

of the defendant do not permit me to doubt that he honestly thinks so. If, however, he be correct, there must have been a time when his conscience was absolved from this deep moral obligation—a time when he threw it off, and when the lawful one took exclusive possession of his judgment. I understand the answer to be that it was at the time he was obligated to take the usual oath in order to assume the duties of executor. This was on the 31st of May, 1869. This latter oath, he says, created a legal as well as a moral obligation. Did it, however, wholly eradicate the moral obligation, "sacred as an oath," under which he had rested up to that time? In his letter of 30th December, 1870, he refers to it as still resting strongly upon him, and that his duty required him to be influenced thereby.

It is contended, however, inasmuch as the defendant has sworn in his answer, and again before the examiner, that he has considered and decided the question as to the site of the library building entirely irrespective of and uninfluenced by any promise made by him to Dr. Rush, that the complainants have failed to make a case in which a court of equity will interfere with the discretion which he has exercised.

In considering the act which the defendant has committed, or is about to commit, we must look at the position of the donor, the donee, and of the beneficiaries of the power. The beneficiaries have the right to require the power to be executed according to the terms of the written instrument creating it. If the donor induced the donee to accept the trust under a pledge that he would execute it otherwise than was provided in the instrument, he committed, in equity, a fraud upon the power. If the donee accepted it under such pledge and so executed it, he committed a fraud upon the power. It is not necessarily a moral fraud. A wilful departure from the terms of the power is a fraud upon it, without regard to whether the motive thereto was good or bad. *Topham v. the Duke of Portland*, 1 De Gex. Jones

