



1939

Insurance--"Participation in Aeronautics" in Aircraft Clause, as Applicable to a Passenger

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Recommended Citation

Bush, Richard Jr. (1939) "Insurance--"Participation in Aeronautics" in Aircraft Clause, as Applicable to a Passenger," *Kentucky Law Journal*: Vol. 28 : Iss. 1 , Article 14.

Available at: <https://uknowledge.uky.edu/klj/vol28/iss1/14>

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pose does not waive the service of process,²¹ but in the instant case, no discussion of the service of process is to be found. All that is to be found in this connection is a rather vague discussion of the effect of the respondent's special appearance. This is followed by a hasty, *non sequitur* conclusion that the special appearance was of the same effect as a general appearance, and in its decision (based on the general proposition that when a defendant in a divorce action voluntarily submits himself to the jurisdiction of the court by a general appearance, the necessity for the service of process is obviated),²² the court concludes that a valid decree was rendered by the Virginia court.

However, despite this faulty reasoning, it is submitted that a just result was reached in this case, for the reason that there was a sufficient service of process to give the Virginia court jurisdiction to grant a divorce. A divorce action is considered *quasi in rem*, and consequently the Virginia Code provides for service by publication on non-residents in divorce actions.²³ It has been held in Virginia that the real purpose to be served by process is to apprise the adverse party of the nature of the proceeding against him.²⁴ There is also authority to the effect that personal service outside the state of suit is equivalent to service by publication.²⁵ This being the law, it would seem that the Supreme Court could have applied it to the facts of the instant case and could in that way have reached a correct as well as just result. As the question of domicil has been litigated and decided in favor of the husband, and since the fault of the wife was established by the decree rendered against her in the District of Columbia, Virginia has jurisdiction over the res, and, therefore, authority to grant the divorce if the notice statute has been complied with. Since the respondent here was personally served in the District of Columbia, both the provisions of the publication statute and the policy of notice in the law have been complied with, and the Virginia court had jurisdiction to grant the divorce.

PHILLIP SCHIFF.

INSURANCE—"PARTICIPATING IN AERONAUTICS" IN AIRCRAFT CLAUSE, AS APPLICABLE TO A PASSENGER.

The insured, a farmer, was killed in the crash of an airplane in which he was a passenger. He had no control over the flight of the plane, and was not connected with aeronautics in any business way. The policy under which recovery for his death was sought provided:

²¹ Bowers, *Civil Process and Its Service*, sec. 19, et seq. (1927).

²² *In re Austin's Estate*, 173 Mich. 47, 138 N. W. 237 (1912); *Freeman v. Freeman*, 126 App. Div. 601, 110 N. Y. S. 686 (1908). However, the general rule is that there can be no waiver by appearance where neither party is domiciled in the state of the forum. *Cheever v. Wilson*, supra n. 3; *Lister v. Lister*, 88 N. J. Eq. 30, 97 Atl. 170. Some courts refuse to recognize any voluntary appearance whatever: *Gondas v. Gondas*, (N. J. Eq.) 134 Atl. 615 (1926).

²³ Va. Code 1930, sec. 6042.

²⁴ *Scott v. Scott*, 142 Va. 31, 128 S. E. 599 (1925).

²⁵ Bowers, *op. cit.*, sec. 295, 296.

"This policy does not cover death, disability, or other loss . . . received because of or while participating in aeronautics. . . ." *Held*, a passenger in an airplane is not "participating in aeronautics" within the provision of the policy. *Mutual Benefit Health and Accident Ass'n v. Bowman*, 99 F. (2d) 856, CCA 8th (1938).

The court's decision in this case was based upon definitions of "participate" and "aeronautics". "Participate" is defined as "to take part or have a part or share in"; "aeronautics" is defined as "the science or art of aerial navigation". Applying these definitions to the clause in question, the court was unable to determine whether its purpose was to prohibit both active and passive sharetaking in "the science or art of aerial navigation", or merely active sharetaking therein. But, under either interpretation, the court decided that a passenger in an airplane was not "participating in aeronautics" any more than "the minister of the gospel who rides the Twentieth Century Limited" is participating in railroading, which is the science or art of rail navigation.

In reviewing the decisions in cases of this type, it is seen that the courts have varied in their holdings.¹ There are two reasons for this variance. First, the determination in each case depends upon the definitions of words and what is meant by those definitions,² and it is the frailty of words that the same combinations of them will convey different ideas to different individuals; and second, the advance of aviation from the status of a hobby to that of a business.³ This latter factor is evident in the case under discussion, when the court compares modern aviation to the business of railroading.

Two phrases, namely, "participating in aviation (or aeronautics)" and "engaged in aviation (or aeronautics)" have been the most commonly used in insurance policy "aircraft clauses."⁴ From the very first, the courts have held that a mere passenger is not "engaged in" aviation or aeronautics.⁵ As the court said in *Benefit Ass'n of Railway Employees v. Hayden*:⁶

"Engaged in aeronautics . . . means active co-operation or taking part in the aeronautical enterprise. . . ."

¹ Reeder, *Aircraft Clauses in Accident Policies*, 65 U. S. L. Rev. 312 (1931); see also annotations in 69 A. L. R. 331.

² *Airplane Passenger*, 91 Ins. L. J. 918 (1933); Reeder, *Aircraft Clauses In Accident Policies*, supra note 1.

³ Gregory et al. v. Mutual Life Ins. Co. of N. Y., 78 F. (2d) 522 (1935); Bayersdorfer v. Mass. Protective Ass'n., 20 F. Supp. 489 (1937); it is suggested as a reason for the change in decisions in Reeder, *Aircraft Clauses In Accident Policies*, supra note 1.

⁴ Reeder, *Aircraft Clauses In Accident Policies*, supra note 1; (1931) 2 Air L. Rev. 77.

⁵ *Gits v. N.Y. Life Ins. Co.*, 32 F. (2d) 7 (1929), certiorari denied 280 U. S. 564 (1929); *Benefit Ass'n of Ry. Employees v. Hayden*, 175 Ark. 565, 299 S. W. 995 (1927); *Peters v. Prudential Ins. Co. of America*, 233 N. Y. Supp. 500 (1929).

It is to be noted that *Masonic Ins. Co. v. Jackson*, — Ind. App. —, 147 N. E. 156 (1925) held a passenger to be "engaged in" aviation, but that case was superseded by *Masonic Ins. Co. v. Jackson*, 200 Ind. 472, 164 N. E. 628 (1929).

⁶ 175 Ark. 565, 299 S. W. 995 (1927).

The earlier holdings as to the "participating in" clauses, however, held that a mere passenger came within their scope.⁷ The attitude of the courts at that time is well expressed in the following quotation from *Traveler's Ins. Co. v. Peake*:⁸

"A passenger in an airplane flying in the air, whether he takes part in the operation of the airplane or not, is "participating in aeronautics" within the intent and meaning of provisions specifically exempting such risk from the indemnity contract contained in the policy."

But the more recent decisions, of which the case under discussion is illustrative, are holding that such a passenger is not "participating in" aviation or aeronautics, and are allowing recovery for the death of a passenger under such clauses, in the absence of any specific statement exempting passengers from the terms of the policy.⁹

The decision of the present case seems to be a just one. If insurance companies wish to exempt passengers in airplanes from the operation of their policies, it is not unreasonable to require them to specifically provide therefor in the policy, and thereby inform the insured exactly when he is not covered by the policy and enable him to avoid the doing of acts which he might otherwise do.¹⁰

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⁷ *Travelers Ins. Co. v. Peake*, 82 Fla. 128, 89 So. 418 (1921); *Meredith v. Business Men's Accident Ass'n of America*, 213 Mo. App. 688, 252 S. W. 976 (1923); *Bew v. Travelers' Ins. Co.*, 95 N. J. Law 533, 112 Atl. 859 (1921).

⁸ 82 Fla. 128, 89 So. 418 (1921).

⁹ *Gregory v. Mutual Life Ins. Co. of N. Y.*, 78 F. (2d) 522 (1935); *Bayersdorfer v. Mass. Protective Ass'n.*, 20 F. Supp. 489 (1937); *Missouri State Life Ins. Co. v. Martin*, 188 Ark. 907, 69 S. W. (2d) 1081 (1934). In the last cited case the court said: "The distinction thought by the courts to exist between 'engage in aeronautics' and 'participation in aviation' may be apparent to, and approved by, those learned in the niceties of the language and accustomed to its precise use; but it is to be doubted whether those hair-splitting and subtle distinctions would occur to, or be understood by, the majority of the thousands of persons who seek insurance against the many hazards to life and limb which are likely to occur to the most prudent and fortunate. Words and phrases used in insurance policies should be construed by their meaning as used in the ordinary speech of the people, and not as understood by scholars."

Some courts have held that "engaged in" or "participating in", without further explanation, creates an ambiguous clause which should be strictly construed against the drawer, the insurer. See, *Gits v. N. Y. Life Ins. Co.*, 32 F. (2d) 7 (1929), certiorari denied, 280 U. S. 564 (1929); *Masonic Ins. Co. v. Jackson*, 200 Ind. 472, 164 N. E. 628 (1929); *Charette v. Prudential Ins. Co.*, 202 Wis. 470, 232 N. W. 848 (1930).

¹⁰ In *Bayersdorfer v. Mass. Protective Ass'n.*, 20 F. Supp. 489 (1937), it is said: ". . . it is only fair that if they do not intend to include such hazards that it should be made so clear that a person of ordinary intelligence . . . will readily understand that such hazard is not covered."

Many insurance companies are now using clauses which specifically