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Evidence—Hearsay—Learned Treatises

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Some states, including Massachusetts and California, have by statute combined the three crimes into one for purposes of indictment. A similar statute would be welcome in Missouri. See (1920) 20 Colo. L. Rev. 318, and 484, 490a California Penal Code 1931, also *People v. Stevenson* (1930) 103 Cal. App. 82, 284 P. 487. J. C. L. '36.

EVIDENCE—HEARSAY—LEARNED TREATISES.—The defendant company maintained its wires carrying 13,000 volts, at a height nineteen feet and four inches above a rural road. Plaintiff's intestate was electrocuted when a twenty-two foot iron pole he was erecting came in contact with the high power line. The defendant assigned as error the exclusion as evidence of the "National Electric Code" issued in 1926 by the United States Department of Commerce, Bureau of Standards, which showed that, for wires carrying 750 to 15,000 volts, the vertical minimum clearance along roads in rural districts should be eighteen feet. This book was issued to inform the public, but no law required it. Held; that the book deals not with an exact science, nor mathematical or factual certainties, but with a controversial and developing science in which opinions may vary and experience work great changes, and is therefore excluded, just as medical books are, from the evidence. *Mississippi Power and Light Co. v. Whitescraver* (C. C. A. 5, 1934) 68 F. (2d) 928.

This decision is of more than passing interest since it determines a point which, heretofore, seems to have been unsettled in the federal courts, and thus falls in line with the overwhelming weight of authority which holds that scientific books are not exceptions to the hearsay rule and must be excluded. *Ashworth v. Kittridge* (1853) 12 Cush. (Mass.) 193, 59 Am. Dec. 178; *People v. Vanderhoof* (1888) 71 Mich. 179, 39 N. W. 28; *Whiteley v. Stien* (S. C. Mo. 1931) 34 S. W. (2d) 1001; 3 Wigmore (2d ed., 1923) par. 1696; 10 R. C. L., Evidence, sec. 364. The courts offer varied reasons for their position. A Missouri court says that such a learned treatise represents a statement out of court by one not present for cross examination. *Whitely v. Stien, supra.* Others say that scientists disagree among themselves and thus such evidence is not trustworthy. *Ashworth v. Kittridge, supra; Hoffman v. Click* (1877) 77 N. C. 57. Passages from a book may not convey the author's complete view, *Gallager v. Market St. R. Co.* (1885) 67 Cal. 16, 6 Pac. 869, and may confuse the jury without oral simplication, *Ashworth v. Kittridge, supra.* Alabama, despite the elsewhere unanimous opinion to the contrary, has continually admitted scientific works as evidence, *Stoudenmeier v. Wilson* (1857) 29 Ala. 568; *Bales v. State* (1879) 63 Ala. 38; *Birmingham R. L. and P. Co. v. Moore* (1906) 148 Ala. 115, 42 So. 1024, arguing that all expert testimony is based in some part on written authorities, and therefore the admission of books is in fact the admission of primary evidence. *Stoudenmeier v. Williamson, supra,* l. c. 567. Several states, for this reason, have attempted to escape the limitations of the common law with regard to the exclusion of scientific books as evidence, by statutory enactment designing them to be an exception to the hearsay rule. *Cal.* C. C. P. 1931, sec. 1936; *Idaho* Comp. St. 1919, sec. 7961; *Iowa* Rev. Code, sec. 7325; *Nebr.* Rev. St. 1922, sec. 8852; *Mont.* Rev. Code 1921, sec. 10575; *Ore.* Laws 1920, sec. 781; 3 Wigmore (2d ed., 1923) par. 1693. In California, Iowa, and Nebraska, however, the effort of the legislature has been negatived by

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the courts which have limited the introduction of scientific material to matters of "general interest." *Gallager v. Market St. R. Co., supra; Burg v. Chi. R. I. & P. R. Co.* (1894) 90 Iowa 106, 57 N. W. 680; *Van Skike v. Potter* (1897) 53 Nebr. 28, 73 N. W. 295, thereby refusing to admit learned treatises as such.

However, in spite of the general rule, or, perhaps, because of it, the books indicate many instances in which scientific works are admissible evidence. Tables of mortality, *Joliet v. Blower* (1895) 155 Ill. 414, 50 N. W. 619, dictionaries, *Nix v. Heddon* (1893) 149 U. S. 304, histories, *Charlotte v. Cholean* (1856) 33 Mo. 194, may be introduced, since they represent exact sciences or matters of general interest. In a few jurisdictions an expert witness may cite writers in his profession as corroborating his views. *Pumey v. Cahill* (1882) 48 Mich. 586, 12 N. W. 862; *Scott v. Astoria R. Co.* (Ore. 1903) 72 Pac. 594. Likewise, others allow counsel on cross examination to read a professional treatise as opposing the statement of an expert. *State v. Wood* (1873) 53 N. H. 495; *Louisville R. Co. v. Howell* (1896) 147 Ind. 266. Kansas allows counsel to read learned treatises to the jury. *State v. O'Neil* (1893) 51 Kan. 651, 33 Pac. 287. In Missouri such practice is permitted in the discretion of the trial court. *State v. Soper* (1899) 148 Mo. 217, 49 S. W. 1007. It is common for a court to cite medical works and the like in support of its decision. *Steenerson v. Great North. R. Co.* (1897) 69 Minn. 353, 72 N. W. 713 (London Economist, Bankers Magazine, cited); *Sumatt v. Colombet* (1895) 107 Cal. 187, 40 Pac. 329 (citing Sonnenschen's Cyc. of Ed.). The honors for such judicial hypocrisy would seem to go to the court which cited in its opinion the scientific books it rejected from the evidence. *Washburn v. Cuddihy* (Mass. 1857) 8 Gray 431.

The decisions among the federal courts on this subject are confusing, if not conflicting. The reason for this can be attributed to a dictum in *Davis v. U. S.* (1897) 165 U. S. 373, which went farther than the facts in the case required and declared that books of science should not be admitted as evidence. Some federal courts have followed this dictum, regarding it as a rule of procedure. *Western Union Tel. Co. v. Amman* (C. C. A. 3, 1924) 296 F. 453; *Du Pont v. White* (C. C. A. 3, 1925) 8 F. (2d) 5; *Mutual Life Ins. Co. of N. Y. v. Savage* (C. C. A. 5, 1929) 31 F. (2d) 35. There remains another federal decision which was decided after *Davis v. U. S., supra,* and which permitted to be read as evidence a pamphlet prepared by the U. S. Dept. of Agriculture, and also "Kent's Mechanical Engineer's Pocketbook." *Western Assur. Co. v. Mohlman* (C. C. A. 2, 1897) 83 F. 811. Although this case is not authority for the admissibility of medical books as such, it permitted the introduction of a governmental pamphlet, since, as says the court, "Records of observations are undoubtedly secondary evidence, but if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself closed to information which was open to every individual in the community." The principal case ignored this plea in deciding that an official pamphlet of the Dept. of Commerce was similar to a medical book and therefore inadmissible. The earlier case decided to the contrary.

It is submitted that the instant case is following blindly a rule of law which has no place in our present system. Learned treaties deserve to be accepted in evidence on the following grounds, (1) necessity, since the author usually is not available, (2) trustworthiness, the author has no reason or motive to

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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 insuror 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 insuror'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 insuror to exclude

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