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A Survey of Aviation Insurance Law

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A SURVEY OF AVIATION INSURANCE LAW

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There are two main types of aviation insurance: (1) aircraft insurance, and (2) ownership and operation insurance for aircraft. The first class includes (a) fire, (b) robbery and pilferage, and (c) windstorm, tornado and cyclone. The second class includes (a) public liability, (b) passenger liability, (c) property damage, (d) workmen's compensation, (e) airport and property damage, (f) cargo, and (g) life and accident.[1] It appears that every conceivable coverage can now be had for almost every possible aeronautic situation. What the legislatures and administrative bodies have done and what the courts have decided in these will be set forth in this survey.

I. LEGISLATION AND REGULATIONS

A. *Authorization of Air Risks*

The legislature of the Commonwealth of Massachusetts in its 1928 session[2] was the first state in the United States to authorize air risks. This act was "An Act relative to the kinds of business that insurance companies may transact and to coverage under insurance policies." Under this enabling statute, insurance companies, incorporated in Massachusetts can insure:

> "Second (e) . . . against loss or damage to, and loss of use of . . . airplanes, seaplanes, dirigibles and other aircraft, their fittings and contents, whether such . . . aircraft, are being operated or not, and wherever the same may be, resulting from accident, collision, fire, lightning, any larceny, pilferage, theft, malicious mischief or vandalism, any of the perils usually insured against by marine insurance or risks of inland navigation and transportation, and against loss or damage caused by the concealment, removal or unlawful disposition, or conversion of such vehicles or aircraft by a conditional vendee or mortgagor or bailee in possession; (f) against loss or damage to any property caused by . . . airplanes, seaplanes, dirigibles or other aircraft . . . and against legal liability for loss or damage caused thereby to the property of another, but not including legal liability for bodily injury or death caused thereby."
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> "Third . . . against loss or damage to, and loss of use of . . .

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1. See excellent article by *Walter C. Crowdus,* Aviation Insurance, 2 JOUR. AIR LAW, 176.

2. Acts 1928, Ch. 106; approved March 8, 1928. Amendment to prior statute on insurance. This statute amended by Laws 1931, Ch. 121, but not relevant to air risks.

airplanes, seaplanes, dirigibles and other aircraft, their fittings and contents, whether such . . . aircraft, are being operated or not, and wherever the same may be, resulting from accident, collision, fire, lightning, any larceny, pilferage, theft, malicious mischief or vandalism, any of the perils usually insured against by marine insurance or risks of inland navigation and transportation, and against loss or damage caused by the concealment, removal or unlawful disposition, or conversion of such vehicles or aircraft by a conditional vendee or mortgagor or bailee in possession thereof."

"Nine, To insure against loss or damage to any property caused by . . . airplanes, seaplanes, dirigible or other aircraft . . . and against loss of use and occupancy caused thereby."

In the following year, Ohio[3] gave permission to fire insurance companies to assume certain air risks.

"Section 9556. All companies organized or admitted for the purpose of insuring against loss or damage by fire may insure upon . . . airplanes, seaplanes, dirigibles or other aircraft or interest therein, whether stationary or operated under their own power against loss or damage by any of the causes or risks specified in this subsection, including also transportation, collision, explosion, or any peril or hazard resulting from the ownership, maintenance or use of airplanes, seaplanes or other aircraft including burglary and theft, vandalism, malicious mischief, the wrongful conversion, disposal or concealment thereof and the accessories thereto, whether held under conditional sale contract or subject to chattel mortgage, and to effect reinsurance of any risk taken, but not including loss or damage by risk of bodily injury to the person."

Iowa amended Section 8940 of the Code of 1927 and permitted insurance "against loss or damage caused by airplanes, seaplanes, dirigibles or other aircraft."[4]

New York in 1930 passed two laws.

"Section 110. Incorporation. Thirteen or more persons may become a stock corporation for the purpose of making insurance on . . . including insurances upon . . . airplanes, seaplanes, dirigibles, and other aircraft, and the breaking of glass therein, whether stationary or being operated under their own power, which shall include all or any of the hazards of fire, explosion, transportation, collision, loss by legal liability for damage to property resulting from the maintenance and use of . . . airplanes, seaplanes, dirigibles, and other aircraft. . .[5]

"9. Against loss or damage to . . . airplanes, seaplanes, dirigibles or other aircraft (except loss or damage by fire or while being transported in any conveyance by land or water), and against loss or damage to property caused thereby, including loss by legal liability for damage to property resulting from the maintenance and use of . . . airplanes, seaplanes, dirigibles or other aircraft; also against loss or damage to property resulting from the maintenance and use of aircraft.[6]

California[7] classified aircraft insurance as:

"18. Aircraft insurance including within its meaning the insurance of the owners and users of or dealers in aircraft against any and all hazards incident to ownership, maintenance, operation and use of such aircraft, and also including loss or damage caused by aircraft to any person's property,

3. Laws 1929, page 54; approved April 6, 1929.
4. Laws 1929, Ch. 229; approved April 5, 1929.
5. Laws 1930, Ch. 391; approved April 10, 1930.
6. Laws 1930, Ch. 395; approved April 10, 1930.
7. Statutes 1929, Ch. 193; approved April 30, 1929.

but not including the liability against loss or damage resulting from an accident to or physical injury, fatal or nonfatal, suffered by any person as a result of the ownership, maintenance, operation or use of such aircraft. Nothing herein contained shall be construed to prevent a fire insurance company from issuing a policy of insurance upon any aircraft covering the fire hazard only, nor be construed to prevent a marine insurance company from issuing a policy of insurance upon any hazard covering the marine hazard of transportation only."

And in the same statute, paragraph 3 thereof, which defines Marine Insurance we find a proviso; "provided, nothing in this paragraph contained shall prevent a company qualified to do. . . . aircraft . . . insurance, from covering the hazards defined in this paragraph when such hazards are included within and are incidental to such other respective classifications."

New Jersey recently enacted a statute:[8]

"1. Ten or more persons may become a corporation for the purpose of making any of the following kinds of insurance to wit:

I. . . . and against perils to property arising from the use of aircraft. . .

II. Against any and all kinds of loss or damage to: (a) . . . aircraft . . . including all kinds of . . . aircraft insurance (except insurance against loss by reason of bodily injury to the person) as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interest therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marines builder's risk and all personal property floater risks, and . . ."

With these several statutes in mind, one can see what air risks have been authorized by the legislatures of several states. Such authorizations form the basis of the right of insurance companies to engage in such business.

B. *Insurance Requirements.*

1. *Liabilities.*

Owners and operators of aircraft are subject to four distinct liabilities: (a) liability to persons and property on the ground, (b) collision liability, (c) liability to passengers and for goods carried, and (d) liabilities for injuries and death to employees. We have seen that certain legislatures have enabled the taking of

8. Laws 1931, Ch. 328; approved April 28, 1931.

air risks by insurance companies. The liabilities imposed by law are important in considering the enforcement of aviation insurance.

(a) Where the state has adopted the Uniform State Law of Aeronautics, the owner of every aircraft is absolutely liable for injuries to persons and property on the ground unless the injury was caused by the negligence of the person injured or the owner or bailee of the property injured.[9]

(b) Collision liability under the Uniform State Law is determined by the rules of liability applicable to torts on land.[10]

(c) As to liability of aircraft owners and operators to passengers and for goods carried, the writer finds but one statute[11] and that relates to the carriage of goods.

(d) For injuries and death of employees engaged in aviation pursuits, any one of four situations may be possible.[12] (1) Injuries in the home state not involving interstate or foreign commerce. (2) Injuries in the home state involving interstate or foreign commerce. (3) Injuries in a foreign state or foreign country not involving interstate commerce, and (4) Injuries in a foreign state or foreign country involving interstate or foreign commerce. There being no applicable federal legislation, the state Workmen's Compensation Act should be applied.[13]

2. *Monetary Enforcement of Liabilities*

So often the plaintiff who has prevailed in a lawsuit cannot have his judgment satisfied, either because the defendant has nothing or absconds to parts unknown. Four states[14] have seen fit to inaugurate prophylactic legislation to counteract the evil. While limited to commercial or common carriers, it is a commendable step in the right direction.

Virginia having vested the power to regulate aeronautics in its corporation commission,[15] the corporation commission[16] promulgated certain rules and regulations governing the licensing of airmen, aircraft and airports and the operation of aircraft and airports in Virginia. Section 4, on insurance requirements, provides:

9. Section 5, Uniform State Law of Aeronautics.
10. Section 6, Uniform State Law of Aeronautics.
11. Maryland, Laws 1931, Ch. 403.
12. *Davis*, Aeronautical Law, pp. 319-323.
13. The author is preparing an article for a forthcoming issue of the JOUR. OF AIR LAW entitled, "Aviation and Its Injured Employees."
14. Virginia, Louisiana, Arizona, and New Mexico.
15. Laws 1928, Ch. 463.
16. On July 1st, 1929. Rules and Regulations of the Virginia State Corporation Commission governing the licensing of airmen, aircraft, and airports, and the operation of aircraft and airports in the State of Virginia.

"Rule 33. LIABILITY AND PROPERTY DAMAGE INSURANCE. No operator of commercial aircraft used for interstate flights (except aircraft carrying United States mail), or holder of a Virginia license for the operation of an airport shall engage in commercial aviation in Virginia without having first obtained liability and property damage insurance covering all aircraft so operated, in the amounts hereinafter set forth, and no holder of a Virginia license for the operation of an airport shall operate such airport without having first obtained Employee's Liability and/or Workmen's Compensation in the amounts hereinafter set forth.

A. LIABILITY INSURANCE—Five Thousand dollars for loss sustained by the insured by reason of bodily injury to, or death of, any one passenger in one accident.

B. PROPERTY DAMAGE INSURANCE—Two Thousand Dollars for damage to property of any person other than the assured.

C. EMPLOYEE'S LIABILITY INSURANCE AND/OR WORKMEN'S COMPENSATION. (1) Employee's Liability (where the number of employees is less than eleven)—Five Thousand Dollars for loss sustained by the insured by reason of bodily injury to, or death, of, any one accident. Ten Thousand Dollars for loss sustained by the insured by reason of bodily injury to, or death of, more than one employee in any one accident. (2) Workmen's Compensation, (where the number of employees is eleven or more)—Workmen's Compensation insurance in accordance with the provisions of Chapter 400, Acts of the General Assembly of Virginia, 1918, as amended."

To enforce this section of the rules, the corporation commission provided that such a policy should be filed within ten days after the granting of an application for a license and before such license shall be issued, and further provided that failure to keep the insurance in full force and effect would result in the license or authority suspended or revoked.[17]

A certain leeway is granted upon special application, except in the case of Workmen's Compensation insurance, so that a surety bond can be filed in lieu of insurance, if the bond is satisfactory to the Commission. However, either the surety bond or insurance can be waived by the Commission if upon application "the financial responsibility of applicant is sufficiently large and unquestionable."[18]

Louisiana, by legislative enactment,[19] prior to the time when the Rules and Regulations were promulgated in Virginia, has a statute which is "AN ACT to regulate the business of carrying passengers for hire in Aeroplanes, to define said business, to require all persons, firms or corporations engaged in said business to furnish indemnity bonds, and to prescribe the punishment for violations of the provisions hereof." An indemnity bond "with a good and solvent surety company authorized to do business in Louisiana," was required in the sum of Fifteen Thousand Dollars for one aeroplane and One Thousand Dollars for each additional aeroplane,

17. Ibid.
18. Ibid.
19. Laws 1926, Act No. 52; approved June 26, 1926.

and had to be given by "every person, firm or corporation engaged in the business of operating aeroplanes whether as owner, lessee or otherwise, for the purpose of carrying passengers for hire in this State."

The bond had to be recorded and had to run "in favor of any person who may be injured in person or property or otherwise suffer loss by the operation of any aeroplane" and the benefit was to "inure to the benefit of anyone having an interest therein in his own name for the recovery of any loss or damage to his person or property or any other loss or damage which he may sustain, or for the recovery of such damages as he may be entitled to recover as the one to whom such right of action shall survive under the laws of this state, in case of death."

Defining such business of carrying passengers for hire, and making the bond statutory, the act was enforced by making the operation of any aircraft within the definition unlawful and illegal with certain criminal penalties attached. Seemingly drastic, this is certainly prophylactic legislation.

Arizona[20] and New Mexico[21] have by their respective corporation commissions promulgated identical regulations covering aircraft common carriers.

"Each passenger carrying aircraft must be insured against injury to persons in an amount equal to a minimum of Five Thousand Dollars ($5,000.00) for any one person, and subject to the same limit for each person, a minimum of One Thousand Dollars ($1,000.00) for each passenger seat plus Four Thousand Dollars ($4,000.00) for any one accident, . . ."

"In addition every common carrier of persons or property navigating any aircraft wholly or partially within the State of . . . shall take and keep in force for each aircraft in some company authorized to transact the business of insurance in the State, a policy or contract of insurance indemnifying the assured who shall be named in the policy against loss on account of property damage in an amount of not less than Five Thousand Dollars ($5,000.00)".

Every insurance policy has to have attached to it a statutory rider.

"IN CONSIDERATION of the premium at which this policy is written and in further consideration of the acceptance by the State Corporation Commission of this policy as a compliance with the State Corporation Commission's Order, it is understood and agreed that, regardless of any of the conditions of this policy the same shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction, within the state by any person, firm, associa-

20. Arizona Corporation Commission, GO 113L—Requirements relating to the operation of aircraft as common carriers in the State of Arizona. November 10, 1928.

21. New Mexico Aircraft Common Carrier Regulations, 1930; March 17, 1930.

tion or corporation suffering such loss or damage; if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the insurer shall pay such judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or to the legal holders thereof, whether the assured be or be not financially responsible in the amount of said judgment, and that this policy may be cancelled by either party except that written notice of the same shall have been previously given for at least ten days to the said State Corporation Commission of . . . prior to the cancellation of said policy.

It is further understood and agreed that this policy shall cover for loss, damage or expense while the aircraft insured hereunder is used, operated, manipulated or maintained for rental, hire, livery, or the transportation of passengers for hire, anything in the policy to the contrary notwithstanding".

To enforce this "any person, firm or corporation who fails or abets in the violation . . . shall be guilty of contempt of the orders and regulations of the said Commission and subject to the penalties as prescribed by law."

3. *Workmen's Compensation*

So far as the writer can ascertain there is only one law which specifically involves employees in aviation pursuits.[22] In this instance, "employment of airmen or individuals including the persons in command and any pilot, mechanic or member of the crew engaged in the navigation of any aircraft while under way" does not come within the Workmen's Compensation Act of Idaho.

II. Digest of Decisions

The insurance decisions which have been handed down by the courts involving aviation can be grouped conveniently under four heads: (a) aircraft, (b) workmen's compensation, (c) life and accident, and (d) miscellaneous.

A. Aircraft Insurance

1. *Failure to comply with regulations a breach of warranty under policy.*

Plaintiff took out insurance on an airplane, a condition of the policy being that he should comply with the laws and regulations concerning aerial navigation in Canada and obtain a certificate of registration and airworthiness required by such regulations before using the plane. He secured a temporary certificate for a land plane in the United States. In Canada, he applied for the necessary certificate but before it had been granted he equipped the ship with pontoons and made trial flights in Canada within three miles of the airport which was permissible under Canada regulations. Later on and before the certificate under the Canadian law was granted he flew seventy-five miles away from the airport and in attempting to land on a lake, the plane

22. Laws, 1929, Ch. 88; approved April 27, 1929.

crashed and overturned. Except for the motor there was no salvage. He sued the insurance company and contended that the certificate of the United States was sufficient and covered the situation under treaty arrangements. The court over-ruled the contention on the ground that the United States certificate had expired and was for a land plane and not a seaplane and HELD that the seventy-five mile flight was a commercial one, violated Canadian regulations and did not comply with the warranties thus denying plaintiff a recovery.[23]

2. *Seaplane damaged by surf is a collision.*

A policy of insurance covered "direct loss or damage to the plane caused by collision with the earth (including land and water)". In this case a seaplane had a forced landing due to engine trouble and after hours the plane drifted on a beach where a heavy surf was running and as a result the breakers grounded the ship and it became materially damaged. HELD: These facts came within the clause and recovery was granted because there was a collision. The court defined a collision as a violent contact between two objects, whether one or both are moving.[24]

3. *Adjustment of loss—authority of adjuster.*

In an action on a policy for damage to an airplane, the question of an adjuster's agency to act for insurer, including waiving of proofs of loss, HELD to be within the apparent authority of the adjuster and to be a question for the jury.[25]

4. *Damage to plane—repair bills.*

In an action on a policy on an airplane, the method of fixing the damage to the plane by repair bills, in accordance with a provision of the application for the policy, by actual cost of materials plus one and a half times labor cost exclusive of overtime and overhead HELD proper.[26]

B. Workmen's Compensation

1. *Jurisdiction.*

Where a man employed on a hydroplane is injured while the plane is moored in navigable waters, the injury is a maritime tort and comes within admiralty jurisdiction and not within the state Workmen's Compensation Act.[27]

2. *Who are employees.*

Where the pilot is in control of the ship but the owner bore all the expenses and the pilot received percentage of the gross receipts HELD: Pilot was employee and not bailee. Under the Washington statute the test of employment is control and the status of employee

23. *Aero Insurance Co.* v. *O'Balski-Chibougamau Mining Co.*, Court of King's Bench, on Appeal, March 13, 1931, Montreal, Quebec. The original is in French.

24. *Gans* v. *Columbia Insurance Co.*, 99 N. J. L. 44; 100 N. J. L. 400; 123 Atl. 240 (1924).

25. *Hubbard* v. *Hartford Fire Insurance Co.*, 135 Wash. 558; 238 Pac. 569; 240 Pac. 565 (1925).

26. Ibid.

27. *Reinhardt* v. *Newport Flying Service*, 232 N. Y. 115; 18 A. L. R. 1324; 133 N. E. 371, reversing 197 App. Div. 915; 188 N. Y. S. 947 (1921).

is not affected by the fact that he shares in profits or made an accounting each day.[28]

Where a proprietor of a hotel has an adjoining field to his hotel and advanced money for a pilot and engineer to go into the airplane business with him and paid for the plane, the hotel keeper was an employer of the pilot and engineer.[29]

3. *Factory or workshop under the Act.*

An airport where a shop is maintained for the purpose of building, cleaning and repairing airplanes and which is equipped with power driven machinery used for such purposes comes within the definition of a factory contemplated by the act. And an airport or flying field equipped with power driven machinery used for the purpose of building, cleaning and repairing airplanes and at which flying and the operation of airplanes is taught is a workshop as used in the act. Thus, an accidental personal injury sustained by a person in the course of his employment as an instructor in flying and as an assistant mechanic at an airport, as a result of a crash of a plane a short distance from the airport is subject to the Workmen's Compensation Act.[30]

4. *General and special employer.*

An airplane pilot who was rented for the day with his plane by an aircraft corporation to a motion picture producer from whom he takes all his orders in the making of a picture is in the general employment of the aircraft company and the special employment of the motion picture producer, and under the California law may look to either or both for compensation.[31]

5. *Employee or independent contractor.*

The employment of an aviator by a motion picture producer at Five Dollars per day and a specified sum for each flight does not constitute the aviator an independent contractor but an employee.[32]

6. *In the course of employment.*

Where a garage mechanic repairs an airplane off of the employer's premises and is killed by the propeller while cranking the motor, the injury took place in the course of his employment.[33]

Where a salesman of a baking company travelled in an airplane and distributed advertising matter and took customers for rides at the direction of his employers an injury which he sustained by the fall of the plane in a test flight was an injury in the course of his employment.[34]

Where an employee borrowed the plane of his employer for his own purposes and engaged in stunt flying, which was a misdemeanor under the statute, the referee was affirmed when he refused to allow compensation because under the statute the employee had to further his

28. *Hinds* v. *Department of Labor of Washington,* 150 Wash. 230; 272 Pac. 734 (1928).

29. *Soule* v. *McHenry,* 286 Pa. 49; 132 Atl. 799 (1926).

30. *Fort Smith Aircraft Co.* v. *State Industrial Commission,* Oklahoma Supreme Court, July 7, 1931.

31. *Famous Players Lasky Corp.* v. *Industrial Accident Commission,* 194 Cal. 134; 228 Pac. 5 (1924).

32. *Stites* v. *Universal Film and Mfg. Co.,* 2 Cal. I. A. C. 653.

33. *Standard Accident Insurance Co.* v. *Arnold,* 1 S. W. (2d) 434 (1927).

34. *Schonberg* v. *Zinsmaster Baking Co.,* 173 Minn. 414; 217 N. W. 491 (1928).

employer's business and the employee here was not doing so and for the additional reason the employee committed a misdemeanor.[35]

7. *Nature of act at time of the injury.*

If at the time of an accident the employee is engaged in straight-away flying, previous acrobatics cannot be considered.[36]

8. *Wilful misconduct.*

The hazards attendant upon the occupation of an aviator are not so great as to amount to foolhardiness to exceed the limits of gross negligence and to constitute wilful misconduct under the California Act.[37]

9. *Rate of premiums—usual course of business.*

Whether an employee is covered by a compensation policy is determined by the statutes of the state, the terms of the policy, and the general nature of his employment and not at all by the question of whether the particular thing he was doing at the time of his injury was more or less hazardous, and if customarily engaged in would have been subject to a higher rate of premium than the policy rate.[38]

10. *Extrahazardous work.*

A garage operator's policy covered "all industrial operations" but did not expressly mention airplane work. A mechanic was killed while repairing an airplane off of his employer's premises. HELD that even though the employer might have caused the mechanic to perform more dangerous work than that contemplated by the policy, such an issue should not prejudice the claimant to his right of compensation[39]

11. *Effect of findings.*

Where decedent was apparently seeking employment as a test pilot of a new type of plane and was killed in a preliminary test flight and where the evidence is conflicting as to whether decedent was an employee, the finding by the commission that there was no contract of employment such finding is binding on the courts.[40]

12. *Exterritoriality.*

Where a contract of employment is made in one state for work on an airport in another state and where there is undisputed evidence that employee did not work in state where contract of employment is entered into, the finding of the Board that the contract was entered into in New York has no competent evidence to sustain it and the award was reversed.[41]

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35. *Datin* v. *Vale, Pa. Department of Labor and Industry,* Jan. 19, 1931.
36. *Stites* v. *Universal Film and Mfg. Co.,* supra.
37. Ibid.
38. *Constitution Indemnity Co.* v. *Shytles et al,* 45 Fed. (2d) 441.
39. *Standard Accident Insurance Co.* v. *Arnold,* supra.
40. *Gale* v. *Industrial Commission,* 294 Pac. 391 (1930).
41. *Baum* v. *New York Air Terminals,* 230 App. Div. 531; 245 N. Y. S. 357 (1930).

C. Life and Accident Insurance Clauses

1. *"Military or naval service of any kind in time of war or by engaging as a passenger or otherwise in submarine or aeronautic expeditions."*

This clause came up for consideration in New York[42] and was taken to the New York Court of Appeals.[43]

The deceased had a policy which provided double indemnity excepting everything in the above clause. He went on a regular air line and the ship in which he was riding crashed, causing fatal injuries. The Appellate Court granted double indemnity on the ground that the policy did not exclude recovery where the deceased was a passenger on a regular air line and that the word "expedition" as used in the clause was not synonymous with "journey" or "trip" and should have been limited to "warlike enterprises" or "explorations" or terms of similar import. The Court of Appeals in reversing the Appellate Division considered the exceptions to "military or naval service of any kind in time of war and concluded that the words "aeronautic expeditions" were not limited to "warlike expeditions"; because a provision had been made to cover war and that it could not be presumed that the insurer intended repetition of the thought and held that the intention of the parties to the contract grew out of and reflected the general belief that presence on a trip or journey in a vessel or machine of this type was such a hazard that neither party intended that the policy should cover the situation, thereby reversing the Appellate Division, making no award to the beneficiary for double indemnity.

2. *"from having been engaged in aviation or submarine operations or in military naval service in time of war."*

This clause has been litigated in three states by four different beneficiaries. The first case came up in New York[44] where the court held that the phrase "engaged in aviation" implies continued occupation and means something more than an occasional participation as a passenger, that the clause is ambiguous and must be construed in favor of the insured and therefore does not exclude aviation in time of peace. The Florida Supreme Court[45] disapproved the conclusion of the New York Court and said the clause was not ambiguous and that aviation during peace as well as war was within the exception to the clause, because "The Meaning of 'operations' and 'service' is not the same. The word 'service' has more direct relation to war. Engaging in aviation or submarine operations is distinctly hazardous at any time, while engaging in military or naval service is peculiarly hazardous only in time of war . . . The use of the words 'or in' to join the two phrases describing materially different hazards indicates the two phrases do not and were not intended to express a continuous thought." Wisconsin[46] followed as the third state to consider this clause in a case where the airplane was under the exclusive control of the insured and held that the exception applied only to war time activity and that it did not include peacetime aviation or peacetime aviation operations.

42. *Gibbs* v. *Equitable Life Assurance Society,* 231 App. Div. 119; 244 N. Y. S. 560.

43. *Gibbs* v. *Equitable Life Assurance,* 256 N. Y. 208.

44. *Peters* v. *Prudential Insurance Co.,* 233 N. Y. S. 500; 153 Misc. 780 (1929).

45. *Price* v. *Prudential Insurance Co.,* 98 Fla. 1044; 124 So. 817 (1929).

46. *Charette* v. *Prudential Insurance Co.,* 232 N. W. 848 (1930).

Then a New York Supreme Court[47] on January of this year had the same question up for consideration in a case where the deceased was in the aviation business and was killed while operating a monoplane and said: "Relative and qualifying words, phrases and clauses are to be applied to the word or phrase immediately preceding and are not to be construed as extending to or including others more remote, unless such extension is clearly required by a consideration of the entire text. The phrases 'aviation or submarine operations' and 'military or naval service' are joined without punctuation by the words 'or in' and the last phrase is followed without punctuation by the words 'in time of war.' The bill was dismissed.

3. *"from engaging in submarine or aeronautic operations."*

The United States Circuit Court of Appeals, Seventh[48] Circuit, declared that the "employment of the word 'operations' tends more certainly to indicate an intended continuous and occupational relation," and therefore a passenger in an airplane is not engaged in aeronautic operations within the meaning of an exception in the policy.

4. *"public conveyance provided by a common carrier for passenger service only."*

An airplane operating on no schedule, carrying no baggage and making no stops in flight but making trips by special contract with prospective passengers whom owner was under no duty to receive without race or other discrimination so long as there was room and no legal excuse, is not a "public conveyance provided by a common carrier" within the meaning of the clause and even though the owner and operator had to exercise the highest degree of care this duty did not bring the flight within the classification set up in the clause.[49]

5. *"While engaged in aeronautic or underwater navigation."*

A passenger is not engaged in aeronautics when he takes a single flight because he does not take part in the operation as an occupation or otherwise.[50]

6. *"While in or on a public conveyance . . . provided by a common carrier for passenger service."*

A passenger killed by the fall of a seaplane was not killed in a conveyance of a common carrier within the clause because the owner carried only white people and flew only at such hours and under such conditions as he pleased.[51]

7. *"While participating in or in consequence of having participated in aeronautics."*

The clause "participating in aeronautics" has been defined as meaning to share in sailing or floating in the air and does not depend on

47. *Taylor* v. *Prudential Insurance Co.,* New York Supreme Court, Monroe County, Jan. 21, 1931.
48. *Gits* v. *New York Life Insurance Co.,* 32 Fed. (2d) 7 (1929).
49. *North American Accident* v. *Pitts.,* 213 Ala. 102; 104 So. 21 (1925).
50. *Benefit Ass'n. Railway Employes* v. *Hayden,* 75 Ark. 565; 299 S. W. 995 (1927).
51. *Brown* v. *Pacific Mutual Life Insurance Co.,* 8 Fed. (2d) 996 (1925).

sharing or piloting or in the profits of such business[52] and the court in the same case held that a passenger was participating in aeronautics within the excepting clause and that the beneficiary could not collect under the "engaged in sports for recreation" clause. Two later cases likewise held that a passenger was participating in aeronautics.[53] As to the second part of the clause "or in consequence of having participated in aeronautics" on an agreed set of stipulated facts[54] it was held that a person who having arrived at a landing field was leaving the plane and having alighted upon the ground stooped to avoid a wire and was struck by a propeller did not suffer an injury either "while participating or as a consequence of having participated in aeronautics within the terms of the policy" because the facts as set forth in the stipulation, were not inclusive enough.

8. *"While in or on any vehicle or mechanical device for aerial navigation or in falling therefrom or therewith or while operating or handling any such vehicle or device."*

A seaplane is a flying machine or mechanical device for aerial navigation within the terms of an insurance policy[55] and even though a forced landing was made on water and the plane capsized there could be no recovery because the facts came within the clause. And where a man is embarking on a plane for a trip and is killed his beneficiary can not recover because it came within the exception.[56]

9. *"while participating or as a result of participation in any submarine or aeronautic expedition or activity either as a passenger or otherwise."*

"Aeronautic activities do not begin or end with actual flight but extend to what is ordinarily incident to an airplane trip including presence or movements in or near the machine incidental to beginning or concluding the flight."[57]

And in that case where the above is quoted from the insured had completed the flight and walked around the plane and was killed by the propeller and the court held he met his death as a result of participation in aeronautics within the clause.

10. *"while engaged in aviation."*

In the Indiana Appellate Court[58] it was held a passenger engaged in aviation but the Supreme Court[59] said a passenger did not engage in aviation because the word "engage" denotes and suggests permanency or continuity or frequency of action and does not aptly describe a single isolated act of riding.

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52. *Meredith* v. *Business Men's Accident Ass'n.*, 213 Mo. App. 688; 252 S. W. 976 (1923).
53. *Travelers Insurance Co.* v. *Peake,* 82 Fla. 128; 89 So. 418 (1921).
54. *Tierney* v. *Occidental Life Ins. Co.,* 89 Cal. App. 779; 265 Pac. 400 (1928).
55. *Wendorff* v. *Missouri State Life Ins. Co.,* 318 Mo. 363; 1 S. W. (2) 99 (1927).
56. *Murphy* v. *Union Indemnity Co.,* Louisiana Supreme Court, March 30, 1931.
57. *Pittman* v. *Lamar Life Ins. Co.,* 17 Fed. (2d) 370 (1927).
58. *Masonic Accident Insurance Co.* v. *Jackson,* 147 N. E. 156 (1925).
59. *Masonic Accident Insurance Co.* v. *Jackson,* 164 N. E. 628 (1929).

11. *"from participating as a passenger or otherwise in aviation or aeronautics."*

What might be expected under such a life insurance clause where a passenger was killed has been judicially determined.[60]

12. *"while participating in or in consequence of participating in aeronautics."*

A passenger participated in aeronautics.[61] However petition did not state a cause of action and was dismissed.

D. Miscellaneous

1. *Change of occupation to a more hazardous one.*

A man insured as a railroad brakeman was not following a more hazardous occupation within the terms of the policy by making a single balloon ascension since to defeat the policy a change must be more than some individual act or exposure and must amount to a permanent or substantially permanent change.[62]

2. *More hazardous occupation.*

Where a man took out insurance while experimenting with airplanes and informed the insurance company he did not contemplate any hazardous occupation and where the policy provided that if he did change his occupation to one more hazardous the policy recovery should be correspondingly reduced, the court upheld the policy and permitted only a limited recovery.[63]

3. *Additional premiums in lodge insurance.*

Insured was drafted in the army and assigned to the aviation division and was killed while so engaged. The by-laws prohibited recovery of those engaged in aviation unless additional premiums were paid. The court held that the by-laws applied only to those engaged in aviation as a private enterprise and not to those engaged in army or navy aviation, and that the membership was not forfeited by joining the aviation branch of the army or on failing to pay the additional assessments.[64]

4. *Suicide a question of fact.*

When death has occurred in an airplane accident and there is some evidence tending to show suicide the question as to whether suicide was in fact committed was for the jury.[65]

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60. *Head* v. *New York Life Ins. Co. and Hartford Accident and Indemnity,* Appeal No. 246, 43 Fed. (2d) 517 (1930).

61. *Head* v. *New York Life Ins. Co. and Hartford Accident and Indemnity,* Appeal No. 245, 43 Fed. (2d) 517 (1930).

62. *Pacific Mutual Insurance Co.* v. *Van Fleet,* 47 Colo. 401; 107 Pac. 1087 (1910).

63. *Ridgely* v. *Aetna Life Ins. Co.,* 160 App. Div. 719; 145 N. Y. S. 1075, affirmed in 217 N. Y. 720; 112 N. E. 1073 (1916).

64. *Sovereign Camp W. O. W.* v. *Compton,* 140 Ark. 313; 215 S. W. 672 (1919).

65. *Gits* v. *New York Life Ins. Co.,* supra.

5. *Newspaper clippings attached to proof of death as evidence.*

Where the beneficiary under an insurance policy in filing proofs of death, attached thereto unidentified newspaper clippings stating that the insured committed suicide by jumping from an airplane such clippings are competent evidence of the issue whether the insured committed suicide.[66]

6. *Incontestability—conflict with recovery of reserve.*

A rider upon a life insurance policy excepting the risk by service, travel or flight in aircraft except as a fare paying passenger and limiting recovery to the reserve is not inconsistent with a clause making the policy incontestable after two years.[67]

7. *Riders.*

In New York a rider which modifies the risk of the contract can be attached to the policy if it has been approved by the Superintendent of Insurance and does not contravene the statutory requirements; for the statute reads itself into the policy and displaces inconsistent terms[68]

8. *Incontestability—conflict of laws.*

The provisions of an Oklahoma statute requiring life insurance policies to be incontestable after two years do not apply to a policy issued in New York upon premiums payable in New York; the New York statute governs unless the policy was delivered in Oklahoma.[69]

9. *Incontestability—participation in aeronautics.*

A clause in a life insurance policy excepting double indemnity from death caused by participation in aeronautics is not inconsistent with or in violation of statute providing all policies must be incontestable after two years.[70]

10. *Authority of soliciting agent.*

Plaintiff an aviator and parachute jumper was solicited by agent of defendant for accident insurance; plaintiff disclosed his occupation, paid a premium and was told by the agent he was covered immediately against accidents of every kind. Subsequently plaintiff was injured and thereafter a policy was delivered to plaintiff dated three days after injury and containing various exceptions. In a suit to reform the policy, the court held the agent had the authority and that the policy should be reformed.[71]

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66. Ibid.
67. *Metropolitan Life Ins. Co.* v. *Beha,* 226 App. Div. 408; 235 N. Y. S. 501 (1929); affirmed in *same* v. *Conway,* 252 N. Y. 449; 169 N. E. 642 (1930).
68. Ibid.
69. *Head* v. *New York Life Ins. Co. and Hartford Accident and Indemnity,* supra.
70. Ibid.
71. *Chambers* v. *North American Accident Insurance Co.,* 118 Kan. 494; 235 Pac. 859 (1925).

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