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# THE JOURNAL OF AIR LAW

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## PENDING CODIFICATION OF AIRCRAFT LIABILITY LAW

### General Statement

JOHN H. WIGMORE\*

This number of the JOURNAL is devoted mainly to the Codification of Aircraft Liability Law, in various aspects. The reason is that the subject is now coming to a head, both nationally and internationally.

The public law of aircraft—their regulation by the State; licenses, routes, traffic rules, and other safety-measures—naturally came first to be formulated. It has been going on—trying to keep up with the traffic!—for nearly twenty years.

1. But why should there be a movement to codify the private aerial law—liabilities to passengers and shippers, liability for terrestrial damage, authority of the commander, and so on? Codification was not what happened in maritime law. And when the steam railway came puffing along with its novelties of fixed tracks and high speed, there was no movement to codify railway law. Nor yet, when the gas-wagon automobile once again revolutionized transport, was there a movement to codify automobile law? There are indeed a few statutory rules. But the hundreds of volumes and thousands of decisions are witness to the slow working-out of the legal rules by judicial reasoning.

So, why this early start at codifying the private law of aircraft?

We shall not try to answer this question. We merely note the fact with commendation, for these codes if successful may save our communities from wasting anew the time and the energy that

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\* Associate Editor of the JOURNAL.

was given to the slow development of the private law rules for vessels and railways and automobiles. Certainly the accumulated experience, and the useful (though competing) analogies, in those transport-types, ought to make easier and safer the task here of anticipatory codification.

2. In the United States, there are three distinct legal regions for such codification: A, International; B, National; C, State.

#### A. INTERNATIONAL

We present in this number of the JOURNAL the results up to 1937 of the work done on an international code of uniform national law (for that is what it really is). This Code, made by treaty, would govern air traffic that passes from one nation to another. It would be still applicable to such traffic while at the same time any one nation's law for domestic traffic might be different. As between the Nations, this codified treaty will occupy the same status as our Federal Interstate-commerce jurisdiction does to our several State intra-state jurisdictions.

Thus far the branches of aircraft private law covered by the international conventions (or drafts) are as follows:

- I. Liability to Passengers and Shippers;
- II. Liability for Terrestrial Damage;
- III. Liability for Collision Damage;
- IV. Registration of Aircraft Title;
- V. Mortgages of Aircraft;
- VI. Attachment of Aircraft;
- VII. Aircraft Commander's Authority;
- VIII. Aircraft Personnel's Contract of Employment;
- IX. Salvage at Sea;
- X. Salvage on Land;
- XI. Lessor's and Lessee's Relative Responsibility;
- XII. Interpretation and Application of These Conventions.

Here in this number of the JOURNAL as assembled in print, for the first time in the English language, the entire series of texts to date. All of them (except No. XI) have been printed from time to time separately in prior issues of the JOURNAL. But now by the courtesy of Mr. Stephen Latchford, Principal Divisional Assistant in the Treaty Division of the Department of State, and of his associate, Mr. Joseph H. Fennell, the text-translations, as given out by that Department, are here collected for convenient reference.

It will be recalled that this movement for international codification of private air law goes back for its beginnings to 1925 (the year before our first Air Commerce Act). In 1923 the French Government had proposed an international conference on the subject; and the First International Conference on Private Aerial Law took place in October, 1925, at Paris; 76 delegates representing 41 nations (but not our own) took part. The practical plan was adopted of organizing a continuing Commission of Experts to prepare draft conventions for submission to successive international governmental conferences.

This Commission the "Comité International Technique d'Experts Juridiques Aériens" (International Technical Commission of Experts in Air Law), having such a long name, is now commonly referred to as the C.I.T.E.J.A.<sup>1</sup> It includes in its membership the leading air law experts of Europe. To its labors, extending over the last twelve years, are due the conventions and drafts here collected.

Our government appointed no members to the C.I.T.E.J.A. during its first nine years (sending only observers). Beginning in 1935 our Government has sent members to the annual meetings of the C.I.T.E.J.A., and sometimes to the interim Committee meetings. Thus it is that the voice of the United States was not heard in the formulation of the earlier drafts.

Nevertheless, the United States in 1934 adhered to the first Convention, the one adopted by the Second International Conference held at Warsaw in 1929.

The Third International Conference was held at Rome in 1933. But its conventions, covering subjects full of problems, have as yet received the adhesion of few nations.

Thus the Warsaw Convention of 1929 (liabilities to passengers and shippers) is as yet the only one that has become binding on the United States, or has received general adherence.

The remaining draft conventions await presentation to the Fourth International Conference—to be held whenever the war clouds blow over.

Meanwhile, the Proceedings of the C.I.T.E.J.A., recorded at its annual plenary meetings and its interim Committee meetings (some twenty volumes in all) remain a treasure-store of argument

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1. N. B. that the French word "comité" is used where we use the word "commission," and that the French word "commission" is used where we say "committee." This perversity of language has led most translators to use the wrong word in English—an error that has passed beyond any power of correction. But in the present article the correct equivalents will be used.

on every aspect of the subject. These Proceedings should have been translated and published from time to time, for the information of our legal profession. It is a reproach to our Government that it has here failed of its duty. The intelligent discussion of the pending Uniform State Acts would have been greatly helped if this repository of experience and argument had been available for our instruction.

#### B. FEDERAL

No Federal Act, to govern the private-law relations of aircraft in interstate commerce, has yet been enacted or even proposed.

Let us hope that it will not be undertaken for some time to come—at least not until a Uniform State Act has been formulated and somewhere adopted. The experience under a Uniform State Act will help to formulate an improved Federal Act. Moreover, by that time, it will be easier to draw with some stability the now hazy boundary-line between Federal and State jurisdiction.

#### C. STATE

Already in 1922 a brief Uniform State Act was formulated by the National Conference on Uniform State Laws and the American Bar Association; and some twenty States adopted it. That Act covered mainly the conditions of lawful use of the air, with reference to injuries done to persons and property on the ground; with some provisions as to jurisdiction. At that period, the main popular interest lay in protecting the terrestrial citizen from injury expected to be suffered from crashes and from annoyances to be caused by low flying. The commercial legal relations had then no practical interest.

But the last ten years have seen an enormous development. Hence the need for an entire re-consideration of the subject in all aspects.

The National Conference undertook this task. The Uniform Regulatory Act (public law) was formulated in 1935, together with the Uniform Airports Act. Meanwhile, in 1934, the National Association of State Aviation Officials formulated a Uniform Regulatory Act, substantially the same in provisions. These Acts, now become the law in several States, are without the present purview.

There remained the private air law. This was now undertaken by a joint Committee, representing the National Conference, the American Law Institute, and the American Bar Association. Wil-

liam A. Schnader of Philadelphia (former Attorney-General of Pennsylvania) was and is chairman; and the present membership (not entirely identical with the original membership) is as follows:<sup>2</sup>

For the National Conference:

*Wm. A. Schnader*, of Philadelphia, Pa., *Chairman*.

*Robert T. Barton, Jr.*, of Richmond, Va.

*Robert K. Bell*, of Ocean City, N. J.

*George G. Bogert*, of Chicago.

*Henry C. Mackall*, of Minneapolis, Minn.

*J. Purdon Wright*, of Baltimore, Md.

For the American Bar Association:

*Clement L. Bouwé*, of Washington, D. C.

*H. A. Hauhurst*, of Cleveland, Ohio.

*George B. Logan*, of St. Louis, Mo.

*Wm. P. McCracken*, of Washington, D. C.

For the American Law Institute:

*Francis H. Bohlen*, of Philadelphia, Pa.

*Nathan William MacChesney*, of Chicago, Ill.

*Edward S. Thurston*, of Cambridge, Mass.

Beginning work in January, 1936, the Committee produced its Tentative Draft No. 1 for presentation at the annual meeting of the American Law Institute at Washington in May, 1937, and at the annual meeting of the National Conference on Uniform State Laws at Kansas City, in September, 1937.

This Tentative Draft No. 1, here published, does not attempt to cover the entire topical scope of the international conventions; perhaps we in this country need never expect to go that far. Under the general title Uniform Air Flight Act, it separates the field into three parts:

The first of these Acts, A, the Uniform Aviation Liability Act, itself covers three separate kinds of liability (each of which would rest on separate principles at common law), viz., liability for injury to persons and property on the ground, liability to passengers and to shippers of goods, and liability to colliding aircraft; as to all of which there are involved questions of insurance, of jurisdiction, of procedure, etc.

(Parenthetically, it may be noted that the first and the third

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2. As research assistant was engaged *Edward C. Sweeney*, of the Illinois Bar, whose articles have appeared in the JOURNAL.

of these heads of liabilities, viz., *injuries on the ground*, and injuries in *collision*, have occupied a very large part of the debates and theoretical lucubrations both in the international drafting and in the uniform State drafting. And yet practically those two legal subjects are of minimum consequence. Experience proves this. As to ground damage from crashes, a leading State aviation official recently told the writer that an estimate of *all* the damage of that kind hitherto done by aircraft would not exceed \$25,000. And as to air-collisions, when an experienced inspector recently was asked how many had occurred, he could not off-hand recall a single one.

Thus, the really important and dominant subject for codified formulation is the second kind of liability above mentioned, viz., *liability to passengers and to shippers of goods*. Until this liability is thoroughly studied and disposed of, we can afford to postpone argument over the subtleties of the other two.

In the part given in this number to the Draft Uniform State Act are included some pages on Insurance and on Transport Contracts.

*Insurance* calls for special consideration. The Draft Act is based on the principle of compulsory insurance with limitation of total recoverable amounts (like the industrial accident legislation). The logic here is simple; it is this: In most aeronautical accidents, it is virtually impossible to prove negligence; hence there will be little chance of recovery if the liability is based on negligence; therefore the liability should be absolute and be covered by insurance; but the insurance must be required, else the weaker lines and the irresponsible individuals would never provide it; but if absolute protection is thus to be given the passenger, he ought to be ready to accept maximum limited amounts, and insurance is unobtainable practically unless such maximum amounts are fixed beforehand.

But insurance rates depend on actuarial experience. Moreover, they call for the voluntary cooperation of the organized insurers with the carriers and with the law. Hence the ultimate practicability of the Uniform State Act, as now drafted, depends upon a just and practicable solution of the insurance problem.

*Transport Tickets* show in their language the terms of liability actually assumed by the airline carriers today. At what points does this liability depart from the terms of the Draft Uniform Act? The answer will show how much adjustment of views is needed,

between legislators and carriers, before a practicable law can be formulated.

The whole subject bristles with details and problems that will require thorough canvassing. No lawyer could form an intelligent opinion merely on perusal of the texts of conventions and drafts here set forth in this number of the JOURNAL. But these texts will furnish a basis of information and discussion for all who are interested.