



1957

## District Court Digest

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the Ways & Means Subcommittee on Internal Revenue Taxation, and presented thirty recommendations for changes in the Internal Revenue Code, but this presentation represents only the beginning of the Section's effort.

In this important work, the Section of Taxation needs the help of all lawyers. It earnestly solicits comments, criticisms, and ideas about both inequities in the present Code and Congressional proposals for legislative change. Please send your views to Donald C. Alexander, Chairman, Committee on Cooperation with State and Local Groups, 603 Dixie Terminal Building, Cincinnati 2, Ohio.

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### DISTRICT COURT DIGEST

INSURANCE — CONSTRUCTION OF AIR TRAVEL RIDER IN ACCIDENT POLICY. — *Day v. Aetna Life Insurance Co.*, District Court of the First Judicial District. Grand Forks County, North Dakota, O. B. Burtness, Judge.

Plaintiff, beneficiary of an accident insurance policy, brought this action to recover on the contract of insurance which provided for a death benefit of \$1000.00 in the event of the accidental death of the insured. The insured was killed by accidental causes while piloting a private plane. The policy had attached to it an "Air Travel Rider" which provided for the accidental death benefits if the insured was killed while riding as a fare-paying passenger in an airplane operated by a licensed pilot over regular routes, but no coverage was provided for death "while acting as a pilot".

The court overruled the defendant's demurrer on two grounds: (1) that the contract as to death benefits was actually a policy of life insurance, and (2) that under North Dakota statutes, the policy was incontestable after a period of two years except for non-payment of premium or violation of any military service exclusions.

The court relied in part upon *Logan v. Fidelity & Casualty Co. of New York*, a Missouri decision reported at 47 S.W. 948. The decision was quoted as follows: "When a policy covers loss of life from external, violent and accidental means alone, why is it not insurance on life? Such a provision incorporated in a general life policy admittedly would be insurance on life. Then, why less insurance on life because not coupled with provisions covering loss of life from usual or natural as well?" This reasoning has been followed in several later Missouri decisions and has been adopted by a number of other jurisdictions. *Wahl v. Interstate Business*, (Iowa)

207 N.W. 395, 397; *Kellogg v. Iowa State Tr. Mens' Assn.*, (Iowa) 29 N.W.2d 559, 575; *Johnson v. Fidelity & Casualty Co.*, (Mich) 151 N.W. 593, 594; *Geisler v. Mutual Benefit Health and Accident Assn.*, (Kan.) 155 Pac. 435, 437; *Continental Casualty v. Wade*, (Tex.) 99 S.W. 877; *Aetna Life v. Parker*, (Tex.) 72 S.W. 62. As additional authorities the court cited: 29 Am. Jur. § 1154 at p. 868; 44 C. J. S. § 3 at p. 475; 1 C. J. § 12 at p. 407.

Section 26-0335 of the North Dakota Revised Code of 1943 provides that no life insurance policy in a form other than a standard form prescribed by statute shall be issued in the state unless, the policy shall contain a provision that it shall constitute the entire contract between the parties and shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for nonpayment of premiums or violations of the provisions relating to naval or military service in time of war. The court rejected defendant's contention that the policy was renewed each year by payments of premium in advance thus becoming a new contract and not a continuation of the old contract that had been in existence for approximately 10 months. Also rejected was the defendant's contention that regardless of the period of time the policy had been in effect, section 26-0335 does not apply to the policy involved.

The court decided, admittedly without aid of prior decisions, that the policy had been in force more than two or three years from its date and not merely from the last payment of premium, 10 months prior. It reasoned as follows: The policy commenced on May 28, 1935, all annual premiums had been paid since, thus keeping it in effect whether this is called a renewal or something else. The policy itself had provisions for renewal. One method of reinstatement recognized by the policy was quoted as follows: "The acceptance after lapse of a past due premium shall reinstate the policy in full, but the insurance so reinstated shall not cover any injury that may have occurred while the policy was in suspension." The court concluded that this clause must mean that the same policy has "been in force" throughout the entire period except for such period as it may have been "in suspension". It was pointed out that the legislators in passing Chapter 189 of the Session Laws of 1953 showed their intent that accident policies provide for continuous insurance rather than separate contracts for a year at a time.

The reasoning of the court in reaching its decision might be summarized in outline as follows: (1) Provision for death benefits

make the contract one of life insurance. (2) Since it is life insurance the "incontestability" statute applies, it being a continuous policy of insurance which was renewed annually for longer than the contestable time. (3) In North Dakota the incontestability statute has been held to apply to policy "exceptions". (4) The air travel rider, since it was not in the form required by statute, did not apply because the insurer could not rely on it to contest the policy. Therefore it was concluded that the insured's death was not an accepted risk.

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### DIGEST OF ATTORNEY GENERAL OPINIONS

#### COUNTY COMMISSIONERS — AUTHORITY TO COMPROMISE CLAIMS

December 4, 1956

Where a county has filed a claim against the estate of a party who was a patient at the State Hospital for a number of years up to his death, the Board of County Commissioners does not have the authority to compromise such claim when a compromise would take away money due the State Charitable Institution Fund.

See Section 25-0825 of N. D. R. C. (1943).

#### COUNTY OFFICERS — CORONER REQUIRED TO BE QUALIFIED ELECTOR OF COUNTY WHERE APPOINTED

December 7, 1956

References in Chapter 115 of the 1955 Session Laws to the "office of coroner", and to a county coroner as an "officer", have extended prior statutory enumerations of county officers to include the office of coroner. Therefore, a coroner is a "county officer" within the terms of N. D. Rev. Code § 11-1004 (1943) and is required to be a qualified elector of the county from which he is appointed.

N. D. Constitution, Sec. 173.

#### GAMBLING DEVICES—SALES PROMOTION PRACTICE CONTRARY TO LAW

January 7, 1957

Where merchandise is offered for sale at usual price with a further right of the prospective purchaser to obtain various discounts up to 100% by breaking a balloon and reading the amount of discount from a paper which had been inserted in the balloon, such sales promotion practice possesses the three essential elements of a gambling device: chance, consideration, and reward, and is therefore contrary to the statutes of North Dakota.