#13

In the Supreme Court of Pennsylvania,

EASTERN DISTRICT.

Edward E. Marvine

vs.

Catharine Drexel, Francis A. Drexel and John D. Lankenau, Executors, and Francis A. Drexel, heir-at-law of Francis M. Drexel, deceased.

In Equity.

July Term, 1866.

No. 9.

May 4th, 1866. Bill in equity filed.

May 5th, 1866. Hearing, and agreement in open court to postpone sale.

June 9th, 1866. Answers filed.

June 11th, 1866. Replication filed.

June 11th, 1866. Charles H. T. Collis, Esq., appointed examiner.

March 10th, 1869. Edward Olmsted, Esq., appointed master.

March 20th, 1869. Charles H. T. Collis, Esq., appointed additional master.

October 3d, 1870. Master's report filed, with exceptions thereto by plaintiff and defendants.

December 9th, 1870. Exceptions to the masters' report on both sides dismissed *pro forma*, and the decree of the masters affirmed.

December 9th, 1870. Plaintiff appeals to the Supreme Court.

December 9th, 1870. Defendants appeal to the Supreme Court.

ABSTRACT OF BILL, AND ANSWER.

The bill sets out the purchase of the property—about 13½ acres on South Broad street—by Mr. Drexel, by the procurement of the plaintiff, and the conveyance to Mr. Drexel, and sets out the agreement between the parties as to the matter, and their interest therein, dated May 18th, 1861.

The bill then alleges that it was the intention of the parties, that Mr. Drexel should sell the said property in separate building lots to builders, and make advances to them to aid in building thereon; and that the price of the lots and the advances were to be secured by mortgages or ground-rents upon the property; and that the sales should be so made that the improvements upon one square should add value to the remaining squares reserved for later sales.

That Mr. Drexel died in June, 1863, leaving a will, which makes no reference to said contract. The will authorizes the executors to sell all or any part of his real estate at public or private sale, and on ground-rent, or otherwise.

That, without any consultation with plaintiff, said property was advertised for a peremptory public sale, in eleven blocks, by M. Thomas & Sons, auctioneers, for the 8th of May, 1866. The bill then alleges that the proposed mode of sale is very extraordinary and unusual under the circumstances, and will be destructive to plaintiff's interests, and prays that the rights, interests and duties of the parties may be declared by the court, and that the court shall make such decree as shall cause said lots to be sold to the greatest advantage, and free from all doubts as to title, and from any lien for decedent's debts, and, if necessary, to appoint a trustee to execute the trust upon

which said premises are held for plaintiff, or a receiver, to make sales and receive the purchase-moneys; and praying for an injunction and for general relief.

The answer alleges that Mr. Drexel bought said property for $112,000, which he paid himself, and became the sole and absolute owner thereof; and that the same was conveyed to him in fee; and that he agreed to pay to plaintiff one-fourth of the net profit, if any, realized from the sale of said property, as a compensation for his services in said purchase, and instead of commissions. In order expressly to exclude plaintiff from interfering in the sales of said property, it was set out in the agreement between them, that Mr. Drexel, as owner, should have full power to sell all or any part of said property at such time or times and for such price or prices as he might deem proper; and that the defendants, as his executors, are authorized under his will, and it is their duty, to sell said property, in order to settle his estate, and to determine what, if anything, is due said plaintiff.

That defendants have no knowledge that it was intended that Mr. Drexel should sell the said property in separate building lots, and make advances to aid in building thereon,—the price of the lots and the advances to be secured by mortgages or ground-rents on the property,—and that they were unwilling to make such advances to aid in building on said lots.

That, before advertising said property for public sale, they consulted with M. Thomas & Sons, auctioneers, and others, as to the best mode of selling such property, and that the same was advertised in the method advised by said auctioneers; but that they expressed a willingness to plaintiff to sell said property in small lots if he would furnish them a plan, which he however failed and refused to do.

HISTORY OF THE CASE.

Messrs. Page and others, the owners of about 13½ acres of land on South Broad street, some time prior to May 13th, 1861, had given to Mr. Marvine, the plaintiff in this suit, the right to sell

said property within a certain time at a certain price. This arrangement between the owners and Marvine expired on the 13th of May, 1861, and, so far as we know, was not in writing.

Some time before its expiration, Mr. Marvine had been in negotiation with the late Francis M. Drexel for the sale of the property to him, but they had failed to agree as to terms; and on the last night, viz., May 13th, 1861, they again came together, and, after eleven o'clock at night, they closed their bargain, and Marvine at once went to the Pages, and a few minutes before twelve o'clock notified them that he had sold the property. Marvine's contract with the Pages was valueless to him when he sold the property to Drexel, except so far as Drexel would agree to compensate him. The property was thereupon conveyed by the owners to Mr. Drexel in fee, and he paid to them $112,000, the purchase-money thereof. An agreement was then prepared between Marvine and Drexel, which, after it sets out the purchase of the property by Drexel, provides that Drexel is to pay Marvine, for his efforts in effecting said purchase, one-fourth of the net profits, if any, realized on the sale of said property, and further provides that Drexel, as owner, shall have full power and right to sell all or any part or parts of said property, at such time or times, and for such price or prices, as he may deem proper. There is no allegation that Marvine intended to purchase the property himself under his arrangement with the Pages, or that he sold out a part of his contract of purchase to Drexel. He seems to have undertaken the matter as a broker, and to have made the sale to Drexel as such; and the contract with Drexel, as to compensation, was on this basis,—Marvine's name not appearing in the title taken, he paying no part of the purchase-money, and assuming no responsibility as to future charges against the property, or losses on its sale. He therefore does not appear to be, in any sense, a part owner of the property.

The agreement between Marvine and Drexel was prepared by Mr. Benjamin Love, an experienced lawyer and conveyancer, under their instructions, and after their full deliberation, and after three or four interviews in his presence, or consultations

with him, and he states that it embodied the instructions he received from them, and, after having copies one or two days for examination, the parties executed the agreement under their hands and seals in presence of two subscribing witnesses. There is no allegation of fraud or mistake in connection with this written contract.

Soon after the purchase, Mr. Drexel, as owner, with absolute power of sale, and without consultation with, or the consent of, Marvine, sold six lots of this property, being the part north of Reed street, and made advances to the purchaser to aid in building thereon, and took mortgages for the price of the lots and the advances, and promised the purchaser when this contract was completed that he would sell him the square below on similar terms, and about the same time stated to different persons his intention of building up the whole property. The contract for building on the six lots sold was not, however, entirely or satisfactorily carried out, and the times becoming unfavorable for building operations, and houses in this neighborhood much depressed in price, Mr. Drexel seems to have abandoned, at least for the time, further sales of the property with advances. At the time of the said sale, Mr. Marvine did not claim the right to interfere in the same or to join in the conveyances.

On the 5th of June, 1863, Mr. Drexel died, leaving a will dated the 23d of July, 1862, and proved on the 11th of June, 1863, by which he authorized and empowered his executors to sell all or any part of his real estate, at public or private sale, whenever they should think proper, (except his dwelling-house, devised to his wife,) and for such prices as they might deem proper, and in fee simple, or other estate, or on ground-rent, and to execute and deliver good and sufficient deeds for the same, and appointed the defendants the executors of his said will. After Mr. Drexel's death, Mr. Marvine alleged that the written contract between them contained only a portion of their real agreement relating to this property; that Drexel had further verbally agreed and bound himself to sell the said property in building lots, and make advances to the purchasers to aid in building up the same; and that one portion or square of the

property was to be sold and built up in this manner before another square was sold, so that the remaining property could receive the benefit of the advances in price caused by these improvements. The executors of Mr. Drexel denied that there was any such agreement on his part, and alleged that the written contract was the only agreement between the parties, and hence refused to sell the property and make advances in the manner required by Mr. Marvine; and further alleged, that even if there had been such a contract on Drexel's part to make advances, it was a mere personal contract, and was terminated by his death, and his executors had no power to carry it out.

In the latter part of March, 1866, the executors, under the advice of counsel, advertised the said property for public sale by M. Thomas & Sons, auctioneers, in the method recommended by said auctioneers and others in the real estate business, viz.: to be sold in eleven separate blocks, as the property was divided by the streets running through it; the terms of sale to be one-third cash upon delivery of the deeds, and the balance to remain upon the usual bond or mortgage.

Notice being at once given to Mr. Marvine of the intended sale, he, through his counsel, protested against it. He was then asked by defendants to furnish a plan for the sale such as he thought best, and was informed, if it did not appear to the defendants to be clearly inexpedient, it would be adopted. Mr. Marvine then proposed, as his plan of sale, that the executors and he should fix the prices of the lots at which they should be let on ground-rent, or sold on mortgage, and that an agent should be employed to make such sales, and that the rates might be higher if the builders were aided by loans secured by mortgage.

On the 20th of April, 1866, defendants replied that they were not willing to make advances on the lots as proposed; that they declined to await the slow process of selling out building lots one by one at private sale, and that they were unwilling to let the lots on ground-rent, but that they would cut up the blocks into lots, and then sell, if Mr. Marvine would furnish them a plan. He failing to furnish them such plan, they refused to stop the sale of the property, as advertised by them, and on May 4th, 1866, the bill in this case was filed by Mr. Marvine.

For masters' report, and the exceptions taken thereto, see printed masters' report and page 4 of appendix thereto.

On December 9th, 1870, the exceptions to the masters' report on both sides, in this case, were dismissed *pro forma*, and the decree of the masters affirmed.

ASSIGNMENTS OF ERROR.

The appellants assign the following errors:—

1. The learned judge erred in dismissing the appellants' exceptions to the masters' report.

2. The learned judge erred in not sustaining the first exception to the report of the masters, which exception was as follows, to wit, that the masters have reported that the method of sale proposed by the defendants was a ruinous one.

3. The learned judge erred in not sustaining the second exception to the report of the masters, and amending so much of the decree as requires them to accept mortgages at par.

4. The learned judge erred in dismissing the third exception, and in not amending the decree so as to require a sum in cash to be paid on each lot at time of sale.

5. The learned judge erred in not sustaining the exception of defendants to the recommendation of the masters,—that it would be proper for the court to charge, on the fund from sales, the costs of litigation as between solicitor and client.

6. The learned judge erred in confirming the report of the masters upon the points specified in the exceptions.

7. The learned judge erred in not dismissing the bill at the cost of the plaintiff.

8. The learned judge erred in not decreeing that the costs of this litigation should all be paid by the plaintiff.

9. The learned judge erred in not decreeing that part of the costs of the litigation should be paid by the plaintiff.

SAM'L DICKSON,
GEO. SERGEANT,
J. C. BULLITT,
For Defendants.

ARGUMENT FOR DREXEL'S EXECUTORS.

The exceptions filed by the executors of Mr. Drexel involve substantially the same questions as are raised by those assigned by Mr. Marvine, and it is not deemed necessary to offer a separate argument in support of them. One or two special points will be considered at the close of this reply to the argument presented on behalf of the plaintiff.

At the outset, it is important to observe, that, so far as there is any question of fact raised by these appeals, the finding of the masters thereon should not be set aside, unless a plain mistake has been committed. In this case the court cannot but feel peculiar confidence in their conclusions. One of them had been the examiner; and both are gentlemen of great experience. The rule in respect to a master's report may not be as rigid as in the case of that of an auditor, but the principle is essentially the same, and the finding on the facts must be followed, unless clearly against the weight of the evidence. Coleman's Appeal, 12 P. F. Smith, 252, 281; Clark's Appeal, *id.*, 447, 451.

Starting, then, with what may be termed a special verdict in favor of the defendants, it is unnecessary to go at length into a review of the evidence upon which it was based. It is important, however, to observe that the testimony, upon which reliance is placed by the plaintiff, does not relate to what passed at the execution of the agreement upon which this controversy rests. The written contract was the subject of very careful consideration, and after several interviews with the gentleman who drafted it, the plaintiff had a copy of it in his possession a day or two before finally signing it. If there be any advantage at all in written contracts, the paper in this cause will hardly be overruled by the uncertain testimony of loose conversations before and after its consummation. A very brief recapitulation of the facts will put this in a clear light.

The plaintiff held what is termed "the refusal" of the property in question—that is, an option of purchase. It does not appear that this agreement (of the terms of which no detailed

evidence was offered) contemplated a purchase by Marvine, or was anything more than the authority commonly given to a broker entrusted with the sale of real estate. His principals and himself both seem to have so regarded it; and accordingly they paid him, and he accepted, two thousand dollars for effecting the sale,—a fact strongly illustrative of Mr. Marvine's own understanding of the transaction, as he has never felt called upon to offer to account for this as a profit made in the course of a joint or partnership operation. His right was about to expire; and there is nothing to show that Mr. Drexel could not have dealt the next day directly with the owners. The subject of the purchase had been discussed between Marvine and Drexel upon previous occasions, and the expediency of building up the property had been before them. The purchase was completed on the 13th May, 1861, (a month after the attack on Fort Sumpter,) and the agreement is dated the 18th of May.

No averment is made in the bill, that this agreement did not express the full and complete meaning of the parties. On the contrary, it is alleged (paragraph 4) that "the said articles of agreement and plan both show that F. M. Drexel and your orator *intended* that to be the method of disposal," etc.; and in paragraph 9 it is averred that the plan of building up by advances was "a *contemplated* plan of enhancing his profits, and the mutual profits of himself and your orator, under said agreement." If the case, upon this point, rested solely upon the demurrer of the defendants, the constructive admission of these averments would not entitle the plaintiff to the relief prayed for; parties may intend and contemplate that which they will not bind themselves by contract to execute, and of this the present case is an illustration. The claim of the plaintiff now is, that the late Mr. Drexel and himself, having it in contemplation to unite in the joint purchase and improvement of this property, for resale, involving the advance of more than half a million of dollars, and having reduced Marvine's share of the profits to one-fourth, because Drexel was to advance all the capital, entered into a contract that they would sell the property in a particular way, and in that way only, and having spent several days in matur-

ing their agreement,—without, however, mentioning this special subject to the attorney employed to draft it,—executed with deliberation a paper prepared at their dictation, which not only does not refer to by far the most important term of their agreement, but is, in its provisions and language, entirely inconsistent with the existence of any such bargain. A reference to the agreement will justify this last assertion. The preamble recites the sale to Francis M. Drexel; how *he* has laid the property out; that *he* has been enabled to effect the purchase; that *he* has agreed to *pay* Marvine a portion of the net profits; that Marvine is to *allow* a portion of the interest on said purchase-money and of all municipal charges and taxes; *but makes no provision for allowance of other advances, or of interest thereon;* and, as if *ex majore cautela*, concludes with the reservation, "*He, said F. M. Drexel, as owner, shall have full power and right to sell all or any part or parts of said property at such price or prices as he may deem proper,*"—shall sell *all* of such property at such *price* as he may deem proper.

It is upon such a state of facts that the court is asked to treat this as a partnership, in the buying, improving and selling of real estate, and to decide that the contract was to advance the money and cover this property with buildings, and that the contract is binding upon the executors of the late Mr. Drexel. To state the claim, is to refute it. The authorities cited to show when and for what purpose parol evidence may be offered, are mostly inapplicable, as the testimony does not, for the most part, come up to the requirements of the established rules. What is to be proved is a contract—an *aggregatio mentium*,—mutual promises actually made and actually accepted. Let it be supposed that Mr. Drexel in his lifetime had sold the property in the lump, in the condition in which it was bought, and Marvine had sued him for a breach of the alleged contract to build up and sell in lots; can it be contended that any such agreement could be established as the law requires? As Chitty says, (Chitty on Contracts, p. 14,) "The assent or consent of the parties to the terms of the agreement must be *mutual*, even although the promise of one of them be in itself positive and unambiguous." See, also, Huthmacher *vs.* Harris' Admr., 2 Wright, 491.

And a reference to the elementary principles on which the rules relating to parol testimony are based will best show how irrelevant are the cases quoted to the facts here. The doctrine that parol evidence cannot be heard, to alter, vary or contradict the writing, unless in case of fraud, accident or mistake *at the time of its execution*, rests, first, upon the rule, that the *best* evidence must be given, and the writing is the best. Human memory is uncertain; but "*litera scripta manet.*" It is also based upon the obvious proposition, that the actual agreement of the parties must necessarily be found in the written paper, for in that the prior talk is merged, and it naturally constitutes the complete expression of the intentions of the parties. 1 Greenleaf's Ev., §§ 17, 275. The alternate banter and chaffer of the trade do not constitute the contract; but it is the meeting of the two minds in mutual promises which makes the agreement. And hence there follows the other elementary rule, that where sundry matters have been the subject of discussion, the mention of part is a rejection of the rest; *expressio unius est exclusio alterius.* According to the whole theory of the plaintiff's case, the building up of the property was in contemplation; and if, therefore, they chose to omit mentioning it in the agreement, it must either, according to this maxim, have been deliberately rejected, or, according to Wigram's sixth proposition, have been left out by that sort of heedlessness which the court will not undertake to correct, it not being its province to make contracts for parties, which they have omitted or neglected to make for themselves; or, as Wigram expresses it, "Where the words, aided by evidence of the material facts, are insufficient to determine the testator's meaning, no evidence will be received of what he intended."

A most instructive illustration of this salutary rule is to be found in Coffin *vs.* Landis, 10 Wright, 431; and special attention is asked to the opinion of Mr. Justice Strong, and the language of Lord Denman, in Aspen *vs.* Austin, 5 Ad. & El. (N. S.) 671, (48 E. C. L.,) cited therein. The masters, after weighing the whole testimony offered, have found that no such contract was entered into, and upon this point their conclusions will necessarily be followed by the court.

In view of these facts and considerations, it is submitted that the executors, under a will which makes no reference to any such arrangement, were fully justified in proceeding to sell in the manner they did. The method and time of sale were the subject of frequent discussion between Marvine and themselves; and finally, three years after the testator's death, they proceeded to sell the property in the manner advised by the most experienced auctioneer in the city. The handbills were issued March 30th, and the first letter of his counsel is dated April 5th; so that Marvine had been apprised, without delay, of the proposed sale; and complaint of want of notice is hardly consistent with fact. The objections to the time and manner of sale do not rest, however, upon any such matter of detail. It is contended that it has been established by the evidence that a contract, such as has been referred to, was entered into by Mr. Drexel, and is now binding upon his executors; that the contract constituted a partnership between Marvine and Drexel, and created a trust in the land in favor of Marvine, and must now be specifically performed by the parties, or the property be held till he will agree to its sale.

Supposing the evidence sufficient to establish such a trust, it would be incompetent, under the statute of frauds. Purdon, 497, Pl. 1 and 3; 1 Smith L. C., 575; Seitzinger *vs.* Ridgway, 4 W. & S., 472; Espy *vs.* Anderson, 2 Harris, 308; Lewin on Trusts, (new edition,) 111, 129, 138.

"If, upon a conveyance, devise or bequest, a trust be declared of part of the estate, and nothing is said as to the residue, then *clearly* the creation of the partial trust is regarded as the sole object in view, and the equitable interest undisposed of will result to him or his representatives." Lewin, 111.

But it is an abuse of language, to speak of this alleged right as a trust. It is not an interest in the land, to be enforced only by subpœna in equity, and cognizable only by the chancellor; but it would be, if established, a personal contract, for the breach of which, in the lifetime of Drexel, an action for damages would lie. Calling the agreement, however, a trust or a partnership, does not tend to establish it or enlarge its obligations,

if established; and it is clear that there was no partnership *inter se*. The distinction is between cases as against third persons and *inter partes*. By compensating a clerk or agent by a share of the profits, no interest is given him in the partnership assets. His rights do not spring into existence till the profits are realized; and although, on the principle of *quia timet*, a bill may perhaps lie to prevent a collusive or fraudulent sacrifice of the property in order to cut him out of his just profits, he is in no sense an owner of the property, nor has he such an interest as would be bound by a judgment. Allison *vs.* Wilson, 13 S. & R., 330; Morrow *vs.* Brenizer, 2 Rawle, 188; Craig *vs.* Leslie, 3 Wheat., 563; Bogard *vs.* Perry, 1 Johns., Ch. 52; Ewing *vs.* Blight (cited 2 Casey, 137). But in the view we take the case, this is a matter of no great consequence; and reference will only be made to Smith *vs.* Burnham, 3 Sumner, 435; Hale *vs.* Henrie, 2 Watts, 145; and Caddick *vs.* Skidmore, 2 De Gex & Jones, 52, to show that in cases of alleged partnerships, as elsewhere, the statute of frauds will prevent the enforcement of such parol agreements as are here alleged.

The rights and duties of the parties, however, are not to be measured by the name given to their agreement; and let it be conceded that the contract was entered into as alleged, and that it constituted a partnership venture, and it would still have terminated with Mr. Drexel's life, and never have been binding on his executors. The very utmost that could have been claimed, if the agreement had been written out according to the understanding as now contended for, would have been that it constituted a partnership; but if so, that would have been dissolved by death. Here, again, the distinction is as between the parties themselves, and as between the firm and third persons. It is an implied term of every partnership, that it will be dissolved by death. Lindley on Partnership, 187, 866, 891; 3 Kent, 55*; Crawshay *vs.* Maule, 1 Swanst., 495; Vulliamy *vs.* Noble, 3 Merivale, 614; Gillespie *vs.* Hamilton, 3 Madd., 251; Downs *vs.* Collins, 6 Hare, 418; Caldwell *vs.* Stileman, 1 R., 212; Brewster's Adm'rs *vs.* Sterrett, 8 C., 115.

And on dissolution, the assets of every partnership, including the real estate,—and though the very business was the buying and selling of real estate,—must be converted into cash, and the business wound up without delay. To put the case in the strongest way for the plaintiff, let it be supposed that articles of agreement had been entered into declaring the intention to form a partnership, and providing for the purchase of this property and its improvement in the manner contended for by the plaintiff; or, even assume that, under such an agreement, the parties were equally interested, and that the plaintiff, having already advanced his equal share of the capital required, was now prepared to furnish the balance necessary to build up the property and carry the speculation to its contemplated conclusion: even then, in the absence of express covenants binding the executors, it would have been an implied term of the agreement, that it should be dissolved by death, and the property immediately converted into cash for the purpose of distribution. This is text-book law; and reference need only be made to Colyer on Partnership, §§ 307, 308, 313; Lindley, 679, 857; Crawshay *vs.* Maule, 1 Swanst., 495; Featherstonhaugh *vs.* Fenwick, 17 Vesey, 298; Darby *vs.* Darby, 3 Drewry, 495, 503 (which was a partnership in buying and selling real estate); Wilde *vs.* Milne, 26 Beav., 504, in which a colliery was sold by the master; Downs *vs.* Collins, 6 Hare, 418; Pierce *vs.* Trigg, 10 Leigh., 406 (in which the real estate was sold). The familiar rule upon the subject is thus laid down in Kent:—"Each party may insist on a sale of the joint stock; and when a court of equity winds up the concerns of a partnership, it is done by a sale of the property, real and personal, and a conversion of it into money." 3 Kent, 64.

But upon a point like this of every-day practice, it is needless to encumber the argument with citations. The hardship where the dealing is in real estate is precisely the same as where it is in personal property. In every kind of manufacture it is the right of the executors, if they see proper, to insist upon a sale of the unfinished stock on hand, instead of incurring the risk of continuing the business to work it up; and in many instances

this may be the highest wisdom. As to this, in addition to Williams on Executors, 1498*, 1583*, 1624*, and cases cited, and Hill on Trustees, 377, reference may be made to Collinson *vs.* Lister, 20 Beavan, 355, 365, (S. C., 7 De G. M. & G., 634,) in which it is said that "it is clear, that executors cannot carry on the trade except for the mere purpose of winding it up;" and a mortgage on a ship, to pay off a prior encumbrance and complete the vessel, was adjudged invalid; and to Stedman *vs.* Fedler, 20 New York, 437, in which it was ruled that the executors of a part owner of a ship had no right to unite in running the vessel. See, also, 16 Mass., 361; 2 Brown, C. C., 653. And hence executors, while carrying on a trade after their testator's death, without express authority, are liable for all losses incurred, and accountable for all profits made, and personally liable on the contracts made in the business, which, again, do not bind the estate itself. Hill on Trustees, 378, 574; Lewin on Trusts, 213; Williams on Executors, 1625*.

But it is only for the sake of the argument that it can be conceded that this was a joint or partnership business. Had it been established to the full extent now claimed by the plaintiff, it would only have amounted to an agreement by Drexel to carry on a business of his own, and allow Marvine a share of the net profits. Of such a contract it can, with even less reason than of a partnership, be contended, that it should survive—for the discretion, in the manner and time of its execution, would be confined to Drexel alone, and not shared with a partner.

A few cases may be added to those mentioned by the masters. An agreement by a coachmaker to furnish a carriage for five years and keep it in repair, is personal, and could not be assigned in law; and executors and administrators are assigns in law. Robson *vs.* Drummond, 2 B. & Ad., 303.

Contracts of apprenticeship founded upon personal instruction on the one side, and the render of work and service on the other, have been held to be discharged and put an end to by the death of either party. Baxter *vs.* Benfield, 2 Str., 1266; S. P. Farron *vs.* Wilson, Law Rep., 4 C. P., 744; see, also,

Chamberlain *vs.* Williamson, 2 M. & S., 408; Taylor *vs.* Caldwell, 3 B. & S., 836.

A contract made by a firm consisting of two partners for the employment of an agent in their business for a term of years, was held to be discharged by the death of one of the partners before the expiration of the term,—that appearing to have been the intention of the parties. Tasker *vs.* Shepherd, 6 H. & N., 575.

The plaintiff sold a picture after death of intestate. Held, could not recover commission on the sale. Camponan *vs.* Woodburn, 24 L. J., C. P., 15.

Where an engineer was appointed to construct certain works, which it was calculated would occupy fifteen months, and was to be paid for his services during that period the sum of £500 by equal quarterly installments, and shortly after the end of the third quarter he died, two of the quarterly installments then remaining unpaid, it was held that, although his death put an end to the contract for the future, it did not divest the right of action for those installments which had already accrued to him. Stubbs *vs.* Holliwell, Ry. Co., Law Rep., 2 Ex., 311.

Whether, therefore, it be considered that the masters were mistaken or not in their conclusions of fact, no duty rested upon the executors to make the advances asked for, and it was incumbent upon them to wind up the estate, in a reasonable time after their testator's death. The authorities already quoted show this to be their duty, as well where an active business is carried on as in other cases; and it is the right of the distributees to get control and possession of their respective shares as soon as possible after the payment of the debts and the fulfillment of contracts legally chargeable upon the estate. Here, again, as in the case of quasi-partnerships, the distinction is between the obligation to third persons, or strangers, and *inter partes*. In the case of the house, (page 61 of the plaintiff's argument,) it must be finished, or damages paid for its non-completion, because the contract is with a stranger, and because of the nature of the contract; but, as between the partners, an agreement to build and sell twenty houses would not

continue after death,—the contract being made in the one case with, and in the other without, reference to the implied continuance of life.

In this State, the duty to wind up, convert into cash, and distribute, may be enforced after the expiration of a year. Pray's Appeal, 34 Pa. State Rep., 100; Dickinson *vs.* Callahan, 7 Harris; Holden's Ex'rs *vs.* McMakin, 1 Pars. Eq. Rep., 298.

After waiting three years, therefore, the executors were not precipitate in what they did. The method of sale was warranted by law. Hill, 480; McCreery *vs.* Hamlin, 7 Barr, 480; 1 Seton on Decrees, 544; 2 *Id.*, 1184; Wild *vs.* Milne, 26 Beav., 504. Indeed, they would not have been justified in selling in any other way than by public auction, and the only criticism which can be made is as to the manner of sale. In regard to this, they consulted the most experienced auctioneer in the city and followed his advice, taking special pains to give publicity to the sale. No one can read the correspondence between counsel, and the testimony of Mr. Ellis and Mr. Freeman, without being satisfied that the defendants acted in good faith and according to the best advice they could get; and it is not for the plaintiff to now complain that the plan then selected was not a proper one, in view of the fact that he was repeatedly requested to furnish a plan of his own for the sale, and declined to do so. His objection was to any public sale of the whole property, and not to the details of the plan adopted; and down to the final hearing he has never volunteered a suggestion upon the subject.

The masters have reported that the plan proposed was ruinous, and, without any evidence to guide them, have recommended a scheme of their own. Inasmuch, however, as they have overruled the exception to the fourth paragraph of the decree,—which is unsanctioned by principle or authority,—upon the ground that "they are so persuaded that the parties to this suit must be the purchasers of the property, that such matters as above mentioned are hardly to be considered," it would seem that they might have selected for the proposed mode of sale a less opprobrious epithet than "ruinous." Apart from the two particulars

mentioned in the exceptions filed by the defendants, the method of sale is a matter which interests the defendants less than the fact of sale; and had it been proposed by the plaintiff in 1866, it would have been at least tested by defendants. In the provisions excepted to, the plan is objectionable. The defendants are entitled to be protected against sham bidders, and a deposit to cover expenses of sale is universal. The other requirement is still worse. Mortgages upon unimproved property cannot be placed with any company, or sold at any time in the market, but at a discount. Mr. Drexel paid cash for this property; and to compel his executors to accept $112,000 in mortgages, not worth more than $100,000, is, in effect, to give the plaintiff $3000 of his money. For such a wrong there is not a syllable of authority in any decision of any court, and, on the contrary, it is in direct contravention of every authority upon the subject, and of every form of decree to be found in any report or book of precedents. The most favorable view of the plaintiff's claim that can be taken, is, to assimilate it to a partnership; and if so, the assets are always to be converted into cash; and the agreement, which is the law for these parties, gives him only "a portion of the net profits that may be *realized.*" So long as any part of the amount advanced is outstanding in mortgages, no *net profits* have been *realized*, and until they have been, there is no warrant in the law or the contract for paying the plaintiff a dollar.

And, finally, the defendants must also object that any part of the costs of this expensive and protracted litigation should be charged upon the fund, and much more, that the costs as between solicitor and client should be so charged. As already stated, the litigation, if the report of the masters be confirmed, was altogether needless. The defendants would have accepted any reasonable mode of public sale rather than have engaged in litigation. They offered repeatedly to adopt any plan the plaintiff and his counsel would suggest, but were met with the objection that they had no right to sell any part of the property, in any manner, until it had been built up and improved. Unable to accede to this view, they invited the plaintiff to apply

to the court, and, without requiring security, awaited the result of the suit. In his attempt to establish his claim, the plaintiff occupied nearly a year in giving his evidence, gaining, meanwhile, the delay he desired, and finally failed to make it out. His effort was to prove a partnership, which, if proven, would not have entitled him to the relief prayed for,—and it was not proven. Wherein he differs from any ordinary suitor, except that he has put the defendants to great expense in contesting a question of fact which was immaterial to the merits of the cause, has not been made apparent. Nay, more, had he been successful in proving the agreement to advance, the whole contest would have been the result of his own negligence and heedlessness, in not having it inserted in his written contract; but having failed, he is in no better position than any other defeated plaintiff, with the issue "no partnership" found against him.

Abundantly plain as this is believed to be, it is still more certain that this is not a case for costs between solicitor and client. Had the defendants come into court and asked for guidance, the expense of the proceedings would properly have fallen on the venture; but here they were resisting a claim on the estate of their testator, which the result has shown to be alike unfounded in law and fact. Under these circumstances they might ask that all their own expenses should be charged to the plaintiff; but no authority can be produced to justify compensating him for engaging in an unwarrantable and unsuccessful litigation, which, even though unsuccessful, has been its own reward, as it has secured him a delay of ten years from the time of the original purchase. The only case in which costs, as between solicitor and client, are allowed, is where all parties having a common interest, the suit brought inures to the benefit of all, by settling questions calling for decision and concerning the interests of all, or where a fund has been realized by the special exertions of the individual creditor for the common benefit of all; but here the claim was antagonistic and hostile, and the proceeding does not differ from an ordinary suit at law. It should be enough, that no precedent for such an allowance in a like case can be produced; but by reference to the exceptional

instances in which such orders have been made, it will be seen that this is not even an analogous case.

In Millington *vs.* Fox, 3 M. & C., 352, Lord Cottenham refused the plaintiffs their costs, though successful, on the ground that the defendants had offered terms which would have rendered the suit unnecessary; and to the same effect are Catlin *vs.* Hamer, 3 Johns., Ch. 61; Coleman *vs.* Ross, 10 Wright, 180. Daniell lays it down, (3 Chan. Practice, 1483,) as "the general rule of the court, that the successful party, though he may be deprived of his costs, never pays them." See, also, Vancouver *vs.* Bliss, 11 Ves., 458; Gyger's Appeal, 12 P. F. Smith, 73.

Hence, a bill for account, after distribution under an account which proved correct, will be dismissed with costs. Mackenzie *vs.* Taylor, 7 Bea., 467.

The principles upon which costs are allowed, as between solicitor and client, are stated with fullness in Daniell's Ch. Pr., 1508, *et seq.* The cases specified are where personal representatives and other trustees are entitled to costs out of the fund, or a bill has been filed for the general benefit of creditors and legatees, and then only when there is a fund actually in court, and it clearly appears that the estate is insufficient for payment of debts. Blackett *vs.* Blackett, 5 L. J., (N. S.,) Ch. 213.

But there is not, and will not be, in the sense of the decisions, "a fund in court." When an English court of chancery undertakes the administration of the estate of a decedent, or a creditor, by a bill for himself and others, establishes a claim, the money comes into the actual custody of the court, having been made by its process as much as it were the proceeds of an execution; but this sale will be made under the authority given the executors by their testator, and not because of the decree of the court. As was ruled by the court in Ewing *vs.* Blight, and, as was laid down in the many like cases collected in the works on partnership, such an agreement gives Marvine no interest in the land *qua* land. The title to that was complete and entire in Drexel, as the owner in severalty; and it is only the method of exercising the power of sale which the court can control. No power of sale is conferred, though the manner of sale may be regulated, and the defendants

will receive the proceeds, therefore, as owners, by virtue of their title, subject only to account for whatever shall remain over after the original outlay and subsequent expenditures have been refunded. As it is their right to thus receive the proceeds of sale, there will be no "fund in court;" and no precedent can be found, even though it might have been in some cases equitable to have done so, for visiting the costs, "as between solicitor and client," upon the losing party, as a penalty to be paid by him out of pocket, in addition to the costs of suit. For this technical reason alone, this latter allowance would necessarily be stricken out, though indeed no part of the decree as to costs can be sustained.

For to conclude the argument upon this point, and upon the merits, it remains only to ask attention to this case, as a whole; and, briefly to recapitulate, it is believed that it has been shown that the claim of the plaintiff was made without warrant or excuse; that the agreement was clear, unambiguous and explicit; that nothing justified the attempt to add to it by parol evidence, and under the circumstances such evidence was wholly incompetent; that, waiving this objection, the effort to prove that two intelligent men of business spent days in maturing a written agreement, defining their rights in respect to an advance of one hundred thousand dollars, but considered it unnecessary to make provision as to one of five hundred thousand dollars, has, as might have been expected, signally failed; that, had the alleged contract been proven, it would not have authorized the demand upon the executors to carry it out, or excuse the interference with a mode of sale, which, even with such a contract once in existence, would have been perfectly regular and proper; that in adopting the plan of sale announced for May 8th, 1866, the defendants acted deliberately, judiciously, and according to approved advice, and substantially in the manner now recommended by the masters; that the plaintiff, by declining to furnish a plan of his own, and objecting to the fact, and not the mode, of sale, is now estopped from alleging any defect in the plan as a reason for visiting upon the defendants the costs of a litigation which he could himself have prevented; and his bill, therefore, having been filed without

warrant, should be dismissed at his own costs, and the defendants be allowed to sell the property under the authority conferred upon them by the will of their testator.

In conclusion, it will not fail to interest the court to read the views of one, of whom it might always be said,—

"*Nec facundia deseret hunc, nec lucidus ordo.*"

Having been of counsel with the defendants, the late George M. Wharton sketched the subjoined points; and, with a reference to them as a perfect statement of the defendants' position, this argument may fitly conclude.

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Mr. WHARTON'S POINTS OF DEFENSE.

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POINTS OF DEFENSE.

1. There seems to be no evidence of contemporaneous conversation or acts to vary the terms of the written agreement of May 18th, 1861. (See testimony of B. Love, pages 141 and 142.) The question, therefore, is as to the true construction of that agreement according to its terms.

2. The interest of the agreement of the parties deduced from its language, was to provide a compensation for Marvine in consequence of his agency in the purchase of the land, which had been beneficial to Drexel. If Mr. Drexel should realize a net profit from any sale or sales, he agreed to pay to Marvine, as

his compensation, one-fourth of such net profit. Marvine was not to be responsible for any loss which Drexel might sustain.

3. The agreement did not make Drexel a trustee. He paid the whole consideration money, and was to be credited with the interest on the purchase-money, and also all after taxes and charges on the property. These were to be debited to the land as a means of ascertaining the net profits, if any, in case of a sale. The agreement expressly recognizes Drexel as owner, and as having become such through the agency of Marvine. The agreement does not treat Marvine as having any interest *in the estate*, but simply binds Mr. Drexel to pay him a sum of money out of any profits which the former might realize. Drexel's power to sell is, by the agreement, discretionary and absolute as that of a full owner, and not such as is confided to a trustee. A trustee is subject to the control of his *cestui que trust* through the courts. Mr. Drexel's power of sale is of a different nature. He could select time, price and mode of sale, without any control.

4. If Mr. Drexel were owner of the whole lot, and not trustee of any part, there was no trust for the court to regulate or administer. There is, therefore, now no vacancy in the trust, and of course no room for the appointment of another trustee. The intent of the parties obviously was to exclude Marvine from *an interest in the title*, and to throw him upon the *personal covenant* of Drexel for his compensation. The agreement was indefinite as to time. It must have a reasonable duration, which can hardly be extended beyond Drexel's lifetime.

During Drexel's life, Marvine had no right to interfere with the time and mode of sale; what right has he to interfere with it after Drexel's death? Are his rights thereby increased?

5. Drexel, as owner, had the right to give his personal representatives a power of sale. Their right to sell under his power is as untrammelled as was his own. The agreement excludes Marvine's interference.

6. There is no partnership growing out of the agreement. The land was not bought as partnership property; on the contrary, it was bought as Drexel's own several estate. It was to

be managed by him alone. A man may pay an agent for services by giving him a share in the profits of a particular venture as a compensation for his agency, without thereby making him a copartner. (See Collier on Partnership, by Perkins, Sec. 25–30, inclusive, and cases cited.)

7. Real estate can only become partnership property by express agreement. Hale *vs.* Henrie, 2 W., 143.

8. Marvine has no equity, without a previous tender or reimbursement by him of a proportionate part of the cost of the property. He cannot keep the agreement open indefinitely at Drexel's cost.

(Signed) G. M. WHARTON.