

Topham *v.* Duke of Portland is entirely unlike our case.

1. No one there claimed that the donee of the power was disqualified from acting by reason of his promise or agreement to accede to the donor's wishes; but all conceded his right to act.

2. It was alleged, however, that he did not intend to execute his power, but that his object was to carry out the donor's wishes. This illegal purpose was admitted, and the appointee was proven to be a mere "dummy" for their gratification.

3. The second deed, similar to the first, executed after a prolonged and expensive litigation bitterly contested, was held to be under the same influences as the first, because it appeared that no desire was felt, and that no effort had been made, to shake off the influence of the original arrangement.

4. The moral obligation which was objected to there was not that which resulted from the expression of the *donor's* wishes, but that which grew out of an illegal arrangement which had been entered into between the *donee* and the *appointee*.

5. The existence of this obligation rendered it utterly impossible that the power could be executed; for so long as the beneficiary felt unable to use more than a moiety of the fund, an appointment of the whole must be necessarily inoperative in part. With us, the moral obligation may exist, consistently with the exercise of the donee's judgment. If there be no conflict between the promise and the judgment the former is inoperative; if there be such conflict, then a resignation by the executor will save the promise without any violation of duty.

6. The donor's wishes were communicated to the donee *after* the power had vested and after his right in the fund had ceased. Dr. Rush's wishes were communicated before such vesting,—and whilst his right to revoke continued.

7. The wishes of the late Duke could only be gratified by the commission of a fraud upon the power with which