Act to be or was it a declaration of the rights in both equity and law? To grant specific performance of leases which fail to comply with statutory requirements tends to lessen the significance of such a statute. On the other hand there is the possibility of some hardship to a complaining party in situations where the theory of a periodic tenancy is not available. HOBERT H. BUSH

# PARTNERSHIP

## MARSHALING — RIGHT OF DEPOSITORS TO COMPETE WITH INDIVIDUAL CREDITORS IN THE SEPARATE ESTATES OF THE PARTNERS.

In 1911 a number of persons formed a co-partnership association for the purpose of engaging in the business of general banking. The Superintendent of Banks of the state of Ohio took over the bank in 1932 for liquidation and sued the owners of the bank for $50,000 alleging that the assets of the bank were insufficient to pay the liabilities to that extent. One of the objections made by the defendants to the maintenance of the suit was that firm creditors were not entitled to move against the partners and their non-partnership property until the individual creditors of the individual partners had obtained satisfaction of their claims. The court, in allowing the suit, granted the correctness of the general equitable rule contended for but said that the rule had been modified as to the depositors in and owners of unincorporated banks by the provisions of Section 710-80, General Code, and that depositors could share in the separate assets of the partners on an equal footing with the individual creditors. *State* v. *Steck*, 132 Ohio St. 198, 9 Ohio Bar 42, 5 N.E. (2d) 919, (1936).

Section 710-80 reads as follows: "The depositors in any unincorporated bank shall have first lien on the assets of such bank, in case it is wound up, to the extent of their several deposits, and for any balance remaining unpaid, such depositors shall share in the general assets of the owner or owners alike with the general creditors." Defendants' argument must have been that "general creditors" meant "general creditors of the firm." Only one case had previously construed this part of the section. The probate judge of Madison County in the case of *In re Johnson*, 3 Ohio Op. 540 (1935), held that "general creditors" meant "general creditors of the owner or owners." He stated, however, that the result would be the same if the words meant "general creditors of the firm." If the depositors, who have

first lien on the assets of the bank, are not satisfied by these assets, then as to the general creditors there are no firm assets, and he contended that the rule of *Brock* v. *Bateman*, 25 Ohio St. 609 (1874), would apply, namely that where there are no firm assets for distribution and no solvent partners, the firm creditors share in the assets of the individual partners *pari passu* with the individual creditors. The depositors then, being by the statute on a par with the general creditors of the bank, would also share in the individual assets. It might be argued, of course, that the rule of *Brock* v. *Bateman* would not apply since there were firm assets for distribution to a preferred class of firm creditors and that the Legislature meant to prefer the depositors to the general creditors only to the extent that their claims could be satisfied by the assets of the bank. The interpretation made by the Madison County probate court and by the court in the principal case seems to be more reasonable in the light of the Legislature's policy of protecting bank depositors to the fullest possible extent.

The rule of distribution adopted by Section 710-80 does not apply generally to partnerships in Ohio. The leading Ohio case is *Rodgers* v. *Meranda*, 7 Ohio St. 179 (1857), which adopts the majority or English rule that firm creditors can share in the individual estates of the partners only after individual creditors of the partners have been paid in full. The same rule is adopted in the Bankruptcy Act, Section 5 (f), and in the Uniform Partnership Act, Section 40 (h). As noticed above an exception is made where there are no firm assets for distribution to the creditors and no solvent partners, *Brock* v. *Bateman*, *supra*, or where the assets are negligible, *In re Robb*, 5 Ohio N.P. 5, 5 Ohio Dec. 227 (1897), although these exceptions are not recognized in bankruptcy, *Farmers Bank* v. *Ridge Ave. Bank*, 240 U.S. 498, 36 Sup. Ct. 461, 60 L. Ed. 767, L.R.A. 1917A, 135 (1916). And even if the partner was indebted to the firm, the firm or those who represent it cannot compete with the separate creditors except where the partner has wrongfully appropriated firm assets to his own use, *Rodgers* v. *Meranda*, *supra*.

*Rodgers* v. *Meranda* discusses some of the propositions which have been advanced in support of the English rule. The first is that the rule is an arbitrary one adopted for convenience. Mathematical simplicity, as the court says, is not usually a sound basis for an equitable doctrine. The second is that firm creditors give credit in reliance on firm assets and not in reliance on the separate assets of the partners. This, of course, is often not true. The third, that the estate to which credit is given is benefited to that extent, is also not always true. After declaring that

none of the above propositions is a sound basis for the rule, *Rodgers* v. *Meranda* concluded that the preference of the individual creditors in the separate estate resulted "as a necessary correlative" from the preference given the firm creditors in the firm assets. As pointed out in *Robinson* v. *Security Co.*, 87 Conn. 268 (1913), this reason is scarcely better than the ones discussed and rejected by the Ohio court. It may often happen that the individual estates will pay out a large percentage to the individual creditors and the firm assets will pay out a very small percentage to the firm creditors. This Connecticut case adopted the rule of the Ohio statute that firm creditors to the extent that their claims are unsatisfied by firm assets share in the separate estates of the partners *pari passu* with the individual creditors. A few other jurisdictions have adopted the same rule. *Barton National Bank* v. *Atkins*, 72 Vt. 33 (1899), *Freeport Stone Co.* v. *Carey's Adm'r*, 42 W. Va. 276 (1896), *Pettyjohn* v. *Woodruff*, 86 Va. 478 (1890). Still a different rule was adopted by decision in Kentucky, *Northern Bank* v. *Keizer*, 63 Ky. 169 (1865), and by statute in Georgia, *Johnson* v. *Gordon*, 102 Ga. 350, 30 S.E. 507 (1897).

It is apparent that in the absence of the statute the non-depositor creditors would have shared equally with the depositors in the partnership assets; and that neither of them could have shared in the separate estates of the partners until all individual creditors had been satisfied. By the statute, however, the depositors were preferred above the general creditors of the firm in the firm assets and were given an additional right to compete with the individual creditors of the partners in the separate estates. In the light of the history of the opposing rules it would seem that no other interpretation of the Ohio statute was possible.

D. M. Postlewaite

# WILLS

## Publication and Republication in Ohio — Probable Effect of Section 10504-3, General Code, on This Problem

Ever since the decision of *Collins* v. *Collins*, 110 Ohio St. 105, 143 N.E. 561, 38 A.L.R. 230 (1924) the Ohio view as to the requisites for revival of a revoked will has been in doubt. In that case the testator destroyed a codicil to his will by tearing it up with the intention of restoring the will to its original condition. On the question as to whether there had been a sufficient revival of the original will the court, interpreting section 10562 (now 10504-54) General Code, held that