Case Western Reserve Law Review

Volume 7 | Issue 3

1956

Insurance

Edgar J. King

Remainderman Not Entitled to Partition

The court, in *Adkins v. Adkins*,[9] properly dismissed an action by a remainderman for partition. The Ohio statutes as construed by the Ohio Supreme Court do not allow a remainderman to sue for partition because he does not have seisin. However the owner of an undivided interest in fee simple subject to an estate for years is entitled to partition because he has seisin.[10] *Adkins v. Adkins* overlooks this distinction and denies partition at the request of a remainderman (who did not have seisin) because he had neither possession nor the immediate right to possession.

ROBERT N. COOK

INSURANCE

Litigation in the area of insurance was unusually sparse in 1955 so far as the attention of the appellate courts of Ohio was concerned.

Ohio Revised Code section 3911.04 states that an insurance company must provide a copy of "each application or other document" intended to affect the validity of the policy. A company failing to do so is estopped to deny the correctness of such document while in default and, failing to supply the copy within thirty days after the demand, is forever barred. *Acacia Mutual Life Ins. Co. v. Weissman*[1] raised two questions of interpretation of this statute. The policy in suit in that case had lapsed and been reinstated upon deceased's application. No copy of this application had been returned to deceased. Following the death of the insured the beneficiary requested such copy which was provided her. The company sought cancellation of the policy because of the alleged falsity of certain answers in the application for reinstatement. The beneficiary answered and cross-petitioned for payment of the policy. The Supreme Court of Ohio refused to cancel the policy and affirmed the judgment that the beneficiary could collect on the policy. First, the court rejected the company's claim that the statute did not apply to an application for reinstatement on the basis of the statutory language "each application or other document." Second, the court held that providing the beneficiary with a copy upon her request did not prevent the estoppel against the company. The court pointed out that the express language of the statute is that the copy must be returned "to any person taking such policy." The court then called attention to the fact that one year and eight months passed between the reinstatement of the policy and the assured's death during which time the copy was not

[9] 97 Ohio App. 185, 124 N.E.2d 179 (1954).

[10] Rawson v. Brown, 104 Ohio St. 537, 136 N.E. 209 (1922).

furnished — as though this passage of time were decisive. It would seem that passage of time, no matter how long, would only work an estoppel in abatement which could be halted at any time by a furnishing of the necessary copy. However, the court's end result can be sustained by the fact that the statute required the copy to be returned to the "person taking such policy." That person in this case is the deceased insured, and because of his death it becomes factually impossible for the company to comply with the conditions which would have prevented the estoppel.

In *Heinze v. Eye*,[2] following recovery of a judgment against the defendant for damages for wrongful death in an automobile accident, a supplemental petition was filed against the defendant's insurance company to recover from that company. The company denied that the defendant was its insured. The defendant had asked an agent to obtain liability insurance for him. Because of the defendant's age none of the companies which the agent represented would issue the insurance and the agent made application under the Assigned Risk Plan. The risk was assigned to the company here involved. The company wrote to the defendant stating that the company would not be bound until after receipt of the premium. The defendant testified that this notice was never received by him, which testimony the court accepted. The defendant gave a certified check to the agent to be forwarded to the company. The agent at that time and in writing told defendant that he was covered. The defendant was involved in the automobile accident, for which he was held responsible in the preliminary action, before the check reached the company and before the policy was issued. The company, unaware of the accident, did, however, proceed to issue the policy. A West Virginia statute,[3] which is substantially the same as Ohio General Code section 9586,[4] provides that "Any person who shall solicit an application for insurance shall . . . be regarded as the agent of the company and not the agent of the assured." In this situation the court held the company liable. The agent, although a stranger to this company at the time he assured the defendant that the risk was covered by this company, became its agent by force of the statute when the policy was issued. The company, having failed to communicate to the defendant its intention as to the effective date of the policy or its intention as to limitation on the authority of the agent, was bound by the apparent authority of the agent.

Plaintiff mortgaged his truck, and mortgagee obtained insurance, adding the cost of the premium to the loan, which was thus paid by the plaintiff. The mortgagee secured the information necessary to obtain the

[1] 164 Ohio St. 82, 128 N.E.2d 34 (1955).
[2] 97 Ohio App. 451, 127 N.E.2d 57 (1954).
[3] W. VA. CODE § 3410 (1949).
[4] Now OHIO REV. CODE § 3929.27.

insurance from the plaintiff and forwarded it to the insurance company. The company then issued the policy which was returned to the company's regular agent for delivery to the insured. This course of conduct was a common one between the mortgagee and the company. At the time the loan was taken out a representative of the mortgagee assured the plaintiff that his truck was fully covered, whereas, under the policy, use of the truck was restricted to a radius of fifty miles. The truck was destroyed and on request the company refused to pay because of violation of the fifty mile use provision. The plaintiff contended that the mortgagee was an agent of the company and that the full coverage representations constituted a waiver. The trial court dismissed at the end of the plaintiff's case, and the appellate court in *Bright v. Calvert Fire Ins. Co.*[5] affirmed. The result was based on the ground that since the mortgagee was an insured it would be an incompatible position to regard it as also as agent of the company. The court also notes the fact that mortgagee had no license to sell insurance and that one could not lawfully be granted to it to permit the type of business here carried out. The plaintiff had urged Ohio General Code section 9586[6] on the court. The court in its opinion makes no direct statement as to why that statute would not control, the implication being that the impropriety of the mortgagee being an agent prevented such application. The use made of Ohio General Code section 9586 in this case by the Court of Appeals of Franklin County should be carefully compared with the use made of a substantially indentical West Virginia statute by that same court of appeals in *Heinze v. Eye*[7] which was discussed in the immediately preceding paragraph.

In *Howell v. Frost*[8] a court of appeals rejected the argument that an insurance company's defense of failure of cooperation by the insured in an action on a supplemental petition was invalid when the company had failed to notify the insured as to her position under the policy.

Green v. Acacia Mutual Life Ins. Co.[9] concerned a suit on an insurance policy which contained the usual provision that the policy must be delivered during the "good health" of the proposed insured. The company defended on the ground that the condition was not fulfilled. The court held that this condition did not apply to ailments known to the insurer and because of the presence of which the insured was classified as a substandard risk and a higher premium was paid.

EDGAR I. KING

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[5] 98 Ohio App. 33, 128 N.E.2d 152 (1954).

[6] Now OHIO REV. CODE § 3929.27.

[7] 97 Ohio App. 451, 127 N.E.2d 57 (1954).

[8] 98 Ohio App. 127, 128 N.E.2d 189 (1954).

[9] 98 Ohio App. 101, 128 N.E.2d 222 (1954).