Journal of Air Law and Commerce

Volume 3 | Issue 4 Article 9

1932

Book Reviews

BOOK REVIEWS

THE LAW OF THE AIR. By Arnold D. McNair. London: Butterworth & Co., Ltd., 1932. Pp. xv, 249.

Published as the Tagore Law Lectures of 1930, this valuable book offers, in more complete form, the lectures delivered by the author at the Air Law Institute during the summer of 1930. It will thus be particularly welcomed by those who enjoyed Dr. McNair's stimulating and scholarly discussions.

Briefly, the volume contains 165 pages of text and 80 pages of documentary material. The chapters are devoted to the following eleven topics: (1) International Developments, (2) Right of Flight, (3) Liability for Dangerous Things, (4) Statutory Liability, (5) Jurisdiction, (6) Carrier Law, (7) Maritime Analogies, (8) Lien, (9) Charterparties, (10) Insurance, and (11) Miscellaneous. The appendices include: (a) Convention of 1919, (b) Air Navigation Act of 1920, (c) I. A. T. A. Conditions, (d) Warsaw Convention of 1929, and (e) General Transport Conditions of the same Associations as to Passengers and Goods.

The aim of the book is to present the subject from the standpoint of the English law and does not endeavor to offer a comparative treatment. The opening chapter presents a short résumé of the air sovereignty question, includes a running discussion of the CINA Convention, and summarizes the British legislation.

The second and third chapters, on the right of flight and the landowner's remedies, are the most voluminous—and are probably the most valuable to American readers. After marshaling the cases and arguments concerning the *cujus est solum* maxim, the author concludes: "I suggest further that there are only two theories which can be accepted without doing violence to that common sense for which the common law is famous. Those two theories are: (i) *that* prima facie *a surface-owner has ownership of the fixed contents of the air space and the exclusive right of filling the air space with contents,* and alternatively, (ii) the same as (i) with the addition of *ownership of the air space within the limits of an 'area of ordinary user' surrounding and attendant upon the surface and any erections upon it*" (p. 34). To indicate his preference, Dr. McNair adds: "The objection to this second theory is that it involves the ownership of space, which I find difficult to believe possible. I suggest that the first theory adequately enables the surface-owner to claim and the jurist to justify, all the rights and remedies that are necessary for protecting the ownership and enjoyment of the surface and erections upon it" (p. 35). In an appended note, the author summarizes the French, American and Canadian law pertaining to the right of flight.

The third chapter is devoted to common law remedies and suggests the following conclusions: "(1) The mere passage of

an aircraft over my land at a height and in such circumstances as to cause no interference with the reasonable use and enjoyment of it and structures upon it does not afford me an action of trespass. (2) The passage of an aircraft over my land at a height and in such circumstances as to cause interference with the reasonable use and enjoyment of it and structures upon it affords me an action of nuisance, but probably not an action of trespass unless the aircraft comes into contact with the land or something attached to it" (p. 66). It is obvious that the author denies the trespass remedy in cases involving both the upper and lower airspace except, in the latter, where there is some physical contact. Considerable doubt may be raised as to the equal willingness of courts to deny the remedy in cases involving the uncertain, but so-called, "lower air space." On this point, the reviewer has elsewhere expressed his personal views.[1]

The subject of liability, common law and statutory, is contained in Chapters three and four. Relative to the common law liability—apart from that of merely flying over the land of another, already discussed—the author offers two conclusions: (1) An aircraft, either at rest or in flight, does not belong to the category of things dangerous *per se,* and an action against the person responsible for it for damage done by it must be based upon negligence, except when trespass or nuisance lies. (2) In an action based upon negligence the rule of evidence known as *res ipsa loquitur* probably applies" (p. 66). The fourth chapter completes the discussion on the right of flight and remedies by adding the most searching analysis yet made of the statutory provisions contained in the Air Navigation Act of 1920.

The fifth chapter is concerned with jurisdictional questions which arise from acts taking place in aircraft finding themselves in any of the eighteen enumerated locations and, particularly, whether common law or the law maritime is applicable. One of the most valuable portions of the chapter is that which indicates that analogies must not be established merely through terminology. Thus, the writer states, "The use of such nautical terms as 'airship, aircraft, navigation, etc.,' have led us into habits of thought which we might have escaped if we had been able to confine ourselves to terms like 'balloons,' 'flying machines,' 'aeroplanes.' I have no hesitation in submitting the opinion that from a juristic point of view the analogy between a ship and an aircraft is fundamentally wrong and misleading, and the sooner we eradicate it from our minds the better" (p. 91).

Chapter six, on the contract of carriage, deals with well recognized principles of carrier law as applied to air transportation. Written manifestly from the viewpoint of English air services, it is to be expected that the American reader may find certain of his problems unanswered. The attempts to evade common carrier responsibility, certificates of convenience, etc., have, of course, no

1. *Fagg,* "Airspace Ownership and the Right of Flight," 3 JOURNAL OF AIR LAW 400.

place in the present volume. Chapter seven, on maritime analogies, develops the suggestions offered in the fifth chapter.

With the exception of Chapter eight—an excellent discussion of the common law possessory lien—the remaining chapters are extremely brief. The section on insurance seems almost sketchy and could have been developed with profit. The final chapter offers some helpful and needed advice relative to source material.

In addition to the careful and scholarly statement of the English law, the reader will appreciate the clarity of expression and the willingness of the author to frankly state his own beliefs—especially in a field of law where so little is settled that the temptation to "straddle" is very great. Without doubt, this book is the most valuable general text book on British aeronautical law that has yet appeared.

F. D. F.

FREEDOM OF PASSAGE FOR INTERNATIONAL AIR SERVICES. By Dr. L. H. Slotemaker. Leiden: A. W. Sijthoff's Uitgeversmij N. V., 1932. Pp. 117.

"Freedom of Passage for International Air Services" presents an international viewpoint concerning problems of international air lines. The author looks to the future establishment of a universal air net and advocates that before international air navigation has come to its full achievement, and as a necessary condition of arriving at it, "a universal, living and supple legal regulation should be effected, which must be directed towards guaranteeing free traffic to the exclusion of unreasonable obstacles, and which by preference should precede national legislation."

Dr. Slotemaker believes that the difference from overland traffic makes it desirable that for air traffic requirements should be made and rights should be allotted other than those requirements and rights existing for different means of communication. He states, "Any detailed adaptation of the law of the air to the regulations in force for other means of transport is less desirable; rather new legal regulations should be called into being, though in these some basic principles may be adopted from the laws of traffic already prevailing. In any case the desire to hamper as little as possible the natural freedom of movement of this traffic should be considered of paramount importance." He points out that the continents occupy only one-fourth of the surface of the earth, and that the rest is formed by the great oceans where a general freedom of traffic prevails, and he advocates that such a freedom, within the limits of sovereignty, should also be recognized with respect to the ocean of air above the continents.

A history of the international law of the air is given with discussion of the different theories concerning sovereignty and freedom of the air. The Air Navigation Convention of 1919, together with the Ibero-American and Pan American Conventions of 1926 and 1928 are summarized, as well as the bilateral treaties

concluded since 1919. National legislation is briefly analyzed both as to the principle of sovereignty and the requirement of previous authorization from a state for the establishment of an international regular air service over its territory.

The silence of article 15 of the Convention of 1919 as modified by the Protocol of 1929 raises the question of what considerations must prevail when granting or withholding permission from an international air service and the accompanying conditions for its operation. "It is possible that some should be doubtful concerning the spirit intended by those responsible for the Convention," says the author, "but by the text of the recommendation it has now been determined that the present wording of art. 15, par. 4, is meant to be based upon the intention of according freedom of air traffic within reasonable limits. This, however, does not remove the objection to the new wording of the fourth paragraph, viz., that arbitrariness is not by any means excluded. * * *"

For a more generous interpretation an appeal is made preferably to the provision of art. 2 of the Convention of 1919, by which the freedom of innocent passage is guaranteed in times of peace, and art. 24 which makes the aerodromes, open to public use by the national aircraft, also accessible, under the same conditions, for aircraft belonging to the other contracting parties. Besides, reference is made to what has been quoted in the foregoing as an initial attitude of the Aeronautic Commission, viz., "to grant the utmost possible freedom compatible with the security of the State," and finally to the Recommendation adopted by the C. I. N. A. in June, 1929. For these reasons, in judging the question whether a request for permission shall be granted or not (and if so, under what conditions) a State should take into consideration only reasonable motives, in themselves justifiable, and having reference solely to the air line to be instituted. In this connection no other motives should be considered justifiable but those concerning the interests of public health and security, or being within the sphere of customs and police.

Dr. Slotemaker's opinion is that this interpretation, particularly in conjunction with art. 2, is the correct one. In practice he states that the opinion prevails that art. 15 of the Convention or the corresponding provisions in national legislation or in other treaties can be interpreted as a requirement which does not in any way impose any restriction on a country as regards the treatment of foreign air services conducted over its territory.

The extent to which a free and favorable evolution of air traffic is impeded and the way paved for the imposition of unreasonable conditions is shown in the section of his book entitled "The Practice," which is especially interesting for operating companies having international lines which have the practical problems to meet. The author comments that although the redrafting of art. 15 introduced in the Protocol of June, 1929, of itself does not signify any progress for those who desire the utmost possible freedom of air traffic, it has the advantage of making a more liberal application

possible in that a previous consent of the State is not compulsory, but optional. The question is whether the opportunity opened up by the new text will be taken advantage of.

A parallel drawn with other means of transport shows that the freedom of the seas is not comparable to freedom of the air because of the greater dangers from air navigation for the underlying states, but the comparison with traffic on international rivers and in territorial waters via waterways and railways and touching at seaports, shows greater freedom than is permitted to aviation, and the author suggests a redraft of article 15, paragraph 4, which takes into consideration this practice already demonstrated, namely, that reasonable grounds for refusal or withdrawal of permission for international regular air services shall be based upon public health and aerial safety and the laws and regulations relating to customs and general police. He concludes that by mutual collaboration of the participating companies themselves with the air of the international money-market a national and economical world air net will be achieved.

MARGARET LAMBIE.

LE STATUT INTERNATIONAL DE L'ESPACE AÉRIEN. By H. Perrin de Boussac. Paris: Albert Mechelinck, 1931. Pp. 240.

This monograph represents a doctoral dissertation dealing with the general question of international regulation. Its opening chapter again relates the development of aeronautics from antiquity forward, and there follows an additional chapter dealing with the various official and private organizations concerned with the international control of aviation.

In Part II, the three international air navigation conventions are outlined and, in the second chapter, the author develops the main portion of his thesis. The various theories of sovereignty are reviewed and the whole question of nationality of aircraft discussed. The various safety regulations, relative to airworthiness, competency of pilots, prohibited cargo, etc., are enumerated and commented upon. The final section in the chapter pertains to customs regulations as established by Annex H of the CINA Convention.

For a concise summary statement of international regulation, the reader will find the monograph of value. However he will find little not already presented in the leading French texts.

F. D. F.