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Private Law: Insurance

J. Denson Smith

standing that the parties would represent that he had been forcibly abducted and robbed. If the charge had been *attempted theft* (by seeking to defraud the insurance company), the act alleged would not have gone beyond the zone of preparation and would not have established criminal liability. In holding that the overt act was sufficient to meet the *criminal conspiracy* physical act requirement the supreme court stressed the distinction between the two inchoate offenses, pointing out that the overt act in a criminal conspiracy need not have the same nearness to the completion of the offense that is required for an attempt.

Justice McCaleb makes one dictum statement which might bear a little further analysis. He declares, "any act such as a visit by one of the parties to his co-conspirators for the purpose of discussing details might suffice as an overt act to complete a criminal conspiracy although such an act would be regarded as merely preparatory in a prosecution for an attempt."[15] This statement shows that very little is necessary to meet the overt act requirement of a criminal conspiracy. At the same time the conference of the conspirators to plan details of the offense, if it is to be considered as an overt act (which is doubtful), clearly would have to come after the parties had already agreed upon their course of criminal action. The case cited[16] by Justice McCaleb for the proposition that a meeting to discuss details "might suffice as an overt act" was one where the parties had gone beyond mere conferring and had actually prepared fraudulent income tax returns with the intent to file them.

INSURANCE

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Under Act 222 of 1928 a breach of representation, warranty or condition contained in a fire insurance policy cannot be relied on by the insurer to avoid liability unless the breach exists at the time of the loss and in fact increases the moral or physical hazard under the policy. The supreme court has established the principle that the insurer carries the burden of proving the actual increase in the moral hazard. The theory it has adopted is that the moral hazard is greatest when the insured's pecuniary interest is such

15. 217 La. 945, 951, 47 So. 2d 731, 733.
16. United States v. Rachmil, 270 Fed. 869 (S.D.N.Y. 1921).

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that he might get more by burning the property.[1] In *Lee v. Traveler's Fire Insurance Company*[2] the court concluded that the insurer had not discharged this burden and rejected its defense based on a breach of the chattel mortgage clause. The court believed that the facts relied on heavily by the insurer to show an increase in the moral hazard lost their significance when considered together with other circumstances tending to negative any pecuniary advantage to the insured by his destruction of the property. In passing, the court pointed out that the insurance had not been procured personally by the insured and that there was nothing to indicate he knew of the non-disclosure. It is not likely, however, that this fact had a controlling influence in the court's disposition of the case.

In *Brocato v. Sun Underwriter's Insurance Company of New York*[3] the insurer urged the court to enforce a contractual period of limitation requiring suit to be brought within twelve months from the date of the loss as provided in a policy of windstorm insurance. This the court refused to do on the ground that the long period of negotiation with the insured extending well toward the close of the twelve months' period plus an offer to settle even beyond that date justified the insured in believing that the company no longer considered the limitation clause of the policy to be in effect. Its holding was that an admission of liability together with other acts and conduct from which an insured is induced to believe that his claim will be settled without suit precludes the insurer from invoking the limitation clause.

In a separate concurring opinion, Justice McCaleb expressed the view previously voiced by him that an unqualified admission of liability is itself sufficient to operate as a waiver of the contractual limitation. He also stated his disagreement with the majority opinion in holding, as construed by him, that to be effective a waiver must occur after the accrual of the contractual prescription. However, it appears that the court's opinion merely pointed out that a waiver could not be found in an offer by the insurer to settle made prior to the expiration of the period of limitation. On the other hand, the court apparently relied on an offer to settle made subsequent to the expiration of the period as a reason for finding that the insured was justified in conclud-

1. Knowles v. Dixie Fire Insurance Company, 177 La. 941, 149 So. 528 (1933).
2. 53 So. 2d 692 (La. 1951).
3. 53 So. 2d 246 (La. 1951).

ing that the company did not intend to rely on the clause. Granting that the offer might have led the insured so to believe, such a belief, coming months after the period had expired, could hardly have been prejudicial.

Co-insurance clauses are not valid in Louisiana unless the particular clause has been approved by the fire insurance division and a consideration allowed in the rate of premium charged, and then to be effective there must be stamped on the face and back of the policy a statement showing that the policy is issued subject to the conditions of the attached co-insurance clause.[4] In *Jonesboro Lodge No. 280 of Free and Accepted Masons v. American Central Insurance Company*[5] the court refused to enforce such a clause on the ground that the required notice was not clearly stamped on the face of the policy. The court permitted recovery of a twelve per cent penalty, refusing to apply the provisions of the Insurance Code,[6] which became effective subsequent to the occurrence of the loss and tender by the insurer. Under the Insurance Code the company's failure to pay must now be arbitrary, capricious and without probable cause to justify imposition of the penalty.

Only a question of evidence was involved in *Picone v. Marine Fire Insurance Company of New York*[7] and this was resolved against the insurer. The facts were adequate in support of the court's opinion.

MINERAL RIGHTS

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Since the case of *Arnold v. Sun Oil Company*[1] had been in court for some five years, it was decided on rehearing not to remand for elicitation of further facts concerning possession and prescription. The court held that a mineral lessee does not acquire the right of reliance upon the public records by virtue of Act 205 of 1938[2] because this statute is merely procedural, and does not alter the substantive nature of the lease, under the articles of the civil code. Therefore, mineral lessees may not "by

4. La. R.S. (1950) 22:694.
5. 218 La. 403, 49 So. 2d 740 (1950).
6. La. Act 195 of 1948.
7. 218 La. 546, 50 So. 2d 188 (1950).
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1. 218 La. 50, 48 So. 2d 369 (1949) (on rehearing 1950).
2. See La. Act 6 of 1950 (2 E.S.), amending to include substantive rights.