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Insurance—Engaged in Aeronautics—Occasional Passengers

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misrepresent, (3) accuracy, due to the care with which such treatises are written. In any event, "it must be admitted that those who write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants." 3 Wigmore (2d ed., 1923) par. 1692.

H. A. G. '35.

INSURANCE—ENGAGED IN AERONAUTICS—OCCASIONAL PASSENGERS.—Judicial construction of exception clauses relating to aviation in life and accident insurance policies is still a matter of doubt despite numerous decisions. Where insured, passenger in an airplane, was killed as a result of the falling of the machine, and plaintiff sued on two life insurance policies providing for double indemnity for accidental death, *held*: the death resulted from "engaging, as a passenger or otherwise, in submarine or aeronautic operations" within an exception in the double indemnity clause. *Goldsmith v. New York Life Ins. Co.* (C. C. A. 8, 1934) 69 F. (2d) 273.

Where the insurance contract denies liability if the injuries resulted from "participating in aeronautics," aviation or the like, cases are uniform in stating that a passenger in an airplane, commercial or otherwise, cannot recover. *Bew v. Traveler's Ins. Co.* (1921) 95 N. J. L. 533, 112 Atl. 859; *Pittman et al. v. Lamar Life Ins. Co.* (C. C. A. 5, 1927) 17 F. (2d) 370, certiorari denied 274 U. S. 750; *Head et al. v. New York Life Ins. Co.* (C. C. A. 10, 1930) 43 F. (2d) 517; *First National Bank of Chattanooga v. Phoenix Mutual Life Ins. Co.* (C. C. A. 6, 1933) 62 F. (2d) 681; *Traveler's Ins. Co. v. Peake* (1921) 82 Fla. 128, 89 So. 418; *Meredith v. Business Men's Accident Assoc.* (1923) 213 Mo. App. 688, 252 S. W. 976; *Vance, Insurance* (2d ed. 1930) 902. But if the clause reads "engaged in aeronautics" or its equivalent Courts have generally been moved to construe the policy more strictly against the insurer and hold the occasional passenger without the exception on the ground that "engaged" involves an element of continuity, of active employment or occupation, and does not relate to a single act. *Benefit Association of Ry. Employees v. Hayden* (1927) 175 Ark. 565, 299 S. W. 995; *Masonic Accident Ins. Co. v. Jackson* (1929) 200 Ind. 472, 164 N. E. 628, overruling 147 N. E. 156; *Peters v. Prudential Ins. Co. of America* (1929) 133 Misc. Rep. 780, 233 N. Y. Supp. 500; *Gits v. New York Life Ins. Co.* (C. C. A. 7, 1929) 32 F. (2d) 7; *Price v. Prudential Ins. Co.* (1929) 98 Fla. 1044, 124 So. 817; *Flanders v. Benefit Association of Ry. Employees* (1931) 226 Mo. App. 143, 42 S. W. (2d) 973; *Charette v. Prudential Ins. Co.* (1930) 202 Wis. 470, 232 N. W. 848; see also Stone, J., dissenting in the present case.

So far there seems to be little difficulty in interpretation, but when the wording of the policy is varied, as in the present case, the problem of the judges is greatly increased. If the word "operations" is added to "engaged in aviation" there is an even stronger indication of a continuous occupational relation, and the scope of the exception to the insurer's liability is further narrowed. *Gits v. New York Life Ins. Co.*, and *First National Bank of Chattanooga v. Phoenix Mutual Life Ins. Co.*, *supra*. "As a passenger or otherwise" has been present in several policies which have been the subject of judicial consideration beside the one under discussion, and it has been accepted as evidence of an intention on the part of the insurer to exclude

this class of cases from the benefits of the contract, although there has been no definite statement that this alone will be sufficient to bar liability in all cases. *Gibbs v. Equitable Life Assurance Society of the U. S.* (1931) 256 N. Y. 208, 176 N. E. 144; *Blonski v. Bankers Life Co.* (1932) 209 Wis. 5, 243 N. W. 410.

It seems to be a fair inference in almost all of the cases that the clauses have been incorporated with the purpose in view of entirely eliminating responsibility for this type of accident. Especially is this true of policies written, as the present one was, before 1925; that is, before the time when the aviation industry became a major one and air travel a normal occurrence. At that time merely riding in aircraft was regarded as highly dangerous and the companies presumably had no desire to include it among the risks insured against. See *Gibbs v. Equitable Life Assurance Society of the U. S.*, *supra*; *Reeder, Aircraft Clauses in Accident Policies* (1931) 2 Mo. Bar. Journ. (no. 8) 7. And although the Courts have argued that the insured might often be unaware of this intention, where "as passenger or otherwise" is added the words would seem to give him notice.

But the basic difficulty in this and other cases where it is used is the word "engaged." The insurers advance the contention that it is to be understood in the same way as engaging in automobiling, tobogganing or some other form of sport or entertainment, and so used a single act is included; while beneficiaries argue that its meaning is similar to engaged in railroading or the drama—some type of business or occupation implying sustained or multiple activity. The word clearly has two different meanings dependent upon the concept with which it is associated. That aviation is a business at the present time and more than a single trip would be necessary to render a person "engaged" in it is incontestable; but that it was so before 1925 is open to doubt. And if not the decision in the instant case has a sounder basis. In any event, the highly technical nature of the reasoning is apparent in all the cases, and in the absence of legislation it would seem that a uniform and more definite clause in the insurance policies would eliminate the necessity of much tortuous construction.

T. S. M. '36.

NEGLIGENCE—LIABILITY OF MANUFACTURER TO THIRD PERSON FOR DAMAGE TO PROPERTY.—The defendant, a manufacturer of paints and varnishes, sold a secret preparation to a contracting company whose employee used it in waterproofing the interior of a tank belonging to a third person. The preparation, containing benzine and kerosene, exploded, destroying the tank and the barn in which it was placed. The insurers, subrogated to the rights of the owner, seek to recover from the defendant on grounds of negligence. The jury found negligence on the part of the defendant in failing to warn against the use of the preparation near fire. *Held*: The defendant, manufacturing a product imminently dangerous to life and property, is liable for damage caused to property by its negligence. *Genesee County Patrons Fire Relief Ass'n. v. L. Sonneborn Sons, Inc., et al.*; *Cooperative Fire Ins. Co. of Wyoming and Genesee Counties v. Same* (N. Y. App. 1934) 189 N. E. 551.

Ever since the case of *Winterbottom v. Wright* (1842) 10 M. & W. 109 it has been the recognized general rule that a manufacturer is not liable to third persons who have no contractual relations with him for negligence in the manufacture or sale of the article. *Huset v. J. I. Case Threshing Ma-*