

(b.) By the donee of the power or discretion. Of course, the distinction is obvious between a mere power, and a power in the nature of a trust. As to the former, it is well settled that equity will not compel its execution, and equally well settled that it will aid its defective execution; but as to powers in the nature of trusts it is different, it being considered that "a person who creates a trust, means it shall be executed at all events,"* and it is, of course, solely of powers in the nature of trusts that we are now speaking.

No one doubts the general doctrine that a court will not control the discretion of a trustee; but it is equally true that "the donee of a power is not the absolute owner of the property which is subject to the power."† Thus it is familiar that

1. A court will *compel the exercise* of a discretion.

As to this, Lord Eldon's language may suffice:—

"The principle of all these cases is that if the power is a power which it is *the duty* of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and, not having a *discretion* whether he will exercise it or not, the court adopts the principle as to trusts, and will not permit his negligence, accident or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it."‡

In the present case, if the defendant should say "My discretion is that the library company are better off where they now are, and I will choose no lot," would it be seriously argued that this court could not compel the exercise of his discretion, and if he would not choose himself, would choose for him?

In *Erisman vs. Directors of the Poor*, 11 Wright, 509, where an estate was given to a trustee to apply the income in the pur-

* Per Lord Wilmot, in *Attorney General vs. Downing*, Wilmot's R., 23; *Perry on Trusts*, § 248.

† Per Lord Justice Turner, in *Topham vs. Duke of Portland*, 1 De Gex, Jones & Smith, 568.

‡ *Brown vs. Higgs*, 8 Vesey, 574, quoted by the Master, pages 73-4.

