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Current Status of Aviation Law - American Bar Association Committee Report

Suel O. Arnold

William P. MacCracken

Percy McDonald

L. Welch Pogue

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CURRENT STATUS OF AVIATION LAW — AMERICAN BAR ASSOCIATION COMMITTEE REPORT

The Committee on Aeronautical Law of the American Bar Association presented the following excellent "progress report" to the meeting of the House of Delegates held in Chicago on February 24-26, 1947.

INTRODUCTION

Carl Rix, President of the American Bar Association, has charged this Committee with the carrying out of a Nation-wide educational program on the principles of aviation law. This program is to be carried out in such a way as to bring these principles to the attention of members of the bar and students in law schools. Your Committee has accordingly prepared a summary outline of the major topics in the field of civil aviation law as a start toward a determination of the task which must be undertaken.

One of the great retarding influences in the field of aviation today is the lag of law and legislation behind the great technical achievements of the War. This situation is one which calls for united effort by lawyers who are aware of the problems which exist. This outline is designed to serve the double purpose of indicating the work which has been done on law and legislation in the aviation field and of indicating the work which needs to be done as shown by experience to date. It is readily apparent that every field of aviation law is in a state of current and almost constant change. Members of the Bar have a most difficult but challenging task to perform in formulating the legal principles best suited to the "air age" in which we now live.

I. INTERNATIONAL AIR TRANSPORTATION

(1) *The Sovereignty of Nations Over Airspace Above All Territory Under Their Jurisdiction*

Settled principles of international law now give each Nation absolute sovereignty over the airspace above the territory under their jurisdiction.¹ The very first article of Chapter I of the Chicago International Aviation Convention restates this principle. This means, for example, that Russia, Yugoslavia, England or the United States may exclude all foreign aircraft or these Nations may prescribe the terms and conditions under which foreign aircraft may land on their territory, or fly over such territory, for any purpose. This absolute sovereignty must be kept in mind in all relations in the international aviation field, for it definitely limits every phase. The Chicago International Aviation Convention mentioned below and the several similar conventions which preceded it all have as their purpose the opening up of air space over Nations to aircraft of other Nations.² If foreign aircraft attempts to cross a Nation's territory without permission, there is no doubt under international law of the right of the aggrieved Nation to force such aircraft to land or to shoot such aircraft down if necessary.

(2) *Legal Rules for International Aviation as Developed by International Convention, Treaty and Agreements*

In addition to the Chicago International Aviation Convention of 1944 which is outlined below, there are international aviation conventions cover-

¹ 69 A.B.A. Reports 228 (1944). See Pogue, *What Is Freedom of the Air?* Nation's Business, June, 1943.

² See Hotchkiss, *LAW OF AVIATION*, P. 4 *et seq.*; Hudson, *Aviation and International Law* (1930) 1 Air L. Rev. 183; and Gibson, *Development of International Air Law to 1919* (1931), 5 Temple L.Q. 161.

ing air mail,³ sanitary and quarantine measures to guard against introduction of communicable diseases by aircraft⁴ and bi-partite treaties or agreements in this field covering a wide variety of subjects.⁵ There are many bi-partite agreements covering operation of non-commercial civil aircraft, the recognition of pilots' licenses, airworthiness certificates for exported aircraft, reciprocal air transport operations, and other international aviation subjects.

The Civil Aeronautics Act of 1938 governs permits to foreign air carriers coming into the United States, and gives the C.A.B. control over routes of United States air carriers to foreign nations. Unfortunately the Act does not give C.A.B. any control over rates charged by United States air carriers in international air transportation, and that is one of the suggested amendments to that Act now pending before the Congress in Senator McCarran's Bill S. 1, 80th Congress. Perhaps the chief thing to remember in connection with agreements for entry of our aircraft to another Nation is that any rights obtained by the United States must be on a reciprocal basis. If we are to fly to or over England, Russia, Turkey or any other Nation we must be prepared to grant them like rights to fly to or over the United States.

(3) *The Warsaw Convention and Its Presumptions and Limitations on Recovery of Damages*

The United States is a party to a Convention which establishes a presumption of liability for death or injury in International Air Transportation and which limits recovery for such death or injury to 125,000 gold francs, or \$8,291.87 in U.S. currency, unless the claimant can prove "willful misconduct."⁶ The Convention also limits recovery for property damage. With proof of the cause of most aircraft accidents almost impossible, the affirmative proof of either negligence, on the one hand, or of "willful misconduct," on the other, is a burden which is difficult if not impossible to meet in most cases. Under the Convention there is a presumption of liability up to the \$8,291.87 in death or personal injury cases, and to escape such liability the air carrier must prove that the injury or death was not caused by its negligence. This shifting of the burden of proof is similar to the *res ipsa loquitur* doctrine sometimes relied upon in domestic aviation accidents. The important question is, do the advantages of such a shift in the burden of proof compensate for the limitation on liability.

This Convention was adhered to by the United States on June 27, 1934.⁷ It is technically known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air" and popularly known as the "Warsaw Convention." Twenty-nine nations are now parties to this Convention. In 1934 international air transportation was minor in character so the adherence of the United States to this Convention was relatively unnoticed. With international air transportation now a major industry, and with all air lines engaged in such transportation issuing tickets "subject to the Warsaw Convention" it seems to be time to give this matter serious attention, and your Committee is giving it thorough study at this time.

The Committee which drafted the Warsaw Convention, "The Interna-

³ See text of UNIVERSAL POSTAL CONVENTION OF BUENOS AIRES (U.S. Govt. Printing Office, 1940).

⁴ International Sanitary Convention (1933), U.S. Treaty Series 901.

⁵ See Gibson, *Bi-Partite Agreements on Aerial Navigation* (1932) 6 Temple L.Q. 57.

⁶ Orr, *The Warsaw Convention* (1945). 31 Va. L. Rev. 423; Sullivan, *The Codification of Air Carrier Liability by International Convention* (1936) 7 JOURNAL OF AIR LAW AND COMMERCE 1.

⁷ 49 Stat. 3,000; U.S. Treaty Series No. 876; HUDSON, INTERNATIONAL LEGISLATION No. 235; 1934 USAvR 239, 246.

tional Technical Committee of Aerial Legal Experts," usually referred to as the "CITEJA," is in the process of transferring its functions to ICAO, and the views of the American Bar Association on this \$8,291.87 limitation will undoubtedly prove quite helpful to ICAO in carrying forward the work "CITEJA" has started on amendments to this Convention. Definite recommendations on this subject will be made at the Annual Convention if your Committee's further study reveals the need for such recommendations.

In addition to the liability limitation referred to above, the Warsaw Convention covers the form and legal effect of passenger tickets, baggage checks and aerial waybills, a limitation on liability of the air carrier for damage to baggage or goods, jurisdiction and procedure of courts in handling claims, a two year time limit on filing of suits and other provisions to carry the foregoing into effect.^{7a}

(4) *The Chicago International Aviation Convention*

From November 1 to December 7, 1944, representatives of 54 Nations attended the International Civil Aviation Conference in Chicago. The Conference adopted an interim agreement setting up the Provisional International Civil Aviation Organization (PICAO) with an Interim Council and Interim Assembly with headquarters in Montreal. PICAO is to co-ordinate and guide international aviation until a permanent organization can be set up. The United States and 45 other nations signed this agreement. PICAO has made remarkable progress in the technical phases of international air transportation. Emphasis has been chiefly on safety, research and development of air navigation facilities, as for example the PICAO agreement to speed up immigration and customs requirements to which this Association gave its approval in Atlantic City last October. Under the Interim Agreement and the Permanent Convention little power is given over the economic phases of international air transportation.

At the First Interim Assembly of PICAO held in Montreal from May 21 to June 6, 1946, a resolution was adopted calling for the Deposit simultaneously by March 1, 1947, of the formal ratifications of all ratifying nations in addition to the 9 who had theretofore deposited their ratifications.⁸ Five have since deposited ratifications and twelve more are necessary to complete the 26 ratifications required so that the Permanent Convention will be brought into effect 30 days later, under the terms of the Convention. The United States ratified the Permanent Convention last year. The Permanent Organization, to be known as the International Civil Aviation Organization, or ICAO, will convene its first general assembly on May 6, 1947.

The Permanent Convention sets forth principles in international air navigation and air transport which ratifying or adhering nations are to follow. It is impossible to summarize such a comprehensive document⁹ so your Committee merely indicates here in brief that it covers sovereignty of nations over airspace above their territory, flight over territory of contracting states by "aircraft not engaged in scheduled international air services," nationality of aircraft, measures to facilitate air navigation, the conditions which aircraft of member nations engaged in international air transportation must meet in the way of documents, licenses, etc., adoption of international standards and recommended practices on communications systems, ground marking, airports, rules of the air, traffic control, licensing of personnel and other technical matters. Certain disputes between member nations are to be decided by the Council created by the Convention and

^{7a} See articles concerning the Warsaw Convention by K. M. Beaumont, J. Brooks B. Parker and Arnold W. Knauth in Winter 1947 issue of *JOURNAL OF AIR LAW AND COMMERCE*.

⁸ *American Aviation*, Jan. 15, 1947, p. 8.

⁹ See Rhyne, *Legal Rules for International Aviation* (1945) 31 *Va. L. Rev.* 267, 305-315.

they may be appealed to the Permanent Court of International Justice. As appendices to the Convention, but not a part of it, there are the "two freedoms" and "five freedoms" agreements which are optional for member nations. The so-called "two freedoms" International Air Services Transit Agreement gives the nations signing it the right to fly over the territory of other signatories without landing and the right to land for non-traffic purposes. The United States is a party to this agreement. The so-called "five freedoms" International Air Transport Agreement grants each contracting nation the privileges just named in the "two freedoms" agreement and in addition the privilege to put down and take on passengers, mail and cargo destined from or to the nation whose nationality the aircraft possesses, and passengers, mail or cargo destined to or from any other contracting Nation. When the United States ratified the Convention it withdrew from this agreement.¹⁰

Up to the present time, PICAO has had no organizational relationship to the United Nations. However, a proposed agreement designed to govern the relationship between the permanent International Civil Aviation Organization, or ICAO, to be established when the Convention becomes effective and the United Nations Organization has been prepared, approved by the PICAO Council, by the Economic and Social Council of the United Nations, by the United Nations General Assembly, subject to the condition that Spain shall not be a member of ICAO, and now awaits only similar approval by the Assembly of ICAO, which has its next meeting in May, 1947. If this agreement becomes effective, it will not place ICAO under the supervision and direction of the United Nations, but will establish a consultative arrangement between the two organizations and will recognize ICAO as the specialized agency of the United Nations in the field of aviation.

II. FEDERAL JURISDICTION OVER CIVIL AVIATION

(1) *Safety Powers Very Broad Under Civil Aeronautics Act*

Under the Civil Aeronautics Act of 1938 Federal jurisdiction over safety in the air is based on the very broad definition of "air commerce" in that Act which includes (1) interstate, overseas, and foreign air commerce; (2) the transportation of mail by aircraft; (3) any operation or navigation of aircraft within the limits of any civil airways; (4) any operations or navigation of aircraft which directly affects interstate, overseas or foreign air commerce; and (5) any operation or navigation of aircraft which may endanger safety in interstate, overseas or foreign air commerce.

Under this broad definition of "air commerce" the Civil Aeronautics Board has promulgated regulations requiring Federal certificates for all aircraft and all airmen regardless of whether either or both are engaged in interstate or intra-state commerce, regardless of whether the flight is of a commercial or non-commercial nature, and regardless of whether the flight takes place on or traverses a civil airway. In other words, any airman or aircraft engaged in flying of any sort in the airspace overlying the United States is required pursuant to the Safety Regulations to have a Federal license.¹¹ Intrastate flights are covered.¹²

(2) *Federal Economic Regulatory Powers Are Limited Under Civil Aeronautics Act*

While the constitutional power of Congress over interstate and foreign commerce is just as broad with respect to economic regulatory jurisdiction as it is to safety regulatory jurisdiction, Congress did not see fit in passing

¹⁰ State Dept., Press Release No. 510, July 25, 1946; 1946 USAvR 378.

¹¹ This regulation was upheld in *Rosenhan v. United States*, 131 F. (2d) 932, 1944 USAvR 30 (C.C.A. 10th, 1942). Cert. Den. 318 U.S. 790.

¹² The court so held in *United States v. Drumm*, 55 F. Supp. 151, 1944 (USAvR 51. D.C. Nev. 1944).

the Civil Aeronautics Act to exercise the commerce power as comprehensive with respect to Federal economic regulation as it did with respect to Federal safety regulation. As has been stated above, all aircraft and all airmen are subject to the safety requirements. No parallel provision is made in the so-called "economic" sections of the Act. Rather, the Act applies its economic sections only to carriers engaged in air transportation, which term, by a series of definitions in the Act, means the carriage by aircraft of persons or property as a "common carrier" for compensation or hire in interstate commerce or the carriage of mail. Consequently, economic regulations under the Act do not extend to contract carriers by aircraft, regardless of whether or not such carriers are engaged in interstate, over-seas or foreign commerce. That Congress has power to regulate any carrier, whether common or contract, engaging in interstate commerce admits of no doubt; why Congress excluded contract carriers from the terms of the Act poses an interesting, if speculative, problem.

Senator McCarran's pending proposed bill (S. 1 80th Congress) rewrites the Civil Aeronautics Act so as to, among other things, regulate contract carriers by air.

(3) *The Problem of Non-Scheduled Air Carriers*

At the present time there is much in the press about the safety and economic phases of non-schedule air carriers and the C.A.B. is currently engaged in rewriting all the safety and economic regulations it had promulgated for this type of air carrier. As stated above in discussing economic jurisdiction, the Civil Aeronautics Act gives C.A.B. jurisdiction over all "common carriers" by air. Whether all non-scheduled air carriers come within this definition or whether many of them are contract carriers is one of the legal problems yet to be decided in this field.¹³ Since the War, availability of surplus aircraft has caused the number of non-scheduled air carriers to increase by the hundred, and cargo and passenger carriers in this classification are seemingly determined to compete with the scheduled airlines for such business as they can obtain. Many new legal regulations must be written to cover this type of air carrier.

(4) *Should Federal Jurisdiction Be Exclusive Over Both Safety and Economic Phases of Civil Aviation?*

There is much discussion at the present time as to whether or not Federal jurisdiction should be exclusive over both safety and economic phases of civil aviation.¹⁴ Your Committee has pointed out that Federal jurisdiction under the Civil Aeronautics Act of 1938 in the safety field is broad enough to cover all flight by civil aircraft, and that the economic powers given to the C.A.B. under that Act are more limited in scope. The problem is merely pointed out for consideration as it is impossible to discuss the various arguments on this subject in this summary.

(5) *How Should the Civil Aeronautics Act of 1938 Be Amended to Meet the Needs of Civil Aviation?*

Civil aviation has made great strides in this country since the Civil Aeronautics Act of 1938 was adopted. The extent of Federal safety and economic powers as discussed above indicate certain improvements which might be covered in amendments to this Act. The problem of non-scheduled air carriers is certainly one that may call for more legislation. Senator McCarran, the acknowledged Congressional expert in the field of aviation law and author of the Civil Aeronautics Acts of 1938, has prepared a

¹³ See Neal, *The Status of Non-Scheduled Operations Under the Civil Aeronautics Act of 1938* (1946) 11 Law & Contemp. Prob. 508.

¹⁴ See Ryan, *Economic Regulation of Air Commerce By the States* (1945) 31 Va. Law Rev. 479; and Hamley, *Appropriate Areas of State Economic Regulation* (1946) 11 Law & Contemp. Prob. 488.

comprehensive bill, S. 1, 80th Congress, in which he has rewritten all Federal legislation on the subject of civil aviation. In this he has, in a comprehensive way, covered such subjects as contract carriers, the matter of rates in the international field, and many other defects of the existing law. He has proposed in his bill that the Civil Aeronautics Authority be recreated as an independent agency and that an independent Air Safety Board be created. Senator McCarran has now introduced the provisions of his Bill creating the Air Safety Board (Title III of S. 1) as a separate Bill (S. 269) and the latter bill is currently the subject of hearings before the Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce. These hearings are directed toward an investigation of the causes of recent aviation accidents.

III. STATE JURISDICTION OVER CIVIL AVIATION

(1) *Air Safety Jurisdiction of the States*

All of the states have legislation covering various phases of air safety regulation. Forty states require that all aircraft and all pilots have Federal certificates. Of the eight states which have no such requirement, six require either a state or Federal certificate, and two require only a state certificate for both aircraft and pilots. Virginia requires both a state and Federal certificate for aircraft and pilots. Eleven states have adopted air traffic rules substantially identical with the Federal Air Traffic Rules, twenty-three have air traffic regulations which make no reference to the Federal rules but which are usually based in part upon them, and fourteen have no provision on this subject.¹⁵

The most recent activity in connection with Federal-state co-operation in the field of air safety enforcement is a model state statute supported by C.A.A. proposing among other things that the states punish reckless flying and that Federal Aviation statutes and regulations be used as *prima facie* evidence of what constitutes reckless flying. C.A.A. has pointed out that it does not have sufficient personnel to police the airways and that it would welcome state aid in the enforcement field. Previous reports of your Committee have pointed out the constitutional questions involved where states adopt Federal regulations by reference, so this new statute attempts to avoid these problems. It is planned to extend this enforcement idea to local police as well as state police by urging adoption of local ordinances similar in character to the Model State Act. Undoubtedly as civil aviation continues to grow there will be many other ways in which states can aid in increasing the safety of air navigation.

(2) *Economic Regulation of Air Carriers By the States*

In discussing Federal jurisdiction over Civil Aviation above, your Committee has posed the question as to whether Federal jurisdiction should be exclusive over both safety and economic phases of civil aviation. In Footnote 14 recent articles on this subject have been cited as a starting point for those interested in the subject.

While fifteen states have statutes authorizing economic regulations applicable to air transportation, no state has taken any action in this field of any consequence. There has been recent agitation in this field due to the activity of the National Association of Railroad and Utilities Commissioners (NARUC) in sponsoring the "Uniform State Air Commerce Bill." This bill purports to give states jurisdiction over intra-state operations of all air carriers. In 1944 Virginia enacted rather comprehensive legislation to provide for economic regulation of air carriers and Rhode Island amended her statute to strengthen its regulatory provisions. In 1945 Alabama,

¹⁵ For names of states in each category see Rhyne, *Federal, State and Local Jurisdiction Over Civil Aviation* (1946) 11 Law & Contemp. Prob. 459 at 467.

Arkansas and Vermont adopted economic regulatory statutes based upon the Uniform Bill just referred to. It is to be noted, however, that in the latter three states the legislatures deleted the provisions of the uniform bill relating to regulation of intrastate business of interstate air carriers.

(3) *State Taxation of Civil Aviation*

State and local taxes on commercial air lines are almost exclusively of the following types: (1) Real property taxes; (2) personal property taxes; (3) net income taxes; (4) capital stock taxes; (5) gross earning taxes; (6) payroll taxes; (7) gasoline taxes; (8) aircraft registration fees; and (9) pilot license fees.

In the only aviation tax case of national import the Supreme Court of the United States has held that Minnesota could tax all of the planes of Northwest Airlines where that airline used Minnesota as its "home port."¹⁶ This decision has brought about a very exhaustive study and report to Congress on taxation of airlines by the C.A.B. pursuant to a resolution of the Congress.¹⁷ Though bills have been introduced,¹⁸ no Congressional action has yet been taken on the legislation proposed in the report to eliminate multiple taxation of air commerce. The National Association of Tax Administrators has recommended adoption by the states of legislation employing a uniform formula for allocation of aviation taxes among the states. Each state's portion of these taxes is determined according to its share of aircraft arrivals and departures, revenue tons handled, and revenues originating inside its boundaries.

(4) *Model State Legislation Now Under Consideration*

With 44 of the 48 state legislatures now in session, there are a number of so-called "model" aviation bills before them. There is a "Model Airports Act" designed to give cities and counties adequate powers to establish and operate airports as well as to receive Federal aid for such purposes. The "Model Airport Zoning Act" which has been adopted with some changes by nearly 40 states, is referred to below in discussing the subject of Airport Zoning under Section IV of this summary on "Airport Development." The "Uniform State Air Commerce Act" has been referred to in discussing state economic regulation over air carriers. The "Model Statute On Reckless Flying" has been referred to in discussing state air safety jurisdiction and has just been made a part of another model bill called the "State Aeronautics Commission or Department Act" which is sponsored by the National Association of State Aviation Officials. A still further "model" bill sponsored by the Council of State Governments would require the channelling of all Federal Airport Funds through state agencies eliminating direct Federal-City relations under the Federal airport program. The Model Act on state taxation of airlines is discussed, *supra*, in the section on "State Taxation of Civil Aviation."

IV. AIRPORT DEVELOPMENT

(1) *Power to Acquire, Develop and Operate*

There have now been 55 decisions by 26 state supreme courts holding that publicly-owned airports are a "public purpose" upon which local governments may spend tax funds. The courts have also held that public airports are a "public use" for which property may be condemned under the power of eminent domain by public agencies. In one instance an airline has been allowed to invoke the power of eminent domain to acquire neces-

¹⁶ *Northwest Airlines v. Minnesota*, 322 U.S. 292, 1944 USAvR 1 (1944).

¹⁷ MULTIPLE TAXATION OF AIR COMMERCE, H. Dec. No. 141, 79th Congress, 1945.

¹⁸ See H.R. 1241, 80th Cong. introduced by Rep. Bulwinkle on January 23, 1947.

sary property for terminal facilities. Airport leases have created many legal problems, as have regulations governing the use of airports. Taxation of public airports and damage claims against both privately owned and publicly owned airports have likewise created legal problems for the courts.¹⁹

With the Federal Government, the states and cities embarking upon a billion dollar national airport program under the Federal Airport Act of 1946, many of the above problems will be most important in the next few years and many new legal problems will undoubtedly arise.

(2) *Alleged Nuisances or Trespasses from Low Flights, at or Near Airports*

The common law maxim "*cujus est solum ejus est usque ad coelum et ad inferos*" meaning "he who owns the soil owns everything above and below, from heaven to hell" has been held inapplicable to air transportation by the Supreme Court of the United States.²⁰ Other courts have reached similar conclusions. The Supreme Court decision held that a person who was damaged by low flights over his property, by Federally owned planes which were taking off and landing at an adjacent airport, was entitled to recover for the damage so suffered. The decision was not unanimous and there is much disagreement in other court decisions as to the legal rules which apply in this type of case.²¹ With civil airplanes increasing by the thousands, claims of this character based on low flying, noise, depreciation of property adjacent to airports, dust, fright and similar factors can be expected to multiply greatly. Much confusion had been caused in this field of law by the "Uniform State Law for Aeronautics" of 1922, endorsed by the Association in 1922,²² and adopted by 25 states,²³ and the American Law Institute's *Restatement of the Law of Torts*, §194,²⁴ both of which contain the old *ad coelum* theory. Section 4 of the 1922 Act subjects air space to a right of flight where the owner's use is not interfered with but much confusion in interpretation has resulted from attempts to reconcile these two sections. In 1931 this Committee attempted to work out a draft of a Uniform Regulatory Act which would eliminate the *ad coelum* theory but conflict of opinion prevented agreement on the language which would accomplish this purpose.²⁵

The Commissioners on Uniform State Laws then attempted a similar objective in their proposed "Uniform Aeronautical Code." Your Committee and a Committee representing the American Law Institute worked on this project from 1933 up to 1939 when your Committee recommended that further work on the proposed Uniform State Aeronautical Code be suspended pending a study by C.A.A. of whether the entire field of regulation cannot and should not be covered by Federal Law.²⁶ Your Committee was

¹⁹ For a starting point on research on any of the subjects mentioned above, see RHYNE, AIRPORTS AND THE COURTS (1944). All courts decisions, books and law review articles on these subjects are cited.

²⁰ *Causby v. United States*, 328 U.S. 256, 1946 USAvR 235 (1946). See Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner* (1946) 11 Law & Contemp. Prob. 538; Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law* (1932) 3 JOURNAL OF AIR LAW 329.

²¹ See RHYNE, AIRPORTS AND THE COURTS (1944) pp. 82-161; Note, *The Causby Case and the Relation of Landowners and Aviators—A New Theory for Protection of the Landowner*, 14 JOURNAL OF AIR LAW AND COMMERCE, 112 (1947).

²² A.B.A. Reports (1922) 97, 413.

²³ 1944 USAvR 129.

²⁴ See Pogue, *Aviation as a Law Molding Force* (1943) 21 Nebr. L. Rev. 53; and Wherry and Condon, *Aerial Trespass Under the Restatement of Torts* (1935) 6 Air L. Rev. 113.

²⁵ 56 A.B.A. Reports (1931) 69, 317; 2 JOURNAL OF AIR LAW 545.

²⁶ 64 A.B.A. Reports 171; 10 JOURNAL OF AIR LAW AND COMMERCE 505.

authorized by the Association in 1939²⁷ to accept an invitation to co-operate with C.A.A. in this study and to suspend further work on the proposed state Code. The President's Reorganization Plan of 1940 came along and C.A.B. inherited this broad study, but the only part ever released was the study on tort liability discussed under the section on Aviation Accident Law, *infra*. In 1941 this Association voted to suspend its recommendation of the Uniform State Regulatory Act on this Committee's recommendation that Federal regulation rather than State regulation was best suited to this field.²⁸ The advent of War and more pressing problems diverted C.A.B. attention elsewhere, and in 1943 this Association adopted a resolution stating as follows:²⁹

"That the American Bar Association endorse the principle that

(a) maximum development of the air commerce of the nation is in the public interest;

(b) uniformity of law and regulation of such air commerce, including its economic, and safety regulation, control and the certification of aircraft and airmen, is necessary to bring about its maximum development;

(c) such uniform regulation and control can only be accomplished through federal legislation;

(d) the declarations of principles and policies stated in H.R. 1012 (committee print No. 2, dated May 26, 1943) of federal control of all air commerce to the exclusion of state control of a contrary, duplicating or otherwise burdensome nature are in accord with the announced policies of the American Bar Association."

This resolution ended Association interest in all parts of the then pending Uniform State Aeronautical Code except the part devoted to tort liability. This leaves the Uniform Airports Act³⁰ and the 1922 Uniform State Law for Aeronautics as the only proposed State legislation bearing the Association's endorsement. Your Committee is making a study as to the advisability of a recommendation that the Association suspend its endorsement of both of these uniform acts as the development of aviation has made them out-of-date in many of their provisions, and the Uniform Airports Act has been superseded by a more recent Model Airports Act referred to in discussing model state legislation *supra*.

Without further elaboration of the many difficult legal and legislative problems in this field as illustrated by the court decisions and legislation herein discussed, it can be seen that this is one branch of aviation law where much work must be done to clarify the legal rights of landowners, airplane operators and others.

(3) Airport Zoning

Airport zoning to prohibit obstructions in the approach zones of airports is a subject which is receiving much attention at present because one of the conditions of Federal aid under the Federal Airport Act is prevention of such obstructions by zoning or other means.³¹ With airports of the transport class costing from 4 to 100 million dollars, this entire investment can be wiped out overnight if some landowner can erect a tall building or other structure in one of the approach zones of such an airport. Airport zoning is designed to prevent such obstructions by limiting the heights of all structures, and objects of natural growth, in the approach zones to public airports. Some 40 states now authorize local governments to enact airport zoning ordinances. The legal basis of such zoning is the principle enunciated by the Supreme Court of the United States years ago in the *Euclid*³² case that zoning is a valid exercise of the police power and that an

²⁷ 64 A.B.A. Reports 100-101.

²⁸ 66 A.B.A. Reports 148, 221-223.

²⁹ 68 A.B.A. Reports 143, 196 (1943).

³⁰ 60 A.B.A. Reports 119 (1935).

³¹ Public Law No. 337, 79th Cong., Section 11 (3).

³² *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); McQUILLIN, MUNICIPAL CORPORATIONS (2d Ed.) §1027.

individual can be required, without compensation, to give up a part of his property rights for the benefit of the community as a whole. Airport zoning cannot be used to force removal of existing structures since that would be confiscation without compensation, but it is directed toward prevention of future obstructions. In the few cases on this subject which have reached the courts, the decisions have pointed out that airport zoning cannot be used to confiscate property immediately adjacent to airports by so limiting the height of structures on such property as to make it useless.³³ The controlling legal principles in this field of aviation law are yet to be written by the courts as no court of last resort has yet passed squarely upon airport zoning under adequate state legislation and local ordinance. There is a model state statute on airport zoning which is jointly sponsored by the C.A.A., the National Institute of Municipal Law Officers, the National Association of State Aviation Officials, and the Council of State Governments.

V. AVIATION ACCIDENT LAW

(1) Aviation Accident Liabilities

There is now a large number of cases covering many points of law involving aviation accident liabilities. The distinction between common and private carriers has been made by the courts in prescribing the degree of care required of aircraft operators. In quite a number of states there are statutory provisions applicable to aircraft operator accident liability. It will be recalled that the Uniform State Law for Aeronautics referred to above, in discussing alleged nuisances from low flights at or near airports, also contains a provision stating the rule of absolute liability for damage by aircraft to persons or property on land or sea unless the injury is caused in whole or in part by the person injured. Twenty-three states have adopted this Uniform Law, but some of them have removed the absolute liability provision and have based liability on the rules of torts applicable to accidents on land. In 1937 your Committee, the Commissioners on Uniform State Laws and the American Law Institute through a joint committee attempted to draft a "Uniform Aviation Liability Act."³⁴ Many differences of opinion arose and finally your Committee and the American Law Institute withdrew from participation in the work on the proposed uniform act.³⁵ The Executive Committee of the Commissioners on Uniform State Laws voted to withhold promulgation of this Act until the Civil Aeronautics Authority completed a study they were making of aviation liability legislation. When the reorganization order of the President reorganized the Civil Aeronautics Authority in 1940 the study went along with the functions of the new C.A.B. The study was completed in 1941³⁶ but the War and its emergencies have caused C.A.B. to delay action upon recommendations made therein. These recommendations call for a Federal Act to cover most aviation tort liability.

In 1939 the Association authorized this Committee to accept a C.A.A. invitation to co-operate in this study³⁷ of tort liability and your Committee

³³ *Mutual Chemical Co. v. City Council of Baltimore*, 1939 USAvR 11 (Cir. Ct. Balt. Co. 1939); *Yara Engineering Co. v. City of Newark*, 132 NJL 370, 40 A. 2d 559, 1945 USAvR 117 (1945). Cases upholding airport zoning are *United States v. 357.25 Acres of Land*, 55 F. Supp. 461, 1944 USAvR 36 (W.D. La. 1944) and by dictum *Burnham v. Beverly Airways, Inc.*, 311 Mass. 628, 42 N.E. 2d, 575, 1942 USAvR 1 (1942).

³⁴ Report of the Standing Committee on Aeronautical Law (1937), 66 A.B.A. Reports 221, 9 JOURNAL OF AIR LAW AND COMMERCE 190.

³⁵ Report of the Standing Committee on Aeronautical Law (1942), 67 A.B.A. Reports 186, 13 JOURNAL OF AIR LAW AND COMMERCE 334.

³⁶ See Sweeney, *Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation* (Pub. by C.A.B. 1941 pp. 428 & Appendices).

³⁷ 64 A.B.A. Reports 100-101 (1939).

is hoping that this project can be revitalized within the next few weeks. No action approving the C.A.B.'s recommendations has yet been taken by the Association or the Committee, and the Committee is giving serious consideration to the C.A.B. recommendations so that it can make proper recommendations for action by the Association on this subject.

(2) *Workmen's Compensation*

Workmen's compensation problems of a unique character have been created by air transportation primarily because of its long distance interstate character. Most state laws have been interpreted as applying to all phases of civil aviation, but numerous interpretations of the situs of the employment of airline employes is required. It has been suggested that the Federal Government assert complete jurisdiction in this field to eliminate some of the problems which have arisen.³⁸

(3) *Aviation Exclusion Clauses in Insurance Contracts and the Trend Towards Court Interpretations Which Nullify These Restrictions on Air Travel*

Up until recent years insurance companies included in all accident and life policies a provision that the insured was not to be covered by the policy if injured while "engaging in" or "participating in" aviation. Some of these exclusion provisions relate to the double indemnity payments only. Almost from the beginning the courts held that a mere passenger was not "engaging in" aviation or aeronautics, but the earliest cases held that a passenger in an airplane was "participating in" aviation or aeronautics. There was then a change in judicial construction of "participating in" which held that this phrase should be given an occupational connotation so that only pilots and those actually directing airplane flights should be regarded as "participating in" or "engaging in" aviation or aeronautics. Some insurance companies then added the word "operations" to "participating" or "engaging," but the courts held that the addition of "operations" did not cover passengers, so the insurance companies then added to "engaging" or "participating" the phrase "as a passenger or otherwise." The courts at first held that the addition of "as a passenger or otherwise" clearly excluded liability under an insurance policy for the death of a passenger who was killed in an airplane accident, but recent cases have now given an occupational connotation to this exclusion clause and have held that a mere passenger on a regularly scheduled flight over an established air route is not within the meaning of the exclusion clause.

The foregoing has been recited to indicate that the courts have gradually changed their construction of aviation exclusion clauses in insurance policies to conform to the development of air transportation. In the beginning the courts considered aviation as an experiment and any person who took a flight in an airplane, even as a passenger, was considered as engaging in or participating in aviation. When air transportation began to be accepted as an ordinary mode of travel, the courts, as indicated above, reversed these earlier decisions.³⁹ A recent survey of life insurance companies reveals that 98% of these companies now issue policies at standard

³⁸ See 68 A.B.A. Reports (1943) and Pillsbury, *Application of Federal Compensation Acts to Aviation* (1933). 4 Air L. Rev. 38; Roos, *The Problem of Workmen's Compensation in Air Transportation* (1935) 6 JOURNAL OF AIR LAW AND COMMERCE 1; Hearings on H.R. 1012, 78th Cong., 1st Sess., at pages 240-249.

³⁹ See for example the recent decision in which the New York Court of Appeals reversed itself: *Hartol Products Corp. v. Prudential Insurance Co.*, 290 N.Y. 44, 47 N.E. 2d. 687, 1943 USAvR 44 (1943).

rates to airline passengers, with 84% imposing no limits whatever on the insured's use of scheduled airlines. Only 14% make such restrictions as limiting flights to 40,000 miles per year or limiting the size of the policy.⁴⁰

Respectfully submitted,

SUEL O. ARNOLD,
WILLIAM P. MACCRACKEN,
W. PERCY McDONALD,
L. WELCH POGUE,
CHARLES S. RHYNE, *Chairman.*

⁴⁰ N.Y. Times, Jan. 29, 1947, page 13.