of eliminating control by the dead, and many will regard this as a wise move. However, it is believed that since the law permits testamentary dispositions of property, and permits settlors to dispose of their property through trust arrangements, the rules of law which have been established to limit their powers should be carefully defined and scrupulously observed by the courts.[39] The limitations within which one may pass his property to future generations should be primarily matters for legislative determination, since the subject is intimately connected with deep-seated notions about the nature of our economic and social structures. Where necessity has caused the courts to create their own rules, they should be applied with understanding as to the nature of the rules, in order that formalization of the concepts will not cause interference by the courts with otherwise valid and socially unobjectionable property dispositions.[40]

Insurance—Exclusion Clauses—Airplane Passenger Not Engaged in "Aeronautical Flight"—[Federal].—The plaintiff was the beneficiary of a life insurance policy issued to her husband in 1928. The policy contained a provision for double indemnity if the death of the insured resulted from an accident, provided it did not result "from an aeronautical flight."[1] The insured was killed when the airplane in which he was a passenger crashed. The defendant paid the face value of the policy, but denied further liability. The plaintiff then brought an action to recover the additional indemnity. On appeal to the Court of Appeals of the district of Columbia, *held*, the death of the insured was not a result of an "aeronautical flight" within the meaning of the clause excluding liability. Summary judgment for defendant reversed. *Clapper v. Aetna Life Ins. Co.*[2]

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orderly development in the law. In placing the matter squarely before the legislature, he pointed out that apparently only thirteen legislatures have thought the problem serious enough to warrant legislation.

[39] The Florida Court in the instant case has gone far beyond, and contrary to, its previous holdings. In Pelton v. First Trust and Savings Bank, 98 Fla. 748, 124 So. 164 (1929), it was held that a trust to pay one-half the annual income to charity, and to accumulate the other half in perpetuity, was void as to the accumulation, but the gift of annual income to the charity was sustained. In Story v. First National Bank and Trust Co., 115 Fla. 436, 156 So. 101 (1934), the court held that a private trust created to run beyond the perpetuity period is not void, that the rule against perpetuities does not apply to the duration of trusts, and that the effect of an invalid restraint on alienation is merely to accelerate enjoyment.

[40] The power of courts to redefine common law principles in the light of fundamentally altered conditions, in the absence of legislation, is well established. Funk v. United States, 290 U.S. 371 (1933). But "there is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid." Shelton v. King, 229 U.S. 90, 101 (1913).

[1] "If the death of the insured occurs . . . . from bodily injuries effected solely through external, violent and accidental means . . . . [and] not . . . . from an aeronautical flight or submarine descent . . . . the Company will pay. . . . ." Clapper v. Aetna Ins. Co., 157 F. 2d 76 (App. D.C., 1946).

[2] 157 F. 2d 76 (App. D.C., 1946).

To protect the insured, normally the weaker party to an insurance contract, against oppressive provisions in policies, the courts have resorted to the familiar device of creating artificial ambiguities in the objectionable clause, and then resolving the ambiguities in the insured's favor. The principal case illustrates the use of this technique in the construction of exclusion clauses.

Prior to the development of commercial aviation in the late twenties, the risk of death or injury from flying was too expensive and indeterminable to be included in the ordinary life or accident insurance policy at the regular premium.[3] Hence, most insurance companies sought to eliminate the risk by the use of specific aviation exclusion clauses. The early clauses were to the effect that a person "engaging in aviation" or "aeronautics," or "participating in aviation" or "aeronautics" was to be excluded from coverage.[4] Because of the small number of individuals then taking part in aviation there was little litigation involving the interpretation of these clauses until after the first World War. The pioneer decision construing an early exclusion clause was *Bew v. Traveler's Insurance Co.*,[5] where it was held that a casual passenger riding in a plane was "participating . . . . in aeronautics" within the meaning of the exclusion provision of the policy. The court stated that it had no doubt that the insurance company had intended to provide against liability in case of injuries to persons who navigate the air, a means of transportation still regarded as extremely hazardous.[6] This interpretation was followed as authority by other courts when construing similar clauses containing the word "participate" coupled with either "aviation" or "aeronautics."[7]

With the advent and growth of commercial aviation following the war, the position of a fare-paying or guest passenger in relation to these clauses took on a new importance. Technological progress had meanwhile made flying a comparatively safe means of transportation.[8] As a result, present-day ordinary life or accident insurance policies no longer exclude a plane passenger from coverage.[9]

[3] Glass, Aeronautic Risk Exclusion in Life Insurance Contracts, 7 J. Air Law 305, 309 (1936).

[4] Massachusetts Protective Ass'n v. Bayersdorf, 105 F. 2d 495 (C.C.A. 6th, 1939) ("participation in aeronautics"); Missouri State Life Ins. Co. v. Martin, 188 Ark. 907, 69 S.W. 2d 1081 (1934) ("participation in aviation"); Flanders v. Benefit Ass'n of Railway Employees, 226 Mo. App. 143, 42 S.W. 2d 973 (1931) ("engaged in aeronautics"); Masonic Accident Ins. Co. v. Jackson, 200 Ind. 472, 164 N.E. 628 (1929) ("engaged in aviation").

[5] 95 N.J.L. 533, 112 Atl. 859 (1921).

[6] Ibid., at 535 and 860.

[7] Pittman v. Lamar Life Ins. Co., 17 F. 2d 370 (C.C.A. 5th, 1927), cert. den. 274 U.S. 750 (1926); Meredith v. Business Men's Accident Ass'n, 213 Mo. App. 688, 252 S.W. 976 (1923); Travelers' Ins. Co. v. Peake, 82 Fla. 128, 89 So. 418 (1921).

[8] See 1 Civil Aeronautics Journal 53, 57 (1940).

[9] Following is the exclusion clause employed by forty-nine large American and Canadian insurance companies: "Death as a result, directly or indirectly, of service, travel or flight in any species of aircraft, except as a fare-paying passenger on a licensed aircraft piloted by a licensed passenger pilot on a scheduled passenger air service regularly offered between specific

However, the early policies containing aviation exclusion clauses presented the courts with a problem. The supervening development had substantially lessened the risk of death or injury from aviation and the courts were faced with the choice of whom to award the benefit of the decreased risk. Perhaps on the reasoning that the continued exclusion from coverage of an activity no longer extra-hazardous without a proportionate reduction of the premiums would be in the nature of a windfall to the insurer, the courts have apparently been inclined to award the benefit of the development to the insured by including the risk from aviation in the policy. To accomplish this without doing violence to the exclusion clauses, the courts have made use of two devices of interpretation when construing such clauses.

The first device is illustrated by *Gregory v. Mutual Life Ins. Co. of N.Y.*[10] where the court for the first time held that a passenger did not "participate in aeronautics" and was covered by the policy. Although the *Bew* case had earlier reached the opposite conclusion, it had unwittingly left the door open for a reversal of its position. It had declared that "aeronautics does not describe a business or occupation like engineering or railroading, but an art which may be practiced for pleasure or profit, and is indulged in by all whether as pilots or passengers."[11] Seizing upon this statement, the court in the *Gregory* case was able to declare that by 1935 aeronautics had acquired an occupational status and, therefore, to participate in aeronautics meant "taking part in actual flying."[12] A passenger, it was held, did not fit this description. Assuming that the definition of the court was correct, its holding was nevertheless questionable. It is recognized that contracts must be construed with reference to the intention of the parties at the time of their entering into the contract.[13] If this is so, the court in the *Gregory* case should have interpreted the aviation clause as it was understood at the time of the issuance of the policy, before aviation had assumed

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airports, is a risk not assumed under this policy; but, if the insured shall die as a result, directly or indirectly, of such travel or flight, the company will pay to the beneficiary the reserve on this policy, less any indebtedness thereon." Glass, Aeronautic Risk Exclusion in Life Insurance Policies, 7 J. Air Law 560, 585 (1936).

[10] 78 F. 2d 522 (C.C.A. 8th, 1935), cert. den. 296 U.S. 635 (1935).

[11] Bew v. Travelers' Insurance Co., 95 N.J. L. 533, 536, 112 Atl. 859, 860 (1921).

[12] Gregory v. Mutual Life Ins. Co. of N.Y., 78 F. 2d 522 (C.C.A. 8th, 1935). An interesting illustration of the change in attitude of the courts after the development of safe flying and their rationalization of their changed attitude on the ground that aviation was now an "occupation" is presented by Masonic Accident Ins. Co. v. Jackson, 147 N.E. 156 (Ind. App., 1925). In this case the Indiana Appellate Court had held that a passenger was engaged in aviation and not covered by the policy. Four years later the Indiana Supreme Court reversed this decision on the ground that aviation had acquired an occupational status. Masonic Accident Ins. Co. v. Jackson, 200 Ind. 472, 164 N.E. 628 (1929).

[13] United States Fidelity and Guaranty Co. v. Parsons, 154 Miss. 587, 122 So. 544 (1929); St. Lucie County Bank and Trust Co. v. Aylin, 94 Fla. 528, 114 So. 438 (1927); Holmes v. Kilgore, 89 Fla. 194, 103 So. 825 (1925); Rest. Contracts, § 235 (d) (1932); 3 Williston, Contracts § 618, at 1780 (rev. ed., 1936).

an "occupational status."[14] Yet, this device of ignoring the meaning of the words as accepted at the time of their expression had been employed in subsequent cases as a means of avoiding a provision which, the courts feel, has become oppressive to the insured.[15]

The principal case is an illustration of a similar, somewhat more subtle, device of reaching the same result. The exclusion clause in the present case was worded differently from that in the *Bew* case and the other cases before the courts; it merely excluded death from an "aeronautic flight." There is little doubt, however, that had his clause come up for judicial construction soon after the issuance of the policy in 1928, the courts, following the *Bew* case, would have held that it excluded a passenger. The legal meaning of the clause was therefore clear at the time it was written. But the court stated that the clause was ambiguous, and, under the rule that ambiguities in insurance contracts must be construed in the insured's favor, found for the plaintiff. The same technique has been used in cases involving identical clauses with those construed earlier as excluding passengers from coverage.[16]

The policy of the courts to curb the superior bargaining position of the insurer by means of their power to construe contracts is not new.[17] The extension of this policy to exclusion clauses is, rather, another step in a development. When insurance companies first recognized the desirability of eliminating aviation risks they could have employed one of two devices. They could have required a warranty[18] from the insured to the effect that he would not take part in aviation, or they could have excluded the risk by the use of an exclusion clause. They chose the latter course because courts were already in the process of construing warranties to be representations in order to prevent forfeitures for

[14] A few courts have recognized that exclusion clauses should be interpreted according to the meaning of the words at the time the policy was executed. See Moyer v. Mutual Benefit Health and Accident Ass'n, 9 Alaska 79 (1936); Gibbs v. Equitable Life Assurance Soc. of U.S., 256 N.Y. 208, 176 N.E. 144 (1931).

[15] Mayer v. New York Life Ins. Co., 74 F. 2d 118 (C.C.A. 6th, 1934) (policy issued in 1921); Goldsmith v. New York Life Ins. Co., 69 F. 2d 273 (C.C.A. 8th, 1934), cert. den. 292 U.S. 650 (1934) (policy issued in 1925); Gits v. New York Life Ins. Co., 33 F. 2d 7 (C.C.A. 7th, 1929), cert. den. 280 U.S. 564 (1929) (policy issued in 1920); Missouri State Life Ins. Co. v. Martin, 188 Ark., 907, 69 S.W. 2d 1081 (1934) (policy issued in 1921).

[16] Martin v. Mutual Life Ins. Co., 189 Ark. 291, 71 S.W. 2d 694 (1934); Charette v. Prudential Ins. Co. of America, 202 Wis. 470, 232 N.W. 848 (1930); Peters v. Prudential Ins. Co. of America, 133 N.Y. Misc. 780, 233 N.Y. Supp. 500 (1929).

[17] ". . . . Courts have made great efforts to protect the weaker contracting party and still keep 'the elementary rules' of the law of contracts intact. . . . . The law of insurance contracts furnishes excellent illustrations. Handicapped by the axiom that courts can only interpret but cannot make contracts for the parties, courts had to rely heavily on their prerogative of interpretation to protect a policy holder." Kessler, Contracts of Adhesion, 43 Col. L. R. 629, 633 (1943).

[18] Warranties have been used to exclude other risks. Aetna Life Ins. Co. v. France, 91 U.S. 510 (1875); Hoeland v. Western Union Life Ins. Co., 58 Wash. 100, 107 Pac. 866 (1910); Metropolitan Life Ins. Co. v. Rutherford, 98 Va. 195, 35 S.E. 361 (1900); Kelley v. Clearing Co., 113 Ala. 453, 21 So. 361 (1896).

breaches of immaterial warranties, and many states have since passed statutes to the same effect.[19] However, the protection to the insurer offered by the exclusion clause has proved to be almost equally illusory.

By declaring unambiguous clauses to be ambiguous the courts are accomplishing the same result as they had by declaring warranties to be mere representations.

While this result may be desirable from the point of view of protection for the insured, the methods used by the courts to reach the result have increased the uncertainty of the risk to the insurance company. But in the light of the peculiar nature of a life insurance contract such methods are perhaps unavoidable. The performance of the average life policy extends over a comparatively long period of time. During this period changes may occur that will impair the interests of the parties. While the insurer normally provides against such contingencies,[20] the insured would be helpless without the assistance of the courts.

Libel and Slander—Use of Action in Ideological Conflict—Designating One as Communist Libelous Per Se—[Federal].—The plaintiffs, a manufacturing corporation and its president, had reprinted, as paid advertisements in a number of newspapers, various political editorials and speeches of a "liberal" slant. The *Chicago Herald-American* published a syndicated column by Westbrook Pegler severely attacking plaintiff's advertising campaign. The article, entitled "Communists Go 'Big Business' to Trick U.S.," asserted that plaintiffs' "New Deal preachments . . . . were anti-Nazi, but, as far as my reading of them reveals, never anti-Communist. . . . ." One editorial in praise of Henry Wallace was described as "well expressing the attitude of some demogogues of the extreme left who regard the American citizen as a soulless lump to be fed, quar-

[19] Cal. Ins. Code (Deering, 1944) § 10207(b) (adopted in 1927); Colo. Stat. Ann. (Michie, 1935) c. 87, § 165(c) (adopted in 1919); Kan. Gen. Stat. (Corrick, 1935) § 40-420(2) (adopted in 1928); Mich. Stat. Ann. (Henderson, 1943) § 24.263 (adopted in 1929); Minn. Stat. (Henderson, 1945) § 6130(4) (adopted in 1925); Glass, op. cit. supra note 3 at 307; Statutes Affecting Representations in Insurance Contracts, 32 Col. L. Rev. 522 (1932).

[20] A typical clause of a double indemnity provision states: "This benefit will not be payable if the death of the Insured shall result directly or indirectly from self-destruction, or attempt thereat, whether sane or insane; from participation in any submarine or aeronautic operations, either as a passenger or otherwise, except as a fare-paying passenger in a licensed passenger aircraft owned and provided by an incorporated passenger carrier and operated by a licensed pilot on a regularly scheduled trip over an established passenger route between specified airports located within the continental limits of the United States and Canada; from participating in or attempting to commit an assault or felony; from participating in riot or insurrection; from war or any act of war or while in military or naval service of any country at war; from violence intentionally inflicted by another person; from the taking of poison or inhaling of gas, whether voluntarily or otherwise; from bodily or mental infirmity or disease of any kind; from medical or surgical treatment . . . . from sunstroke, ptomaines or bacterial infections other than pyogenic infections occurring simultaneously with and in consequence of an accidental cut or wound." Limited Payment Life Non-Participating Policy of Reliance Life Insurance Co. of Pittsburgh (1942).