

1932

Proposed Federal Merchant Airship Act and Its Comparison with the Existing Maryland Act

Edgar Allan Poe Jr.

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Edgar Allan Poe Jr., *Proposed Federal Merchant Airship Act and Its Comparison with the Existing Maryland Act*, 3 J. Air L. & Com. 179 (1932)
<https://scholar.smu.edu/jalc/vol3/iss2/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE PROPOSED FEDERAL MERCHANT AIRSHIP ACT AND ITS COMPARISON WITH THE EXISTING MARYLAND ACT

EDGAR ALLAN POE, JR.*

Senator McNary has just introduced into the 72nd Congress, a bill identical to the one introduced last year and above referred to as the "Merchant Airship Act." Just what does this Federal Act seek to accomplish and what are its provisions? Looking upon the Act as a whole, the first impression that one gets is the limitation of its scope. Throughout, it applies specifically and only to air carriers engaged exclusively in foreign commerce and purposely excludes all air carriers engaged in interstate commerce. It even goes further than this, in that in Sections 1, 2, 19 and 20 it only uses the word "airship", although in its numerous other sections, the words "airship and other aircraft" are used consistently. Probably, it was intended that the words "airship and other aircraft" should be used consistently throughout, but a literal interpretation of the phraseology as actually used, makes the four sections above enumerated apply only to the zeppelin or dirigible type of airship, excluding aircraft heavier than air. Furthermore, the Federal Act appears to purposely cover only aircraft engaged in overseas transportation. This is brought out very forcibly by the caption to the Bill and also by the fact that practically the entire Bill is based on United States Statutes, relative to the maritime law of the United States. In fact, the phraseology is so nearly identical to the Harter Act and to other maritime statutes that except for a few small, but exceedingly important, provisions, they are the same, to all intents and purposes.

This, of course, immediately brings this question to the fore—namely, can Congress constitutionally legislate on matters relating solely to air carriers when such legislation is based on the constitutional grant of maritime jurisdiction? The grant of jurisdiction over navigable waters cannot possibly be construed to extend to navigation of the air. However, under the interstate and foreign commerce clause of the constitution, Congress can undoubtedly pass legislation relative to air carriers engaged in interstate and

*Of the Maryland Bar. Member, American Bar Association Committee on Aeronautical Law.

foreign commerce. Due to this far-reaching grant of power, the substantive part of the Proposed Federal Act would probably stand up under a constitutional test, but the Bill goes further than this and attempts to define what procedure shall be used. In fact, the Bill states that proceedings must be brought "in any United States District Court", presumably without a jury. This seems to me to be an attempt on the part of Congress to grant jurisdiction not permissible under the Constitution. An aircraft, while in flight, is not within the admiralty or maritime jurisdiction and Congress is, therefore, without power to give to the District Courts of the United States, as *admiralty* courts of the first instance, authority to hear proceedings for limitation of liability and apportionment of damages with regard to causes of action arising during such flight, except as hereinafter qualified. However, due to the fact, as previously stated, this Bill apparently seeks to limit its application to carriers not only in foreign commerce but in overseas transportation, this criticism may prove to be more theoretical than practical.

Our immediate interest in the relation between aviation and admiralty is in the domain of torts. So, let us suppose an aircraft falls into navigable waters and a passenger is injured in the water or a passing vessel is damaged. The act or omission which caused the aircraft to fall, occurs in the air, but it becomes injuriously effective in the water. Now, under such conditions, may not both the passenger and vessel owner have recourse to admiralty? Under such circumstances, it is well settled in principle, that locality being the test of admiralty jurisdiction in tort, it is the locality of the person or thing injured and not the locality of the origin of the injury that is decisive. Where the injury has its origin on navigable waters but is consummated in the air, it is not within the admiralty jurisdiction, but, conversely, where the consummation of the injury happens on navigable waters, it is within the admiralty jurisdiction, although it originated in the air. Thus it seems reasonably clear that if the occupant of the falling aircraft is injured in navigable waters, admiralty alone has jurisdiction of the cause of action. This certainly is true if locality is the sole test of admiralty jurisdiction and that locality is the sole test has been repeatedly reaffirmed by the highest judicial authority of this country. The Supreme Court has held that:

"It is clearly established that the jurisdiction of admiralty over a maritime tort does not depend on the wrong having been committed on board vessels, but rather upon its having been committed on navigable waters."

The Federal Bill was apparently written with the idea of aiding and assisting the contemplated Goodyear-Zeppelin Corporation. This company has planned to design and build four large type dirigibles to be used in a transatlantic service between ports of the United States and cities in foreign countries. This fact probably explains why the term "airship" was used in four sections of the Bill. "Airship" is in air parlance different from "aircraft" and refers to an aircraft using gas lighter than air as a means of support and having a means of propulsion. Aircraft, on the other hand, means any contrivance for navigation of or flight in the air and includes aircraft both heavier than air and lighter than air. But assuming that the Federal Bill does not contemplate only overseas transportation but that these air carriers, after completing their transatlantic flight, attempt to take passengers to, let us say Berlin, or some other inland city; that after crossing the Atlantic safely, the dirigible explodes somewhere over Germany and numerous passengers are killed or injured; then clearly there would be no maritime jurisdiction and the question would then arise as to whether or not Congress had the power to provide that the limitation of liability provisions in the Bill should be brought in "any United States District Courts". The constitution of the United States provides under Article VII of the Amendments that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Clearly, any action for personal injuries or for loss of property or merchandise would be a common law action and because this is true, the question immediately arises, can Congress pass legislation limiting liability when the constitution of the United States expressly provides that in common law actions, the verdict of the jury is final and conclusive. Here again, this may be an objection more theoretical than practical, because in the vast majority of severe aircraft accidents, very few passengers are injured. Generally, death ensues and, of course, there is no right at common law for a pecuniary recovery, based on wrongful death. Consequently, there being no common law right for an action because of wrongful death, Congress would not be contravening the United States Constitution by passing the liability provisions of the Federal Act, in all cases where passengers were killed rather than injured. But in instances where personal injuries were received and

in all cases where property or merchandise carried by the aircraft was lost or injured, Article VII of the Constitution of the United States would apply, with full force and effect and the legislation authorizing limitation of liability in a District Court of the United States would be unconstitutional and void, unless saved by the theory of a contractual relationship.

Next, there is the grave and exceedingly important question as to why Congress should pass this Bill, temporarily assuming that no legal or technical objections existed. The Bill, as already stated, does not seek to protect by its limitation of liability provisions, any company in the United States doing an interstate business. The interstate air carriers of this country have expended enormous sums of money and have done a colossal amount of work in developing and effecting their network of air routes, which at the present time enmesh the United States from border to border and from ocean to ocean. In spite of the efficiency of their management and their successful efforts to cut costs to a minimum, none of them except one company, whose flying routes make it a special exception, at the present time can show profits from passenger traffic alone. Were it not for the air mail contracts, which amount to a government subsidy, all of them would show loss. The tempo of this country is probably faster than that of any other in the world and its distances between points are stupendous. Consequently, it is particularly fitting, not only to the psychology of the inhabitants but also the geographical set-up of the United States itself, that interstate carriers should receive all the help and encouragement possible. Accidents, of course, at times are unavoidable and where a number of prominent passengers are killed, the cost of settling the claims or paying the verdict, where it is an adverse one, are enormous and immediately establish a large deficit in the company's operating expenses. Insurance premiums are so high that they are almost prohibitive and form a most substantial operating cost. This being so, it can readily be seen why Congress should initiate and pass legislation which will assist the interstate carriers in this country to operate. If aviation is to progress, or even survive, it is necessary that it have some sort of Government aid. This aid must come from one of two sources, either as a subsidy now disguised in the form of mail contracts or else a limitation of liability as expressed in the Federal Act.

At the present time, the Federal Act limits the liability of the owner of any aircraft engaged in foreign commerce for any loss or destruction of any property or merchandise shipped on such

aircraft, or for any loss or injury caused by collision, or for any loss or damage done to such property or merchandise, provided such loss is incurred without the privity or knowledge of such owner, to the value of the interests of such owner in such aircraft and her freight then pending. This limitation of liability as previously stated, has been adopted from the admiralty statutes and it is fair to assume that should this Act become law and should it be held to be constitutional, its application would be interpreted in accordance with similar decisions rendered by the admiralty courts. These courts have held that the value of the vessels and their freight then pending, refers to the value after a collision or stranding, or other injury, and not to the value before such collision or other injury. Generally, in the case of shipping, there is not a total loss. Something is generally salvaged and consequently the shipper losing goods or merchandise, or having them injured, is not without redress. However, in the case of airships and other aircraft, the reverse is true. If a zeppelin explodes, or an airplane crashes, the value of the wreckage is insignificant and consequently there would be little or nothing for the shipper to recover. It would seem, therefore, that it would be more equitable for the limitation of liability to extend to the value of the aircraft before an accident rather than afterwards and appropriate words should be inserted in Section 5 of the Federal Act to cover this.

Another question arises under this Section 5, namely, whether it includes damage caused to persons or property on the ground by the fall of an aircraft or objects falling from said aircraft. It would seem that Section 5 was sufficiently broad for it specifically limits liability by "any loss, damage or injury by collision", or "for any act, matter or thing, loss, damage, or forfeiture done, etc." Certainly, there is nothing in this Section which limits collision to a collision in the air and when an aircraft comes in contact with mother earth, surely a collision exists, both legally and actually.

The whole purpose of the Federal Act is to limit the liability of the aircraft owner and consequently, a broad interpretation of this section would be in keeping with the fundamental object of the entire bill. Here again, the question arises—would such limitation as to parties other than passengers and shippers be legal? The present State laws in the majority of the States unfortunately make "the owner of every aircraft which is operated over the lands or waters of this State, *absolutely* liable for injury to persons or property on the lands or waters beneath caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any objects

therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured." Thus, it is readily seen that the *owner* as such is absolutely liable for injuries to persons and for injuries to property on the lands or waters beneath, and that such liability exists, *whether such owner was negligent or not*. This law is obviously most unfair, in that it makes the owner as such of any aircraft *absolutely liable*, regardless of the conditions existing which caused the accident. A few cases will suffice to explain this.

Let us suppose that an airplane, properly inspected, equipped and operated, has a collision with another plane, due to the negligent operation of the latter. As a result of the collision, the first plane falls upon a house, demolishes it and kills some of the inmates. Suit is then brought against the owner of the plane doing this damage, and all the testimony conclusively shows that the plane doing the injury was without fault. Yet, nevertheless, under the above quoted statute, the defendant owner would be liable.

The same thing would apply should a lightning bolt or any other act of God, which could in no way be anticipated, cause the plane to fall upon the house mentioned. Even if the owner of a plane kept it under lock and key in his private hangar and thieves broke into this hangar and stole the plane, causing the injury already alluded to, due to negligent operation, the owner would still be liable, even if the thief made a full confession and admitted entire responsibility.

Let us go one step further and assume that the thief above referred to negligently crashed this stolen airplane into a gas tank on the outskirts of the City of New York and that as a result the majority of that metropolis was razed to the ground by the ensuing fire. The innocent owner of the plane would theoretically be legally liable for this entire damage, amounting to billions of dollars. It is reasonable to suppose that the authors of this unfortunate piece of legislation did not contemplate such results but this does not alter the fact that the law exists as stated and illustrated. Therefore, if this portion of Section 5 of the Federal Act does not cover injury to persons or property on the ground, it would be most advisable and advantageous to re-write it so that there would be no doubt or difficulty of its application thereto.

Equally in importance with Section 5 of the Federal Act is Section 12. Briefly this 12th Section holds that:

"If the owner of any aircraft engaged in foreign commerce transporting persons, merchandise, or property shall exercise due diligence to make such aircraft in all respects airworthy and properly manned, equipped and supplied, neither the aircraft nor owner, agent, nor charterer shall be responsible for injury or damage resulting from faults or errors in navigation or in the management of said aircraft nor shall the aircraft, her owner, etc., be held liable for losses arising from dangers of the air, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property, or from any deviation in rendering such service."

This Section corresponds to the Harter Act in every detail, with this important exception: The Federal Act includes *persons*, while the Harter Act only covers merchandise or property.

It has been universally held by the Federal Courts that the Harter Act does not apply to claims for loss of baggage or claims for death or personal injury on the ground that such claims have nothing to do with the relations between vessel and cargo. Thus, the present contemplated Federal Act goes far beyond the Harter Act, in that it does include baggage, personal injury, and death claims. Thus, the owner of aircraft, engaged in foreign commerce, will be under no liability to pay damages for death or injury to passengers, or for loss of baggage if the owner of such aircraft exercises "due diligence to make the aircraft in all respects airworthy, properly equipped and supplied." This exemption from liability stands for the benefit of not only the aircraft itself but also her owner, agent or partner and applies even if the loss or injury is caused by "Faults or errors in navigation or in the management" of the aircraft, acts of God, etc. To put it briefly, the owner under the Federal Act will be free of liability for all those accidents which he does not directly control, including *the negligence of his employees engaged in the operation of the aircraft*.

The same objections which were raised in connection with Section 5 apply here with full force and effect, namely, as to whether this total exemption from liability violates the constitutional guarantee of a trial by jury of all common law civil cases. The act is probably constitutional with relation to passengers killed, whether over land or sea because no common law right existed for wrongful death claims. Also, the exemption from liability would probably hold in all cases of injury or damage to persons, merchandise or property, where the place of injury was in navigable waters, because then maritime jurisdiction would exist. But where

the injury to persons, merchandise or property takes place over land rather than over navigable waters, there would be no maritime jurisdiction, and the common law rights guaranteed by the constitution of the United States would apply and the act to this extent might be void and unenforceable, as hereinafter discussed. Just as the Interstate Commerce Commission allows the railroads to limit their liability on passenger baggage, based on a graduated scale or premium payment, so undoubtedly the owner of aircraft engaged in foreign commerce could limit his liability for damage and injury to baggage belonging to the passengers by the same method. But that would still leave open the question of his liability on all common law damage suits for personal injuries occurring anywhere other than in navigable waters.

There is still another question involved in this proposed Federal Act which needs clarifying. As already frequently stated, the Act applies only to carriers in foreign commerce and the Act undertakes to define foreign commerce as follows:

"The term 'foreign commerce' means commerce between the United States or possessions or territories of the United States and foreign countries, or between the United States and possessions or territories of the United States, or between foreign countries. The term 'United States' when used in a geographical sense means the several states and the District of Columbia. The term 'possession of the United States' is including the Panama Canal Zone."

But it is not clear from the terms of the Federal Act whether an aircraft engaged in foreign commerce, as above defined, can or cannot make intermediate stops. If the ultimate destination of the flight governs the determination of whether or not the aircraft is engaged in foreign commerce, then the act will be subject to many abuses, because carriers which are primarily interstate carriers could by extending their routes across the borders of neighboring countries easily take advantage of the exemption of liability and limitation of liability of this Act and thus obtain a very gross and unfair advantage over other competing interstate carriers whose routes would not permit them to do this. For example, a company sending its planes from New York to Los Angeles could, without any loss of time and with very little expense, have as its ultimate destination Agua Caliente, lower California, Mexico. Similarly, a company sending planes from New York to Seattle could use Vancouver as its ultimate destination and planes coming from San Francisco to Detroit could land on the Canadian shore. On the other hand, planes leaving Washington for St.

Louis would be unable to do this and consequently any competition with carriers who might be in a position to use foreign soil as their ultimate destination, would be disastrous and in the long run, probably impossible. Thus, it appears advisable, if not necessary, to definitely clarify this point.

The Federal Act is an exceedingly lengthy bill, comprising 19 pages and I cannot attempt in this article to analyze separately all of the different Sections. I have gone into the liability features of Section 12 with a great deal of thoroughness, because they are by far the most important features of the Bill. Section 3 enumerates a long list of valuable articles such as jewelry, money, etc., and then states that unless these articles are truthfully marked and valued, the owner of the aircraft is not liable for their loss or destruction in any form or manner. Section 4 exempts the owner of any aircraft from loss or damage to merchandise caused by fire, unless such fire is caused by the design or negligence of such owner. Section 5 has been thoroughly discussed. Sections 6, 7 and 8 relate to procedure and have already been carefully gone into. Section 9 states that nothing in the 5 preceding Sections shall be construed to take away the remedy to which any party may be entitled, against the master, officers or members of the crew because of injury or loss of merchandise or property, or on account of any negligence or fraud of such master, officer or members of the crew, even though such master or member of the crew may be an owner or part owner of the aircraft. Its meaning is so clear that no further discussion is needed. Section 10 prohibits any manager, agent, master or owner of any aircraft from covenanting that he shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, storage, custody, care of proper delivery of all such property committed to his charge. This section is self-explanatory and needs no comment. Section 11 makes it unlawful for the owner, master, etc., of any aircraft to enter into any covenant whereby the obligations of the owner of such aircraft to exercise due diligence, properly equip, man, etc., said aircraft and to make said aircraft airworthy or whereby the obligations of the master, officers, etc., to carefully handle and stow the cargo, care for and properly deliver same, shall in any way be lessened or voided. This section is also self-explanatory and needs no comment.

Section 12 has been carefully and thoroughly gone into. Section 13 merely stipulates certain requirements with regard to bills

of lading and makes such a document prima facie evidence of the receipt of the merchandise therein described. Section 14 merely sets forth a fine of Two Thousand Dollars for any violation of Section 13. Section 16 states that general average and salvage shall be payable with regard to aircraft in accordance with the maritime law and shall constitute liens thereon, but permits parties to modify this by contract if they so desire. Section 17 requires that all aircraft shall file with the Secretary of Commerce a true copy of every agreement with another such carrier, and permits the Secretary of Commerce to disprove, cancel, or modify any such agreement, if he finds it unjustly discriminatory or unjustly unfair between carriers.

Section 18 requires every sale, contract of conditional sale, conveyance, mortgage and assignment of mortgage of an aircraft or any interests therein to be registered in the office of the Secretary of Commerce and provides that any such sale, etc., not so recorded shall be void against subsequent purchasers and mortgagees in good faith, without notice. There is then an enumeration of just what must be recorded. This section also provides that a mortgage properly recorded as set forth, shall constitute a lien on the mortgaged airship or other aircraft in the amount of the outstanding indebtedness secured by such aircraft and shall outrank all other liens, except such mortgages as have been previously recorded. The Act then further provides that upon default, such lien may be enforced by the mortgagee by a suit in rem, in equity, and that the court may appoint a receiver to either operate or take possession of the mortgaged aircraft, notwithstanding the fact that the aircraft is in the possession or under the control of the person claiming a possessory common law lien.

Section 19 permits the Secretary of the Navy to authorize members of the Navy to volunteer their services for the operation and/or maintenance of any airship engaged in foreign commerce; the fact that the words "and other aircraft" have been omitted from this section is already commented on.

Section 20 permits the Secretary of the War and/or the Secretary of the Navy, to make any airports under their jurisdiction available for use to transportation companies engaged in foreign commerce by "airship" and then fixes proper compensation. Here again the words "any other aircraft" are omitted. Section 21 consists of a series of definitions.

It is now my purpose to take up the Maryland Act, and, at this point, I would like to state that the Maryland Act is almost identical

to the Federal Act, which has just been discussed. The main point of difference lies in the fact that all the limitations of liability and all the exemptions of liability existing in the Federal Act comply with full force and effect in the Maryland Act, but in addition, the Maryland Act covers all aircraft engaged in *interstate* and *foreign* commerce. Also, the Maryland Act covers in all sections, all aircraft and is never limited to those lighter than air, designated in four sections of the Federal Act as "airships".

It is not my intention in this article to discuss the constitutionality of the Maryland Act. It does not violate the Maryland Constitution in any way except possibly where it attempts to place a limitation of liability for personal injuries. The Maryland Constitution provides in Section 6, as follows:

"The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved."

Thus, it will be seen that the same objection to the Maryland Act exists at this point as exists in the Federal Act, due to the Federal constitutional provision. All damage or loss to baggage can be limited under a contract of carriage just as is now done in railway transportation. All death cases would be subject to the Maryland statute, due to the fact that there was no common law right to sue for wrongful death. The contention may be presented that the Maryland Act attempts to regulate and is a burden upon interstate commerce and consequently is void in toto. I do not believe that this contention is justifiable at the present time because the United States Government has not entered the field covered by the Maryland Act and consequently until the United States Government does enter this field, there is nothing to prevent a state from so legislating. There are some practical and also some theoretical difficulties to be overcome before aircraft carriers can take advantage of the Maryland statute and nearly all of these difficulties arise from and are due to the doctrine of the conflict of laws. In February, 1931, the American Law Institute issued two pamphlets on this subject. These pamphlets represent the very latest word on this doctrine and combine the consensus of opinion of the best legal minds in this country on the application of this very confusing and difficult subject. In determining what law shall apply to contracts, two distinct principles are nearly always involved. The word "contracts" refers to contract of carriage between passengers and air transport operators engaged in carrying

these passengers either from one state into another or from one state into a foreign country—in other words, passenger flying in interstate or foreign commerce. The two principles just alluded to are:

- (1) The law of the place of contracting.
- (2) The law of the place of performance.

"The place of contracting is the State in which the last event necessary to make a contract, occurs." (Section 333, Conflict of Laws.)

"The law of the place of performance is the State where either by specific provision or by interpretation of the language of the promise, the promise is to be performed." (Section 384, Conflict of Laws.)

"The law of the place of contracting determines whether the acceptance of goods or of a passenger for carriage creates an obligation of carriage and when the obligation comes into existence." (Section 365, Conflict of Laws.)

"The law of the place of contracting determines the validity of a contract limiting the carrier's liability." (Section 366, Conflict of Laws.)

Now, with regard to principle two, or "the law of the place of performance": In order to take advantage of this Maryland statute, it would be necessary for every common air carrier to insert in every contract of carriage, a provision providing in effect that all rights and liabilities of the parties thereto arising under said contract, or in connection therewith, or growing out therefrom, shall be determined in accordance with the laws of the State of Maryland. If this is done, principle two will be amply taken care of. Thus, a citizen passenger of Illinois taking off in Indiana and having an accident in Ohio and suing in Philadelphia, would be bound by the Maryland Act, unless the Maryland Act were contrary to the public policy of the forum, namely, Pennsylvania. However, because the terms of the contract were made subject to the laws of Maryland, principle two would be covered. In order to cover principle one, namely, "the law of the place of contracting" it would be necessary for each interstate carrier to incorporate in Maryland and have a resident agent in that State who would be authorized to receive by wire or by telephone, the offer of each individual contract of carriage and then it would be his duty to send a return wire accepting the offer, to the place from which the contemplated passage was to originate.

Telegrams are so quickly dispatched in these times that it is safe to say that not more than one hour would be necessary to complete this contract and generally a shorter period of time would be sufficient. Most of the carrier companies require reservations well in advance of the time of the departure of the plane and con-

sequently it should be comparatively simple to complete this contract before the passenger commences his journey. By these two methods, both principle one and principle two would be covered—i. e., the contract not only would be accepted in Maryland but also would be subject to the laws of Maryland. Thus, under the full faith and credit clause of the Constitution, the Courts of Pennsylvania, here used as an example, would have tremendous difficulty in finding such a contract contrary to the public policy of Pennsylvania.

“A mere difference between the laws of two states will not render the enforcement of a cause of action created in one state contrary to the public policy of the other. * * * There is a strong public policy favoring the enforcement of obligations validly created by the law governing their creation. Denial of enforcement of the following claim will result in an undeserved benefit to the defendant. The desirability of uniform enforcement of rights acquired in other states is especially strong among the states of the United States. The differences in policy among them are of minor nature and for the most part relate to internal affairs. The social interest in uniform enforcement regardless of State's lines is particularly great.” (Conflict of Laws, page 175.)

Of course, if suit were brought in Maryland, the limitation of liability as expressed in the Maryland statute, would apply with full force and effect. Consequently, if it were stipulated in each individual contract of carriage that any breach of contract should be brought only in Maryland, then all plaintiffs, regardless of where the accident occurred, or where the place of departure was, would be compelled to sue the defendant company in Maryland.

“Parties to a contract may provide that all actions for breach of the contract shall be brought only in a certain Court, and the Courts of other states will usually give effect to such a provision; but the requirement can be imposed only by consent of the parties as a term of a contract. If the parties agree it is not like the case of one state prescribing by its statute what the Courts of another state may do.” (Conflict of Laws.)

In this analysis of the two statutes, the following points should be carefully considered:

(1) Is it advantageous for Congress to pass any legislation which grants exemption of liability and limitation of liability to common air carriers engaged in foreign commerce and which purposely excludes similar carriers engaged in interstate commerce?

(2) Is the contemplated Federal legislation sufficiently clear and explicit on all points sought to be covered?

(3) Is the contemplated Federal legislation constitutionally

sound, both with regard to its substantive and procedural provisions?

(4) Does the Maryland statute seek to impose a burden on interstate commerce?

(5) Has the Federal Government already entered the field now covered by the Maryland statute?

(6) Until conflicting legislation is passed by the United States Congress, cannot air transport companies successfully take full advantage of the Maryland statute?

(7) Congress, as far as admiralty jurisdiction is concerned, has complete power over legislation with regard to torts committed on navigable waters. Therefore, if a plane crashes on navigable waters and although the ensuing tort is an admiralty tort rather than one in foreign commerce, due to the fact that its situs is on navigable waters, may or may not Congress, by a reasonable classification of admiralty torts, permit certain limits for liability with regard to torts ensuing from airships and at the same time permit a different basis for liability for torts committed on vessels? In other words, may not the present admiralty statutes remain in effect as far as shipping is concerned but at the same time, may not the McNary Bill validly become effective as far as aircraft is concerned, where in both cases the torts occur on navigable waters and as such, are in the exclusive jurisdiction of admiralty?

(8) Although a jury trial under the Constitution of the United States is required in all common law actions, may or may not Congress, through its power to regulate foreign commerce, either limit the liability as in the McNary Bill, or else do away with all liability, as in the McNary Bill, but at the same time let the jury decide whether, based on the facts adduced in each case, exemption from liability should apply, and if the jury should find that an exemption did not apply, then would the Constitution be violated if the jury were to be permitted to assess damages within the limit set by Congress, as per the McNary Bill, namely, the value of the ship and the cargo then pending. There is still another class of cases for injured persons or property on ground, caused by airships in foreign commerce. Congress, under its power to regulate foreign commerce as above stated, might by law permit passengers and carriers by contract either actually signed or by notices posted in conspicuous places, bind the passengers with the limited liability provisions as accepted by the passengers, either actually or constructively, and backed and made legal by congressional action. But under this same power to regulate foreign com-

merce, can Congress seek to limit or exempt liability for persons and property on the ground, who in no way have any contractual relations whatsoever with the carrier?

(9) Does the word "regulate" as used in the Constitution permit Congress to go to the extent, under the guise of regulation, of practically doing away with the common law right of permitting a passenger to have his damages assessed by a jury, simply by permitting carriers sanctioned by law to force passengers to enter into contractual relations which either exempts or limits the carrier. For this to be reasonable, would not a graduated scale of premium payments, depending on size of insurance risk, taken by each passenger, have to be unlimited in their amounts just as is the practice now on steam railroad with regard to personal luggage. In other words, there is nothing to prevent one at the present time from insuring his baggage for any amount he wishes, provided the premiums are paid. This is a contractual limitation on a former common law right and if Congress saw fit to do so, it undoubtedly could, on the same principle, limit the carrier's liability for injury to passengers in the same manner. But would this same principle hold if the ultimate limitation of liability to be assumed by the carrier were so small as to practically do away with the practical pecuniary result, as in the McNary Bill?

(10) For death claims, no common law right would be involved so Congress could probably, under its regulatory grant, set any limit it saw fit, regardless of the smallness of the limit involved.

(11) As far as procedure is concerned, can Congress force all litigants to sue in the Federal Courts rather than in the State Courts? As far as any admiralty torts are concerned naturally the Federal Courts would have the original and exclusive jurisdiction but can Congress, under its power to regulate foreign commerce, force a man, injured on the ground by an object which was dropped from an airplane, to sue in the Federal Court?

(12) Likewise, can Congress insist that all questions of jurisdiction not arising under the Constitution, be brought in a Federal Court, as between passenger and carrier?

(13) Also, would not the McNary Bill have to have included by its provisions, planes in interstate commerce as well as in foreign commerce, even though it is admitted the planes to be covered by the Bill were to fly only in foreign commerce? In other words, suppose a severe storm blew one of these contemplated zeppelins from New York to Chicago, where it crashed. Would not the Bill for the protection of its own "infant" have to embrace this probability?