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issues of child custody,<sup>28</sup> alimony,<sup>29</sup> and property disposition.<sup>30</sup> Our society often imposes cruel punishments on the party who is said to have lost in a divorce action. There is no reason why one party or the other should be burdened for life with this social stigma.

GEORGE TRAVERS

## TORTS: AIRPLANE NOT WITHIN GUEST STATUTE

An action was brought for damages resulting from the death of a guest in the crash of a private airplane in Florida. The complaint alleged lack of ordinary care by the pilot. Defendant's demurrer, relying on plaintiff's failure to allege gross negligence as required by the Florida Guest Statute,<sup>1</sup> was overruled. *Held*, affirmed, an airplane is not a "motor vehicle" within the meaning of the Florida Guest Statute. *Gridley v. Cardenas*, 3 Wis. 2d 623, 89 N.W. 2d 286 (1958).

The Florida Supreme Court has never determined whether an airplane is a "motor vehicle" within the Florida Guest Statute.<sup>2</sup> Only two jurisdictions have defined the same term within their own guest statutes,<sup>3</sup> and both reached the same result as the instant case. In each decision, the court relied on the vernacular<sup>4</sup> and statutory<sup>5</sup> definition of "motor vehicles" and utilized the rules of statutory construction embodied in *McBoyle v.*

28. Cases cited note 13 *supra*.

29. Cases cited note 14 *supra*.

30. Cases cited note 15 *supra*.

1. FLA. STAT. § 320.59 (1957) "No person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle . . . ." (Emphasis added.)

2. The Florida Supreme Court refused to rule on a question of this nature, certified to it by the Osceola County Circuit Court. The reason given was improper certification by the lower court. *Sieverts v. Loffer*, 45 So.2d 483 (Fla. 1950).

3. *In re Hayden's Estate*, 174 Kan. 140, 254 P.2d 813 (1953); *Hanson v. Lewis*, 11 Ohio Op. 42, 26 Ohio L. Abs. 105 (C.P. 1937).

4. "Vehicle—that in or on which a person or thing is or may be carried from one place to another, esp. along the ground, also through the air; . . . a means of conveyance. Motor—the causing, setting up, or imparting motion. Equipped with or driven by a motor or motors. Of or pertaining to automotive vehicles . . . To ride in, travel by, or drive, a motor-propelled vehicle, as an automobile or airship." WEBSTER, NEW INTERNATIONAL DICTIONARY 2824 (2d ed. 1950).

5. KAN. STAT. ANN. ch. 8, §126 (1957) "Vehicle—Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks. Motor vehicle—Every vehicle, as herein defined, which is self-propelled." OHIO REV. CODE ANN. tit. 45, §4501.01 (1958) "Vehicle—Everything on wheels or runners, except vehicles operated exclusively on rails or tracks . . . Motor Vehicle—Any vehicle propelled or drawn by power other than muscular power . . ."

*United States*.<sup>6</sup> In the latter case, while construing the term "motor vehicle"<sup>7</sup> as used in an automobile theft statute,<sup>8</sup> Mr. Justice Holmes applied the basis generally used today<sup>9</sup> to determine the scope of statutory words. This requires: (1) That due consideration be given to legislative intent and to common and approved usage, and (2) The recognition of the doctrine that general words following specific words in a statute are inferred to be within the same class or kind of the specific words.<sup>10</sup>

In cases other than those involving guest statutes, the courts have tended to include airplanes to be within the scope of the terms "vehicles" or "motor vehicles."<sup>11</sup> The federal courts, as illustrated by the interpretation of tariff acts,<sup>12</sup> and the state courts, when interpreting such subjects as police equipment facilities<sup>13</sup> and a motor carrier act,<sup>14</sup> have conformed with such a construction. However, the terms "vehicles" or "motor vehicles" within insurance policies have been accorded both

6. 283 U. S. 25 (1931).

7. "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction. . . . But in everyday speech 'vehicle' calls up the picture of a thing moving on land . . . . It is a vehicle that runs, not something, not commonly called a vehicle, that flies. Airplanes were well known in 1919, when this statute was passed; but it is admitted they were not mentioned in the reports or in the debates in Congress. It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class . . . . when a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, that statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *McBoyle v. United States*, 283 U. S. 25, 26, 27 (1931).

8. Motor Vehicle Theft Act of 1919, ch. 89, 41 Stat. 324, as amended, ch. 383, 59 Stat. 536 (1945) (the 1945 amendment included aircraft within the statute).

9. *United States v. Hood*, 343 U.S. 148, 153 (1952); *Bowers v. United States*, 226 F. 2d 424, 431 (5th Cir. 1955); *United States v. Hunt*, 146 F. Supp. 143, 146 (D. Minn. 1956); *City of Danbury v. Corbett*, 139 Conn. 379, 384, 94 A.2d 6, 9 (1953); *In re Hayden's Estate*, 174 Kan. 140, 145, 254 P.2d 813, 817 (1953); *Rich v. Finley*, 325 Mass. 99, 108, 89 N.E.2d 213, 218 (1949); *So. Miss. Airways v. Chicago & So. Airlines*, 200 Miss. 329, 339, 26 So.2d 455, 458 (1946); *Hanson v. Lewis*, 11 Ohio Op. 42, 43, 26 Ohio L. Abs. 105, 106 (C.P.1937); *Gridley v. Cardenas*, 3 Wis. 2d 623, 89 N.W.2d 286, 288 (1958).

10. Legally referred to as the doctrine of *ejusdem generis*.

11. *United States v. One Pitcairn Biplane*, 11 F. Supp. 24 (W.D.N.Y. 1935); *In re Jackson*, 35 F.2d 931 (N.D.N.Y. 1929); *Barnes v. Crowe*, 240 S.W.2d 604 (Ky. 1951); *MacKnight v. Federal Life Ins. Co.*, 278 Ill. App. 241 (1934); *So. Miss. Airways v. Chicago & So. Airlines*, 200 Miss. 329, 26 So.2d 455 (1946).

12. *United States v. One Pitcairn Biplane*, *supra* note 11 (exclusion of an airplane as a "vehicle" in certain sections of the Tariff Act of 1930 did not mean to exclude it as one in other sections of the same act); *In re Jackson*, *supra* note 11 (airplane construed to be a "vehicle" when used for smuggling liquor in violation of the Tariff Act of 1922 governing seizure of "vehicles" used for such purposes).

13. *Barnes v. Crowe*, 240 S.W.2d 604 (Ky. 1951) (an airplane is a motor vehicle as within the facilities necessary to perform the duties of state police).

14. *So. Miss. Airways v. Chicago & So. Airlines*, 200 Miss. 329, 26 So.2d 455 (1946) (interpretation of the Mississippi Motor Carrier Act).

interpretations.<sup>15</sup> In some jurisdictions it has been judicially<sup>16</sup> and legislatively<sup>17</sup> decreed that the laws applying to torts occurring on land are applicable to torts involving airplanes.

The aeronautics statutes of Florida<sup>18</sup> and Colorado<sup>19</sup> define airplanes as "motor vehicles." The Florida court, on one occasion, has accepted the view that airplanes are classified with automobiles as dangerous agencies when in operation.<sup>20</sup> The same court, on another occasion, liberally interpreted the guest statute,<sup>21</sup> thereby contradicting a previous construction of this statute.<sup>22</sup> There the court extended the term "public highway" to include a "private road." Thus, there is a possibility an airplane may be construed to be a "motor vehicle" within guest statutes.

In the instant case, Wisconsin *attempted* to determine the question as if it were before the Florida court. Thus, the court looked to decisions of Florida regarding the guest statute<sup>23</sup> and aviation,<sup>24</sup> as well as to the Florida statutes dealing with "motor vehicles"<sup>25</sup> and "aeronautics."<sup>26</sup> How-

15. *MacKnight v. Federal Life Ins. Co.*, 278 Ill. App. 241 (1934) ("vehicle" within an accident policy applies to any conveyance, whether on land, on the water or in the air); *Monroe v. Federal Union Life Ins. Co.*, 251 Ky. 570, 65 S.W.2d 680 (1933) (airplane not a motor vehicle).

16. *United States v. Alexander*, 234 F.2d 861 (4th Cir. 1956), *cert. denied*, 352 U. S. 892 (1956), *reversing* 134 F.Supp. 691 (M.D.N.C. 1955); *Sammons v. Webb*, 86 Ga. App. 382, 71 S.E.2d 832 (1952); *Tiedt v. Gibbons*, 1940 U.S. Av. 63 (Ill. Cir. Ct. 1937); *Rennekamp v. Meloby Co.*, 375 Pa. 620, 101 A.2d 669 (1953); *Grunke v. No. American Airways Co.*, 201 Wis. 565, 230 N.W. 618 (1930).

17. ARIZ. REV. STAT. ANN. tit. 2, ch. 2 § 208 (1956); ARK. STAT. ANN. tit. 74, ch. 1 § 113 (1957); CAL. PUB. UTIL. CODE § 21405; DEL. CODE ANN. tit. 2, ch. 3 § 306 (1953); GA. CODE ANN. ch. 11, § 107 (1933); REV. LAWS OF HAWAII ch. 16, § 6 (1955); IDAHO CODE ANN. tit. 21 § 206 (1947); ANN. CODE OF MD. art. 1A, § 10 (1957); VERNON'S ANN. MO. STAT. tit. 19, § 305.040 (1952); NEV. REV. STAT. ch. 493.070 (1957); N. J. STAT. ANN. tit. 6, ch. 2, § 8 (1939); GEN. STAT. OF N.C. ch. 63, § 15 (1949); N.D. REV. CODE ch. 2-0306 (1943); PURDON'S PA. STAT. ANN. tit. 2, § 1472 (1957); CODE OF LAWS OF S.C. tit. 2, § 7 (1952); S.D. CODE tit. 2, ch. 203, § 2.0306 (1939); TENN. CODE ANN. tit. 42, ch. 1, § 105 (1955); VT. STAT. tit. 22, ch. 244, § 5305 (1947); WIS. STAT. § 114.06 (1957).

18. FLA. STAT. § 330.06 (1957) "Aircraft means any motor vehicle now known, or hereafter invented, used or designed for navigation of or flight in the air." FLA. STAT. § 330.07 (1957) "by making registration procedures for aircraft similar to those for automobiles, both of which are motor vehicles."

19. COLO. REV. STAT. ch. 5, art. 3, § 1 (1953) "Aircraft — a motor vehicle used or designed for aviation of or flight in the air."

20. *Crenshaw Bros. Produce Co. v. Harper*, 142 Fla. 27, 194 So. 353 (1940); *cf. Grain Dealers Nat'l Mut. Fire Ins. Co. v. Harrison*, 190 F.2d 726 (5th Cir. 1951) (application of Florida law by a federal court).

21. *Fishback v. Yale*, 85 So.2d 142 (Fla. 1955).

22. *Summersett v. Linkroom*, 44 So.2d 662 (Fla. 1950).

23. As advanced by the appellant: *Fishback v. Yale*, 85 So.2d 142 (Fla. 1955) (liberal interpretation of guest statute); *Kroger v. Hollahan*, 144 Fla. 779, 198 So. 685 (1940) (legislative intent of the guest statute); and as advanced by the appellee: *Summersett v. Linkroom*, *supra* note 22 (strict interpretation of guest statute).

24. *Kasanof v. Embry-Riddle Co.*, 157 Fla. 677, 26 So.2d 889 (1946); *Peavey v. City of Miami*, 146 Fla. 629, 1 So.2d 614 (1941) (in the absence of a statute aviators are governed by the ordinary rules of negligence).

25. FLA. STAT. § 320.01, 320.59 (1957).

26. FLA. STAT. § 330.06, 330.07 (1957).

ever, the court stated it rejected them as a basis for making its decision<sup>27</sup> and instead construed the Florida statutory definition of "motor vehicles"<sup>28</sup> by utilizing the Wisconsin statutory rule<sup>29</sup> of interpreting words and phrases according to common and approved usage. This approach of the court is in complete accord with the opinion of the *McBoyle* case, which the court cited as final support for its conclusion.

In view of the decisions of the two cases on point,<sup>30</sup> the result reached by the Wisconsin court was correct. However, the decision could have had stronger support, as it was rendered without regard for either of these decisions. The opinion also failed to take into consideration the expression of the 1949 Florida Legislature not to consider airplanes as motor vehicles. This was shown by the enactment of a separate section in the Florida Statutes to deal with crimes in the operation of airplanes rather than include them in the section dealing with motor vehicle crimes.<sup>31</sup> With the ever increasing use of private aircraft in Florida, it is ventured that the Florida courts will have this question to decide in the very near future. It is probable that the aforementioned act of the Florida Legislature will be of foremost importance in the decision rendered. However, this question could become moot if the Florida Legislature would enact an aircraft statute similar to its guest statute governing motor vehicles as already enacted by several states.<sup>32</sup>

MARVIN H. GILLMAN

## NEGLIGENCE: NOTARY'S LIABILITY TO BENEFICIARY OF INVALID WILL — ABSENCE OF PRIVITY

A notary public prepared a testamentary instrument which named plaintiff as *sole* beneficiary and failed to have it properly attested, which resulted in its invalidity and denial of probate. The intended beneficiary

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27. 3 Wis. 2d 623, 89 N.W.2d 286, 288 (1958) "they seem to us so evenly balanced that collectively they are of little help."

28. FLA. STAT. tit. 22, § 320.01 (1) (1957) "Motor vehicle" includes automobiles, motorcycles, motor trucks and all other vehicles operated over the public highways and streets of this state . . . ."

29. WIS. STAT. tit. L., § 990.01 (1) (1957) "All words and phrases shall be construed according to common and approved usage; . . ." (Also applied in Florida by court decision. E.g., *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950).)

30. *In re Hayden's Estate*, 174 Kan. 140, 254 P.2d 813 (1953); *Hanson v. Lewis*, 11 Ohio Op. 42, 26 Ohio L. Abs. 105 (C.P. 1937).

31. FLA. STAT. § 860.13 (1957).

32. CAL. PUB. UTIL. CODE § 21406; SMITH-HURD ILL. ANN. STAT. ch. 15½, § 22.83 (1951); BURNS IND. STAT. ANN. tit. 14, § 924 (1957); NEV. REV. STAT. ch. 41.190 (1957); OHIO REV. CODE ANN. tit. 45, ch. 4561.151 (1958); ORE. REV. STAT. tit. 3, ch. 30.120 (1957); CODE OF LAWS OF S.C. tit. 2, § 21 (1952); S.D. CODE tit. 2, ch. 203, § 2.0310 (1952); UTAH CODE ANN. tit. 2, ch. 1, § 33 (1957); MICH. PUB. ACTS No. 114, § 259.180a, at 121 (1958).