

for a "monument," and for "keeping the pictures, &c., of the testator;" [for on a consideration of the whole will and codicils, it is clearly the intention of the testator that it is to be held for all these purposes, notwithstanding the restrictive language of the early part of the will (page 16, ante), that it is to be "for the uses and purposes of their (The Library Company of Philadelphia) library, and for no other use or purpose whatever," and notwithstanding in the first paragraph of the additional codicil he calls the Philadelphia Library Company the "heir to his estate,"] provided, always, they accept the same on the terms and conditions in the will and codicils contained. The interest of the complainants in their double capacity of trustees and *cestui que trusts*, is contingent on the site and building being such as they can accept. In the meantime their interest is one which entitles them to the aid of this Court to prevent an illegal or inequitable exercise of the power of selection to their detriment. The will of Dr. Rush speaks from his death as to all its provisions, and is incapable of being varied by parol testimony, unless a latent ambiguity is discovered. The will gives a lot to be selected at the discretion of the defendant. From the moment of the testator's death the complainants had an interest in the nature of property in the *bona-fide* exercise of that discretion; and, of course, a right to the interposition of this Court to protect that interest from any illegal or inequitable interference or abridgment.

The expression used in the additional or second codicil, "I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot, and select any situation he may deem expedient," while in one sense conferring a discretionary power, in another, imposes a duty as coupled with that power, which the donee of the power cannot refuse to perform, which makes him a trustee, and the power a trust, so that if not executed by him the court will execute it.

Lord ELDON, in the well considered case of *Brown vs. Higgs*, 8 Vesey, 574, thus states the law: "The principle of all these

