Case Western Reserve Law Review

Volume 4 | Issue 3

1953

Insurance

Edgar I. King

rence of a future event. For the same reason an interest in property, other than an undivided interest, is subject to a condition precedent when the identity of the property depends upon the occurrence of a future event.[8] In the *Braun* case there is no gift of an undivided interest in specific property to the trustee for the marital trust. The selection by the executor of specific items of the testator's property to be held by the trustee under the marital trust is a condition precedent to the vesting of the legal title to this property in the trustee. Although the executor's selection of the property is a condition precedent under general rules of construction, the Ohio Supreme Court could determine that, for the purposes of the Rule against Perpetuities, the trustee of the marital trust received a "vested" interest at the testator's death.

However, the trust can be sustained in a more logical way and therefore the meaning of the word "vest" should not be unnecessarily distorted. An accepted modern policy of construction is not to defeat the testator's intent but, if possible, to construe his language so as to avoid the Rule against Perpetuities.[9] It would, therefore, be proper for a court to hold that the testator's executor must select the property for the marital trust within the period allowed by law for making the federal estate tax returns which is considerably less than the period of twenty-one years after the testator's death within which the vesting or nonvesting of an interest must be determined under the Rule against Perpetuities.[10] The common pleas court in the *Braun* case recognized the validity of this reasoning,[11] but elected to call the interest of the trustee vested as of testator's death.

ROBERT N. COOK

INSURANCE

In the cases reported during the past year, the courts of Ohio considered once more the question of who may carry on the insurance business. In *Motors Insurance Corp. v. Robinson*[1] the plaintiff insurance company and certain of its agents sued to enjoin the defendant from refusing to grant, refusing to renew and revoking licenses to the appointees of the insurance company. Ohio has long required that only persons engaged in a general insurance business could be licensed as agents. Sections 644 and 644-3 of

---

[8] 1 BOGERT, TRUSTS AND TRUSTEES § 111 (1951).

[9] AM. LAW OF PROPERTY § 24.45 (1952); 3 PAGE, WILLS 695 (1941); RESTATEMENT, PROPERTY § 243, comment *n*, § 375 (1950)

[10] For discussion of comparable cases see 6 AM. LAW OF PROPERTY § 24.23 (1952).

[11] Braun v. Central Trust Co., 104 N.E.2d 480, 485 (Hamilton Com. Pl. 1951)

the Ohio General Code allow the Superintendent of Insurance to prevent agents from being licensed if the agent intends to place insurance principally on property of which he or his employers or employees are "agent, custodian, vendor, bailee, trustee or payee." In the present case the insurance company habitually designated automobile dealers or their salesmen as appointees. The insurance company, concerned primarily with the word "vendor," contended that the restriction "could refer only to the time that the named persons held the property either actually or theoretically and that as soon as the property was sold and the property belonged to the purchaser, the restriction no longer applied."[2] However, the court held that "The purpose of the restriction was undoubtedly intended to prevent an unfair advantage in the placing of insurance and the licensing of persons who are not intending to do a general insurance business but simply to supplement their primary business of selling automobiles."[3] Consequently, an automobile dealer or salesman is left free to sell insurance as a general matter, but in a specific case the Superintendent of Insurance is to determine whether or not he is selling principally on property of which he or his employer or employee is the "vendor." The court further held that there was nothing unconstitutional in such a restriction. The opinion in the common pleas court was adopted by the court of appeals[4] and the Supreme Court of Ohio dismissed an appeal.[5]

In *Hirschfelt v. Kentucky Central Life & Accident Insurance Co.*,[6] a life insurance policy provided: "No indemnity will be paid for accidental death resulting from fatal or nonfatal injuries intentionally inflicted." The insured was beaten by two men and subsequently died from the injuries inflicted. Other than a possible inference from the brutality of the attack, there was no evidence that the aggressors intended to kill. The court held that, because the provision was an exception, the insurance company had the burden of proving as an affirmative defense that the injuries were intentionally inflicted; but, since the "policy does not require evidence of an intent to inflict a fatal injury,"[7] the defense was established.

Royer v. Shawnee Mutual Insurance Co.[8] involved the construction of a personal injury and property damage policy covering operation of an auto-

[2] 106 N.E.2d 572 (Franklin Com. Pl.), *aff'd*, 106 N.E.2d 581 (Ohio App. 1951), *appeal dismissed*, 157 Ohio St. 354, 105 N.E.2d 61 (1952). For a further discussion of the case see the CRIMINAL LAW article, *supra*.

[3] *Id.* at 577.

[4] *Id.* at 579.

[4] 62 Ohio L. Abs. 72, 106 N.E.2d 581 (Ohio App. 1951).

[5] 157 Ohio St. 354, 105 N.E.2d 61 (1952).

[6] 90 Ohio App. 144, 103 N.E.2d 839 (1951).

[7] *Id.* at 147, 103 N.E.2d at 841.

[8] 91 Ohio App. 356, 106 N.E.2d 784 (1950).

mobile. The automobile specified in the policy was in the garage for repair. The insured purchased a second car to use in the meantime and with it had the accident involved in the present litigation. The policy provided that coverage included an automobile other than that specified in the policy if the second car "replaced" the specified automobile. It was held in a suit to recover for damage to the second automobile that a car laid up in a garage does not serve the owner's purpose. The second one then serves that purpose and "replaces" the first even though ownership to the first is retained.

In *Neff v. Massachusetts Mutual Life Insurance Co.*,[9] a life policy, in which a wife was insured, provided that the proceeds were to be retained by the company and the interest paid to the husband, if living; and, on the death of the survivor of the husband and wife, the remaining amount was to go to the children. The husband murdered the wife and was sentenced to life imprisonment. The suit, although nominally against the insurance company, is actually between the administrator of the wife's estate and the guardian of the children. The court recognized the familiar principle that a murdering beneficiary cannot take. As the alternative joint-beneficiaries, the children are in no way tainted with the crime and will take under the policy. However, since their right to take will mature only when both the husband and wife are deceased and since Ohio does not recognize civil death, they cannot take as long as the husband is alive.

The condition of health of the insured when the policy is initiated came before the courts of Ohio for consideration. In *Sambles v. Metropolitan Life Insurance Co.*[10] the insured applied for insurance and died four months later of a coronary condition. During the two-year period prior to his death, he had made eleven visits to a doctor, but when applying for the insurance he represented that he had not visited a doctor in five years and that his last serious illness was twenty-nine years earlier. When sued by the beneficiary, the insurance company contended that it was entitled to judgment as a matter of law. However, the trial court rendered judgment on a verdict for the plaintiff. The Ohio Supreme Court, after referring to Ohio General Code Section 9391, stated that "reasonable minds could only conclude that the answers of the insured in his application were material and induced the defendant to issue the policy and that but for such answers the policy would not have been issued."[11] Furthermore, the court held that it would be unreasonable to infer that the insured did not know that he had a serious ailment in light of his regular visits to the doctor. Final judgment

[9] 158 Ohio St. 45, 107 N.E.2d 100 (1952).
[10] 158 Ohio St. 233, 108 N.E.2d 321 (1952).
[11] *Id.* at 238, 108 N.E.2d at 323.

was given as requested by the defendant. In another case involving misrepresentation, *Burpo v. Resolute Fire Insurance Co.*,[12] the court recognized that misrepresentation of ownership in an automobile liability policy would prevent the policy from becoming effective.

In *Davis v. Prudential Insurance Co.*,[13] although the policy requirement of "due proof" in notifying the company of death was held to mean "only prima facie evidence," the mere reference to "hemorrhage" was held insufficient to inform the company of death by "accidental means."

The attempt of two insurance companies to adjust their interest in commonly insured property led to the decision in *Aetna Casualty & Surety Co. v. Buckeye Union Casualty Co.*[14] The plaintiff company had granted one Butler automobile liability insurance. The policy provided that it would be "excess insurance over any other valid and collectible insurance" and also provided for subrogation. Butler borrowed an automobile from the Motor Co. while his own was being repaired. The Motor Co. was protected by a blanket liability policy issued by the defendant company which was broad enough to cover Butler in his use of the borrowed car. Butler had an accident for which he was liable. Both insurance companies were fully informed as events progressed. The defendant disclaimed liability and the plaintiff paid. The plaintiff sued claiming to be secondarily liable. The defendant contended that the plaintiff had acted as a volunteer in paying. The supreme court held that the plaintiff could not abandon its insured just because the defendant chose to "deny liability and gamble on future exoneration."[15] The defendant can not be "immunized from payment by its own breach of contract."[16] The plaintiff had an interest to protect and was not a volunteer. It may recover from the defendant which is primarily liable for the loss.[17]

The problem of cooperation by an insured under a liability policy was involved in *Ermakora v. Daillakis*.[18] The plaintiff in that case was injured by the defendant in an automobile accident. In a telephone conversation with the plaintiff's attorney, a person, supposedly the defendant, gave a false address and promised to call on the attorney. Instead the defendant left town. Following an unsatisfied judgment against the defendant, the

[12] 90 Ohio App. 492, 107 N.E.2d 227 (1951).

[13] 61 Ohio L. Abs. 15, 102 N.E.2d 602 (Ohio App. 1951).

[14] 157 Ohio St. 385, 105 N.E.2d 568 (1952), *reversing*, 62 Ohio L. Abs. 202, 106 N.E.2d 589 (Ohio App. 1951).

[15] *Id.* at 391, 105 N.E.2d at 571.

[16] *Id.* at 392, 105 N.E.2d at 571.

[17] It should be noted that the court distinguishes the present case from Mutual Automobile Ins. Co. v. Buckeye Union Cas. Co., 147 Ohio St. 79, 67 N.E.2d 906 (1946).

[18] 90 Ohio App. 453, 107 N.E.2d 392 (1951).