

Supposing there to be no difficulty about the site, could the trustee have said the erection of a building is a condition precedent to the vesting of the estate, and because I promised the testator in his life that I would not erect the building, I refuse to do so? The devise in trust to the library therefore fails. I think not. The Court would compel the trustee to act. To say that anything which was said by Dr. Rush to his trustee and executor could change his will would be pro hac vice to repeal the statute of wills. The testator did nothing to disqualify the executor and trustee named in his will.

The conclusions then to which the Master has come upon the questions submitted are that the will was not affected by the promise; that the trustee, by his promise, has so crippled his discretion as to make it impossible to say how much his preference for the lot in question is due to his unbiased opinion that it is the most expedient for the purpose, and how much to his promise to Dr. Rush; that his action in the premises must therefore be under the direction of the Court.

That the complainants have an interest in the selection of the fittest site, which gives them a standing in a Court of Equity to ask that the selection be made under the supervision of the Court; that this course is not to be viewed as an expression of opinion adverse to the site proposed by the executor; that it be referred to a Master to inquire and report to the Court whether the proposed site is a proper and expedient location for the said building, and if not, what would be such a site? and that the defendant be restrained by injunction from proceeding to erect the said building on the said lot on the south-east corner of Broad and Christian Streets until further order. Of course the last specification of demurrer fails with the rest.

The master submits a form of decree drawn in conformity with the above report.

Respectfully submitted by
P. PEMBERTON MORRIS,
Master.

