

terms, and therefore it seems to me the rule does not apply. The power with which the executor is clothed by the will is purely discretionary. The executor could not be compelled to act. He was clothed simply with the discretionary right to sell the real estate outside of the state of Virginia and re-invest the proceeds. Until the executor exercised this discretion to sell for the purpose of re-investment, the fee of this land remains in the children, the devisees under the will, and there is no clause or word in the will intimating that the testator intended that the executor should take the fee. When the executor saw fit to sell for the purpose of re-investment under the powers with which he was clothed, that passed the fee out of the children, as in the case of a power given any agent to sell real estate under a letter of attorney from his principal. "Mere powers are purely discretionary with the donee: he may or may not exercise or execute them at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead or place, if for any reason he leaves the power unexecuted. It is different with powers coupled with a trust, or which imply a trust." Perry on Trusts, § 248. So in *Taylor v. Benham*, 5 How. 269, the supreme court of the United States says: "One of the tests on this subject is that a naked power to sell may be exercised or not by executors, and is discretionary, while an imperative direction to sell and dispose of the proceeds, as in this case, is a power coupled with a trust." So in Story's Eq. Jur. § 1070, the rule is stated in these terms: "In the nature of things there is a wide distinction between a power and a trust. In the former, the party may or may not act in his discretion; in the latter, a trust will be executed notwithstanding his omission to act."

But it is urged further that this sale has been ratified by the executor, by the receipt from Hughes of the proceeds of the sale made to Hyman. The answer to this seems to me to be—*First*, the executor received this money from Hughes under the false statement that the property had been sold at a forced sale under foreclosure proceedings, when in fact it was a mere colorable sale, consented to and managed by

Hughes as the agent of Washington, and where there was no compulsion about it—a sale made simply by arrangement; *second*, the executor, being only empowered to sell for the purpose of re-investment, he could not ratify a sale not made by himself under the powers, so as to bind the devisees under the will, if they were necessary parties to the suit. The fact that the executor received the remnant of the proceeds of the property left after the sale made in pursuance of the decree of the court in that case, cannot, it seems to me, be held to ratify a sale which he had no agency in making, and which he did not pretend to make, under the powers with which he was clothed.

It is further suggested that there has been undue delay in the bringing of this suit, but the proof shows that all these complainants were minors at the time these proceedings were had; that they did not learn of the fact that the property had been sold, or in any way disposed of, until 1871, at which time those who were then of the age of 21 years were married women, and continued such until this suit was brought. There does not seem to me, therefore, to have been any such delay in the bringing of this suit as makes this proceeding what might be called a stale proceeding, within the meaning of the equity cases. It does not come within any of the limitation laws of the state of Illinois, and it seems to me it is not such a claim as should be considered stale. The other defendants in this case, Barling, Davis, and Mandel, claim a title under Hyman, and have no better standing in court than he.

Under all the facts in this case, therefore, and under the law as I think it should be applied to these facts, these complainants will be entitled to a decree allowing them to redeem these premises upon such terms as are equitable under all the facts in the case; and those terms will be—*First*, that they shall pay the amount due on the Williams trust deed, with the interest from the time it fell due, at the rate called for by the bond; in other words, Hyman should be subrogated to the position of Mrs. Williams. He should also receive 6 per cent. upon the balance of the money which

he has paid, from the time he paid it, including the amount paid by him for taxes and assessments, and for permanent improvements upon the premises; Hyman accounting for all rents and profits received by him from the land, which should be deducted from the amount so found due him.

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BRIDGES v. SHELDON and others.

(Circuit Court, D. Vermont. January 6, 1860.)

I. STATEMENT OF FACTS.

A., B., and C. severally held contracts with the United States for the supply of head-stones and blocks for soldiers' graves. A. purchased B.'s contract for \$20,000, giving four notes on time for the amount, and also bought C.'s contract, S. & S. becoming security for the payment of the purchase money, upon A.'s offer of a bonus, in three propositions, of \$3,520.32. A. purchased stone of S. & S. for his own contract and for C.'s contract, at agreed prices, but, on becoming assignee of all the contracts, A. made a written proposition to S. & S. that they should furnish the marble for all the contracts, and the means to carry them on, receiving one-third the profits, guarantied to be to them at least \$20,000. S. & S. assented in writing: "the price heretofore agreed upon for head-stones and blocks is not to be considered as included in the \$20,000 mentioned; \* \* \* full agreement, in accordance, to be hereafter executed;" to which was added, over the signatures of A. and S. & S., that "the full agreement, referred to above, may be modified and made so as to fix the compensation of S. & S. by a definite price per head-stone and block in addition to the price heretofore agreed upon; this, in lieu of the one-third interest, but not of the given sum of \$20,000." The contract, drawn in pursuance thereof, provided that S. & S. should receive certain increased prices for head-stones and blocks, and "for interest and commissions on advances, and for their services in and about said business, 9 per cent. per annum" on the advances until repaid, and 9 per cent. per annum on the prices of stones, 60 days after shipment, until paid; that the stones should "be and remain the sole and absolute property" of S. & S. until set up in the cemeteries; that S. & S. should furnish the "necessary machinery and machine shops, except said blast machines and rubbers. They shall also keep the same in repair;" that all moneys due from the government should be paid to S. & S., under powers of attorney from A., and that, "as soon after final settlement and payment with and by the government as reasonably may be," S. & S. should pay over to A. the balance remaining in their hands after deducting their com-