Journal of Air Law and Commerce

Volume 7 | Issue 1 Article 10

1936

Notes, Comments, Digests

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COMMENTS

Insurance—Construction of Contract Malum Prohibitum.—[Federal] Appellant insurance company insured the respondent administrator's deceased intestate against accidental death under a double indemnity provision making the company liable in the event that "death shall not have resulted from bodily injuries sustained while participating in aviation or aeronautics except as a fare paying passenger." Insured, while flying over northern California in search of a missing brother, was killed in the crash of a private plane owned and flown by the holder of a federal private pilot's license, which permitted the licensee to pilot a plane in private flight but specifically prohibited the flying of aircraft for hire. A California statute made it a misdemeanor for a pilot to operate a plane in any manner except that for which he had been licensed by the government. Insured paid the pilot no fare before the flight, but respondent argued on the trial of this case that there was an implied contract between the insured and the pilot for the payment of such fare and that this implication constituted insured a fare paying passenger, thus bringing the insured's death within the coverage of the policy. The jury found that there was an implied contract with the pilot for payment, which finding was adopted by the District Court and made the basis for its decision. *Held:* on appeal, reversed. No contract can be created by an attempted agreement for the services of a person required to be licensed under California law for the protection of the person to be served, nor implied from a request for an acceptance of such unlicensed services. *Metropolitan Life Insurance Cmpany* v. *Amos Halcomb, as Administrator of the Estate of George R. Halcomb, deceased,* 79 F. (2d) — (C. C. A. 9th, Nov. 4, 1935), 235 C. C. H. 507. A consideration of decisions handed down involving contracts made in violation of a statute reveals the widely adopted rule that a contract, such as the one implied in the instant case for the insured to pay the pilot for operating the plane, was a service *malum prohibitum,*[1] which the courts have thrown into the same contractual category as agreements *malum in se,*[2] and held that such contracts are not voidable but entirely void.[3] As the status of a person on a carrier as a passenger is dependent entirely on the contractual duty of such person to pay for the transportation, then the California decisions cited by the respondent[4] that a person not in *pari delicto,* who cannot recover upon a void contract, may have other relief, are of no consequence here. These cases obviously would be direct authority in a suit by the insured for the recovery of any money paid the pilot, assuming that such had been paid and the trip had been safely completed, but such authority has

1. *Kryle* v. *Frank Holton & Co.*, 217 Wis. 628, 259 N. W. 828 (1934). *Jessewich* v. *Abbene*, 277 N. Y. Supp. 599, 154 Misc. 768 (1934).
2. *Seminole Phosphate Co.* v. *Johnson*, 188 N. C. 419, 124 S. E. 859 (1924).
3. *Baxter* v. *City of Venice*, 194 Ill. App. 62, 111 N. E. 111 (1915); *Baker* v. *Latses*, 60 Utah 38, 206 P. 553 (1922); *The Stratford, Inc.* v. *Seattle Brewing Co.*, 94 Wash. 125, 162 Pac. 31 (1916); see *Clark* on Contracts, third edition, page 322.
4. *Hammemeon* v. *Amalgamated Copper Mines Co.*, 95 Cal. App. 400, 402; *Becker* v. *Stineman*, 115 Cal. App. 740, 745.

no effect whatsoever in the determination of the status of the insured as a passenger, and the court was justified in refusing to consider it in the opinion.

Two California cases directly in point with the issue herein involved[5] further substantiate the position taken by the court in the instant decision in holding that a contract made in violation of a statutory provision requiring a license or certificate as a prerequisite to engaging in the business of which the contract was an incident, is void in all cases where the statute in question was designed "to prevent improper persons from engaging in that particular business, or is for the purpose of regulating it for the public." Even were the validity of an agreement between the pilot and passenger is to be determined by the federal law, the result would not vary from that necessitated by the California cases; for the United States Supreme Court declared in the early case of *Harris* v. *Runnels,*[6] which still stands as the adopted holding of this tribunal, that a promise made upon a consideration which is rendered in violation of a statute is void.

The fact that the decision in the instant case followed so closely on the heels of the case of *Gregory* v. *Mutual Life Insurance Company of New York*[7] which overruled a long line of consistent authority on the interpretation of "participation" aeronautic liability exception clauses[8] and adopted a radically different rule as to such interpretation, the query naturally arises as to what effect, if any, the decision in the *Gregory* case would have had on the result here reached if such decision had been available to counsel at the time briefs were filed in the instant case.

As the court in the *Gregory* decision held under a very similar statement of facts as are here involved that a passenger killed in the crash of a private plane whose policy contained a "participation in aeronautics" liability exception clause, was not "participating in aeronautics" within the meaning of such exception, it appears on first consideration as though the decision would have afforded a first line of offense to the respondent in the instant case, which, if he had proved it, would have concluded the case in his favor. However, it is submitted, that it is not only possible but plausible, on the basis of adopted rules of policy construction and on the reasoning of the court in the *Gregory* case itself, to distinguish between the two cases, and to thus conclude that the result of the *Halcomb* case would not have been affected had the *Gregory* case been available for consideration in the instant decision.

The *Gregory* case mentions with approval the addition of the words "as a passenger or otherwise" to the "participation" exception clauses and cites with approval the recent case of *Goldsmith* v. *New York Life Insurance Com-*

5. *Levinson* v. *Boas,* 150 Cal. 185, 88 P. 825 (1907); *Wood* v. *Krepps,* 168 Cal. 382, 143 P. 691 (1914).
6. 53 U. S. 79 (1851).
7. 79 F. (2d) 522 (1935).
8. *Bew* v. *Travelers Insurance Company,* 95 N. J. Rep. 533, 112 Atl. 859 (1921); *Travelers Insurance Company* v. *Peake,* 82 Fla. 128, 89 So. 418 (1921); *Meredith* v. *Business Men's Accident Association,* 213 Mo. App. 688, 252 S. W. 976 (1923); *Pittman* v. *Lamar Life Insurance Company,* 17 F. (2d) 270 (C. C. A. 5th, 1927); *Tierney* v. *Occidental Life Insurance Company,* 89 Cal. App. 779, 265 Pac. 400 (1928); *Heat et al.* v. *New York Life Insurance,* 43 F. (2d) 517 (C. C. A. 10th, 1930); *First National Bank of Chatanooga* v. *Phoenix Mutual Life Insurance Company,* 62 F. (2d) 681 (C. C. A. 6th, 1933); *Martin* v. *Mutual Life Insurance Company of New York,* 189 Ark. 291, 71 S. W. 694 (1934); *Missouri State Insurance Company* v. *Martin,* 188 Ark. 907, 69 S. W. (2d) 1081 (1934); *Sneddon* v. *Massachusetts Protective Association, Inc.,* — N. M. —, 39 P. (2d) 1023 (1935).

pany[9] which held that the addition of the words "as a passenger or otherwise" to an "engaged" exception clause included a passenger on a plane. This interpretation was a rather radical upheaval in the general trend of policy interpretation as it overruled a long line of cases[10] holding with a marked degree of unanimity that "engaged" had the connotation of frequency and continuity in dealing with the instrumentality and therefore could not be interpreted to mean a mere passenger. Thus it is evident from these two recent cases that words specifically listing a passenger in an exclusion clause are all-important, and as a re-phrasing of the exception clause in the instant case made such clause read to the effect that the insured was not covered for accidental death while flying in an airplane "except while participating in aeronautics as a fare paying passenger" it is easily distinguishable from the *Gregory* case as to fact and approved by the decisions in both the *Gregory* and *Goldsmith* cases.

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DIGESTS

Insurance—Construction of "Participation in Aviation" Clause.— [Federal] On October 28, 1935, the Supreme Court of the United States denied the petition of the Mutual Life Insurance Company of New York for a writ of certiorari from the federal C. C. A. for the Eighth Circuit. For comment on the C. C. A. decision in *Gregory et al.* v. *Mutual Life Insurance Company of New York,* see 6 JOURNAL OF AIR LAW 626 (1935).

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9. 69 F. (2d) 273 (1934).

10. *Benefit Association of Railway Employees* v. *Hayden,* 175 Ark. 565, 299 S. W. 995 (1927); *Gits* v. *New York Life Insurance Company,* 32 F. (2d) 7 (C. C. A. 7th, 1929); *Price* v. *Prudential Life Insurance Company,* 98 Fla. 1044, 124 So. 817 (1929); *Masonic Association Insurance Company* v. *Jackson,* 200 Ind. 472, 164 N. E. 628 (1929); *Charette* v. *Prudential Life Insurance Company,* 202 Wis. 470, 232 N. W. 848 (1930); *Flanders* v. *Benefit Association of Railway Employees,* 226 Mo. App. 143, 42 S. W. (2d) 973 (1931); *Blonski* v. *Bankers Life Insurance Company,* 209 Wis. 5, 243 N. W. 410 (1932); *Irwin* v. *Prudential Life Insurance Company,* 5 F. Supp. 382 (1933); *Provident Trust Company of Philadelphia* v. *Equitable Life Society of the United States,* 316 Pa. St. Rep. 121, 172 Atl. 701 (1934); *Mayer* v. *New York Life Insurance Company,* 74 F. (2d) 118 (C. C. A. 6th, 1934).

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