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

to constitute a valid revivor of the revoked will, the testator must acknowledge the instrument to be his last will before the witnesses who had already signed his will, or if before other witnesses, then those witnesses must sign the will at the request of the testator, or the testator and two witnesses must sign some other instrument showing such intent; or such testator must republish his will with the same formalities as attended its original execution and publication.

Is it necessary to publish a will in Ohio in order to make its original execution valid? Is it necessary to republish the same, using the term "republish" in the sense "to publish again," in order to revive a will once revoked? In view of the use by the court of the terms "republication" and "acknowledgment," the previous Ohio cases as to the necessity of publication in this state, and the wording of sections 10505 (now 10504-3) and 10562 (now 10504-54) General Code, these questions arise.

As used in the field of wills, "publication" is the act of making it known to the witnesses that the instrument is intended to be the last will and testament of the testator. Page, Wills (2nd. ed.) Sec. 353. "Republication" is defined by the same authority as "any act which gives new validity, as of the date of publication, to a will which was executed at some time theretofore." Page, Wills (2nd. ed) Sec. 505. The term "acknowledge" is used to convey the meaning to admit as one's own, and is usually used in connection with the signature to a will. Unfortunately, however, the courts have carelessly used these terms and all the Ohio cases must be construed with this fact in mind.

On the question of publication as a requisite to the proper execution of a will at the time of the *Collins* case, *supra*, the most nearly applicable Ohio Code provision then read in part as follows: "Such will shall * * * be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe or heard him acknowledge it." (The words of this statute were the same as those formerly set out in Section 5916 of the Revised Statutes, except that the last words in the latter were "the same" instead of the present "it.")

The question often arose under these two earlier statutes as to the proper antecedent of the words "the same" and "it." Was it "such will" or was it the testator's act of subscribing? It could not be expected that the lower courts of Ohio, with this ambiguous wording of the statute, would arrive at a unanimity of decision. In *In re Williamson's Will*, 6 Ohio N.P. 81, 8 Ohio Dec. 47 (1898), it was held that where the witnesses to a will saw the testator subscribe, it was not necessary that he acknowledge the instrument. (Note that here "acknowledge" is used to

mean "publish"). But in *Tims* v. *Tims*, 14 Ohio C.C. (N.S.) 273 (1911), where the testator signed in the presence of both witnesses, who then subscribed, the will was held invalid because the testator did not make known to one of the witnesses that the instrument was a will. In *In re Reckard's Will*, 15 Ohio N.P. (N.S.) 465 (1914), the court held that where both witnesses saw the testator sign, it was unnecessary that the witnesses be informed in any manner as to the nature of the instrument. But in *In the Estate of Nicholson*, 20 Ohio N.P. (N.S.) 189 (1904), it was said that "what our statute prescribes is the *publication* of the will in the presence of the attesting witnesses." In this case the will was signed in the absence of the subscribing witnesses and the court construed "the same" in the statute to mean the will and not merely the signature. *Haynes* v. *Haynes*, 33 Ohio St. 598 (1878), at page 614 states: "In the absence of the attesting witnesses, the will and signature to the same, must be acknowledged by the testator to the attesting witnesses." The syllabus in *Keyl* v. *Feuchter*, 56 Ohio St. 524, 47 N.E. 140 (1897), where the testator signed out of the presence of the attesting witnesses, reads as follows: "One essential to the admission of a paper writing purporting to be a will to probate is that it shall have been acknowledged in the presence of two subscribing witnesses."

The case of *Underwood* v. *Rutan*, 101 Ohio St. 306, 128 N.E. 78 (1920), seemed to settle one point at least; that where the witnesses see the testator sign, there need be no publication that the instrument is his will. The syllabus of the case states: "When two subscribing witnesses have seen a testatrix subscribe her name to a will * * * and the signature so made is then attested and subscribed by said witnesses in the testatrix's presence, the will is properly executed. In such case it is not necessary that the testatrix declare that the instrument is her will or that she has signed it."

In speaking of *Keyl* v. *Feuchter*, *supra*, the court said that, "the quoted syllabus undoubtedly has gone beyond the scope which the facts in the case and the *per curiam* warrant. While the language of the syllabus states that one essential to the admission of a will is that it should be acknowledged by the maker as his will," (i.e., "published"), "an examination of the case discloses that the real issue involved was whether the signature of the testator, made in the absence of a subscribing witness, was acknowledged in the presence of the latter."

This seemed to settle the problem under the former statute by setting up the following requirements: (1) That where the testator signed in the presence of the witnesses, it was unnecessary that he make known that the instrument was his will, but (by way of dictum) that (2)

where the testator did not sign in the presence of such attesting witnesses, it was necessary that he make known, i.e., "publish," the instrument as his will as well as to acknowledge his signature.

Under the language used in the statute, it could be reasonably implied that publication was not required in any case. This is the view taken by John S. Bachman, "Wills — Execution — Acknowledgment — Publication — General Code, Section 10505," 3 University of Cincinnati Law Review, page 191 (1929). He states at page 195: "Since where the witnesses see the testator subscribe it is unnecessary that they be informed that the instrument is a will, it would seem to follow necessarily that the essential fact to which the witnesses attest is that the signature is that of the testator, and that if the will is signed in the absence of the witnesses, the testator must acknowledge only the *signature* as his own.

On the hypothesis that publication was required in Ohio only in the instance stated above at the time of the decision of the *Collins* case, we turn to an examination of the rule laid down therein requiring, in order to revive and validate a revoked will, that it must be "republished." The section of the General Code immediately pertinent to that problem was section 10562 (now 10504-54), which read in part as follows: "After making a will, if the testator duly makes and executes a second will, the destruction, cancellation, or revocation of the second will, shall not revive the first will unless the terms of such revocation show that it was his intention to revive and give effect to his first will; or, after such destruction, cancellation, or revocation, he duly republishes his first will."

In construing this section the court quoted with approval from *In the Matter of Stickney*, 161 N. Y. 42, 55 N.E. 396, 76 Am. St. Rep. 246 (1899), where the court interpreting a similar statute stated: "To render the execution of a will effectual, the testator must declare the instrument to be his last will and testament in the presence of at least two subscribing witnesses, * * *. With a clear understanding of the requirements necessary to the proper publication of a will, we are to interpret the provisions of the statute relating to the republication of such an instrument. * * * It was the intent * * * by this statute to require the same formalities * * * to establish a republication of a will as are plainly required to establish its original publication."

In New York Decedent's Estate Laws, 1909, chapter 18, paragraph 21, publication is expressly required to execute a valid will. The court, in the *Collins* case, followed the rule in *In the Matter of Stickney*, *supra*, without considering those instances where no publication is re-

quired in Ohio. However, it approved the New York court's statement that the sections referring to execution and revival are in *pari materia* and must be construed together. We immediately ask: Does the Court mean to hold that republication in its etymological sense, i.e., "to publish again" is to be required? Or is it using the term in the sense of "re-execution"? If it is the former, then by implication the court is assuming that the will must be made known as one's own, for there could not be a republication without a publication in the first instance.

The term "republication" is an unfortunate one and its use should be fully and explicitly explained. If the court meant to use the term in its etymological sense it should have distinguished those situations where no publication is required in the first instance and those where it is not so required. That the court did so mean to use the term is shown by its statements in the principal case that "to constitute a valid revivor of the revoked will, the testator must acknowledge the instrument to be his last will before the witnesses who had already signed his will, or such testator must republish his will with the same formalities as attended its original execution *and* publication." (writer's italics) Thus it distinguishes between execution and publication. It would seem that the statements of the court are too broad.

In 1930 the Special Committee on Revision of the Ohio Probate Laws of the Ohio State Bar Association recommended that Sec. 10505 of the Geineral Code be amended to "require that testator declare instrument as a will, whether witnesses see him sign or hear him acknowledge his signature" (Recom. 97, p. 54 of Second Report, Jan. 1930). This recommendation did not, however, find expression in the new Probate Code of 1932. On the contrary, all ambiguity as to requirement of publication was resolved contrary to the Committee's suggestion, for the present section (10504-3) now reads: "Who saw the testator subscribe or heard him acknowledge *his signature*" (writer's italics). This change in the statute would seem to indicate a legislative intention that no publication is to be required in the original execution of a will in any case. If this is true, then no matter how the term "republication" has been used heretofore, it should now be interpreted to mean "re-execution" rather than "publication again."

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