

1938

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Recommended Citation

Madel Walker Willebrandt, *Comment on Uniform Aviation Liability Act*, 9 J. AIR L. & COM. 675 (1938)
<https://scholar.smu.edu/jalc/vol9/iss4/10>

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COMMENT ON UNIFORM AVIATION LIABILITY ACT*

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Mr. William Schnader has just spoken of the Uniform Aviation Liability Act, the Uniform Law of Air Flight and the Uniform Air Jurisdiction Act. Some uncertainty concerning the recommendation for passage of these laws has arisen by virtue of the fact that Mr. Schnader speaks with the background of experience of many years of association with the development of these proposed measures and many years of experience in authoritative committees. He is the chairman of the Aviation Committee of the National Conference of Commissioners on Uniform State Laws. Last year he was chairman of the Aviation Committee of the American Bar Association in which chairmanship I have the honor this year of succeeding him. But, he is still a distinguished member of our Aviation Committee. General Schnader, as you have seen, believes deeply in the wisdom of passing these measures, and thus acquiring that desired uniformity which we all recognize is essential for the proper development of the aviation industry, safety of flight, and the public confidence in airways as the best means of travel. I would, however, like to make it very clear that the American Bar Association does not, through its Aviation Committee or otherwise, recommend the passage of the measures Mr. Schnader has discussed.

As an individual actively interested in aviation for many years, I wish to speak briefly about the opportunity that it seems to me is presented this year to do constructive work for aviation in both the legal and practical fields.

Those dealing with everyday flying problems, such as most of this body do, are frequently impatient at the fact that lawyers are "ground minded," are steeped in the precedent of real estate law, and are prone to be fearful of results rather than confident that the law, cumbersome as it is, has usually expanded sufficiently to cover with fairly equitable accommodation the expanding, scientific growth of the country. There have, of course, been painful points of maladjustment when scientific development imposed upon the

* Address presented at the Eighth Annual Convention of the National Association of State Aviation Officials, October 13-15, 1938.

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tallow candle legal precedents, the problems of an electric light age. Judges have, however, adjusted the fundamental principles of law to new scientific thoughts. Basic common law has been applied as expert testimony has brought new scientific problems. We have seen it in the field of radio, and it is proving more certainly true each day in the field of aviation. Old principles can be applied to new facts. It has not been necessary to pass many new state laws.

Only a few years ago when as attorney for the company that opened the first combination air and rail transit linking the Pacific with the Atlantic coast, I remember one of our chief problems grew out of the prediction of a multiplicity of trespass suits by land owners who adhered to the *ad coelum* theory of ownership of the air space above their land. A few such cases did arise, but the courts have handled them in such a way as to make the trespass cases at various heights of flight below and above the one established at first so timorously by the Commerce Department, no real handicap to aviation.

Thus in the first ten years of aviation history in the United States, we have found that the doleful predictions of legal trouble from "ground minded" lawyers have been only fears. We have found that it is safe to adhere to the *law of growth* even in this new field.

I make bold to state a few of my hopes for the 1938-39 work of the Aviation Committee of the American Bar Association. I cannot yet speak officially for that committee since its work is not organized. The Committee this year, however, does take up the study of aviation law at a time when it can be extremely helpful not only to the body from which it originates—the American Bar Association—but to other organizations interested in the development of the law of aviation and its application to this rapidly expanding means of transportation. That is because of the establishment of the new centralized Civil Aeronautics Authority in the Federal government. The organization of work under the Authority has been described by men better qualified to speak than I.

The Aeronautics Authority is cutting through the fears of ground minded lawyers.

Everyone concedes that uniformity of law and regulations applying it, is utterly essential. We have been ten years saying that, and trying to get that uniformity by state efforts. We have not succeeded by such methods, and history shows us that there never has been any measure of success in establishing uniformity by get-

ting states to pass uniform laws on subjects which are undergoing quick scientific, month-by-month, change. The net result, therefore, is that such progress as we have made toward uniformity is not of law but of coordinate activity of official bodies set up by federal government and the states.

The federal government has gone farther than we would have thought possible a few years ago in setting up the Authority. True, as Mr. Logan has pointed out, the new law's definitions of flight and of what constitutes interstate commerce go far enough perhaps to impinge upon activities we have always regarded as a proper field for state activity. But, as Mr. Hestor said yesterday, and as we know from the facts thus far developed, the Authority is making an effort to coordinate and not to supplement. I believe the Aviation Committee of the American Bar Association has a remarkable opportunity to study this new federal legislation, particularly with reference to its actual operation in conflict with, or in coordination with, state law, and with the activities of state bodies organized to promote and regulate the aviation industry within state boundaries. In the actual workout of this federal law, should it prove true that it does *not* clash legally with state law, but at the point of possible clash by regulation and a dual activity, it coordinates only, we would have achieved an ideal never attainable in any other way. It seems to me equally true that even though a few points of actual clash should arise between the Federal Authority and the operation of some of the laws of some of the states, the Committee of the American Bar Association can serve most by pointing out those *instances* of conflict, and recommend adjustment. Let us go about it in that way and, together, work to remove the conflict, should any arise, rather than indulge in predictions of usurpation of state rights by federal authority. It is my hope that the American Bar Association Aviation Committee will be able to conduct a comprehensive, serious and sympathetic study this year, on the interactivity of the new law passed by the federal government and the laws of the several states on a similar subject. It is my hope that in its report at the end of the year it may be able to state truly that at certain points where danger of clash seemed to be possible, no clash occurred, that friendly correlation of activities and authority prevented it. In order to conduct this study and make a report which we hope may be informative and helpful, I propose to ask your general counsel, Mr. Logan, who has served ably on the Aviation Committee of the American Bar Association during several

years of that committee's activity, to meet with us as frequently as possible and to act, if he will be willing to do so, as an unofficial member, and advisor of our committee.

We hope that you will inform him so that he can keep our committee informed of practical, actual points of conflict or instances where conflict might have arisen and was avoided in the application of this extension of federal power in your respective states. This kind of work on the part of the committee of the American Bar Association may not be as spectacular or be as quickly appreciated as for us to write a proposed set of regulations or criticisms of federal laws. It, however, seems more useful and more in line with true growth in this new field of law for our committee to serve as a sympathetic clearing-house, not as a body of critical jurists. It is more in line with the philosophy of the greatest jurist, in my opinion, America has ever had—Justice Holmes. During nine precious years Justice Holmes extended me a friendly, kindly, personal and professional interest and often discussed aviation and this new field of law emerging, as other things at first equally new, he stated, had emerged in his experience after the Civil War period. One statement he made, seems to me the text for any body of lawyers trying to study new law, regulatory principles, or for applying existing law to new conditions. Justice Holmes said: "The Constitution of the United States should ever be regarded as the bark of a living tree and ever be applied so as to permit of expanding life within." That is the philosophy that should guide in applying this new law passed by the federal government. If it be applied to permit of expanding aviation life within the states and the United States, it thus can be of inestimable service. Let us observe it, not obstruct it, and cooperate with its administrators in this the first year of its application, bearing in mind the tolerance of Justice Holmes' philosophy in interpreting the field it covers.