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THE BEGINNINGS AND THE GROWTH OF AERONAUTICAL LAW

ARNOLD D. McNAIR*

Mr. Landis, Ladies and Gentlemen: I should like to begin by saying how conscious I am of the honor done to me and the responsibility laid upon me in being invited to give this opening address to the First National Legislative Air Conference held in this country. It seems to me that the only excuse which the organizers of this conference can give to you for this part of the program is that I am an English lawyer, and that it is the common law of England which forms the common heritage of our two countries, and is one of the closest bonds which unite us and help us to understand one another.

Now both here and in England a condition precedent to sound legislation upon any topic is a knowledge of what the rules of the common law governing that topic may be, and therefore it is that I venture to address to you some observations which, but for that common legal tradition that unites us, it would be impertinent for a foreign lawyer to make.

Now, before I attempt to state to you the English common law and statutory law upon this subject, I must first of all refer to another source of air law, namely, international law, and in particular, the International Convention for the Regulation of Aerial Navigation, of the 13th of October, 1919, a Convention to which twenty-seven states, including Great Britain, are already parties, a number which is likely to be increased to thirty-one within the next twelve months.

Now you can readily understand that in a continent like Europe, which is divided into so many different state territories, it is not surprising that from the very beginning the aspect of aeronautical law, which has been most prominent, is the international one, for purposes both of time of peace and for time of war.

Now, long before aerial navigation became a practical commercial proposition the lawyers had been discussing the various theories which should regulate this new form of transportation as

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between countries, once it really became established, and that theoretical discussion had reached the following stage:

Firstly, over the high seas it was admitted that the air space was free. Secondly, as regards the air space over land, including internal and territorial waters, the theories which were competing in the international spheres may be summarized as follows:¹

(1) The first, *that the air is free subject to the necessary rights required in the interest of self-preservation*. This theory is the one that was adopted by the Institute of International Law in 1906. It rests mainly on the argument that the air is physically incapable of appropriation because it cannot be actually and continuously occupied. That is substantially the same as one of the arguments of Grotius in favor of the freedom of the seas. Sovereignty implies occupation, and it was argued that since occupation of the air is impossible, there can be no sovereignty in the air. But sovereignty does not really involve continual presence any more than private law possession does. A state can exercise sovereignty over a huge desert, for instance, if it is in de facto control and is in a position to suppress internal disorder and repel external attack. In that sense many a state does control the air space above it.

The analogy of the sea is rather interesting. If I may digress for one moment, Justinian, some fourteen hundred years ago, asserted that the air and the sea were by natural law common to all. In his time no use was made of the upper air, and very little use was made of the high seas, so that statement went unchallenged. But, in the Middle Ages, when men learned how to navigate the high seas and the voyages of the great discoverers began, the ownership of the high seas was claimed right and left by the different states, and it took all the eloquence of Grotius and the lapse of more than a century to destroy those claims.

Now, also that the upper air is becoming useful, claims of sovereignty of it are being made and admitted on all sides as regards the air space over the territory of a state, and we may now regard the theory of the freedom of the air over state territory as definitely exploded. That was the first theory.

(2) The second was this: *The second was based on the analogy of each state's maritime belt, or territorial waters; namely, that there is a lower zone of territorial air space, and a higher,*

1. Professor Hazeltime's *Law of the Air* (1911) contains the best account of these matters which has been published in England.

unlimited zone of free air space. That theory, too, has been discredited by events and need not detain us.

(3) The third theory was to the effect *that the state has complete sovereignty in its superincumbent air space to an unlimited height*, thus applying the *cujus est solum* maxim in a crude form.

This theory confers upon the territorial state the unfettered right of excluding foreign aircraft, public or private, the right of regulation of any foreign aircraft it may choose to admit, and the right of jurisdiction over any foreign aircraft thus admitted.

(4) The fourth theory is *practically number three with the addition of a servitude of innocent passage for foreign non-military aircraft*, akin to the right of innocent passage of merchant ships through territorial waters.

There, briefly, are the four theories which were agitating the lawyers in the years preceding the great war. Possibly that is an over-simplification of the theories that were being advocated, and one could quite easily subdivide those four into a much longer list, but substantially those four represent the principal theories, and there was a mass of literature being poured out upon this topic, and many, many discussions were taking place at international legal gatherings. Then came the great war, and it accelerated a decision as between those competing theories, and the one which triumphed by treaty in Europe, including Great Britain, in the year 1919, was the third, the theory of complete sovereignty, subject to a mutual treaty right of the free entry and passage of the non-military aircraft of other countries.

I lay emphasis upon the fact that that is merely a treaty right, not considered to exist by customary international law, and therefore requiring an express treaty for its creation.

That treaty is, of course, the Convention which I have already mentioned, the International Convention of 1919 for the regulation of Aerial Navigation, and I am going to direct your attention to only three of the many clauses in that Convention. The first article is this: "The high contracting parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory"

There you get laid down in the most emphatic terms the third of the theories which I have outlined to you.

Article II: "Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States."

Article III: "No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization."

Well now, the United States of America signed that Convention of 1919, but did not ratify it. Nevertheless, it can safely be stated that this theory of complete national sovereignty in the superincumbent air space is accepted by this country, and indeed by substantially the whole of this continent. It forms the basis of the Pan-American Convention upon Commercial Aviation, of 1928, and equally of your recent treaty upon the same subject with Canada. Moreover, by Section 6 of the Air Commerce Act of 1926, Congress declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the air space over the lands and waters of the United States, including the Canal Zone, and also, Section 2 of the Uniform State Law of Aeronautics, which has been adopted by twenty-one states and Hawaii, declares "Sovereignty in the space above the lands and waters of this state is declared to rest in the state except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this state."

Therefore we may say that in the international sphere this theory of complete national sovereignty in the air space has triumphed, and that the growing practice is to create by convention a mutual right of passage for non-military aircraft, and it can be only a short time before that practice becomes universal as between all states which have recognized one another and one another's governments.

So much for the international sphere, and perhaps I ought to apologize for the amount of time devoted to it, but you see, from the point of view of the beginning of air law in Europe, that international aspect is vital, because in a continent so divided up into state territories as Europe, until one has settled the basic international principles, it is difficult for any individual state to proceed to develop its own national air law, and therefore, it was not until after the Convention of 1919 that Great Britain took any substantial steps in that direction.

Now, I would have you realize that that Convention of 1919 had a double aspect. It fulfills a double function. Primarily, it regulates international aviation; that is, flights which cross the frontiers of the state of departure. It is obvious, from those sections which I read to you, that that is its main, ostensible purpose;

but secondarily and incidentally, it involves and produces a considerable measure of unification in the private law of the states which are parties to it. Clearly, the law as to the nationality of aircraft, the registration and the marking of aircraft, as to certificates of airworthiness of aircraft and competency of pilots, as to the documents which must be carried by aircraft, as to lights and signals and air traffic rules and many other matters, must be substantially uniform among states whose aircraft are flying over one another's frontiers. That aspect of the matter has, of course, been fully realized in this country and cannot fail to be of interest to this conference; so that this Convention of 1919 forms the basis of the British law of aviation in its administrative and regulatory aspect, and accordingly necessitated the British Air Navigation Act of 1920 and the many Orders in Council which have been issued in pursuance of it.

I am not going to recite to you the numerous topics with which that act deals. Many of them are of a highly technical character, but in the main they are based upon the Convention, in desiring to produce a uniformity amongst the different states that have conceded to one another, by that Convention, a mutual right of entry and passage. Obviously it matters very little to an aviator what is the land law or the marriage law of a particular state that he happens to be flying over; but it matters to him a great deal that the air law of that particular state should be substantially identical with his own, and so long as doubt and uncertainty exist on points like that you are bound to get obstacles in the development of this new mode of transportation.

That is, however, only one aspect of the British Aviation Law, the governmental aspect, and I propose now to touch very briefly upon one or two other aspects more connected with private law, and firstly, with the liability of the operator of an aircraft for damage done to persons and property on land. You have all heard of that ancient maxim, *cujus est solum, ejus est usque ad coelum, et ad inferos*, a maxim which seems to have slipped almost inadvertently into the English common law and is now giving a great deal of trouble on both sides of the Atlantic. This maxim, in spite of the imposing language in which it is enshrined, is not found in Roman law, and was probably coined in the Middle Ages by some commentator upon Justinian's digest. I think it is Dean Pound who described a maxim as being a "substitute for thought." It is a dangerous short cut. It is apt to operate in the

same way in law as a slogan in public affairs, and now that our courts are really being called upon to construe and apply this maxim, it is becoming very difficult and very important to know exactly what it means, and in particular, to know whether it means that an aviator who flies across the land of another commits the tort of trespass so as to expose himself to an action for damages at the suit of the land owner.

My own view, and I am very glad indeed to find that it accords with the view of Mr. George B. Logan, of St. Louis, is that the maxim involves no such consequence, and in the recent Summer School Conference which the Air Law Institute has been holding, we have devoted a good deal of discussion to the meaning of that maxim. The suggestion which I have made in the course of those recent lectures is that a reasonable interpretation of the maxim is as follows, namely, that there is a presumption that the owner of the surface is also the owner of any fixed contents of the air space above it, and that he has the exclusive right of exploiting and occupying that air space by filling it with fixed contents—buildings, mooring masts and so forth. I am disposed to admit that you can own *air* if you can enclose it in a receptacle such as a room or a bottle, but I incline to the view that *space* is not ownable, and herein lies the importance of distinguishing between air and air space. I am inclined to think that space is not capable of legal ownership.

Obviously, that is a matter which we could discuss at great length. It is not a purely academic matter, because courts of law, both in your country and in mine, and particularly in this country in those states that have not adopted the Uniform State Law upon Aeronautics, are being forced to direct their attention to this maxim and to give it a reasonable interpretation. But in England the British Air Navigation Act of 1920 has settled this question by enacting as follows. Before I read part of the section, perhaps I may put into popular language what it has done. It says, in effect, no action for trespass or nuisance lies for a mere flight at a reasonable height over the property of another, but if any material loss or damage is done an absolute duty rests upon the operator of the aircraft, the owner of the aircraft, to make compensation. That is, in popular language, what our Parliament has enacted to this point.

Now if I may just read the really important part of this section nine of the British Act of 1920, it is as follows: "No action shall lie in respect of trespass or in respect of nuisance by reason

only of the flight of aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable; or the ordinary incidents of such flight, so long as the provisions of this Act and any order made thereunder and of the Convention are duly complied with." I will stop there for a moment.

That is what we may call the "disabling" part of the section. In effect it says: if it be the fact that the common law gives an action of trespass or nuisance against an aviator who flies across another person's land in an unreasonable manner, then we disable such land owner from taking such action against an aviator who behaves in a reasonable fashion, and complies with the Act and the orders in Council and in Convention.

Now we come to the second part of this provision, which I call the enabling part, because it creates a court of action. That is as follows: "But where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in such aircraft, or by any article falling from such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered." Thereby you see the Act creates a statutory cause of action, a new statutory tort.

There may well be in common law a cause of action against a negligent aviator, but here if any material damage or loss is caused to a person or property on the ground the party so injured has an absolute right to recover against the owner of the aircraft, who may be a more substantial person than the pilot, for any loss or damage thus incurred, unless the defendant can show it was the plaintiff's negligence which caused or contributed to the loss or damage.

I give you there the gist of the section. Notice that our law places the liability on the owner, leaving him to recover against any person such as a friend or servant who may be personally responsible for the damage that resulted.

But there is one case in which it is not the owner, and that is in the case of what I may call an "out and out" charter of the aircraft exceeding fourteen days. I mean by "out and out" namely, that no pilot or other member of the crew is taken over by the

charterer. In that case, where there is an "out and out" charter of the aircraft exceeding fourteen days, the statute substitutes the charterer for the owner as the person liable under that section.

There is only one qualification to be made upon that section, and that is made by Section 18, which says that Section 9 does not apply to aircraft belonging to or exclusively employed in the service of His Majesty unless and until it may be made applicable by an Order in Council. No such Order in Council has yet been made. That was merely a desire to protect the Crown against actions for damage done by governmental aircraft.

It is obvious, too, that that Section 9 imposes a compromise, a bargain, between the aviator and the general public, namely, no liability on the aviator for the mere flight of an aircraft over the land of another at a reasonable height and in a reasonable manner, but absolute liability of the owner or charterer of an aircraft for any material loss or damage resulting to any person or property on land. In that fashion has the British Parliament laid the ghost, the *usque ad coelum* ghost, by consigning it *ad inferos*.

Now just a word or two as to one or two other sources of English law relating to aircraft. Today in England, in Great Britain, apart from a few minor matters such as police court prosecutions for low flying and a Scottish decision on ballooning, we have in Great Britain no reported decision upon any aeronautical question, therefore our law, apart from the statute and Orders in Council, has to be sought in the speculative opinions of writers and in the actual advice given by lawyers connected with the aviation industry or making claims against it.

As to the contract of carriage, I think it is generally admitted that there is no reason inherent in the nature of aviation why a corporation which operates aircraft for gain should not be a common carrier, both as to goods and as to passengers,² and that *prima facie* such a corporation is a common carrier, and of course we all know what degree of liability the possession of that status entails.

But in practice, these corporations in England take steps to repudiate that status and the ensuing liability, and legally they are able to do so provided the words they use are unambiguous and otherwise effective. All air carriers who operate between Great Britain and other countries carry both goods and passengers on the basis of certain general transport conditions which have been

2. By English law the degree of liability incurred in the carriage of passengers is quite different from the liability in regard to goods.

negotiated by international agreement and prevail practically throughout the European continent.

Well now, my duty is merely to refer to the beginnings and the development of aerial law and it is obviously quite impossible for me to attempt to give you a complete sketch. I am only going to make one more general remark, and that is upon the alleged analogy between the aircraft and the ship, an analogy which one is very apt to adopt by reason of the many nautical terms that are used in connection with aviation.

Of course, a ship has been endowed by the law with a very peculiar juristic status. Metaphorically, that status is sometimes put like this, by saying that the ship is a floating portion of its own state's territory. That is a dangerous metaphor, and personally I should never dare to state the law like that, but it suffices to illustrate my point that a ship differs from any other kind of movable property, like an automobile, in the fact that it attracts to it certain peculiar characteristics, and in particular attracts to it the jurisdiction of its home state wherever it may be; if on the high seas, exclusive jurisdiction of its home state, if in some other state's territorial water, then a concomitant jurisdiction of its home state, and therefore of course what we call the law of the flag, the law of the nationality of that ship, is always available to regulate the many things that may occur and transactions that may be carried out on such a ship—crimes, torts, contracts, births, deaths, mariages, wills, et cetera.

You can thus see why we must pause before we liken an aircraft to a ship in a wholesale fashion, and apply to it the law of ships, just as if it were a new kind of ship, just as if it differed from a steamer, a coal driven steamer, in the way a motor driven steamer differs from a coal driven steamer. English law has not identified aircraft with ships, and automatically and universally applied to aircraft all the peculiar juristic qualities belonging to the ship. Nevertheless, in several special topics such as salvage service rendered to or by aircraft at sea, our legislature has adopted the maritime analogy and likened aircraft to ships, but any general maritime analogy has been rejected.

It seems to me, if I may venture to say so, that any group of persons who are contemplating legislating with regard to aircraft have got to consider very carefully what attitude they are going to adopt toward that very seductive analogy of the ship, and consider how far they are going to adopt it, consider whether they are going to adopt it wholesale, with all its juristic consequences,