

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 as having a discretion whether he will exercise it or not; and 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. "Stated in a note to this case, in Sumner's Edition of Vesey's Reports, to have been approved in the House of Lords in 1813. The draftsman of the will and codicils seems to have been aware of this distinction towards the close of the fourth paragraph of the additional codicil (ante page 34); he confers a discretionary power of a kind which no court could interfere with—and in much stronger words than are used when speaking of the selection of the site.

In the case before us, the devise is to the trustee, among other things, to exercise this discretion, that is to select the lot and build upon it. The interest of the *cestui trust*, or the right of the new trustee, *i. e.*, the Library Company, to assume the trust after the completion of the building, would not fail if Mr. Williams should die before making the selection, nor would it go to the substituted executors, Messrs. Craven or Biddle, but would be executed by the court.

The will, therefore, creates an interest in the plaintiffs which this court will protect, and the discretion allowed the donee of the power is so inseparable from the duty to select and build, as to make the defendant to all intents subject as to both to the law applicable to trusts. If the trustee, donee of the power named in the will, should refuse to execute the trust, or die, the court would, if necessary, appoint a new trustee, or in some other manner carry out the intentions of the testator. They would not be allowed to fail because of the inability or refusal to act of the trustee named in the instrument. *Burroughs vs. Philcox*, 59 My. & Cr., 92; *Brown vs. Higgs*, 4 Ves., 708; 8 Ves., 574.