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AERIAL INSURANCE

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THE subject of insurance against injuries and damage by aircraft naturally arouses great interest. The falling of a dirigible on a Chicago bank some years ago, besides many deaths, caused great property loss to the owners of the balloon, to the bank, to the employees of both, and to other innocent bystanders, which should have been covered by insurance. The influence which insurance companies heavily interested in the matter would exert to make travel through the air safe to all concerned would be like the influence which surety companies exert on the soundness of our banking system through their watchful supervision over the private habits of bank officers and employees. A monograph entitled "Airplanes and Safety" has already been issued by Travelers' Insurance Company of Hartford, which stresses the necessity of uniform and stringent laws governing the licensing of pilots, the construction and use of aircraft, and the conduct of air navigation. The National Aircraft Underwriting Association is in existence. New York in 1919 expressly legalized insurance against loss occasioned to and by airplanes.[1] Some writers have strenuously urged that pilots be required to take out insurance as a condition of obtaining a license. With the passage of Uniform State Laws of Aëronautics, and the existence of a national act regulating interstate and to some extent intrastate flying, much of the uncertainty and conflict which existed in this field and which was a hazard incapable of being gauged by the best actuarial acumen has now been dispelled, and insurance against aircraft damage is an assured fact. Under these laws, commercial flying, well regulated, will unquestionably develop, and it has in Europe, and the question of insurance to the pilot, the passenger, and the third person below, will soon be of importance. The legal factor which, for the last two decades, has presented the chief obstacle, being in the course of adequate solution, rapid progress can be looked for.

It is but natural that owners of airplanes should be willing to insure them and that aviators should be anxious to secure life and accident policies. It is equally natural that insurance companies would not be overanxious to assume such obligation and would cast about for pro-

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[1] N. Y. 1919 Chapter 391-393.

visions to exclude even risks occasionally assumed by ordinary policy holders riding in airplanes.

The reason for this condition is not hard to find. There has been until recently no general law, except that of self preservation, which forbade any inexperienced and incompetent aëronaut from flying almost anywhere in a defective machine. For quite a few years after the mechanical flight was discovered, aircraft were crude, unreliable, and not wholly controllable. One who undertook the air in such a "flying coffin," composed of spruce, linen, bamboo, and string, engaged in a reckless act. Erratic wandering pilots who picked up old decrepid planes and started in the business of amusing the curious by a flight, without any proper regulation and restriction, were certainly not good insurance risks. While any "gypsy flyer," whether he was physically fit, or mentally or professionally qualified, was permitted to fly any sort of aircraft, regardless of design, age or condition, the ground insurance companies were indeed justified in not being enthusiastic about insuring such risks. However, the airship of today is no more comparable to the earlier flimsy creations than Fulton's steamboat is comparable to a modern trans-Atlantic liner. Flying today, properly conducted by competent pilots in the proper kind of craft and under the proper supervision, has been proved by European experience to be as safe as is a journey by railroad or automobile. As to such, flying insurance should be procurable, both in the interest of aëronautics and in the interest of the insurance companies themselves.

A great development in this field of law may, therefore, be expected as air travel and air transportation increases.

The ordinary rules of law so well worked out in connection with automobiles, railroads, bicycles, and other conveyances, will doubtlessly be applied by the courts to the new situation. A contract to insure against accident, fire, damage and liability, at least one of a number of airplanes owned by a certain owner will not, after one airplane has been destroyed, give rise to a cause of action. If insurance has been procured, it might have been on a plane which was not destroyed. In such a case the plaintiff could not have recovered because the defendant had complied with his contract. To enable the plaintiff to recover damages for the violation of the contract, it should have specified the particular airplane which was to be insured, or should have provided for insurance on all the planes which the corporation owned. The situation is the same as if a farmer should make an agreement with an insurance agent to insure the life of one of his horses without specifying exactly which horse.[2]

One of the first questions to present itself is as to the legal nature of the airplane. Airplanes are used to transport express, mail, bag-

[2] 1921. *Stratford v. Petticord*, 197 Pac. 221, 108 Kan. 775.

gage and passengers. Where they fly on schedule at fixed prices from and to different points they become closely assimilated to railroad trains, interurbans, boats and stagecoaches. Where they simply rise from their flying field, circle around and return to the starting point, they are in the nature of merry-go-rounds or aviation swings, their purpose being amusement and not transportation. Therefore, an aviator engaged in visiting resorts along the Florida coast with an airplane owned and controlled by him, who, on week-ends, takes up passengers for short flights around the bay for hire, varying his flights with the weather, the number of persons wishing to fly and the physical conditions, who sells no tickets, takes on no negroes and carries no baggage, and usually begins and ends his flights in front of a hotel, though he sometimes takes persons to other places, does not operate a "public conveyance provided by a common carrier, for passenger service only" within the meaning of an accident insurance policy.[3]

Insurance companies can protect themselves from direct liability toward the owner of the airship by simply declining, for any reason whatsoever or for no reason at all, to accept his insurance. When it comes to the act of a person carrying life or accident insurance in taking the air either as a passenger or a pilot, the only protection which they have must be found under the conditions inserted in the contract. A provision in the policy of a railroad brakeman excepting death suffered while following "any occupation" more hazardous than that of brakeman, has no application where he is killed while he is making a balloon ascension as an isolated act and not as an occupation.[4] A provision withdrawing protection where the insured is injured or killed while participating or engaging in aëronautics or aviation is much broader and more effective.

To protect themselves from the danger of such excursions into the air on the part of their policy holders, many accident insurance companies insert a provision in their policies withdrawing protection where the insured is injured or killed while participating or engaging in aëronautics or aviation. It is perhaps surprising that such conditions have already been judicially construed in at least four reported cases. It has been held that the words "participating in aëronautics" will not be so narrowly construed as to make "aëronautics" mean merely the sailing or navigating of the air by means of gas balloons, and "participating" imply merely the sharing in any and all profits accruing to the company to which the participator belongs.[5] A passenger in an

[3] 1925. *N. Am. Acc. Ins. Co. v. Pitts,* 104 S. 21. (Ala.)

[4] 1910. *Pacific Life Co. v. Van Fleet,* 47 Colo. 401, 107 Pac. 1087.

[5] 1923. *Meredith v. Business Men's Acc. Ass'n.,* 213 Mo. App. 688; 252 S. W. 976.

airplane flying in the air, whether he takes part in the operation of the airplane or not, is therefore "participating in aëronautics" within the intent and meaning of the provision.[6] Navigating in the air is still regarded as extremely hazardous. Such a provision will, therefore, be construed as intended to provide against liability in case of injuries to persons navigating in the air and suffering any injury or death in consequence. If only physical activity in the management and control of the ship were intended to be provided against, language such as "engaging in the piloting, management or operation of aëronautical vessels" would be more proper. Aëronautics does not describe a business or occupation like engineering, but an art which may be practiced for pleasure or for profit and is indulged in by all who ride, whether as pilots or passengers. Therefore, passengers in a balloon, military bombers, photographers, observers or machine gunners in military planes, *participate* in aëronautics.[7]

Similarly, the words "engaged in aviation" in an accident insurance policy can have but one meaning, and that is the act of flying in the air in a machine much heavier than air. The purpose which the insured had in mind in making the flight has no influence in determining whether he was "engaged in aviation." If the policy provided against engaging in tobogganing or row-boating or automobiling, no control over the machine would be necessary to bring the insured within the terms.[8]

It must be assumed that in all these cases the general principle, that an insurance contract is made primarily for the protection of the insured and that any exceptions to the liability of the insurer must clearly be expressed so as to leave no avenue, applies. A recovery, therefore, would be prevented only when the injury or death results proximately from the act of participating or engaging in aviation or aëronautics. In the cases cited this was the fact, for in each case the plane crashed to the ground. An entirely different question would be presented if the death or injury resulted from a stray bullet's finding its mark in the body of the passenger, from lightning, from fright, from inhaling carbon-monoxide gas, or, perhaps, even from a collision with another plane which completely destroyed the machine before it reached the ground. In such cases the injury would not be proximately due to the participation in aëronautics, but to other causes. Such cases are similar in principle to that of a provision exempting the insurer if the insured should engage in the military service and die as a result, directly or indirectly, of engaging in the service. It has been held by the Wis-

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[6] 1921. *Travelers Ins. Co. v. Peake,* 89 S. 418. (Fla.)

[7] 1921. *Bew v. Travelers Ins. Co.,* 112 A. 859.; 59 N. J. Law. 533.

[8] 1925. *Masonic Acc. Ins. Co. v. Jackson,* 147 N. E. 156 (Ind. App.)

consin Supreme Court that where the motorcycle on which the insured rode behind the lines in France, skidded and threw him into a tree, this provision was not applicable, because it referred to causes *peculiar* to military service and not common to military service and civilian life.[9]

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[9] 1919. *Kelly v. Fidelity Mut. L. Ins. Co.*, 169 Wis. 274.
See also *Huntington v. Fraternal Reserve Ass'n*, 173 Wis. 582.