Volume 27 | Number 3 Article 11

4-1-1949

Insurance -- Loss Occasioned by False Pretenses -- Coverage Under Automobile Theft Policy

Clark C. Totherow

regards all continuous acts in moving the goods from their place of storage to the actual placing of them on the vehicle as within the policy,[18] while the alternate view regards acts other than the actual loading on the truck as merely preparatory and not within the scope of the policy.[19] Under decisions thus far reported it is difficult to determine just how much the courts will allow "loading" to cover. Again such factors as uninterrupted continuity of movement, and perhaps the time and distance involved, may well be factors of weight. It would seem, whether dealing with loading or unloading, that before the truck could properly be held as in "use" there should be a tangible relation between the truck itself and the goods.

In construing the phrase ". . . use . . ." as enlarged by "loading and unloading" it is submitted that there is merit in the contention that some courts have overlooked the fact that the latter clause is merely to extend "use" and does not, at least in the absence of other factors,[20] purport to completely divest it of its usual connotation. It is believed that the word "unloading" as generally thought of embraces only acts closely connected with the lifting of the goods off the truck, and that liability imposed for accidents lacking closeness in time and physical connection with the vehicle infringes on the intent of the parties.[21]

The upshot of those cases which contravene the intent of the parties will likely be the modification of insurance policies in order to obtain decisions more in keeping with the usual meaning of the words "loading and unloading." This could be accomplished by inserting in the insurance contract a definition of those words as the parties intend that they shall be used.

CHARLES L. FULTON.

Insurance—Loss Occasioned by False Pretenses—Coverage Under Automobile Theft Policy

Where title and possession to an automobile are obtained by a swindler using a preconceived plan of false pretense, may the insured owner

[18] Washington Assur. Corp. v. Maher, 31 Del. Co. Rep. 575 (Pa. 1942). *Contra:* Ferry v. Protective Indemnity Co., 155 Pa. Super. 266, 38 A. 2d 493 (1944) (on very similar facts).

[19] Ferry v. Protective Indemnity Co., 155 Pa. Super. 266, 38 A. 2d 493 (1944).

[20] Further explanations in the policy or a construction of the entire instrument might tend to expand the meaning of the phrase, as might an established course of dealing under the policy consistent with the enlarged interpretation.

[21] In Zurich Gen. Accident & Liab. Ins. Co. v. American Mut. Liab. Ins. Co., 118 N. J. L. 317, 192 Atl. 387 (Sup. Ct. 1937) an employee under the usual policy had taken milk off the truck and was putting it in an icebox inside a building when an ice pick in his pocket injured someone. The court, in denying liability under the policy, at page 319, 192 Atl. 388, said: "These words are plain and unambiguous, and delimit with understandable certainty the liability imposed upon the insurer. They relate to the vehicle itself, and exclude acts that are only remotely connected with its ownership, use, or operation."

of the property so lost recover under a policy protecting against loss from larceny and theft? Such a problem was presented in a recent case[1] decided by the Supreme Court of Arkansas. There, the owner of an automobile, who was induced to part with the car for a check on a bank in which the pretended buyer did not have an account, was seeking recovery under an insurance policy indemnifying against loss occasioned by theft, larceny, robbery or pilferage. The insurer resisted the claim on grounds that the automobile was lost through an act constituting false pretenses and that the policy did not protect the insured against such loss. *Held:* Even if the swindler in this case is guilty only of false pretense, still—under the Arkansas statute—such false pretense is deemed to be larceny and insured is entitled to recovery.

The decision in the case commends itself as a sound result. As to the reasoning of the court, in so far as it involves the problem of interpreting the coverage intended in the insurance contract, one cannot be quite so sure. Indeed when one reads the cases upon this branch of the American law he discovers little but chaos, both as to concrete decisions and as to reasons therefore.[2]

For convenience in analyzing the conflicting decisions involving an interpretation of the meaning of the words "theft" and "larceny" as used in an automobile insurance policy[3] the writer chooses to present them in two groups—(1) those apparently placing a controlling emphasis upon the label branded upon the crime committed thus giving to the words their legal and technical meaning; (2) those cases holding that the words should be given their usual meaning in the ordinary walks of life regardless of the crime for which the wrongdoer could be convicted.

An oversimplification of the reasoning used by those courts falling within the first classification in determining whether a given set of circumstances is within the risk contemplated appears to be as follows: *A* has been deprived of his car. He is insured against theft. Theft and larceny are synonymous, and, therefore, the insurer is liable to *A* only if the act by which he suffered his loss is larceny as defined in our criminal law.

Since the common law distinction between larceny and false pretenses still exists in the criminal codes of a majority of jurisdictions, it naturally follows that most courts using such an approach, when confronted by the question presented in the principal case, have denied

[1] Central Surety Fire Corp. v. Williams, —— Ark. ——, 211 S. W. 2d 891 (1948).

[2] Generally, see Notes in 14 A. L. R. 215; 19 A. L. R. 171; 24 A. L. R. 740; 30 A. L. R. 662; 38 A. L. R. 1123; 46 A. L. R. 534; 89 A. L. R. 465; 109 A. L. R. 1080; 133 A. L. R. 920; and 152 A. L. R. 1100.

[3] Unless otherwise noted, the decisions referred to in discussing both groups are distinguishable from the principal case in that the insurance policies involved therein provided for coverage against theft only.

recovery, saying that since the owner in parting with the property intended to invest the swindler with the title as well as possession, the latter has committed the crime of obtaining property by false pretense, an act not contemplated by the parties to the contract.[4] On the other hand, as in the principal case, recovery has been allowed in those jurisdictions wherein the act is deemed to be larceny.[5]

Though usually in accord in applying rules of construction applicable to insurance contracts in general,[6] there is little harmony in the results reached in those cases apparently falling within the second of the writer's classifications. Some say that "theft" is a broader and looser term than "larceny" and therefore such a loss is within its meaning as used in the policy.[7] On the other hand, others have concluded that "theft" as used in an insurance policy has a narrower meaning and that such a loss is not one fairly to be contemplated by the parties.[8] Thus recovery has been allowed even in jurisdictions where the common law distinction between larceny and false pretenses is recognized[9] and denied in another where the two crimes are no longer distinguishable.[10]

It is submitted that the reasoning of those courts falling within the second classification is the sounder, and, when properly applied, reaches

[4] Illinois Auto. Ins. Ex. v. Southern Motor Sales Co., 207 Ala. 265, 92 So. 429 (1922); Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923 (1925) (alternative holding); *cf.* Laird v. Employer's Liability Assur. Corp., 2 Terry, Del., 216, 18 A. 2d 861 (1941) (stock certificates); Cedar Rapids National Bank v. American Surety Co., 197 Iowa 878, 195 N. W. 253 (1923) (bank theft policy).

[5] Brady v. Norwich Union Fire Ins. Co., 47 R. I. 416, 133 Atl. 799 (1926); Gaudy v. N. C. Home Ins. Co., 145 Wash. 375, 260 Pac. 257 (1927) (recovery denied on other grounds); *accord,* Farmer's Loan & Trust Co. v. Southern Surety Co., 285 Mo. 621, 226 S. W. 926 (1920) (common law larceny).

[6] As a rule they agree that the policy should be interpreted in the light of its nature as a contract of insurance, in view of its purpose as such, and with a considerable degree of liberality in favor of the insured and against the insurer by reason of its having framed the contract, and that a risk fairly within its contemplation is not to be avoided by nice distinctions or artificial refinements in the use of words.

[7] Hill-Howard Motor Co. v. North River Ins. Co., 111 Kans. 225, 207 Pac. 205 (1922); Overland-Reno Co. v. International Indemnity Co., 111 Kans. 668, 208 Pac. 548 (1922); *cf.* Pennsylvania Indemnity Fire Corp. v. Aldridge, 73 App. D. C. 161, 117 F. 2d 774 (1941) (temporary larceny as theft coverage); Granger v. New Jersey Ins. Co., 108 Cal. App. 290, 291 Pac. 698 (1st Div. 1930); Fidelity and Casualty Co. of N. Y. v. Walker, 205 Ky. 511, 266 S. W. 4 (1924) (household theft policy); Toms v. Hartford Fire Ins. Co., 146 Ohio St. 39, 63 N. E. 2d 909 (1945) (temporary larceny). *But cf.* Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923 (1925).

[8] Fiske v. Niagara Fire Ins. Co., 207 Cal. 355, 278 Pac. 861 (1929) (by implication); Delafield v. London & Lancashire Fire Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221 (1st Dep't 1917); *cf.* Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432 (1925) (temporary larceny).

[9] Hill-Howard Motor Co. v. North River Ins. Co., 111 Kans. 225, 207 Pac. 205 (1922); Nugent v. Union Automobile Ins. Co., 140 Ore. 61, 13 P. 2d 343 (1932) (by implication).

[10] Delafield v. London & Lancashire Fire Ins. Co., 177 App. Div. 477, 164 N. Y. S. 221 (1st Dep't 1917); *see* Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 306, 146 N. E. 432, 433 (1925).

the more justifiable result. Such gaps as resulted from the niceties and technical elements of common law larceny can be, and generally have been, eliminated in the criminal statutes. The parties to a contract of insurance should not be bound by any such artificial refinement. Unless it is obvious that words which appear in an insurance policy are intended to be used in a technical connotation, they should be given the meaning which common speech imparts. The common thought and common speech meaning of theft is that which prevails, not among lawyers and judges, but among people, the great majority of whom have never heard of any such technical distinctions.[11] The insured is purchasing protection against loss occasioned by an unlawful deprivation of his property and the insurer is in the business of selling such protection. If the act by which the loss results is fairly to be contemplated within the terms of the contract, giving to that instrument a considerable degree of liberality in favor of the insured and against the insurer by reason of its having framed the contract, recovery should be allowed, notwithstanding any label given the crime for which the wrongdoer may be tried and convicted. The loss to the insured is present and real whether the act of the swindler be technically "false pretenses" or "larceny."

Another consideration emphasizing the desirability of giving to the terms their common thought meaning is the need for uniformity of construction of the insurance contract. Theft insurance policies are generally standardized. They are not limited in protection to the jurisdiction wherein the policy is purchased. Theft in any other state is equally within its terms. This, without more, is sufficient to forbid a reading that would cause the risks to vary with the accident of local laws.[12] Neither insured nor insurer could reasonably have intended that the same act would be theft within the purview of the contract if committed in one jurisdiction but otherwise if committed in another. The prevailing disagreement in the decisions as to the common thought meaning of the terms is readily admitted; yet, it is beyond all reasonable expectations to believe that uniformity is within the realm of possibility when contracts of insurance are construed in terms of the criminal codes.

As has been noted, the lack of agreement as to whether theft as used in the contract is broader or narrower than larceny largely accounts for the varying results in those cases emphasizing the common thought meaning, and the presumption that they are synonymous terms is a necessary premise to any conclusion reached by those courts placing a controlling emphasis upon the label given the act committed. But, it should

[11] Pennsylvania Indemnity Fire Corp. v. Aldridge, 73 App. D. C. 161, 117 F. 2d 774 (1941).

[12] Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432 (1925).

be noted that the cases referred to in either group have, in the main, involved policies using only the term "theft" to describe the intended coverage. The policy in dispute in the principal case, as apparently do those in general use today, lists theft *and* larceny as coverages. One may reasonably predict that the inclusion of both should result in more uniform decisions granting recovery. No longer should it be necessary to arrive at the intended meaning of the word "theft" in terms of its relation to larceny and, therefore, the primary source of disagreement should have been eliminated by the terms of the agreement itself. Only in those states wherein the act proximating the loss in dispute is classified as larceny may one reasonably expect a controlling emphasis to be placed uopn the crime committed in construing such a policy. It would appear that the courts should concede that, in so far as theft is now used in the policy, it is not restricted in its meaning to that of larceny.[13] Any such concession would necessitate an abandonment of the reasoning applied by those courts heretofore denying recovery on grounds that the act of the wrongdoer is "false pretenses" and the policy only protects against an act amounting to "larceny." Those jurisdictions which have previously held "theft" to be a narrower term than "larceny" and thus denied recovery, even where under their criminal code the act involved is larceny, should be expected to grant recovery where the policy itself lists larceny as a coverage. It has been said that there is a growing trend in the more recent decisions to rule more strictly against insurance companies on the "theft" provisions of their policies.[14] In some of these decisions, though the direct point in question was not involved, the courts have taken cognizance of the comprehensive language of the new type policy and abandoned older stands on the strength thereof.[15] It is submitted, therefore, that even those jurisdictions having previously been confronted with the question under discussion and answered it in favor of the insurer would not necessarily reach the same result in a proper case brought under the comprehensive type policy now in general use.

The only North Carolina case[16] found involving a dispute based upon the coverage provisions of an automobile theft policy did not involve the

[13] *See* Mello v. Hamilton Fire Ins. Co., 71 R. I. 510, 514, 47A. 2d 621, 623 (1946) (concurring opinion).

[14] Baker v. Continental Ins. Co., 155 Kan. 26, 122 P. 2d 710 (1942).

[15] *Compare* Block v. Standard Ins. Co. of New York, 292 N. Y. 270, 54 N. E. 2d 821 (1944) (recovery allowed in temporary larceny situation), *with* Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 303, 146 N. E. 432 (1925) (recovery denied). Also *compare* Toms v. Hartford Fire Ins. Co., 146 Ohio St. 39 63 N. E. 2d 909 (1945) (allowing recovery for temporary larceny), *with* Hoyne v. Buckeye Union Casualty Co., —— Ohio App. ——, 69 N. E. 2d 153 (1943) (recovery denied).

[16] Hanes Funeral Home, Inc. v. Dixie Fire Ins. Co., 216 N. C. 562, 5 S. E. 2d 820 (1939) (temporary larcency).

situation presented in the principal case; thus, one may only surmise as to what may be the result when, and if, such a question is properly presented to our highest tribunal. There is much in the language of that opinion, however, that would permit one to reasonably conclude that our court would follow the reasoning of those courts placing a controlling emphasis upon the label given the crime committed in reaching a decision denying recovery.[17] Yet, there is nothing in the opinion indicating that the policy under consideration was the comprehensive type policy purporting to protect the insured against loss due to "theft" *and* "larceny." It is not, therefore, too much to hope that our court when confronted with such a policy will recognize that "theft" as used therein should be given its common thought meaning, perhaps that found in *Bouvier's Law Dictionary*[18] where theft is thus defined:

"A popular term for larceny.
"It is a wider term than larceny and includes other forms of wrongful deprivation of property of another.
"Acts constituting embezzlement or swindling may be properly so called."

CLARK C. TOTHEROW.

Recordation—Priority by—Title by Estoppel as Affected by

Timber land was owned by three brothers and three sisters as tenants in common. One brother, without authority from the others, purported to sell all the timber to the defendant by an unsealed instrument dated November 15, 1946. On November 27, 1946, the sisters deeded their interest to the three brothers, whereby each brother acquired an additional one-sixth interest in the land. On December 14, 1946, all three brothers deeded the timber to the plaintiff, who had no actual notice of the earlier instrument. On December 16, 1946, the defendant recorded his instrument of November 15th. On December 18, 1946, the plaintiff's deed was recorded. Last, the deed from the sisters was recorded on January 15, 1947. Plaintiff sought an injunction against further cutting and removal of timber by defendant, to which the defendant counterclaimed and sought specific performance of the unsealed instruments against the three brothers and their grantee. *Held:* The unsealed instrument of November 15 was an enforceable contract to convey, by which the defendant was entitled to the original one-sixth interest owned by the vendor, but the plaintiff was entitled to the rest of the timber,

[17] Theft is defined as larceny. Larceny is given its common law definition including the requirement that the taking must be under such circumstances as to amount technically to a trespass. Great emphasis is placed on whether or not the act of the wrongdoer meets the common law or statutory requirements of larceny.
[18] BOUVIER, LAW DICTIONARY 3267 (Rawle's 3d ed. 1914).