, their heirs and assigns forever; also, twenty acres of wood land, part of thirty acres I purchased of Richard Vanduyne and wife, all in the township of Pequananac aforesaid, to the said Cornelius, John and James M. Vanduyne and Hetty Vanduyne, equally, to them, their heirs and assigns forever; also, I give and devise to my son James M. Vanduyne and Hetty Vanduyne, equally, the lot of five acres and sixteen hundredths of an acre; also, the lot of nine acres and forty hundredths an acre of chestnut woodland I purchased of Richard B. Faesch and William H. Robinson, all in the township of Pequananac, to them, their heirs and assigns forever. I give and devise to my son John M. Vanduyne, twenty-six acres of the lot of thirty-two acres I purchased of Peter F. Doremus; also, a lot of land I purchased of Moses Morrison and wife, containing eight acres and thirty-eight hundredths of an acre, all in Pequananac aforesaid, to him, his heirs and assigns forever; also two other small lots of land I purchased of Richard Vanduyne and wife, in Pequannac aforesaid, one lot containing two acres and seventy-three hundredths of an acre, the other containing ninety-one hundredths of an acre, to him, the said John M. Vanduyne, his heirs and assigns forever. I give and devise to my son Cornelius M. Vanduyne, six acres of land, to be taken off the north-west corner of the thirty-two acre lot I purchased of Peter T. Doremus; also, the lot of nineteen acres and ninety-six hundredths of an acre I purchased of Peter T. Doremus; also, ten acres of cleared land, out of the thirty acre lot I purchased of Richard Vanduyne and wife, all in Pequananac aforesaid, to him, his heirs and assigns forever. I give and devise to my son John M. Vanduyne, the lot of land on which his house stands, as the same is now enclosed and in his possession, to him, his heirs and assigns forever. I give and devise equally to my sons Cornelius M. Vanduyne and John M. Vanduyne, the lot I purchased of Bethuel Baldwin and wife, being the tan yard lot; also, my share in the saw mill and lot I purchased of Abraham J. Vanduyne and wife, all in Pequananac aforesaid, to them, their heirs and assigns forever. I give and bequeath to my sons Cornelius, John and James M. Vanduyne, and to my daughter Hetty Vanduyne, five hundred dollars each. I give and bequeath to my son James M. Vanduyne and to my daughter Hetty Vanduyne, equally, my stock of horses, cows and other horned cattle, hogs and sheep, with all my farming utensils, equally between them; also, all my household and kitchen furniture equally between them, the said James and Hetty; and I give and bequeath equally, to my sons James, Cornelius and John, and my daughter Hetty, all the residue of my personal property of every description.

Lastly, I appoint my three sons, Cornelius M. Vanduyne, John M. Vanduyne and James M. Vanduyne, Executors of this my last will and testament.

[L. s.]

(Signed)

MARTIN I. VANDUYNE.

Signed, sealed, published and declared, by the said Martin I. Vanduyne, to be his testament and last will, in the presence of us—

SILAS COOK.

JAMES PENTNER.

MOSES A. BALDWIN.

And this Defendant further answering says and insists that in and by

said last will and testament, no lands or real estate, nor any interest in any lands or estate nor in any estate, real or personal, was devised, given or bequeathed to the complainant, either in person, in reversion, trust or otherwise, and that the said complainant if at all related to the testator, was and is an illegitimate grandchild of said Martin I. Vanduyne, as it is admitted and alleged by the complainant, and therefore, independantly of said devise, was and is entirely incapable of taking, inheriting or having any such estate, interest or share whatever, of or in the estate of the testator, and that the said clauses, and each thereof, in said will contained and expressed, relating or referring in any way to the said complainant, are, if they are in any way or degree to be regarded, in this honorable Court, or be regarded as of any force or effect whatever, only as expressions, by the said testator, of suggestions, at the pleasure of said devisees, or at farthest of his hopes that the devisees, of lands in such clauses mentioned, might be willing to aid said complainant to the extent therein respectively mentioned, and not as at all obligatory or binding in any legal or equitable sense upon them or either of them, and so ought to be regarded by this honorable Court, and that the devisees of lands above stated, and from said will quoted, (in said bill contained,) are absolute, in due form of law, to the devisees especially and by name in said will named, and

10 20 devise and convey the said lands to the said devisees thereof, respectively, in fee simple absolute, and that if any claim whatever of said complainant, under, or upon said will, or in any way whatever, can be made in this honorable Court, it cannot be made as in this suit claimed; and this Defendant claims the same benefit and advantage thereof, as if the same were set up and pleaded by way of plea or demurrer in this suit.

And this defendant, further answering says, said testator did soon afterwards die, leaving said will unrevoked and in full force, and that said will was afterwards, and at or about the time in that behalf named, proved in due form of law, and recorded, as in said bill is stated, by reference to the proper records thereof.

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And this Defendant, further answering, says that he admits the complainant is the same person named in said will as the testator's grandson Hiram Vanduyne, and that the testator's daughter, who was never married, and whose son was the *illegitimate* son, the complainant in this suit, died before the death of said testator, but not before the making of said will; and that soon after the death of said testator, this defendant, as tenant in common with his co-tenants of all lands devised to him, took and has had possession thereof, as such co-tenant until the partition hereinafter referred to, and since such partition, of his separate share, by such partition, to him awarded and released

40 in such lands.

And this Defendant denies that in or by the said will, or by the death of the said Hetty, the said Hiram Vanduyne the complainant became or was made, in trust, or otherwise, in any way interested in said will, or in any of the devises or bequests thereof to any extent or degree otherwise than the statement in that behalf above made, or in or to the lands and real estate whereof said Hetty Vanduyne died seized, and denies any claim of the complainant in said bill named or made of or against the heirs at law of said Hetty, and espe-

cially of or against this Defendant, to convey to him any share whatever, of, in or to the two lots of land in said bill, in which he claims to be interested as in said bill is claimed, or otherwise howsoever, or in any lands of which said testator made disposition of by said will or died seized.

And this Defendant prays that said will, and the provisions of the same, may be justly and legally construed, and its legal effect upon the rights of this Defendant in and to the lands whereof Hetty Vanduyne died seized, may be determined, and the share thereof of this Defendant may be ascertained and declared, if by the rules and practice of this Court the same may be properly done, as also of the heirs at law of said Cornelius M. Vanduyne and of the said James M. Vanduyne, and of the complainant in and to the same and the same allotted to them in severalty, according to their and each of their just rights in the premises. 10

CHANCELLOR'S OPINION.

HIRAM VANDUYNE, v. JAMES M. VANDUYNE, et. als.

JULY 1, 1863.

The case depends upon the true construction of the second and third clauses of the will of Hiram Vanduyne, of the county of Morris. By the second clause of his will, the testator devised his homestead farm to his son James and his daughter Hetty, equally, "to them, their heirs and assigns forever, hoping and believing they will do justice hereafter to my grandson Hiram Vanduyne, to the amount of one-half of the said homestead farm." The third clause contains a devise in similar terms. 20

The bill claims that the terms of the devise create a trust in favor of Hiram Vanduyne, the grandson for one-half of the land devised, in fee to take effect upon the death of the devisees respectively. The legal position is that a devise to A, in fee, hoping that he will hereafter do justice to B, to the amount of half of the land is tantamount to a devise to A, of half the land in trust for B, from and after the death of A.

This is not the natural import of the terms of the devise. No trust is declared. No condition is imposed. No injunction is laid upon the devisee. A mere hope and belief is expressed that the devisee will do justice to the grandson. It would have been natural for the testator, in case he had designed to create a trust or impose a condition upon the devisee, so to have declared. There is a clear and obvious distinction, which every man understands, between an injunction and an entreaty, between a condition imposed, and a hope or belief expressed. The one imposes an obligation, the other rests in discretion. Compliance with the one is voluntary, with the other compulsory. The devise it will be observed, is to the devisees in fee simple, "to them, their heirs and assigns forever." The hope annexed to that gift, it is claimed, converts that estate *pro tanto* into an estate for life, with remainder in fee in trust for a third party. The testator certainly indicates no such intention. That is not the natural import of the terms used. It is admitted, indeed, that it is not an *express trust*, but a trust by implication of law, resulting from an artificial construction which courts have given, or ought to give, to the language of the 30 40

testator, to effectuate his real intent and purpose.—*Knight v. Knight*. 3 Beavan 175.

It is an observation incident to all trusts created by precatory words, that the testator might, if he had intended, have created an express trust.—*Knight v. Bouton*. 11, *Clark & Finnelly* 533.

And I think it is an equally obvious idea, that if the testator had designed to create a trust at all he would have done so in express terms, and not have left it to legal inference or conjecture, or at least that the devise would have been such as to render the existence of the trust the result of *necessary* inference.

It was well said, by the Vice Chancellor Hart, that the first case that construed words of recommendation into a command, made a will for the testator; fore very one knows the distinction between them.—*Sale v. Moore*. 1 *Simons*, 534.

No inference, I think, can be fairly drawn from the terms of this will, that the testator designed to create a trust in favor of his grandson. If such had been the intention of the testator he would have indicated such intention by terms more appropriate to that design. His failing to do so is the best evidence that he had no such intention. Such is the fair and reasonable conclusion to be drawn from the terms of the will itself.

20 But in the construction of wills, terms often acquire a technical meaning, independant of their ordinary and natural signification, which it is incumbent upon Courts to adopt and apply.

Have the terms here used, acquired such technical meaning, as to control their natural import in the interpretation of the will?

There is, I think, a very obvious distinction which does not seem to be clearly recognized in the books, between the *creation* of a trust, and the regulation of a subsisting trust, or the disposal of the trust fund. It would seem to require much stronger and clearer terms in the one case than in the other. The executor is a trustee of the estate of the testator. The will of the testator is the law of the trust, and the guide of the trustee. If, therefore, the trustee desires, or wishes, or confidently expects that his executor will pay one thousand dollars to his son, on his attaining the age of twenty-one, it is certainly no forced construction to regard the language as imperative, and as designed to be compulsory. It is but a direction by the creator of the trust to the trustee as to the mode in which the trust fund shall be appropriated. But where the testator, by his will, disposes of part of his estate to another absolutely untrammelled by any condition, unaffected by any express trust, but accompanied by a hope or a confidence that he will dispose of the whole or a portion of it in a specified way, it seems very remarkable that the mere wish, or hope, should cancel the gift; should convert the beneficiary into a mere trustee; should not only be the law of the trust, and regulate the disposal of the fund, but should create the trust. For this is the extent of some of the authorities. However absolute may be the gift, the mere hope expressed by the testator, at once converts the donee into a trustee for the benefit of another, and regulates the disposal of the fund, and this too by a legal inference in the very face of the natural and obvious import of the language of the testator, and strange as it may seem, that inference, resting on the assump-

tion that it accords with the intention of the testator. For, all the cases agree that here, as elsewhere, the manifest intention of the testator is to be regarded, and unless he intends that the words should be imperative they are not so. Unless it was intended to create a trust, none is created. "The real question in these cases always is, whether the wish, or desire, or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party leaving it, however, to the party to exercise his own discretion. That is the real question."—*Williams v. Williams*.—1, *Simons*, N. S. 357.

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It cannot be questioned that the earlier English authorities, adopting the principles of the Roman law, establish the rule that words, expressing hope wish, expectation, confidence or recommendation, will create a trust as against a devisee or legatee. The cases are very numerous and will be found collected in—1 *Jarman on Wills*, 335. 348.—*Hill on Trustees*, 71. 82.—*Story's Eq. Jur.* § 1068.

The principle settled by the cases as stated by Lord Eldon, is that "whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects with regard to whom such terms are used are certain, and the subjects of property to be given are also certain; the words are considered imperative and create a trust.—*Paul v. Compton*. 8 *Vesey*, 379

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But the current of authorities of late years, has been against converting the legatee into a trustee.—*Sale v. Moore*. 1 *Simons* 534.

A strong disposition has been manifested by the courts to limit, rather than extend the doctrine of raising trusts upon words of recommendation, and as far as the authorities will allow, to give the words their natural and ordinary effect, unless it be clear that they are intended to be used in a peremptory sense. It is obvious that the English Courts feel themselves trammelled by the force of the earlier authorities, and question the soundness of the rule, which they are constrained to adopt. Thus, in *Wright v. Atkyns* 1 *Ves.* and *B.* 315. the Lord Chancellor (Eldon,) in delivering his opinion, says: "This sort of trust is generally a surprise on the intention, but it is too late to correct that. Conceiving these cases upon words of hope, confidence, &c., to be generally decided against the intention, I have endeavored to raise a distinction in the defendant's favor, but cannot. I do not believe the testator intended a mere trust, but that must be the construction." And in *Meredith v. Henage*. (1. *Simons*, 542,) the Lord Chief Baron, in delivering his opinion, said: "I hope to be forgiven, if I entertain a serious doubt whether, in many, or perhaps most of the cases, the construction was not adverse to the real intention of the testator. It seems, to me very singular that a person who really meant to impose the obligations established by the cases, should use a course so circuitous, and a language so inappropriate and also obscure, to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself, and to the professional or any other person who might prepare his will. In considering these cases, it has always occurred to me that if I had myself made such a will as has generally been

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considered imperative, I should never have intended it to be imperative ; but, on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer those whom I proposed to him, and who next to him, were, at the time, the principal objects of my regard."

That cannot be a sound principle of interpretation which confessedly defeats the intention of the testator. In *Briggs v. Perry*. 3 Mac. and Gov. 546, the rule was laid down by Lord Chancellor Turo, as the result of the authorities, to be, that " Words accompanying a gift, or bequest, expressive of confidence, or belief, or desire, or hope that a particular application will be made of such bequest. will be deemed to import a trust upon these conditions. First, they are to be so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not. Secondly, the subject must be certain ; and thirdly, the object expressed not too vague or indefinite to be enforced. Now, it is obvious to remark that the mere expression of a hope, or wish, or belief, or request, that the devisee will make a particular use of the property, does not naturally import a design to exclude the exercise of discretion by the donee, but to permit its exercise. The technical rule of the English Courts have, it is true, given them such effect, but it is directly opposed to their natural import, and the sense in which they would be used, and understood by every man of ordinary intelligence, independent of artificial rules of interpretation. The rule therefore, as stated by Lord Turo, is a natural modification of the rule as stated by Lord Eldon.

In conformity with this statement of the principle, the rule has been stated by a recent, accurate, elementary writer to be " when a bequest is accompanied by words expressing a *command*, recommendation, entreaty, wish or hope ; on the part of the testator, that the donor will dispose of the property in favor of another, a trust will be created if *the words on the whole are sufficiently imperative*, and the trust and the object be sufficiently certain." *Hill on Trustees*, 71, (Ed. 1857.) A command certainly is sufficiently imperative. So a hope or wish may be ; if addressed to an Executor or Trustee, the trust being created ; or, if coupled with other expressions indicating a clear intent that they shall operate as a command. But standing alone, and addressed to a legatee to whom property is given by the testator, in terms importing an absolute gift, they are not imperative. A wish addressed to my agent as to the mode of dealing with my property, is tantamount to a command, but a wish addressed to a third party as to the mode of disposing of his own property, can amount but to a request, and nothing more.

In *Ellis v. Ellis*. 15, Ala. 301, it was stated by Judge Chilton to be the true rule of interpretation to give such recommendatory expressions their natural, ordinary and familiar sense, and having arrived at the true intention of the testator, to let that intention, if lawful, be the rule of decision in the particular case.

In the case of *Pennock's Estate*, 20 Penn. St. R. 268, after repeated arguments, and a very elaborate examination of the authorities, the Supreme Court of Pennsylvania held that " words in a will, expressive of desire, recommendation and confidence, are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise, or bequest into a trust ; that

such words may amount to a declaration of trust when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice or discretion." This conclusion receives strong support from the emphatic language of Justice Story in regard to the principle of construction adopted in the earlier English decisions. "This doctrine," says he, "of thus construing expressions of recommendation, confidence, hope, wish and desire, into positive and peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that in using the one and omitting the other, he should not have a determinate end in view. It will be agreed on all sides, that where the intention of the testator is to leave the whole subject as a pure matter of discretion to the good will and pleasure of the party enjoying his confidence and favor, and when his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it—there the language cannot and ought not to be held to create a trust. Now, words of recommendation and other words precatory in their nature, imply that very discretion as contra-distinguished from peremptory orders, and, therefore, ought to be so construed unless a different sense is inevitably forced upon them by the context."—2 *Story's Eq. Jur.* § 1069.

I am not aware that the subject has even undergone judicial investigation in this State. The only reported case that has been brought to my notice, is *Ward v. Peloubet*. 2 *Stock*. 304. But that was a case of clear trust, and falls within the principle above stated. All the property was given by the testator to his wife, to be disposed of in such manner as she might think fit for the benefit of the family. The testator's expressed wishes in regard to the disposition of the property were very properly held to be imperative, and that the property on the death of his wife, went to his children equally. In the absence of any adjudicated case, or any settled rule of construction, I feel at liberty to adopt such rule of construction as seems best calculated to effectuate the intention of the testator. I think there is nothing in the will indicating an intention to create a trust in favor of the complainant. The gift to the testator's children is absolute in its terms. The expression of a hope or belief as to the mode of disposing of the property, created no qualification of the gift. There is nothing in the will indicating that the testator used the terms in any other than their natural and ordinary sense, or that he designed them to be imperative. On the contrary, the form of the expression seems to import directly the reverse, and that the disposition of the matter was to be left to the discretion of the devisees. The testator does not request, or even hope, that the devisees will give the complainant one-half of the real estate within one year after his death, or on the death of the devisees, or at any other time, or that they will do him justice by giving him half the farm. He hopes merely that they will hereafter do him justice to the amount of one-half of the land. Now, that is a form of expression that would have been adopted if there was something in the character or circumstances of the grandson,

known to the testator and his children, which required the exercise of discretion, which might or might not render it proper at some future time, that he should have a share of the property, and which the testator designed by adopting this peculiar form of expression, to leave to the discretion of his children. The testator neither indicates the *estate* which the grandson is to receive, nor *when* he is to receive it, nor whether he is to have the land itself or the value of the land in money. All this is obviously left to the discretion of the devisees. To convert the property into a trust fund would defeat the real design of the testator.

- 10 The form of expression used in this will, and which is relied on as creating a trust, would not have been resorted to by any experienced scrivener for the purpose of creating a trust; nor would it have been adopted by any man *inops consilii*, as a mode of making an absolute gift.

If the terms of this will are held in conformity with the prayer of the complainant's bill to create a trust of one-half the lands on the death of the devisees, for the use of the grandson, it is clear that the Court must make the will.

No trust is created by the second and third clauses of the will in favor of the complainant. He is not entitled to the relief prayed for.

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IN CHANCERY OF NEW JERSEY.

Between HIRAM VANDUYNE, Complainant,
and JAMES M. VANDUYNE et. als, Defendants.

Interlocutory
Decree.

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This cause coming on, on the first day of July, eighteen hundred and sixty-two, in the term of May, in the year aforesaid, at the State House, in the city of Trenton, before the Chancellor, in the presence of Jacob Vanatta, Solicitor, and of counsel with the Complainant, and of Lyman A. Chandler, of counsel with the Defendant, John M. Vanduyne, who had previously filed his answer, (it appearing that process of subpoena for all the other Defendants to appear and answer the Complainant's bill, had been duly issued and returned, duly served by the Sheriffs of the Counties of Morris and Essex, but that the Defendants, except the said John M. Vanduyne, have not, nor has any or either of them appeared, pleaded, answered or demurred to the said bill of complaint, within the time limited by law, or at any other time, but that they have wholly failed and neglected so to do,) to be heard on the bill of complaint, and the said answer. as to the title, interest and estate of the Complainant under and by virtue of the second and third clauses of the last will and testament of Martin I. Vanduyne, deceased, set forth in the said bill and answer; in and to the homestead farm of the said Martin I. Vanduyne, containing eighty-one acres and sixty-one hundredths of an acre, described in the second clause of said will, and in and to the tract of eighty-four acres and twenty-eight hundredths of an acre, described in the third clause of said will and the said bill and answer having been read, and the arguments of the respective counsel being heard and considered and the Chancellor having taken time to consider thereof, and at the term of October, eighteen hundred and sixty-two, having announced his opinion that the said Complainant did not,

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by virtue or means of any devise made to him, or to or for his use, in or by the said second and third clauses of the said will, or by either of them, receive or acquire any right, title, interest or estate, legal or equitable, in or to the lands in said second and third clauses of said will mentioned and described, or in or to any part thereof, and that the said Complainant is not now, by virtue or by means of any devise to him or to his use, in or by the said second or third clauses of said will, entitled to any estate, in use, or share, or part of the said two lots of land, or in or of either of them, or any part of either of them, and a decretal order now being applied for in conformity to the opinion of the Chancellor then expressed, by the Complainant's Solicitor, and it appearing by the said bill of complaint, that the said Complainant claims title to undivided shares and parts of the several tracts of land in his bill mentioned and described, by virtue of divers deeds of conveyance made to him and mentioned and stated in said bill. 10

It is, thereupon, on this fifteenth day of September, in the year eighteen hundred and sixty-three, ordered, adjudged and decreed, that the Complainant is not entitled to the use of, or any title, interest or estate in the lands mentioned and described in the said second and third clauses of the said will of Martin I. Vanduyne, or in or of any part thereof, by virtue of any devise made to him, or to or for his use, in or by the said second or third clause of said will. 20

And it is further ordered, adjudged and decreed that the Complainant's bill be, and the same is hereby taken, as confessed, against all the Defendants named therein except John M. Vanduyne, and that it be referred to Alfred Mills, Esq., to ascertain the truth of the allegations of the Complainant's bill and to report the right, title and interest of the parties severally and respectively in the premises mentioned and described in the bill of complaint, in this cause, conformably to this decree, and also, whether the said premises and real estate are so situate that a partition thereof can be made without prejudice to the rights and interests of the parties therein.

A. True Copy.

B. GUMMERE, Clerk.

HENRY W. GREEN, C.

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IN CHANCERY OF NEW JERSEY.

Between HIRAM VANDUYNE, Complainant, }
and JAMES M. VANDUYNE, et. als. De- }
fendants.

On Bill
for Partition
Appeal.

The Complainant hereby appeals from so much of the Interlocutory decree made in this Court, in the cause above stated, bearing date the fifteenth day of September, eighteen hundred and sixty-three, as orders, adjudges and decrees that the Complainant is not entitled to the use of, or any title, interest or estate in the lands mentioned and described in the second and third clauses of the will of Martin I. Vanduyne, or in or of any part thereof, by virtue of any devise made to him, or to or for his use, in or by the said second or third clause of said will, to the Court of Errors and Appeals. 40

JACOB VANATTA,

Dated Sept. 25th, 1863.

Solicitor, and of Counsel for Complainant.

I conceive, that there is good cause for appeal in the above stated cause.

JACOB VANATTA, of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between HIRAM VANDUYNE, Appellant,
and JAMES M. VANDUYNE, et. als. }
Appellees,

On Bill, &c.
Petition of
Appeal.

To the HONORABLE the COURT OF ERRORS AND APPEALS :

10 The humble Petition of Hiram Vanduyne, the Appellant in the cause above sta-ed, shows that your petitioner finds himself aggrieved by an interlocutory decree, made in the Court of Chancery, by His Honor, Henry W. Green, Chancellor of the State of New Jersey, bearing date the fifteenth day of Sep-
tember, eighteen hundred and sixty-three, in a suit wherein your petitioner is Complainant, and the said James M. Vanduyne and others are Defendants, in this respect, to wit : That the said decree adjudges that your petitioner is not entitled to the use of, or any title, interest or estate in the land mentioned and described in the second and third clauses of the will of Martin I. Vanduyne, deceased, or in or of any part thereof, by virtue of any devise made to your petitioner, or to or for his use, in or by the said second or third clause of said will.

20 And your petitioner humbly appeals from that part of the said interlocutory decree above stated, on the ground that the same is erroneous, for that your petitioner is entitled to the use of and the title to one equal. undivided one fourth part of the land and premises described in the second clause of the said will, and to one equal undivided one-eighth part of the tract of land and premises described in the third clause of said will, by virtue of devises made to your petitioner, or to or for his use and benefit in and by the said second and third clauses of said will.

30 Your petitioner, therefore, prays that that part of said decree hereinbefore stated may be reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable Court. shall seem meet.

JACOB VANATTA,

Solicitor, and of Counsel with the Appellant.

Dated September 25th, 1863.