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## Judicial and Regulatory Decisions

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# JUDICIAL AND REGULATORY DECISIONS

## JURISDICTION OVER CRIMES COMMITTED IN AIRCRAFT WHILE FLYING OVER THE HIGH SEAS

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THE novel case of *United States v. Cordova*<sup>1</sup> has for the first time brought an American court to face a problem which has long been anticipated — that of finding jurisdiction for crimes committed in aircraft while flying over the high seas.

The *Cordova* case involved a prosecution for assault and battery committed when the defendant bit the pilot as the latter was trying to break up a fight between two passengers. The plane was then flying over the Atlantic Ocean between Puerto Rico and New York. The district court found that an assault and battery had been committed, but arrested judgment of conviction as no federal jurisdiction to punish the acts could be found. The court found that assault and battery are only punishable by a United States court when committed within the admiralty and maritime jurisdiction of the United States.<sup>2</sup> The Act defining the admiralty and maritime jurisdiction<sup>3</sup> confined itself to crimes "committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof." (Italics added.) The court decided that prior decisions<sup>4</sup> and legislative action<sup>5</sup> had determined that an airplane was not a vessel, and held that "upon the high seas" could not be extended to mean "over the high seas."

When it is realized that this jurisdictional problem has been foreseen by various commentators since 1902,<sup>6</sup> the result of the *Cordova* case is somewhat surprising. But in the United States, apparently nothing has been done in anticipation of such criminal acts. Our state courts are bound by

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<sup>1</sup> 89 F. Supp. 293 (E. D. N. Y. 1950), 1950 USAvR 1. Not appealed.

<sup>2</sup> 18 U.S.C. §455 (1946), now 18 U.S.C. §§ 113(d), 113(e) (Supp. 1949). There is no problem of venue if there is jurisdiction. 18 U.S.C. §3238 (Supp. 1949) states that the place of trial shall be in the district where the accused is found or first brought.

<sup>3</sup> 18 U.S.C. §451 (1946), now 18 U.S.C. §7 (Supp. 1949).

<sup>4</sup> *United States v. Northwest Air Service, Inc.*, 80 F. 2d 804 (9th Cir. 1935); *United States v. Peoples*, 50 F. Supp. 462 (N. D. Cal. 1943); *The Crawford Bros. No. 2*, 215 Fed. 269 (W. D. Wash. 1914). *Contra: Reinhardt v. Newport Flying Service Corp.*, 232 N. Y. 115, 133 N. E. 371 (1921).

<sup>5</sup> 44 STAT. 572 (1926), 49 U.S.C. §177(a) (1946).

<sup>6</sup> In that year Paul Fauchille drafted his original code of air law, in which he said that crimes committed aboard aerostats wherever they may be are within the competence of the tribunals of the nation to which the aerostat belongs. Art. 15, *Annuaire de l'Institut de Droit International* (1902). HAROLD BROWN, AIRCRAFT AND THE LAW 190 (1933); SPAIGHT, AIRCRAFT IN PEACE AND THE LAW 124 (1919); Myers, *The Criminal in the Air*, 4 J. CRIM. L. & CRIMINOLOGY 815 (1914); Vold, *Postwar Aviation and Crime*, 35 J. CRIM. L. & CRIMINOLOGY 297 (1945).

the traditional territorial concept of jurisdiction,<sup>7</sup> which excludes jurisdiction for crimes committed over the high seas unless they in some way affect the state.<sup>8</sup> While the states have, in many instances, created the fiction of defining a crime in such a way as to make it a "continuing" offense, and thereby pulling it within the bounds of the state,<sup>9</sup> such legal manipulation cannot be effective in cases of assault or of murder (where both the fatal blow and the death occur above the high seas), as the entire crime has there been completed without the territory of the state.

As there is no general jurisdiction in the federal courts over common law crimes, a federal court must look to a specific federal statute defining an act as criminal and making such act punishable.<sup>10</sup> In the United States Criminal Code, Congress has provided that certain crimes are punishable when committed "within the Special Maritime and territorial jurisdiction of the United States," as defined in 18 U.S.C. §7.<sup>11</sup> That jurisdiction applies to offenses committed *on the high seas or on an American vessel*.

<sup>7</sup> *State v. Parrish*, 242 Ala. 7, 5 So. 2d 828 (1941); *State v. Stephens*, 118 Me. 237, 107 Atl. 296 (1919); *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894). See also Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931), and Levitt, *Jurisdiction over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316 (1925) at p. 331.

<sup>8</sup> *Skiriotes v. Florida*, 313 U.S. 69 (1941) (State statute forbidding use of diving equipment for taking commercial sponges from Gulf of Mexico held valid and applicable to defendant, a citizen of Florida, who violated it two marine leagues from shore); *Mortensen v. State*, 214 Ark. 528, 217 S. W. 2d 325 (1949) (false pretenses); *State ex rel. Geldar v. Kress*, — Md. —, 62 A. 2d 568 (1948) (conspiracy to violate prohibition laws of North Carolina. Purchased liquor in Maryland and obtained its transportation to North Carolina. Venue of crime in North Carolina held proper); *Lenore v. Comm.*, 127 Ky. 480, 105 S. W. 930 (1907) (defendant took prospective purchaser of liquor on boat, crossed Mississippi River from dry Kentucky to wet Missouri, made sale, and returned to Kentucky. Held that transaction made on Kentucky shore); *People v. Adams*, 3 Denio 190 (N. Y. 1846), *aff'd* 1 N. Y. 173 (1848) (false pretenses). See also N. Y. PENAL LAW §1930(5) and §1933 (1944). *The Lotus*, 2 L. of N. Permanent Court, p. 20, 1928 A.M.C. 1, showed that Turkey undertakes to punish an alien who injures a Turk outside Turkey, if the alien is so imprudent as later to come into Turkish Territory; upheld by a divided court, 7-6.

An interesting law in the TEXAS CODE OF CRIMINAL PROCEDURE, Art. 186 (1925) reads: "*Offenses not committed in the State*: Prosecutions for offenses committed wholly or in part without, and made punishable by law within this State, may be begun and carried on in any county in which the offender is found." This statute most likely would only be constitutionally applicable to crimes which in some way affect persons or property within the state. A borderline case for its application would be one in which a Texas citizen was the victim of a murder while a passenger on a trans-oceanic flight, and the murderer was subsequently apprehended in Texas.

<sup>9</sup> This is done most often in larceny statutes where it is provided that every transportation is a new taking and therefore the offender is punishable in every county through which the goods are brought. Many courts interpret the statute to be applicable even where the original taking was outside the state. *Schultz v. Lainson*, 234 Iowa 606, 13 N. W. 2d 326 (1944); *Garcia v. State*, 151 Tex. Crim. Rep. 272, 207 S. W. 2d 624 (1948).

Similarly, conspiracy indictments will lie in any state in which an overt act in furtherance of the conspiracy is committed. *Brown v. Elliott*, 225 U.S. 392 (1912); *People v. Murray*, 95 N. Y. S. 107 (Sup. Ct., N. Y. Cty. 1905).

And in homicide cases, the offender has been punished in the state where the victim died, even if the fatal blow was inflicted on the high seas. *Commonwealth v. Macloon*, 101 Mass. 1 (1869); *Tyler v. People*, 8 Mich. 320 (1860).

Thus, in many instances, a "continuing" crime committed on board an airplane in oceanic flight may be punishable by a state court, depending upon the wording and interpretation of the statute.

<sup>10</sup> *United States v. Hudson*, 7 Cranch 32 (U.S. 1812).

<sup>11</sup> "The term 'special maritime and territorial jurisdiction of the United States,' as used in this title (the value of the word 'special' has been questioned by some admiralty lawyers), includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of

It would be easy to find jurisdiction under that definition if an airplane were considered a vessel. While the dictionary includes "any of various types of aircraft" in the definition of the word "vessel,"<sup>12</sup> the courts have consistently held that an airplane is not a vessel.<sup>13</sup> The term "vessel" is itself defined in Title 18 of the United States Code,<sup>14</sup> but the definition does not make clear whether an airplane is to be included within its meaning. Section 7 (a) of the Air Commerce Act<sup>15</sup> specifically states that any definition of "vessel" found in the navigation and shipping laws of the United States shall not be construed to apply to airplanes. So it seems clear that without a new definition of "vessel" enacted by Congress to apply to Title 18 of the Code, there can be no doubt that an airplane is not a vessel.

The maritime jurisdiction also includes "the high seas." It is here that the court in the *Cordova* case was unwilling to make an extension of its jurisdiction to the air space above the high seas. When one examines the history of the term "upon the high seas" as it has appeared in the federal criminal statutes, there is strong support for the court's interpretation.<sup>16</sup> The wording of the law seems to have changed but slightly since its original enactment in 1790, when air travel was unthought-of. If Congress had consciously intended to broaden the scope of the maritime jurisdiction when it made the latest revision of the criminal code in 1948, it is reasonable that express wording would have been used so as to remove all possible doubts. It is more likely that this impending problem was not brought to Congress' attention, for it can hardly be thought that Congress intended to leave this air space above the high seas open for criminals to operate in with immunity.

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the jurisdiction of any particular state, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

These crimes, defined and punished under Title 18 of the United States Code (Supp. 1949) are Arson, §81; Assaults, §113; Maiming, §114; Embezzlement and theft, §661; Receiving stolen property, §662; False pretenses, §1025; Murder, §1111; Manslaughter, §1112; Rape, §2031; Carnal knowledge of female under 16, §2032; Robbery and burglary, §2111.

<sup>12</sup> WEBSTER, NEW INTERNATIONAL DICTIONARY 2837 (2d ed. 1949), definition no. 3.

<sup>13</sup> Cases cited note 4 *supra*.

<sup>14</sup> U.S.C. §9 (Supp. 1949). "The term 'vessel of the United States,' as used in this title, means a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof."

<sup>15</sup> 44 STAT. 572 (1926), 49 U.S.C. §177(a) (1946).

<sup>16</sup> The history of the phrase "upon the high seas," as applied to jurisdiction over felonies, is as follows:

U.S. CONST. Art. I, §8, cl. 10: Congress shall have power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."

April 30, 1790. 1 STAT. 113. "That if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, . . . (he) shall be deemed, taken and adjudged to be a pirate and felon, . . ."

March 3, 1825. 4 STAT. 115. "That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of wilful murder, or rape, . . . (he) shall be deemed guilty of felony, . . ."

March 4, 1909. 35 STAT. 1142. "The crimes and offenses defined in this chapter shall be punished as herein prescribed: First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, . . ."

June 25, 1948. 62 STAT. 685, 18 U.S.C. §7, as in note 11 *supra*.

But it was not necessary that the court should interpret the wording to apply only to a single geometrical plane. While the criminal laws of the United States are generally strictly construed,<sup>17</sup> the Supreme Court at an early date extended the phrase "upon the high seas," to include "in the sea"<sup>18</sup> thereby recognizing a three-dimensional effect to the statute. Unfortunately, the law of the air seems to have bewildered the courts each time a new issue of this nature has arisen. Most often the Congress has merely had to amend an existing law which the federal courts were reluctant to apply to air-planes.<sup>19</sup>

There is no doubt that Congress has the constitutional authority to provide for the punishment of crimes committed in the air over the high seas. Congress was given power to "define and punish Piracies and Felonies committed on the high seas."<sup>20</sup> While arguments may be suggested that this clause does not include the superadjacent airspace because air transportation was not contemplated by the framers of the Constitution, there is no doubt that the necessary statute would be within Congress' power to regulate foreign commerce.<sup>21</sup>

It is likewise clear that such a statute would not be contrary to international law. While no treaties have dealt with this subject,<sup>22</sup> most com-

<sup>17</sup> *United States v. Wiltberger*, 5 Wheat. 76 (U.S. 1820). In that case the master of an American ship lying in the river Tigris in China was charged with manslaughter committed on board the vessel. The prosecution was laid under the Act of April 30, 1790, 1 STAT. 112, dealing with manslaughter committed "upon the high seas," but other places were not mentioned. §113 of the same statute dealt with murder committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state." Chief Justice Marshall refused to transfer the broad jurisdictional scope over murder to the crime of manslaughter, and to make the latter offense punishable when committed on a river.

<sup>18</sup> *United States v. Holmes*, 5 Wheat. 412, 418 (U.S. 1820). Defendant knifed the victim and then threw him overboard, as a result of which he drowned. The court was of the opinion that "it makes no difference whether the offense was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard."

<sup>19</sup> For example, the stowaway laws, 18 U.S.C. §2199 (Supp. 1949), as a result of *United States v. Peoples*, 50 F. Supp. 462 (N. D. Cal. 1943); THE MOTOR VEHICLE THEFT ACT, 18 U.S.C. §2312 (Supp. 1949), as a result of *McBoyle v. United States*, 283 U.S. 25 (1931).

<sup>20</sup> U.S. CONST. Art. I, §8, cl. 10.

<sup>21</sup> U.S. CONST. Art. I, §8, cl. 3.

"It has been asserted that Congress has no specific right to make laws for navigable airspace as it has for navigable waters of the United States inasmuch as there is no pertinent provision therefor in the federal Constitution. It is equally true that when that historic document was framed, flying by human beings was beyond the wildest dreams; and it is a reasonable presumption that with modern air travel conditions to face, its framers would have made adequate provision therefor." HAROLD BROWN, AIRCRAFT AND THE LAW 190 (1933).

The constitutional problem might arise in a case where a private pilot, flying his own plane, took a passenger for a "joy" ride, flew out over the ocean, murdered his companion, and then returned to his landing field in the United States. Since the flight could hardly be called foreign commerce, and had no effect thereon, there is serious doubt that the federal law would apply. Perhaps, though, the state in which he landed would have jurisdiction on the grounds that the act was "constructively committed" within that state. See note 8 *supra*.

<sup>22</sup> SHAWCROSS AND BEAUMONT, AIR LAW §586 (1945).

However, the draft Convention Relating to International Air Navigation at Paris, 1919, Art. 23, §3, provided that "Legal relations between persons on board an aircraft in flight are governed by the law of the nationality of the aircraft." Paragraph 4 said that "In case of crime or misdemeanour committed by one person against another on board an aircraft in flight the jurisdiction of the State flown over applies only in case the crime or misdemeanour is committed against a national of such state and is followed by a landing during the same journey upon its territory." SPAIGHT, AIRCRAFT IN PEACE AND THE LAW 142 (1919). Unfortunately, this article was entirely deleted from the final Convention because it was felt that the territorial sovereignty provisions of Art. 1 would cover all situations.

mentators have felt that the law of the air in this instance should be the same as the law of the sea — that the state of the flag of the airship should have criminal jurisdiction.<sup>23</sup> The Seventh Pan American Conference at Montevideo in 1933 adopted a resolution "To recommend the adoption of the following principles on the penalty for offenses committed on board aircraft: \*\*\* (2) Any aircraft without the boundaries of any State, on the high seas, is subject to the legislation and jurisdiction of its flag."<sup>24</sup> Certain national states have followed this principle. In England the Air Navigation Act of 1920, Section 14, renders amenable to trial any offender, British, foreign, or stateless, who commits "any offense whatever . . . on a British aircraft." Germany,<sup>25</sup> Italy,<sup>26</sup> Poland,<sup>27</sup> and China<sup>28</sup> also have similar provisions.

Thus it is seen that the only obstacle to finding jurisdiction in the *Cor-dova* case was the court's interpretation of the federal statute defining the area wherein assaults are punishable. Congress could rightfully have provided the necessary jurisdiction, both under the Constitution and under international law. It is also clear that the statute could have been construed so as to find that jurisdiction over crimes committed above the high seas had been provided for by Congress. The fact remains that the court did not so construe the law. A special Act of Congress is now required.<sup>29</sup> It can only be hoped that this amendment will be soon forthcoming.

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<sup>23</sup> See note 6 *supra*.

<sup>24</sup> U.S. Conf. Ser., No. 19 at 254 (Dep't State 1933).

<sup>25</sup> Law of May 6, 1940, [1940] I REICHSGESETZBLATT 754, says "The German Criminal Law shall apply to acts committed on a German ship or German aircraft regardless of the law of the place of commission." (Translated in U.S. War Dep't Pamphlet No. 31-122, THE STATUTORY CRIMINAL LAW OF GERMANY 9 (1946).)

<sup>26</sup> Law of Oct. 19, 1930, [1930] CODICE PENALE, Art. 4, says that the ships and aircraft of Italy are considered as territory of the state and are subject to Italian law except as provided by International law.

<sup>27</sup> THE POLISH PENAL CODE OF 1932, translated by Lemkin and McDermott (Duke Univ. Press, 1939), c. I, Art. 3, §1: "The Polish penal law is applicable to all persons who have committed an offense within the territory of the Polish State, or on a Polish vessel or aircraft."

<sup>28</sup> THE CRIMINAL CODE OF THE REPUBLIC OF CHINA, translated by Ching-Lin Hsia and Boyer Chu (Shanghai, 1936), c. I, Art. 3: "This Code shall apply to any offense committed within the territory of the Republic. An offense committed on board any Chinese vessel or aircraft, though it was lying at the time outside the territory of the Republic, shall be deemed to be an offense committed within the territory of the Republic."

<sup>29</sup> Arnold W. Knauth, maritime authority whose advice was cited in the instant case, urges an amendment to the Federal Criminal Code to make the federal criminal laws applicable "in all places subject to the jurisdiction of the United States beyond and outside the jurisdiction of any particular State and to all crimes and felonies and misdemeanors committed in or upon any vessel of the United States and any aircraft of the United States being in waters and harbors and in air-spaces and on airports in any foreign place, subject to the primary jurisdiction of the sovereign state in whose air-space or on whose airports such offenses are committed to take such action at the time and place of such offense as the authorities of such sovereign state may deem appropriate."

The 73rd Annual Meeting of the American Bar Association, held in Washington, D. C., September 18-22, 1950, adopted the following resolution:

"RESOLVED, That the American Bar Association urges the revision of the present statute by the Congress of the United States so that the jurisdiction relative to crimes committed aboard surface vessels be extended to include crimes committed aboard aircraft operating over the land and waters over which the United States can exercise jurisdiction."

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