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PROBLEMS IN PARTNERSHIP

The Pennsylvania cases on partnership present some curious situations. As a learned author observes, "The life of the law has not been logic, it has been experience." [1]

Our cases involving the holding of property by partners are by no means logical but represent the experience of our courts in an endeavor to reconcile and sometimes apply divergent and diametrically opposite theories. The law of partnership has suffered in its development from the antagonistic views of the law and the equity courts and as we in Pennsylvania have had a peculiar amalgamation of legal and equitable conceptions, [2] it is not strange that our courts would oftimes be in confusion, sometimes adopting one concept and sometimes another. The contract of partnership embracing, as it does, the dedication of property to a particular commercial use and involving furthermore of necessity accounting with the usual complications of that branch of commerce, was early taken jurisdiction of by the courts of equity. On the other hand affairs of partners very often came within the jurisdiction of the courts of law particularly through the actions of creditors of the partners issuing executions and the questions arising in

[1]The Common Law by Holmes, now Mr. Justice Holmes, page 1.
[2]Rawle, Essay Eq. in Penna.; Laussat, Id.; Fisher: Eq. in Penna; remarks of Gibson, C. J., Torr's Estate, 2 Rawle, 253.

the matter of sales of partnership property and the distribution of proceeds. When A, B, and C, enter into the relation of partnership, contributions are made by them to the purpose of the joint venture, e. g., each contributes say $4,000. The total amount thus contributed constitutes what is called the capital stock or the assets of the partnership. This amount is invested in a way to carry out the purpose of the joint venture. In the conduct of the business and in the relations of the partners collectively and individually with the business world, it is conceivable that obligations will be incurred. Obligations that are incurred in the joint venture are called firm or partnership debts or obligations. Other obligations or debts may, however, be incurred by the partners as individuals aside from and not related to the joint venture. All the obligations or debts are, nevertheless, obviously against the partners themselves. Most of the difficulties and incongruities in our Pennsylvania law of partnership have grown out of determinations as to the rights of firm and separate creditors and the root of the trouble has been the divergent views as to the nature of a partnership and the rights or so-called "equities" of the partners.

Is the Firm an Entity?

In the study of this problem, as well as allied or kindred ones, the reader cannot escape, the prevailing, yea, pernicious influence of Doner v Stauffer, [3] erroneous as the reasoning may be, [4] this celebrated case has persisted as a guide in partnership problems in this state for over three-quarters of a century due to the fetish like worship accorded its great author by the legal profession and the almost saintlike halo surrounding his memory.

Says Gibson, C. J., [5] "It is settled by a train of decisions in the American, as well as the British

[3] 1 P. & W. 203 (1829.)
[4] Dickinson Forum, Vol. 10 page 25.
[5] Doner v Stauffer, supra.

Courts, that the joint effects belong to the firm and not to the partners." That is to say the legal title of the partnership assets is not in the individual partners but is vested in a quasi corporate body called the firm. Logically, it would appear, that the learned justice starting his argument with the premise that the joint effects belonged to the firm and not to the partners, ought to have reached the conclusion that no action of a separate creditor of a member of the firm could effect the firm's title to the assets levied upon, and yet the opposite conclusion was attained and the joint assets swept away because the interests of both partners were sold at the same sale, to the same purchaser. With the entity theory as a premise, the New York Court in Menagh v Whitwell [6] decided that even though every partner's interest in the partnership was sold by executions of separate creditors, or otherwise disposed of, nevertheless, these sales did not effect the legal title of the corpus of the partnership estate which was vested in the firm. Although Gibson, C. J., did not consistently or persistently apply his entity theory we find numerous allusions in the cases citing Doner v Stauffer for the proposition that the firm is the legal owner of the partnership assets. In Clarke v Railroad Company, [7] a comparatively recent case, Mr. Justice Williams declared unequivocally that the partnership when formed is "a distinct person in law," owning its property, having a right to contract and to sue and be sued by its firm name. [8]

Although this view has been advanced in matters of accounting in equity, it has never received the sanction of the common law. Says Holmes, J, in Francis & McNeal; [9] "Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is

[6] 52 N. Y. 146 (1873.)
[7] 136 Pa. 413 (1890.)
[8] To same effect, Gordon, C. J. Richard v Allen Pa. 199 (1887.)
[9] 228 U. S. 695 (1913).

an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm and that the individual liability of the members is not collateral like that of a surety but primary and direct , whatever priorities there may be in the marshaling of assets." [10] However, Gibson C. J., could not have meant what he said despite the fact that his dictum has been taken seriously by later courts, for in Moddewell v Keever, [11] he admitted that the notion of firm ownership was merely a figment of the equity courts raised for the purpose of carrying out the evident contract of partnership that the firm assets should be devoted to firm uses, adding rather significantly, "the common law courts act on the same principle, though it is not so easy for them to carry it out."

It is reasonably clear as a fact that the title to the property of a partnership, real or personal, can only be vested, according to common law theory, in the individuals who compose the group called the firm. The partnership as an entity or quasi-corporate-body is not a legal concept [11a] and legally speaking it would be just as efficacious to attempt to vest a legal title at common law in the town pump or in a cemetery lot as to select a non-recognizable, non-existing being called by merchants a firm. [12]

The Uniform Partnership Act repudiates the Gibson dictum in Section 6, thus defining a partnership:

[10]See also Hughes v Gross, 166 Mass. 61 (1896).
[11]8 W. & S. 63 (1844).
[11]a. It might be desirable, however, to abandon the legal theory. For a strong expression of the entity theory, see remarks Jessel, M. R., in English case, Pooley v Driver, 8 H. L. C. 268 (1876).
[12]We have a curious instance of attempted personification in Orphans' Court Practice when dealing with "decedents' estates."

"A partnership is an association of two or more persons to carry on as co-owners a business for profit."[13]

Are Partners Joint Tenants?

As early as 1693 it was said in the English Courts that partners were joint tenants and in consequence Holt, C. J., held that upon an execution against a partner by his separate creditor the sheriff in executing a writ against the partner's share in the partnership, must seize the entire partnership property, "because the moieties are undivided: for if he seize but a moiety and sell that, the others will have a right to a moiety of that moiety; but he must seize the whole and sell a moiety thereof undivided and the vendee will be tenant in common with the other partner." [14] This was an expression of the common law view of the relation of partners and was later acquiesced in by the equity courts, Lord Chancellor Hardwicke in West v Skip [15] declaring "the partners themselves are clearly joint tenants in the stock and all effects being seized per my and per tout," adding, however, that the partners were entitled to an accounting in equity as against each other.[16] The equity courts in order to preserve the elements of the partnership agreement and the priority of claims against the partnership entertained bills of injunction restraining sheriffs thus levying from selling until an accounting had been stated.

In Moddewell v Keever, [17] Gibson, C. J., refers to this practice and the resultant effect in this language:

"A partner himself has no more than a resulting interest in the stock, to be ascertained by a settlement of the partnership account, and he can transfer no more. So far is the principle carried in equity that solvent partners

[13] Act Mch. 26, 1915, P. L. 18. See also Mch. number 1916. Dickinson Law Review. "Any estate in real property may be acquired in the partnership name." Uniform Act, Sec. 8 (3).
[14] 1 Salkeld, 392 (1693). Heydon v Heydon.
[15] 1 Vesey, 239 (1749).
[16] Taylor v Fields, 4 Vesey 396.
[17] 8 W. & S. 63 (1844).

are entitled to an injunction to stay execution of the joint effects, for a separate debt, till the accounts are taken: and if it turn out that the debtor has nothing in the stock, the injunction will be made perpetual, as it was in Taylor v Fields, (4 Vesey 396) and Barker v Goodair, (11 Vesey 85), and the common law courts act on the same principle, though it is not so easy for them to carry it out. It seems to be settled that a purchaser of an interest in the joint effects under a separate execution, is a tenant in common with the other partners, and subject to their equities against the partner whose interest he has acquired."

With these authorities in mind Hepburn, P. J., for the lower court in King's Appeal, [18] nineteen years after Doner v Stauffer was moved to say: "The creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and may sell the undivided interest of his debtor. The purchaser becomes a tenant in common with the other partner and takes the property in the same manner as the debtor himself had it, subject to the partnership debts and to the rights of the other partner." In a Per Curiam, the judgment of the court below was affirmed "on the lucid and accurate opinion" submitted. Five years later in Deal v Bogue, [19] the Supreme Court more moved apparently by the equity view of the matter decided that the partners altho holding as joint tenants did not have such interest as could be directly reached by their separate creditors, hence the sheriff levying on the partnership property for the separate debt of a partner was guilty of trespass. "A levy, then, to effect the interest of a partner, cannot touch a specific portion of the

[18] 9 Pa. 126 (1848).

[19] 20 Pa. 228 (1853) per Woodward, J. The early cases permitted a seizure of specific items subject to an accounting. The later cases deny the right of tangible seizure. The levy should be on the partner's interest in the partnership, not his interest in specific property. This is the construction despite the peculiar wording of the Act of 1873. See McCrossin v McCrossin, 21 Pa., C. C. 36 1899. Dengler's Appeal, 125 Pa. 18 (1889). Balliet v Stever 6 Northampton, 197 (1897).

goods, nor the whole, because others have property in every part, as well as the whole, coupled with a right resting in contract, to use them for the purpose for which the partnership was instituted." It is remarkable that the court here reached a conclusion forbidding a seizure upon precisely the same line of reasoning adopted by Holt, C. J., [20] almost two centuries before to reach the very opposite result. However, Holt, C. J., made no mention of the "right, resting in contract," an equitable creation of probably a later date. In Vandike v Rosskam, [21] the lower court, influenced by the earlier decisions, remarked that altho only the interest of the partner could be sold, the sheriff might seize the corpus of the partnership property to accomplish this result. This was held to be error, the court repeating the reasoning of Deal v Bogue. It is now well established that the sheriff cannot at the instance of a separate creditor's writ disturb the possession of the remaining partners. [22] The development and evolution of our law along these lines is the direct result of the legal recognition of the partner's equity doctrine, an equitable concept, together with the influence of the entity theory as it was gradually being recognized by our judges. This is also apparent from the construction given the provisions of the Special Fi. Fa. Act of April 8, 1873. [23] With the repudiation of the dogma that the sheriff, for a separate creditor, could seize the corpus of the partnership estate, there would apparently pass out also the conclusion that the purchaser of a partner's interest becomes a tenant in common with the remaining partner. What becomes of the doctrine of joint tenancy of the partners?

[20]Heydon v Heydon, supra, 14.

[21]67 Pa. 330 (1871), per Williams, J. It will be recalled that this justice was a strong advocate of the entity theory. Durborrow's Appeal, 84 Pa. 404 (1877) per Paxson, J.

[22]Richard v Allen, 117 Pa. 199 (1887).

[23]This act has been repealed by Section 45, Uniform Partnership Act.

The Uniform Partnership Act, which as has already been quoted repudiates the entity theory and distinctly designates the partners as co-owners, [24] presents a solution of the problem by creating a new tenure called "tenancy in partnership." The provisions are as follows:

> "Section 24. The property rights of a partner are (1) his rights in specific partnership property; (2) his interest in the partnership, and (3) his right to participate in the management. Section 25. (1) A partner is co-owner with his partner of specific partnership property, holding as a tenant in partnership; (2) the incidents of his tenancy are such that: (a) A partner, subject to the provisions of this act and any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes: but he has no right to possess such property for any other purpose without the consent of his partners. (b) A partner's right in specific partnership property is not assignable, except in connection with the assignment of the rights of all partners in the same property. (c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for partnership debt, the partners, or one of them, or the representative of a deceased partner, cannot claim any right under the homestead or exemption laws. (d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except when the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or

[24] Prof. Beale in his edition of Parsons on Part. defines a partnership as "a legal entity formed by the association of two or more persons for the purpose of carrying on business, etc."

partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose. (2) A partner's right in specific partnership property is not subject to dower, curtesy or allowances to widows, heirs, or next of kin."

These provisions, together with Section 26 to be hereinafter quoted, constitute what might properly be termed the heart of the Uniform Act. The application of these provisions will be discussed in connection with the following additional problem of this article.

What Is the Partner's Equity?

In the formation of the association of partnership, the equity courts have drawn from the contract an implied understanding from the nature of the agreement that the contributions of the various members to the enterprise and called after the analogy to corporations, the capital stock, shall be dedicated to the purpose of the joint venture and shall be used exclusively to that end. Such implication gives rise to what is called "the partners' equity."

Sharswood, J. thus expressed it, [25] "The interest of each partner in the assets of the firm is not a title to any aliquot part, as a half or a fourth. Each partner being liable in solido for the engagements of the partnership has a right, which is termed his equity, because in England it was administered only in the Courts of Chancery, to have the firm assets applied in the first instance to the payment of the firm debts—an equity through the instrumentality of which the partnership creditors have a priority over separate creditors to be paid out of the partnership funds. The interest of a partner is therefore only such a proportion of the capital and profits as by the original articles

[25]Manhattan Insurance Co. v Webster, 59 Pa. 227 (1868).

of agreement he may appear to be entitled to receive after all the debts are paid, and the affairs of the concern liquidated and wound up." [26] Gibson, C. J., in Doner v Stauffer, referring to this phase of the partnership contract as a means by which partners may keep a class of their creditors "at-bay" marvels that it should not have been deemed within the statute of Elizabeth and states that it was not, "is attributed exclusively to the disposition universally manifested by courts of justice to encourage trade," and continuing says: "But such as it is, has the contract of partnership been established: and the principle which enables the partners to pledge to each other the joint effects as a fund for the payment of joint debts has introduced a preference in favor of the joint creditor, *founded on no merits of their own* but on the equity which springs from the nature of the contract between the partners themselves." [27]

In the preceding sentence of the opinion just quoted the learned justice had laid down the doctrine that "the joint effects belong to the firm, and not to the partners." To a neophyte the wonder grows at "the polarity of mind" which would in two succeeding sentences express such diametrically opposite ideas, [28] thus deserting the entity theory and embracing the common law notion with no warning whatsoever to "the gentle reader."

However, an unbroken line of authority in Pennsylvania, beginning with Doner v Stauffer, teaches the doctrine that the right of the partnership creditors to a priority in firm assets is not an inherent one but is derivative from the respective rights of the partners against each other. Referring to the rights of partnership creditors in Baker's Appeal, [29] Lewis, J., says:

[26]Mechem on Part. 2nd. Ed. 371; I. Lind, Part. (Ewells) 352.
[27]1 P. & W. 203 (1829).
[28]Menagh v Whitwell, supra note 6.
[29]21 Pa. 82 (1853).

"The latter have no lien on the property and must work out their preference in the distribution of the partnership funds, entirely through the medium of the partners whose interests remain undisposed of. Story's Equity, Sec. 8, 1253." The equity or right of the partners may be waived by them [30] and it is held to be waived when a partner's interest is sold either by himself or by the sheriff at the instance of a separate creditor. Says Lewis, J., in Coover's Appeal, [31] each partner has such right or equity "while he exercises dominion over the property, to insist on its application to partnership claims, before it be appropriated to individual debts of the several partners. But this right *may be waived* and *it is waived* when each partner disposes of all his interest in the property. Sales on separate executions against the several partners have the same effect as sales by the individual partners themselves, Doner v Stauffer, 1 P. & W. 205: Baker's Appeal, 9 Harris, 16."

In McNutt v Strayhorn & Hobson, [32] Thompson J., speaks of the sale of the partner's interest "destroying" his dominion or control over the firm assets and thus working a destruction of the equity.

It is not, however, the mere levy upon the interest which destroys the dominion or control and the resultant annihilation of the equity. There must be a sale to mark the passage of the control. Hence when separate creditors of each partner make a levy upon the interest, which it will be recalled, is the uncertain and indefinite result of a partnership accounting, but before the sale under these levies a partnership creditor intervenes with an execution, the latter prevails. The joint levy is made upon the corpus or tangible property of the partnership, the separate levies are merely upon the residual interests. [33] As the priority of creditors is based upon the

[30] Ex parte Ruffin, 6 Vesey, 191, Baker's Appeal, supra.
[31] 29 Pa. 14 (1857).
[32] 39 Pa. 273 (1861).
[33] King's Appeal, 9 Pa. 124. (1848); Cooper's Appeal, 26 Pa. 262 (1856).

equity of the partners and the equity of the partners in turn upon the contract of partnership, it has been held that joint creditors, who are not however, partnership creditors, can not claim the benefit of the equity. They are not children of the covenant or heirs of the promise.[34]

Doner v Stauffer.[35]

A and B were partners in trade. X, a separate creditor of A, levied upon the latter's interest and later Y, a separate creditor of B, levied upon B's interest. The two writs were in the sheriff's hands at the same time and by virtue of these two writs the *personal property* of the firm was sold at one sale to the same purchaser. The lower court distributed the proceeds of the sale equally to X and Y. and denied the right of partnership creditors, who had not issued executions, to any participation in the proceeds, and refused the admission of any evidence that the firm was insolvent, because "this is a case where the whole partnership effects are swept away by separate executions against each partner, when the creditors at large have no lien."

The Supreme Court per Gibson, C. J., affirmed the judgment declaring inter alia, "when the shares of the partners are united in the same purchaser every semblance of partnership equities is at an end." The logic of the learned justice may be tested by the following paraphrase of points consecutively taken in the opinion.

(1)—The joint assets belong to the firm and not to the partners.

(2)—The interest of each partner is residual, consisting of his portion of surplus remaining after an accounting.

(3)—A separate creditor levies upon and sells merely the interest specified in the last paragraph.

[34]Snodgrass' Appeal, 13 Pa. 474, (1850). See also Overholt's Appeal, 12 Pa. 222 (1849). Hershey v Fulmer, 3 Pa. C. C. 442 (1887).

[35]1 P. & W. 203, (1829).

(4)—A sale of both interests simultaneously to the same purchaser equals a joint sale of the corpus.

(5)—Consecutive purchasers at the same sale take the goods. Same result as in the preceding paragraph.

Says Brown, P. J., in Richard v Allen, [36] "However illogical it may appear that a purchaser of two or more intangible interests in property should thereby become the owner of the corpus of the property, such is the well settled law of Pennsylvania as applied to the purchase, by the same person, of the interests of all the partners in the partnership property." The same reasoning is applied when at the same sale, both interests are sold to different purchasers." [37] The assumption by Gibson, C. J., in Doner v Stauffer, that the sale of a partner's interest wrought destruction of his equity, an assumption that is faithfully followed in all subsequent cases, [38] was purely gratuitous and in large measure unwarranted but in the light of the development of partnership law in this state is explicable. The court was undoubtedly confused as to the nature of a partnership, whether to follow the entity or common law theory. Furthermore the doctrine of Ex parte Ruffin [39] a case of voluntary transfer by partners, was improperly extended to involuntary dispositions. Again the court was perhaps unconsciously influenced by the then well established practice, due to Holt C. J.'s holding that partners were joint tenants, that the tangible property of the partnership could be seized, altho subject to an accounting, a doctrine which as has already been

[36]117 Pa. 201 (1887).

[37]Kelly's Appeal, 16 Pa. 59 (1851); Vandike's Appeal, 17 Pa. 271 (1851); Vandike's Appeal, 57 Pa. 9 (1868).

[38]Contra, Sharswood, P. J., Brenton v Thompson, L. I. 133. See also Woodward, J., Beatty's Appeal, 3 Grant, 213 (1857).

[39]6 Vesey, 126.

[40]Discussion under Joint-Tenancy, supra.

pointed out has been abandoned by our later cases. [40] Nevertheless, it is amazing that a legal opinion as replete in grotesque reasoning as that of the eminent and learned Chief Justice should have persisted and manifested such virility throughout the years. Verily it is a striking illustration of the potency of a good name.

The Uniform Act.

It has been pointed out already in this article that the Act is ostensibly and admittedly based upon the common law theory of a partnership and that the partners are "co-owners of the business." Furthermore, that the Act creates a new kind of tenancy called "tenancy in partnership," the incidents of which are found in Section 25.

Section 26 must now be quoted to round out the discussion. It is as follows: "A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property."

In Doner v Stauffer, Gibson, C. J., in referring to the partner's interest said: "In consequence of the rule as I have stated it, a separate creditor sells, not the chattels of the partnership, but the interest of the partner, *encumbered with the joint debts.*" The year before in Taylor v Henderson, [41] the same judge declared that a partner "has no specific interest in the partnership effects, but only in what may remain after the settlement of the partnership account," and in Moddewell v Keever, [42] he expresses the same thought defining the interest as "a resulting interest in the stock, to be ascertained by settlement of the partnership account." This view has the approval of all the subsequent cases. [43] Said Gordon, C. J., in

[41] 17 S. & R. 456 (1828).
[42] 8 W. & S. 63 (1844).
[43] Vandike v Rosskam, 67 Pa. 330, (1871); Appeal, 81½ Pa. 270 (1875); Richard v Allen, 117 Pa. 199 (1887); Clarke v R. R. Co., 136 Pa. 413 (1890); Cf. Remarks Sharswood, J., Whigham's Appeal, 63 Pa. 198 (1869).

Richard v Allen. [44] "Admittedly had the sale been on but one of the writs, the purchaser would have taken no right in the firm assets, but only the right to compel an account with the continuing partner, and such also is the purport of the first section of the Act of the 8th of April, 1873."

It follows that Section 26 of the Uniform Act is in accord and harmony with the conception of our courts as to the nature of a partner's interest as that conception has been gradually developed.

It is reasonably clear likewise that the incidents of the "tenancy in partnership," expressed in Section 25, are in harmony with the best and latest expressions of our courts as to the effect of partners holding of the specific partnership property, [45] except possibly in those peculiar cases of real estate holdings illustrated by Foster's Appeal, [46] Leaf's Appeal, [47] and Haeberly's Appeal. [48]

Partners's Equities and the Uniform Act.

The concluding problem to be discussed is the relation of the partner's equity with the terms of the Uniform Act. We have seen that the doctrine of the equities, originally an equitable idea has been absorbed by the courts of law. That by virtue of these equities the partners are enabled to keep "at bay" one class of creditors and give to another class (the partnership creditors) a preference in the distribution of the joint assets. That furthermore this preference is not an original or inherent right of the firm creditors but is merely a derivative one from the rights of the partners themselves. That the partners may, without being chargeable with fraud, forego or waive these rights of each other and lastly, according to an unbroken line of authority from Doner

[44] 117 Pa. 199 (1887) Cf. Smith v Emerson, 43 Pa. 456, (1862).
[45] Hall's Estate, 266 Pa. 312 (1920).
[46] 74 Pa. 391 (1873).
[47] 105 Pa. 505 (1884).
[48] 191 Pa. 239 (1899); Real estate cases will be discussed in a subsequent article.

v Stauffer to the time of the passage of the Uniform Act, our courts have held uniformly that a partner loses this right upon the sale by the sheriff of his interest in the partnership and that if all interests are sold, particularly at the same sale, the legal effect is to sweep away completely the partnership assets. Does the Uniform Act meet this admittedly anomalous state of our law, referred to as peculiar and provincial by every American writer on the law of partnership? The basis of the reasoning of our cases relative to the destruction of the equity is that, by the sale, the partner has lost control or dominion over the property of the partnership. In Section 24 of the Act one of the tabulated property rights of the partners is "his right to participate in the management."

Suppose A and B are partners and X, separate creditor of A, levies upon A's interest in the partnership, which would be under all authority that which is described in Section 26. The interest is sold to X. Does A thereby lose his right of management? Has he lost his dominion over the property as is held in all the cases prior to the Act? [48a]

Suppose, furthermore, that X obtains a judgment later against B and levies upon and sells B's interest in the partnership. Who then is the owner of the firm assets? Assuming that A. and B. were still considered as the holders of the bare legal title to the property of a partnership now dissolved, , [49] for whom would they hold the property, for the partnership creditors and ultimately for X, or merely for X, excluding the creditors of the firm? As we have already seen by the terms of the Act the partners are "co-owners" of the business. As co-owners it is apparent upon both principle and authority in Pennsylvania, the partners may agree upon a disposition of the firm assets ousting the firm creditors of their priority and the latter would have no legal re-

[48a]Horton's Appeal, 13 Pa. 69 (1850).
[49]See Uniform Act, Section 27, (1); Section 32, (2).

course when their claims had not fastened on the property as legal liens. The provisions of the Act are to the same effect. [50]

Section 38, (1), provides that each partner, as against his co-partner and all persons claiming through them in respect of their interest in the partnership may, unless otherwise agreed, insist upon the application of the partnership property to the discharge of its liabilities, but it is not clear that partners who have parted with their interests may likewise insist.

Under the terms of the Act the priority of firm creditors must be based upon the equities of the partners for the equities or rights of the partners—an equitable concept as already shown—is nevertheless manifestly based upon the common law view of the partnership, recognized by the Act. If the entity view were considered, there would be no place for the operation of the partner's equity. The joint effects belong, then, as Gibson, C. J., has declared to "the firm" and creditors of the firm have the same right to a liquidation of their claims first out of firm assets that the creditors of a corporation have against the assets of the corporate body. [51] If the partners lose control or dominion by a disposition of their interests and also by virtue of such loss the equity to insist upon payment first of partnership creditors, the latter's claim would be gone. The Act nowhere saves the rights of partnership creditors because they are firm creditors. If the rights of firm creditors are swept away and the interests of the partners "in the partnership" are all sold, it will appear that merely a bare legal title would stand between the purchaser X and the specific partnership property. It is conceivable that our courts in such case adhering to the doctrine of former decisions would continue to follow Doner v Stauffer. There is nothing in the Act to forbid this conclusion.

[50]Sections 25, (2)-a; 38, (1); 40.

[51]Woodward, J., in Deal v Bogue, 20 Pa. 228, (1853) uses the corporate analogy for a somewhat similar illustration.

Moreover, *stare decisis* is a legal maxim to conjure with in Pennsylvania. Even as independent a thinker as Sharswood, J., confessed in a rather astonishing way to its constraining influence in another phase of partnership law when he said: "We are bound to stand *super antiquas vias,* by our own decided cases; for nothing is truer (?) or more important (!!?), than the maxim: Omnis innovatio plus novitate perturbat, quam utilitate prodest." [52]

On the other hand our Courts may decide that as X, in each instance purchased simply a right to an accounting, the legal title to the firm property remaining in the partners, the recourse of X is to file a bill against the partners for an accounting and in this proceeding the rights of firm creditors would be preserved. In so doing they would undoubtedly be in harmony with the current of authority and in accord with uniformity which is the purpose of the Act and the avowed purpose of the codification movement. To accomplish this however, Doner v Stauffer must be repudiated. Heretofore this cause celebre, like Hamlet's ghost, has refused to rest. Will it return to haunt us in the Uniform Act?

There is no authority at present. A thoughtful writer, however, referring to the possible disposition of B's interest in the above queries says: "If his interest also were finally seized by his separate creditor, the firm title would not thereby be *necessarily divested,* nor his right to continue the settlement necessarily be terminated, altho as a practical matter such a situation would be likely to lead to bankruptcy or insolvency proceedings against the partnership." [53]

However, in discussing at a different point the appropriate sections, the same author sententiously observes: "It is obvious that these provisions raise some

[52]Edwards v Tracy, 62 Pa. 381 (1869). The bulwark of conservatism, the very ark of the covenant.

[53]Mechem, Elements of Partnership, (2nd. Ed.) page 358.

new and interesting questions not yet settled by the authorities." [54]

In conclusion the opinion is ventured that the desirable result of preserving the priorities of firm creditors would have been more securely attained in this state by codifying the entity theory, thus following a path blazed by Williams, J., twenty-five years before the passage of the Act. [55]

A. J. WHITE HUTTON.

[54]Supra, page 132.

[55]Clarke v R. R. Co., 136 Pa. 413 (1890). The late James Barr Ames, Deam of Harvard Law School, had prepared a draft of a Uniform Act based on the entity theory. The work of this eminent authority was subsequently rejected by the Committee. See also article by Judson A. Crane, 28 Harv. L. Rev. 788.

MOOT COURT

MITCHELL'S ESTATE

STATEMENT OF FACTS

Sarah Mitchell, an invalid, engaged Jane Kop, the plaintiff, as nurse, promising to pay her five dollars a week, and to devise to her a house worth $2000.00, and subsequently made a will containing the devise. Later however Mrs. Mitchell conveyed the house in question to X, without the knowledge of the plaintiff. Mrs. Kop remained in this employment for the period of ten years, until the death of her employer, and seeks to recover from the estate of the decedent, the present value of the house which was to have been devised to her, basing her claim upon the above agreement with Mrs. Mitchell.

Ridgway, for Plaintiff.
Snyder, for Defendant.

OPINION OF THE LOWER COURT

PERRY, J:—The question arises as to whether the plaintiff may recover upon this alleged contract. To us there appears an insuperable difficulty in the way of the plaintiff, in that she seeks to recover upon the strength of a contract which she, in the trial, has failed to establish. The agreement alleged in the pleading, and upon which Mrs. Kop bases her recovery, is an oral contract to devise certain realty, in the nature of a contract to convey, and invalid and unenforceable because within the provisions of the Statute of Frauds dealing with such contracts. It is settled law in Pennsylvania that an oral contract to devise land to the promissee falls within the terms of the Statute and will not form the foundation of an action based, thereon. Tieman's Appeal, 23 Dist. Ct. 607; Fuller v Fuller, 219 Pa. 163.

Nor is the plaintiff's full performance of all outstanding obligations sufficient to remove this obstacle which the legislature has seen fit to impose upon such agreements; the weight of authority seems settled, that where the performance of the services under a contract to devise realty in consideration thereof, are of such a nature as to be capable of an approximately accurate estimate, and their value liquidated into money, so that the promissee may be made substantially whole, there is not a sufficient part

performance to satisfy the statute. See the cases cited in 15 Lawyers Reports Annotated (New Series) at page 466.

Nor do we consider that the will made subsequently to the agreement and containing a devise, to be sufficient memo of the transaction, so as to remove the contract from the terms of the Statute. A case upon which the defendant relies and which we consider as the basis of our present decision, is to be found in Goehring's Estate, 70 Sup. 340. In that case Mrs. Goeh ring, an invalid, employed Mrs. Carey as nurse and housekeeper paying her five dollars a month, boarding her and her child. Mrs. Carey complained that the salary given her was inadequate and refused to continue the employment until she should be paid more. Mrs. Goehring then promised to leave her a house, if she would stay, subsequently drawing up a will containing the devise to her. Later however, she sold the house to another for $1100.00, and Mrs. Carey's representative brings an action against the estate of Mrs. Goehring for that amount. It was decided that the situation presented a breach of a parol agreement to convey land, and the plaintiff was not allowed to recover the present value of the house.

Although it is true that the very early cases in Pennsylvania decided the measure of damages in such a case as this, to be the value of the property promised to be devised, yet these decisions were overruled in the case of Hertzog v Hertzog, 34 Pa. 418, and the present doctrine, as we so interpret it, allows a plaintiff suing, to recover the value of services rendered in consideration of a contract to devise property, invalid because of the statute of frauds, only the reasonable value of the services rendered and not the value of the property, without reference to, and disconnected with, the express contract. The action is on the implied promise, imposed by law upon the defendent and not upon any express contract; any evidence of the value of the land, stipulated in the agreement to be devised being inadmissable. Therefor the amount to be recovered in this action, is not the present value of the house as stated in the agreement, but rather the reasonable, or the market value of the services rendered by the plaintiff after deducting the amount which she may have already received. Hertzog v Hertzog, 34 Pa. 418; Bender v Bender, 37 Pa. 419; Ewing v Thompson, 66 Pa. 383; Krauss v Rohner, 172 Pa. 481; Goehring's Estate, 70 Sup. 340. See also the cases cited in 37 L R A (n. s.) 641.

And our conclusion is therefor, that altho the plaintiff's claim is not without substantial merit, yet she is entitled to recover only upon her strict legal standing, and only to the extent of the market value of her services which she has performed.

She seeks in this action to recover on a contract which she is forbidden by the statute to assert, and we would advise her to bring an action, not on the contract as in this case, but rather an action to recover the value of services rendered. We must therefor decide that the action be dismissed, the costs to be borne by the plaintiff.

OPINION OF THE SUPERIOR COURT

But little need be added to the lucid opinion of the learned court below.

The promise to devise the house was oral. Nothing occurred to exempt it from the operation of the statute of frauds. Neither specific execution nor recovery of damages equal to the value of the house can be permitted.

For the services rendered, their fair value can be recovered, but in estimating their value, no use can be made of the value of the house. The fact that the house is now worth $3000 is irrelevant.

Mrs. Kop might have changed the character of her demand. By the contract she was to get five dollars per week and a house worth $2000. This might be deemed an estimate by Mrs. Mitchell, of the value of the services, i. e., five dollars per week for the weeks of the service plus $2000. She has not made such claim, and the decision of the learned court below must be affirmed.

Appeal dismissed.

COLLINS v RAILROAD COMPANY

STATEMENT OF FACTS

The plaintiff, Collins, procured from the defendant a ticket for a ride between the points A and B. As soon as he took his seat at A, the conductor lifted his ticket. Later not recognizing him or forgetting the receipt of the ticket, the conductor demanded a ticket. Collins refused to offer any ticket declaring that he had delivered it to the conductor. This person stopped the train and ejected Collins. This is an action of trespass.

Krick, for Plaintiff.

Delesantro, for Defendant.

OPINION OF LOWER COURT

CAROTHERS, J.—A railroad is a public service company. It is the recipient of exclusive franchises; to it is granted the power of eminent domain, the use of the streets and high-ways

and other powers and rights of a public nature. Since such powers and rights can only be granted or delegated for the benefit of the public, the railroad company as a public service company or common carrier is under a duty to serve the public. In the performance of that duty a railroad company may provide reasonable rules and regulations to be complied with by those who seek it's service. There is no question but that it is a reasonable regulation which requires a patron of the railroad to make payment in advance of the service or that he shall secure a ticket before entering one of the company's passenger trains. If a patron enters a passenger train having complied with all the rules and regulations and conducts himself in a decent and orderly manner he is entitled to, and the company is under a duty to give him, the service for which he has contracted.

The case at bar is clearly distinguishable from those in which the conductor has expelled a passenger who presents an improper ticket due either to the fault of the agent from whom he purchased the ticket or of a conductor on a previous train, or of himself. In the case at bar the whole mistake was made by the conductor whose act of expelling the plaintiff was made the basis of the latter's alleged right of action. Therefore, the plaintiff's right to recover rests solely upon the determination of the question as to whether a passenger who heeds all rules and regulations, may recover damages from a railroad company whose conductor takes from him a proper ticket and later demands from him repayment of the fare and ejects the passenger upon refusal to pay a second time.

It is conceded that the conductor acted within the scope of his authority. 87 N. Y. 25.

The majority rule is that a passenger who has paid his fare, either with cash or ticket, is entitled, if called upon to pay a second time, to stand upon his rights and refuse to pay. He is not bound to pay a second time: Ann. Cases. 1913 B. Vol. 27. p. 1209. This rule is applied in several cases whose facts are identical with those of the case at bar. In 153 Pa. 236 it is held that a passenger is entitled to recover for injury to feelings and humiliation suffered by trespass. In 153 Ala. 386 and a case exactly on point, it was held that the passenger was under no obligation to pay her fare a second time even when a fellow passenger offered to pay it for her, and the fact that she refused said fellow passenger's assistance does not lessen the damages.

It was suggested by counsel for the defendant that the plaintiff should have paid his fare to his destination and brought an action against the railroad afterward. It seems that it would be just

as reasonable to require the company to carry him to his destination without the fare and afterwards, bring an action against him for it. No man is bound to suffer even a trifling extortion. We are not partial to a rule requiring a person to submit to extortion for the purpose of relieving the extortioner from the natural consequences of his own acts.

On principle therefore, it seems to us that the majority rule best accords with justice and courteous and efficient performance of the duties resting upon a public service company. For application of the rule we are supported by precedent in our own Commonwealth and in view of the overwhelming weight of authority disclosed by our own research and by the admirable brief of plaintiff's counsel, we must find judgment for the plaintiff.

OPINION OF THE SUPERIOR COURT

It is the duty of a passenger on a railroad, to produce to the conductor, a ticket showing the payment of the fare, or to pay the fare. In this case the duty was performed by the plaintiff, who when requested delivered his ticket to the conductor. He thus had a right not to be put off of the train, until he had reached his destination.

Did anything later happen to deprive him of this right? The conductor apparently forgot that he had received the ticket, and demanded another, and the plaintiff refused to offer another. Did that refusal impair his right to be further carried by the train? How could it? For his transportation he had fully paid, and he had delivered to the conductor, the appointed evidence of the payment, i. e. the ticket. The railroad company could properly demand no more.

Explanation by the passenger, to the forgetful conductor was unnecessary. It was for the conductor to remember. The railroad company took the risk of his having capacity to remember. We think that, had the plaintiff refused any statement, his ejection would have been improper. Richards v Penna. R. R. Co., 70 supra. 257.

But, the plaintiff attempted to remind the conductor that he had delivered the ticket to the latter. That he did not succeed was not the result of his neglect, but of the imperfection of the memory of the conductor.

Falsely assuming that the plaintiff had not delivered a ticket, the conductor ejected him from the train. So to eject was a part of the ordinary duty of the conductor, when a person was on the train who did not give proof of having paid his fare. For an expulsion from the train, when the facts did not warrant it, the conductor and the corporation are responsible. 70 Pa. 257, supra;

Perry v Passengers R'way. 153 Pa. 236; Light v Railway Co., 4 super. 427.

The learned court below has properly allowed a recovery.

Affirmed.

RUMMEL V STOKES

STATEMENT OF FACTS

On September 1, 1919, Stokes drew a check for $300, payable to the order of Simpson. Simpson endorsed it to Rummel, who retained it until August 1, 1920, when he sued Stokes on it, never having made an attempt to obtain payment from the bank on which it was drawn.

At the trial, Rummel proved the signature of Stokes, the delivery to Simpson and Simpson's indorsement. He offered no explanation of the long delay in presenting it to the bank nor did he show why he resorted to a suit instead of the bank for payment. He was allowed to recover. Defendant Appeals.

McCready for Appellee.

Peelor, for Appellant.

OPINION OF SUPERIOR COURT

DAVIS, J:—There are two questions for consideration of the court in the case at hand. (1) Does the failure of a plaintiff, holder of a check, to explain the reason for the long delay and failure to present same to the drawee bank for payment, preclude the said plaintiff from recovery in an action, by him against the drawer, upon the check, and (2) must the plaintiff, holder of the check, present the same to the drawee bank for payment before resorting to an action at law upon the check against the drawer thereof?

The cases are not harmonious and all are not unanimous in either affirming or rejecting the propositions of law set forth above.

The better rule seems to, and the decisions of this state certainly do, sustain the decision of the court below in the case here for further consideration.

A check is an unconditional order in writing addressed by one person or persons to a bank or banker, signed by the person or persons giving it, requiring the bank or banker to whom it is addressed to pay on demand a sum certain in money, to order or to bearer.

The drawer of a check warrants that he has sufficient funds in the hands of the drawee bank to pay the check and if the check is not paid by the bank upon presentation, he will do so. Why should the mere failure of the holder to present the check to the drawee for payment estop him from collecting from the

drawer directly? The liability of the drawer is primary, merely because the holder seeks to have payment directly from the drawer rather than from funds in the banks of the drawee is no reason to prevent him, if he choses so to do.

It works no hardship upon the drawer because he is only doing that which he would be forced to do had his funds in the hands of the drawee been exhausted or the account withdrawn.

That the drawer is not discharged by the laches of the holder in presenting it for payment, unless he can show that he has sustained some injury by the default, is decided in the cases of Exchange Bank of Wheeling v Sutton Bank, 75 Md. 577, 28 Atl. 563 and Morrison v Bailey, 5 Ohio St. 13, 64 Am. Dec. 632.

It is held in Flemming v Denny 2 Phila. 111, to an action by a holder against the drawer of a check, it is no answer that the check was not presented in a reasonable time, unless, during delay the fund has been lost by failure of the banker.

In the Uniform Negotiable Instruments Act, Sec. 186, we find a "Check must be presented within a reasonable time after its issue or the drawer will be discharged from liability thereon, to the extent of the loss caused by delay."

By this section it is quite clear that the only ground for relieving the drawer from liability on the check, where there has not been presentment within a reasonable time is where he, the maker, has been occasioned loss by reason of the delay,—and even then his exemption is only in proportion to the loss which he has suffered.

Failure to make demand within a reasonable time, and to give notice of non-payment, does not premptorily discharge the drawer of a check. In case of a check the drawer is the principal debtor, and he is not discharged by any laches of the holder in not making due presentation thereof, or in not giving him notice of the dishonor unless he has suffered some loss or injury thereby, and then only pro tanto. He is exonerated to the extent of his injury. A mere partial injury will not entitle him to be exonerated from the whole debt. Bradley v Andrews 107 Fed. 196; Industrial Bank of Chicago v Bowes. 165 Ill. 70, 46 N. E. 10; Noble v Doughten 72 Kan. 336, 83 Pac. 1048; Kenyon v Stanton 44 Wis. 479, Weiand's Adm. v State Bank of Maysville 112 Ky. 310, 65 S. W. 617; Culver v Marks 122 Ind. 554, 23 N. E. 1086.

The only way in which a drawer of a check would be liable to be injured by failure to present it within a reasonable time is where, subsequent to its delivery and prior to its presentment, the bank upon which it is drawn becomes insolvent. In such a case

the drawer will be, in respect to the check, discharged to the extent of loss he has sustained thereby. Eaton and Gilbert on Commercial Paper, Sec. 167; N. I. A. Title 111, Article 1, Sec. 186.

If a check is not presented within a reasonable time and there is a loss due to delay, such loss falls on the holder ot the check. If the bank fails, the holder must suffer the loss provided the drawer had money on deposit sufficient to pay it. Gordon v Levine, 194 Mass. 418, 80 N. E. 505; Manitoba Mortgage and Investment Co. v Weiss 18 S. D. 459, 101 N. W. 37.

Where a check was presented long after date, and payment was refused not on account of failure but because the drawer has closed his account, or withdrawn his funds, the drawer is still liable. Cox v Boone, 8 W. Va. 500, 23 Am. Rep. 627.

Delay, short of the period prescribed by the statute of limitations for an action on the check or original consideration, in presenting a check to drawee for payment does not release the drawer from liability on the check or original consideration for which it was given, unless he is damaged or prejudiced by such delay. Rosenbaum v Hazard, 233 Pa. 206; Bradley v Andrews, 107 Feb. 196.

There is no presumption of loss or injury to the maker arising from delay on the part of the holder which would render necessary the rebuttal of such presumption by the holder but the burden of proof is on the maker of the check, to show that loss or injury has resulted to him through the delay by the holder in making, presentment and giving notice. Rosenbaum v Hazard, 233 Pa. 206. As was said by the court in Spink and Keyes Drug Co. v Ryan Drug Co., 72 Minnesota 179: "Loss by reason of negligent delay, either in making presentment or in giving notice of dishonor is a matter of defense to be pleaded and proved by the drawer instead of requiring the holder to allege and prove a negative as to a matter peculiarly within the knowledge of the drawer."

There is not, in the case at bar, even an inference of any loss to the defendant maker, therefore since none is alleged or proven, and a holder may neglect to present a check to the drawee for payment and demand payment from the maker instead, at any time until an action on the check has been rendered impossible

OPINION OF SUPREME COURT

The question is, whether the delay of eleven months in presenting the check, precluded a suit upon the check by its holder. The court below has properly decided that it did not. The drawer of the check tacitly says that he has the money in the bank

because barred by the statute of limitations, the decree of the court below is affirmed and the Appeal dismissed.
with which to pay it, and that he will not withdraw that money until the holder of the check has had the opportunity to obtain payment of it from the bank. But, by receiving a check, one does not agree to look to no other source of payment than the bank on which it is drawn. The drawer may let this money remain in the bank for the purpose of paying the check, and if an undue time passes without presenting it, and if the bank becomes partially or wholely insolvent, the holder of the check will have to indemnify the drawer to the amount of the check, or as much of it as shall be lost.

The burden of showing insolvency and loss is on the maker of the check. They are not presumed. Rosenbaum v Hazard, 233 Pa. 206.

The opinion of the learned court below sufficiently supports its disposition of the case.

The judgment is affirmed.