The Air Transport Committee continued under the chairmanship of Sir Frederick Tymms for the fall session of 1953 (20th Session of Council). The Assembly at its 7th Session in Brighton (June 1953) had requested that the Organization give first priority to the completion of a report on the subject of airport charges (Resolution A7-18) and the Committee therefore took this subject up first, utilizing a draft report prepared by a working group. The Committee devoted nearly the whole session to amending this draft and presented its final report to the Council at the beginning of its 21st session in February 1954. The Council accepted the report, but decided not to adopt it since it contained a number of conclusions which might be construed as recommendations, and the Assembly had asked for a purely objective report without recommendations. Instead, the Council directed that the report should be circulated to contracting States as a study prepared by the Air Transport Committee. At the same time States' views were to be requested concerning the desirability of convening a special conference on the subject of airport charges. Such a meeting might consider methods of charging and might also review the economic position of international airports and consider measures for improving that position (Resolution passed at 3rd Meeting, 21st Session of Council, 8 February 1954).

The study on airport charges prepared by the Air Transport Committee will be published as an ICAO document. It contains three main parts, (1) an analysis of the global economic position of international airports, (2) a review of methods of charging at airports and (3) a brief discussion of the principles governing the determination of charging levels. The report also contains a quantity of statistical tables and diagrams and some explanatory appendices. The main conclusion of the report is that international air transport does not at present pay its full share, on a global basis, of the costs of the airports it uses and that it could probably afford to pay rather more than it pays at present for these facilities. The report points out, however, that there is great variation between the economic positions of different airports and does not recommend any standardization of the levels of charges or even any uniform increase in those levels.

The ICAO Air Transport Committee's study describes a number of different types of landing charge tariff, but concludes that the simple weight-scale tariff is the best for general purposes, the charge to be related directly to the aircraft's maximum take-off weight as given in its certificate of airworthiness. A single comprehensive charge is preferred over a composite itemized charge and extra charges for facilities and services that are normal concomitants of a commercial landing are not recommended.

**Policy Principles on Charges**

Certain principles of policy were also developed by the airlines (IATA) on airport charges. These principles were submitted to ICAO. While they could not easily be used for specific application to each individual airport,
IATA felt that they would be of some value to individual airport authorities as a basis on which each could resolve its problems and that in this way a sound and equitable structure of airport charges could be attained in the long run.

The principles so far developed by the airlines were as follows:

1. The various airport facilities and services should be classified according to the use made of them and with the object of making a functional allocation of costs among all beneficiaries as follows:

   (a) Basic facilities and services provided to operators of aircraft on a common-user basis, such as the landing area and other facilities for common use.

   (b) Facilities and services occasionally provided to operators of aircraft, normally under private lease or charge arrangements, such as hangar space.

   (c) Facilities provided for government departmental representatives, such as customs, immigration.

   (d) Facilities provided for use of the general public, such as trading concessions, public car-parks, sight-seeing facilities.

2. Air navigation facilities and services for aerodrome and approach control should not be considered as airport facilities and services since they form an integral part of aerial highways and air traffic control.

3. Responsibility for the total annual cost of the basic facilities as mentioned in 1(a) should be borne on an equitable basis by all beneficiaries, i.e., the State, the local community and the operators of aircraft, according to the circumstances at each individual airport, due allowance being made for military potential.

4. Total allocable annual cost of the facilities should include only those costs which are directly related to the requirements of operators of aircraft. This implies the exclusion of costs arising from the provision of over-elaborate installations, or unduly expensive construction work.

5. Allocation of total costs between states or local communities on the one hand and the operators of aircraft on the other hand is by its nature not susceptible of precise computation; therefore, the most reasonable and practicable solution is to take as a basis a division according to elements of cost rather than a percentage figure, as follows:

   (a) Capital expenditure and the annual charges related thereto should be borne by the states and/or local communities, thus reflecting the public service function of the airport, and the fact that the community exercises a large measure of control over the location, design and construction of the airport.

   (b) Maintenance and operating costs should then be borne by operators of aircraft, including state, military and private aircraft operations, commercial non-transport as well as domestic and international transport operations.

6. The operators' share of the costs (mentioned in 5.(b)) should be distributed among operators in accordance with the number of ton-landings and should be expressed as a charge for each landing. In calculating the number of ton-landings to be used as a basis for determining the landing charges, full account should be given to the potential rather than actual utilization of the airport, which means that charges should in some instances be based on increased use of airports in the future.

7. These charges to operators should be constructed according to the following methods:

   (a) Only one single charge should be levied for each landing; no separate passenger service or other similar charges should be made.

   (b) The scale of charges should be based on a straight-line progression according to the all-up weight of the aircraft.
(c) In certain cases special discounts can be given but such discounts should only relate to the nature of operations and always be uniform for all classes of user.

8. The cost of other airport facilities and services provided to individual operators under lease or charge arrangements as mentioned in (1.(b)) should be met by specific charges on the users which would cover the cost of the individual services required.

9. All rates and charges for rendering the facilities and services mentioned in 1(a) and b) should be based upon sound pricing and accounting practices; and information regarding all charges should be readily available to any user.

10. No system should be introduced which discriminates, however, indirectly, in favor of one operator as against another.

11. The cost of airport facilities and services provided to government representatives mentioned in 1.(c) should be borne in full by the departments concerned.

12. The cost of airport facilities and services provided for use of the general public, as mentioned in 1.(d), should in no instance be borne by the operators; any revenue from concessions should be allocated between the airport authorities and the aircraft operators in appropriate proportions.

In setting up these principles, the operators had one very important consideration in mind, namely the effect of these proposals, if accepted, on the current level of airport charges. As the airlines do not have access to detailed statements of airport costs, they could not at this stage discover what would be the effect if the principles enunciated above were applied. They were working in the dark. They were, therefore, only able to utter a general warning as follows:

Should the application of any set of principles involve any increase in the costs borne by the airlines such increase can only be met by higher fares and rates from passengers, freight or mail, or by additional subsidies from Governments if these measures fail to produce more total revenue. The industry has within the last few years been endeavoring, in spite of generally rising costs, to introduce lower levels of fares in order to extend the benefits of air transport to a wider public. These efforts may well be nullified if increases in charges are imposed.

LEGAL SUB-COMMITTEE ON COLLISIONS

The Sub-Committee on Aerial Collisions established by the Legal Committee at its Ninth Session, in September 1953, and composed of Messrs. E. A. Ferreira (Argentina), T. B. Cavalcanti (Brazil), C. Ganns (Brazil), C. S. Booth (Canada), S. Iuul (Denmark), A. Garnault (France), A. Ambrosini (Italy), A. A. Kotaite (Lebanon), J. H. Beekhuis (Netherlands), K. Sidenbladh (Sweden) and K. M. Beaumont (United Kingdom) met in Paris from January 12th to 22nd, 1954 and held fifteen meetings. The Sub-Committee drew up the following draft convention and comments*:

DRAFT CONVENTION ON AERIAL COLLISIONS

CHAPTER I — Principles of Liability

Article 1

1. The provisions of this Convention shall apply to every collision between two or more aircraft in flight, and to other cases where damage

* L. C. Working Draft No. 465, 28/1/54.
is caused to an aircraft in flight, or to persons or property on board thereof, as a result of the operation of another aircraft in flight, even if no actual collision occurred.

2. For the purposes of this Convention, damage to property on board an aircraft shall be deemed to include any compensation for which the operator or carrier, in case of a collision or other interference as mentioned in paragraph 1 of this Article, is held liable to persons on the surface or under any contract of carriage of persons or property, or any contract of employment.

3. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends. In the case of an aircraft lighter than air, the expression "in flight" relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereto.

Note on Article 1 (General).—This article defines the scope of the draft convention in accordance with Article 24 of the Rome Convention of 1952, according to which the Rome Convention shall not apply to damage caused by an aircraft in flight or by any person or thing falling therefrom to an aircraft in flight or to persons or goods on board such aircraft.

The Sub-Committee discussed whether it would be appropriate to give the draft convention a wider application by extending the expression "in flight" to cover other cases where aircraft were in movement under their own power, because similar reasons which underlie the general rules of the draft convention seem to apply to such cases. The result of the discussion was the adoption of the same definition in the draft convention as in the Rome Convention in order to avoid any overlapping of the rules of the two conventions. A minority view, however, was in favor of including within the scope of the draft convention all collisions between aircraft, even if one or more of such aircraft were not in movement.

The article gives no definition of the notion of "collision," which seems unnecessary, since the draft convention applies also to cases similar to those of collision.

Note on Article 1(2).—In accordance with Article 1(1), the draft convention deals with claims for compensation for damage caused to aircraft in flight or to persons or property on board thereof. It is, however, evident that a collision may result in other kinds of damage. For instance, in damage to third persons on the surface, or in claims for compensation under contracts which are made as a result of a collision. Article 1(2) identifies, in cases where an operator or carrier is held liable for such compensation, his claim for recovery with damage caused to property on board his aircraft. The importance of this identification is evident, especially in Article 10 of the convention where, in accordance with the provisions of the Rome Convention, there is prescribed a distribution of the amount available between the different claims for compensation. If an operator who has not been guilty of any negligence is sued under the Rome Convention, and, in accordance therewith has paid compensation to third persons on the surface, he has suffered a loss which is recoverable from the operator who is liable for the collision which caused the damage on the surface. Such a claim will probably have to compete with other claims for damage caused to the other aircraft and to property and persons on board the aircraft, and the Sub-committee has found it preferable to consider such claims of recovery as claims for compensation for damage to property.

It was discussed whether, in case of damage caused to third persons on the surface, the right of recourse of the operator who is held liable under the Rome Convention should be subject to the limits of the draft convention
or of those of the Rome Convention. It was decided, as appears from the present article (cf. Articles 6, 7 and 10), to make the limits of the draft applicable also to such claims.

It must be noted that the question whether there shall be a right of recourse for compensation paid under the Rome Convention in case of a collision, where none of the operators is guilty of negligence, falls outside of the draft convention.

Article 2

1. Liability for the damage contemplated in Article 1 shall, subject to the provisions of Articles 3 and 4, attach to the operator of the aircraft, the operation of which has caused the damage.

2. For the purposes of this Convention the term "operator" shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.

3. (a) A person shall be considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.

   (b) No action shall be brought against a servant or agent of an operator by the person who suffers damage, except where the damage has resulted from a deliberate act or omission of such servant or agent done with intent to cause damage.

4. The provisions of this Article shall not prejudice the liability of other persons who have caused the damage or contributed thereto, nor the liability arising under a contract.

Note on Article 2(1), (2) and (3).—The liability for aerial collision is, under the draft convention, attached to the operator, but, contrary to the system of the Rome Convention, he is not subject to absolute liability, but is only liable when it is proved that he is guilty of negligence. In order to avoid any misunderstanding of the concept of "operator," the draft convention expressly defines what is meant by this, and the definition is in accordance with that of the Rome Convention. The draft convention also reproduces the definition of the Rome Convention relating to the notion of "making use of an aircraft," when it is said that a person shall be considered to be "making use" not only when he is using the aircraft personally, but also, on certain conditions, when it is used by his servants or agents. It appears from this definition that an operator must be considered as having acted negligently in cases where his servant or agent has been guilty of such negligence, even if the operator himself could not be personally blamed for the acts which have caused damage.

It should be noted that it is impossible to bring an action under the draft convention against a servant or agent except in case of wilful misconduct or similar cases. Whether the operator who has been held liable for damage caused by his servants or agents shall have a right of recourse against such servants or agents is not decided by the draft convention, and the solution of this question is therefore left to the national law.

Note on Article 2(4).—This provision says expressly that persons other than the operator may also be liable for damage arising from the collision, but the draft convention contains no provisions concerning the liability of such persons. Further, the draft convention makes a reservation concerning liability arising from contracts. This means that the liability of the carrier
to passengers on board the aircraft is still subject to the provisions of the Warsaw Convention.

**Article 3**

If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than fourteen days, dating from the moment when the right to use commenced, the person from whom such right was derived shall be liable, under the provisions of Article 6 and Article 7, jointly and severally with the operator.

*Note on Article 3.*—Article 3 reproduces Article 3 of the Rome Convention and is based upon the same considerations in principle—namely, that if the operator has the right to use the aircraft for a very limited period only, it seems necessary to hold the original operator liable for such damage as may occur. It cannot be assumed that the other person, who is operator under the draft convention, has taken out the insurance which is necessary to cover his liability under the draft convention, and in many cases his personal assets will be insufficient to pay the claims which may be made in the case of a collision. The system of Article 3 is therefore the following: The person who has obtained the right to use the aircraft for a very limited period is considered to be the operator and is liable as such under the provisions and within the limits of the draft convention. The person from whom the right was derived is liable jointly and severally with the former up to the limits of the draft convention (with the exception in Article 7), irrespective of his personal care or negligence. His liability must therefore be characterized in such cases as absolute but generally limited.

**Article 4**

If a person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has exercised due care to prevent such use, shall be liable, under the provisions of Article 6, jointly and severally with the unlawful user for damage giving a right to compensation under Article 1.

*Note on Article 4.*—This article reproduces in principle Article 4 of the Rome Convention and refers to the case of unlawful use. The provision is similar to that of Article 3, in so far as the owner of the aircraft is jointly and severally liable with the unlawful user, but, while under Article 3 the liability of the person from whom the right was derived is absolute, the liability of the owner under Article 4 is based upon negligence, but with shifting of the burden of proof in so far as it is the owner who must prove that he has not been guilty of negligence, while it usually is the claimant upon whom the burden of proof of negligence is placed. Another difference is that the unlawful user in accordance with Article 7(2), in general, will be liable without any limits, while the owner *ex hypothesi* cannot be liable without limits. For this reason the text refers only to Article 6 and not to Article 7, as in Article 3. A large minority, however, did not share this point of view.

**Article 5**

The operator shall be liable only when it is proved that damage was caused by his negligence or by that of his servants or agents using the aircraft in the course of their employment, whether or not within the scope of their authority.

*Note on Article 5.*—This provision states the general principle of liability: negligence. Contrary to the CITEJA draft and the Brussels Convention
on Collisions between Vessels, the principle of negligence is not expressed by mentioning all the situations in which there shall be no liability—for instance, in cases of fortuitous events, force majeure, etc., but by stating that the damage must be caused by the negligence of the operator or by that of his servants or agents. As mentioned above, it is left to the claimant to prove that such negligence exists, and no presumption of negligence is prescribed for any case of collisions. Article 2(3) of the Rome Convention contains another presumption, when it states that the registered owner shall be presumed to be the operator and be liable as such. There is no need for a similar presumption in the draft convention, and, moreover, it would seem useless since it will be of little importance for a claimant to be entitled to sue a certain person as operator under this convention, when he is unable to prove that this person has caused the collision by his negligence. It must also be noted that, if a person other than the operator is guilty of a collision, he can be sued outside of the draft convention without being entitled to its limits and without being subject to its provisions. In the rare cases in which it may be doubtful whether the owner of an aircraft is the operator or not, the defendant himself will be interested in proving that he is the operator.

CHAPTER II — Extent of Liability

Article 6

1. Subject to the provisions of Article 7, the liability of any person for damage giving right to compensation under Article 1, for each aircraft and incident, shall not exceed: . . . francs.

2. The liability in respect of loss of life or personal injury shall not exceed 500,000 francs per person killed or injured.

3. The sums mentioned in francs in this Article refer to a currency unit consisting of 65 1/2 milligrammes of gold or millesimal fineness 900. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment, or, in cases covered by Article 10, at the date of the allocation.

Note on Article 6(1).—From the beginning of the work of preparing an international convention on aerial collisions, it was realized that the liability of the operator for such collisions should be limited. The Legal Committee has on its work programme an item called "Global Limitation of Liability," the aim of which is to fix a maximum limit for all kinds of liability which an operator may incur. It is obvious that the discussion of this problem would be useless if liability for air collisions were not subject to limits. It has been objected against limitation of liability for collisions that such a principle is inappropriate if liability is based upon negligence, and that liability must therefore be unlimited. This objection, however, does not appear to be relevant since the Rome Convention recognizes a limitation of liability, even in cases where it can be proved that the operator was guilty of a high degree of negligence, the only cases of unlimited liability under the Rome Convention being unlawful use and the case where damage is caused by a deliberate act or omission done with intent to cause damage. On the other hand, it seems inadvisable to limit the liability for collisions in accordance with the principles of the Rome Convention, namely, in accordance with the weight of the aircraft. It will be remembered that the principle of the Rome Convention was criticized by several States as being unsatisfactory, but, as regards damage caused on the surface, it must be admitted that statistically there is a certain correlation between the damage caused by an aircraft and its weight. Concerning aerial collisions, such a
correlation does not exist. A small aircraft may cause the destruction of a very large aircraft and it therefore seems necessary, if liability is to be scaled, that the scale should not be based on the weight of the respective aircraft.

It must not be overlooked that the economic consequences of the limitation of liability may be very different for operators of small aircraft and for other operators, and in order not to enlarge the economic burdens for operators of small private aircraft, it might be found advisable to lay down special rules concerning smaller aircraft. On the other hand, it must be remembered that if negligence is the condition of liability, there seems to be less reason for reducing the liability than when liability is absolute, and the Sub-committee has not been able to make definite proposals with respect to a possible scaling of liability in accordance with factors other than the weight of the aircraft. Therefore, it is suggested to provide for a single high limit applicable to all aircraft, the amount to be left for the consideration of the appropriate authorities.

Note on Article 6(2).—The Sub-committee discussed the question whether the draft convention should contain a special limit of compensation for each person in case of loss of life or personal injury. Objection was raised against such a rule on the ground that it is immoral to have a special limit for such damage, which would in some cases deprive the victims of full compensation even if the person liable was guilty of negligence. On the other hand, it was argued that, under the present Warsaw and Rome Conventions, such a special limit is found, and that such a limit was necessary, in order to avoid conflicting decisions in similar cases in the different States. It was also argued that persons involved in a collision, usually passengers and the members of the crew, will already be protected to a certain extent by their contracts with the carrier or operator, and that it must be left to themselves to provide for further compensation by taking out insurance in case they do not consider the present system adequate. The decision to retain a special limit for bodily injury was taken by a vote of 5 to 2, with one abstention. As regards the amount of the special limit, the opinions of the members were more divergent, in so far as 4 members voted for the retention of the amount of 500,000 gold francs under the Rome Convention, while 4 members wanted the amount to the changed to that of the Warsaw Convention. The choice must be between these two alternatives. A third one can hardly be contemplated. The decision depends mainly upon whether the position of the persons involved in the collision appears to be nearer to that of innocent persons on the surface than to that of the passenger whose claim for compensation is subject to the rules of the Warsaw Convention.

It is obvious, nevertheless, that if it should be decided to scale the limitation of liability in accordance with the weight of the aircraft, it would be necessary to insert a clause in the draft convention similar to that of Article 11(3) of the Rome Convention, containing a definition of what is understood by "weight of an aircraft."

Article 7

1. If the person who suffers damage proves that it was caused by a deliberate act or omission of the person liable, his servants or agents, done with intent to cause damage, the liability shall be unlimited; provided that in the case of such act or omission of such servant or agent, it is also proved that he was acting in the course of his employment and within the scope of his authority.

2. If a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability shall be unlimited.
Note on Article 7.—This article makes the same exceptions from the principle of limitation of liability as those found in Article 12 of the Rome Convention.

Article 8

Whenever, under the provisions of Article 3 or Article 4, two or more persons are liable for damage, the persons who suffer damage shall not be entitled to total compensation greater than the highest indemnity which may be awarded under the provisions of this Convention against any one of the persons liable.

Note on Article 8.—The Sub-committee discussed whether this article, which reproduces in principle Article 13(1) of the Rome Convention, has any practical importance in the draft convention. It was decided, however, to retain the article because, otherwise, it might not be completely clear under all systems of law that the plaintiff in the cases mentioned in Article 3 and Article 4 shall never receive higher compensation for the damage he has suffered than he is entitled to obtain from the person whose liability exceeds that of the other person. It must be remembered that the cases referred to in Articles 3 and 4 are those in which the operator and another person are jointly and severally liable for damage caused by the aircraft in question. In these cases the liability of one of the persons liable will usually be limited, while the liability of the other person may be unlimited, under Article 7. The result of the present article therefore is that in such cases the plaintiff can never obtain compensation exceeding the loss he has sustained and which he is entitled to recover from the person whose liability is unlimited. A minority view, however, found the provision superfluous since it only contains the logical consequence of the system of Article 3 and Article 4.

Article 9

Actions to enforce a right of recourse against the operator or any other person liable under this Convention shall be subject to the provisions of Article 6 and Article 7.

Note on Article 9.—This provision makes the general rule of limitation of liability applicable to rights of recourse. It may be argued that the rule is superfluous since Article 6 leads to the same result; but, in order to avoid any misunderstanding concerning the scope of Articles 6 and 7, it is considered preferable to insert an express provision.

Article 10

If the total amount of the claims established exceeds the limit of liability applicable under the provisions of this Convention, the following rules shall apply, taking into account the provisions of paragraph 2 of Article 6:

(a) If the claims are exclusively in respect of loss of life or personal injury or exclusively in respect of damage to property, such claims shall be reduced in proportion to their respective amounts.

(b) If the claims are both in respect of loss of life or personal injury and in respect of damage to property, one half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life and personal injury and, if insufficient, shall be distributed proportionately between the claims concerned. The remainder of the total sum distributable shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury.
**Note on Article 10.—**This article reproduces Article 14 of the Rome Convention. It should be noted that, in accordance with Article 1(2) of the draft convention, claims for compensation for damage to property are deemed to include, for instance, claims which may be made in recourse for compensation for bodily injury paid under the Rome Convention.

**CHAPTER III — Apportionment of Liability and Rights of Recourse**

**Article 11**

If the damage is caused by the contributory negligence of the operators of two or more aircraft, or of their servants or agents using the aircraft in the course of their employment, whether or not within the scope of their authority, the liability shall be in proportion to the respective degrees of negligence proved. If the proportions cannot be determined, the liability shall be shared equally. In no case, however, except as provided by Article 7, shall the liability of any of the persons liable exceed the limits provided for in Article 6.

**Note on Article 11.—**This article introduces into air law the principle of apportionment of liability, which is a well established principle in maritime law concerning collisions between vessels and which is in several States adopted as a general rule of law with respect to cases of contributory negligence. The provision was adopted by a vote of 6 to 2. The minority was in favor of the solution that each operator should bear his own loss in case of contributory negligence. In the view of the minority such a provision would prevent unnecessary litigation and relieve the courts from the difficulties of establishing degrees of negligence where no real evidence could be obtained.

In the English text the words "contributory negligence" are used; in the French text "faute commune." It was discussed thoroughly whether these two expressions have exactly the same scope, because "negligence" might be understood as not including cases of wilful misconduct. It was, however, pointed out that the phrasing of the English text could not exclude an apportionment of liability in case of wilful misconduct where the other operator was guilty of a high degree of negligence. Under these circumstances it was decided to retain the present wording of the article.

**Article 12**

If owing to limitation of liability under a contract of carriage or of employment, a person suffering damage cannot obtain full compensation from the carrier or operator, the excess may be recovered from persons liable under this Convention, under its provisions and within its limits, and in accordance with the principle of apportionment of liability under Article 10. Nevertheless, the carrier or operator whose liability is limited, as mentioned above, shall not be subject to a claim for recovery of the excess or to an action of recourse for payment of such excess.

**Note on Article 12.—**The intention of this article is, on the one hand, to make it possible for a person who has to a certain extent obtained compensation for damage under a contract, to recover the excess (i.e. the difference between the damage suffered and the compensation under the contract) from a person who is liable under the draft convention. On the other hand, it is also intended to prevent a solution according to which the total liability of a person who is liable to a person both under the draft convention and under a contract, might exceed his contractual liability. If an operator or carrier has been guilty of negligence with the result that a collision arises, but the other operator has also been guilty of negligence, a passenger on board the first aircraft may sue his carrier under the Warsaw Convention, and afterwards under the draft convention sue the operator of the other
aircraft for the amount which he has not obtained under the Warsaw Convention. For this amount, the other operator will only be liable subject to apportionment of liability, and for the compensation he pays to the plaintiff he can have no right of recourse against the former operator or carrier.

It should be noted that the provision does not apply to cases where a passenger cannot sue his carrier under a contract — e.g., stowaways.

**Article 13**

Any person who has paid compensation exceeding that for which he is liable under this Convention, shall be entitled to exercise a right of recourse against any other person liable under this Convention, subject to the provisions and within the limits thereof.

*Note on Article 13.*—It was questioned whether it was possible to include in the draft convention a rule similar to that of Article 4 of the Brussels Convention, according to which no person shall be liable even to a third party, for more than the proportion of damage due from him in accordance with the apportionment. The Sub-committee, however, found such a provision contrary to Article 7 of the Rome Convention and for other reasons inadvisable.

**CHAPTER IV — Rules of Procedure and Limitation of Actions**

*Note on Chapter IV.*—Chapter IV and Chapter V of the draft convention are as a whole a reproduction of the corresponding provisions of the Rome Convention, while the provisions of the Rome Convention concerning security for operators' liability have no equivalent in the draft convention. It must be taken into account that, while it may seem important that an innocent victim on the surface can be sure that he will receive adequate compensation for damage he suffers, similar reasons cannot be recognized for protecting by special securities the persons directly involved in an aerial collision since they are able to take out insurance against the risks which are connected with air transport, including the risk of a collision. It was argued that a chapter on security for liability must be considered as being extremely important, but the majority of the Sub-committee decided not to include any rules on this subject in the draft convention. It may be added that the corresponding chapter in the Rome Convention was exposed to very strong criticism by several of the delegates and it was proposed to delete it completely.

**Article 14**

1. Actions under the provisions of this Convention may be brought only before the courts of the Contracting State where the damage occurred. Nevertheless, by agreement between any one or more claimants and any one or more defendants, such claimants may take action before the courts of any other Contracting State, but no such proceedings shall have the effect of prejudicing in any way the rights of persons who bring actions in the State where the damage occurred. The parties may also agree to submit disputes to arbitration in any Contracting State.

2. Each Contracting State shall take all necessary measures to ensure that the defendant and all other parties interested are notified of any proceedings concerning them and have a fair and adequate opportunity to defend their interests.

3. Each Contracting State shall so far as possible ensure that all actions arising from a single incident and brought in accordance with paragraph 1 of this Article are consolidated for disposal in a single proceeding before the same court.
4. Where any final judgment, including a judgment by default, is pronounced by a court competent in conformity with this Convention, on which execution can be issued according to the procedural law of that court, the judgment shall be enforceable upon compliance with the formalities prescribed by the laws of the Contracting State, or of any territory, State or province thereof, where execution is applied for:

(a) in the Contracting State where the judgment debtor has his residence or principal place of business or,

(b) if the assets available in that State and in the State where the judgment was pronounced are insufficient to satisfy the judgment, in any other Contracting State where the judgment debtor has assets.

5. Notwithstanding the provisions of paragraph 4 of this Article, the court to which application is made for execution may refuse to issue execution if it is proved that any of the following circumstances exist:

(a) the judgment was given by default and the defendant did not acquire knowledge of the proceedings in sufficient time to act upon it;

(b) the defendant was not given a fair and adequate opportunity to defend his interests;

(c) the judgment is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgment or an arbitral award which, under the law of the State where execution is sought, is recognized as final and conclusive;

(d) the judgment has been obtained by fraud of any of the parties;

(e) the right to enforce the judgment is not vested in the person by whom the application for execution is made.

6. The merits of the case may not be reopened in proceedings for execution under paragraph 4 of this Article.

7. The court to which application for execution is made may also refuse to issue execution if the judgment concerned is contrary to the public policy of the State in which execution is requested.

8. If, in proceedings brought according to paragraph 4 of this Article, execution of any judgment is refused on any of the grounds referred to in sub-paragraphs (a), (b) or (d) of paragraph 5 or paragraph 7 of this Article, the claimant shall be entitled to bring a new action before the courts of the State where execution has been refused. The judgment rendered in such new action may not result in the total compensation awarded exceeding the limits applicable under the provisions of this Convention. In such new action the previous judgment shall be a defence only to the extent to which it has been satisfied. The previous judgment shall cease to be enforceable as soon as the new action has been started.

The right to bring a new action under this paragraph shall, notwithstanding the provisions of Article 15, be subject to a period of limitation of one year from the date on which the claimant has received notification of the refusal to execute the judgment.

9. Notwithstanding the provisions of paragraph 4 of this Article, the court to which application for execution is made shall refuse execution of any judgment rendered by a court of a State other than that in which the damage occurred until all the judgments rendered in that State have been satisfied.

10. Where a judgment is rendered enforceable under this Article, payment of costs recoverable under the judgment shall also be enforceable. Nevertheless the court applied to for execution may, on the application of the judgment debtor, limit the amount of such costs to a sum equal to ten per centum of the amount for which the judgment is rendered enforceable. The limits of liability prescribed by the Convention shall be exclusive of costs.
11. Interest not exceeding four per centum per annum may be allowed on the judgment debt from the date of the judgment in respect of which execution is granted.

12. An application for execution of a judgment to which paragraph 4 of this Article applies must be made within five years from the date when such judgment became final.

Note on Article 14.—Article 14 reproduces the corresponding article of the Rome Convention with small changes. It must, for instance, be noted that there is no reference in paragraph 9 to a period within which claims shall be presented in order to have priority over other claims. The reason is that it is found inadvisable to establish a system according to which, in the first place, a provisional distribution of the amount available shall take place, and in the second place a final distribution. Such a system may be natural as regards third persons on the surface, but will probably be without practical value as regards persons involved in a collision. The most important question under Article 14 is whether cases under the draft convention may be brought before one or more courts. In the Rome Convention, all suits under the Convention shall in principle be brought before the court of the place where the damage occurred. In the Warsaw Convention, the plaintiff has the choice between several courts, and a similar rule was found in the CITEJA draft. It seems advisable, as far as possible, to unify the rules of forum in the different conventions, and during the discussion in the Sub-committee it was suggested to solve the problem in accordance with the provisions of the Warsaw Convention. The majority of the Sub-committee was, however, in favor of the system which is found in the Rome Convention, and wished to restrict the exception which is found there concerning agreements between the parties about other courts, since the majority found it necessary to recognize only those agreements to which all persons involved in a collision were parties. When it is found necessary to recognize only one court as competent, the reason is that the draft convention to a certain extent is based upon the principle of apportionment of liability, and therefore the possibility that the apportionment may be made in different ways in different courts must be avoided. Therefore, a choice must be made in the draft convention between several possible courts, with the exclusion of all other courts, and the only forum which has a natural preference to other courts is that of the place where the damage occurred. While under the Rome Convention the question of evidence plays no important role, it is obvious in case of a collision where liability possibly will be apportioned in accordance with the negligence proved, that evidence is available, and such evidence will probably be easier to obtain at the place where the damage occurred than in any other place. The minority which favored an extension of the application of the draft convention (see Article 17) pointed out that, if such an extension were accepted, it would be necessary to give up the single forum solution.

Article 15

1. Actions under this Convention shall not be admissible after a period of three years from the date of the incident which caused the damage.

2. If an operator or carrier or any other person is sued for damage arising from a collision, he may, by giving notice thereof to the person against whom he may have a right of recourse, reserve such right. The period referred to in paragraph 1 of this Article, to which the right of action of recourse is subject, shall be suspended until the original claim has been disposed of by final judgment or settlement. In other cases the grounds for suspension or interruption of the period
referred to in paragraph 1 of this Article shall be determined by the law of the court trying the action.

*Note on Article 15(1).*—The period of limitation is three years taking into account that the corresponding limitation prescribed by the Warsaw and the Rome Conventions is two years. Before claims under these conventions have been settled, it will in many cases be impossible to decide what claims can be brought under the draft convention.

*Note on Article 15(2).*—In view of the fact that many of the claims under the draft convention will be actions of recourse, it will probably in many cases be a long time before the claims can be brought before the courts, and the limitation of three years of paragraph 1 will therefore very often be insufficient for the plaintiffs. For these reasons, paragraph 2 provides for a special rule of suspension of the period of limitation in such a way that it is only necessary for a plaintiff who may have a right of recourse based upon a claim brought against himself to give notice thereof to the person against whom he wishes to reserve his right of recourse. When such notice has been given, the period of limitation is suspended with respect to the action of recourse, but as soon as the claim upon which the right of recourse is based is finally settled, the suspension ceases, with the result that the action of recourse must be brought before the court within the remaining part of the period of limitation. With respect to the phrasing of the Article, it must be noted that the expression "prescription" has been avoided in the French text, since it might cause difficulties in interpretation resulting from the difference between "prescription" and "déchéance." The present phrasing is extended to make it clear that, when the period of three years, with possible extensions due to suspension, has elapsed, the possibility of bringing the action before the court shall be excluded.

**Article 16**

In the event of the death of the person liable, any action under the provisions of this Convention shall lie against those legally responsible for his obligations.

**CHAPTER V—Application of the Convention and General Provisions**

**Article 17**

This Convention applies to damage contemplated in Article 1 caused in the territory of a Contracting State when at least one of the aircraft involved is registered in the territory of another Contracting State.

*Note on Article 17.*—The territorial scope of the draft convention is rather limited and a minority proposed to extend the application of the draft convention also to cases where the collision takes place over the high seas or in the territory of non-contracting States. As regards collision over the high seas, it was, however, questioned whether there was any practical need for such a provision since in case of a collision over the high seas, it will hardly be possible to prove the negligence upon which liability according to this draft convention shall be based. With respect to a collision caused in the territory of a non-contracting State, it must at least be a condition for the wider application of the draft convention that more than one aircraft is registered in contracting States. But, even with this reservation, it seems inadvisable to extend the application of the draft convention to such cases. If a collision takes place in the territory of a non-contracting State, the courts of this State will, in accordance with the general rules of procedure, be competent to hear any case which arises from such a collision, and it is not possible by the Convention, on one hand, to impose upon the courts of a
non-contracting State the obligation of deciding cases in accordance with the provisions of the Convention. On the other hand, it seems difficult to restrict the competence of the courts in the State where the collision occurred by giving other courts competence under the draft convention; and even if this solution was adopted, it still remains very doubtful what other courts should be competent to try cases arising from such a collision.

Article 18

This convention shall not apply to damage caused to or by military, customs or police aircraft.

Article 19

Contracting States will, as far as possible, facilitate payment of compensation under the provisions of this Convention in the currency of the State of the claimant.

Article 20

If legislative measures are necessary in any Contracting State to give effect to this Convention, the Secretary General of the International Civil Aviation Organization shall be informed forthwith of the measures so taken.

Article 21

For the purposes of this Convention:

— "Persons" means any natural or legal person, including a State.
— "Contracting State" means a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.
— "Territory of a State" means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible.

INTERNATIONAL AIR TRANSPORT ASSOCIATION

TRAFFIC CONFERENCES, HONOLULU, NOVEMBER 2ND TO 22ND, 1953

The IATA Traffic Conferences met in Honolulu from November 2nd to 22nd, 1953 and agreed to 423 unanimous resolutions, covering more than 30,000 rates and fares and related subjects. The major features of the agreements were these:

Completion of the air tourist network around the world by provision for trans-Pacific tourist class. Addition of tourist class over the mid-Atlantic. Worldwide standardization of baggage allowances for both tourist and first class passengers at 44 and 66 pounds respectively. Readjustments of first class and tourist fare levels in many parts of the world after the first 18 months' experience of their relationship. Worldwide agreement on many phases of the conditions of tourist service which differentiate it from first class. Initiation of new quantity discounts on scheduled air cargo service in some parts of the world. A new universal standard code for acceptance, labelling and handling of special or "restricted" cargoes. Adoption of a worldwide standard Conditions of Carriage (Rules Tariff) for Passengers and Cargo. See H. Drion, "Towards A Uniform Interpretation of the Private Air Law Conventions" on uniform conditions of contract and carriage, 19 Jrl. of Air Law & Com. 423, (Autumn, 1952).
INTERNATIONAL TOURIST CONDITIONS

It was noted that the airlines were closer to worldwide agreement on standards for tourist class as the kind of travel which would give the public the most transportation, with the fewest frills, for the lowest possible price.

There would be some discrepancies in standards for first and tourist because they were still in a transitional period, working with aircraft designed and built for first class transport before international tourist started. However, substantial uniformity on seating accommodation, baggage allowances, cabin attendants, meal service, bar facilities, "give-aways" and the like have been attained.

Agreements on seating densities set the minimum number of seats which could be offered in tourist aircraft of a given type and range from 21 in some types of DC-3s to 107 in two-decker Breguets. A complete study of both traffic and technical aspects of tourist seating densities would be conducted during the coming year by IATA.

Baggage allowances throughout the world have been standardized at 20 kilograms (44 pounds) for tourists and 30 kilograms (66 pounds) for first class. Previous allowances had ranged from 33 lbs. on short European journeys to 88 lbs. on very long flights. All excess baggage transported with the passenger would be charged at a straight one per cent of the one-way adult fare.

No alcohol would be sold or served on tourist aircraft in the Western Hemisphere or across the Pacific. Elsewhere, it would only be sold at specified minimum prices. The number of cabin attendants allowed for tourist class would depend to some extent on the area in which the service operated. In the Western Hemisphere and across the Pacific, a maximum of one on DC-3 aircraft and two on all others would be allowed. In Europe and on routes between Europe and the Far East, there would be a maximum of three attendants. The transatlantic allowances would be two attendants for 60 passengers and three for any larger number.

MIXED CLASS AIRCRAFT

Aircraft carrying both tourist and first class passengers, which would be used by about 15 airlines, were allowed under IATA Conference Resolutions. In order to assure proper economies and good passenger relations, these stipulated that the two classes in mixed aircraft should be kept effectively separated and that tourist accommodation should be the same in proportion to that provided in all-tourist planes.

ANALYSIS OF FARES AND RATES

Area-by-area highlights of the fares agreements of the IATA Traffic Conferences could be summed up as follows:

Trans-Pacific — The Conferences agreed that tourist service across all three of the Pacific routes would begin April 1 next between North America on the one hand and Australia and New Zealand; Malaya, Siam, Hong Kong and the Philippines; and Japan and Korea. Tourist fares over all three routes would run about 25 per cent below existing first class fares, which would themselves remain unchanged except for a few upward adjustments of $35 to $50 in fares between North America and Singapore, Sydney and Hong Kong. Fares would remain stable throughout the year and both tourist and first class would be subject to the usual 10 per cent round trip discount. Examples of the new low-cost Pacific tourist fares, on a one-way basis, are Tokyo-San Francisco, $488; Manila and Hong Kong-San Francisco, $550; and Sydney-Vancouver, $540. International one-way tourist fares from Honolulu to the west would include $386 to Tokyo, $486 to Manila, and $436 to Sydney.
Western Hemisphere — The price of air transport in international routes in the Western Hemisphere would remain unchanged except for the addition of a few new points to the tourist service network in the Caribbean area and some readjustments of individual rates and fares which were described as “a tidying-up job.”

Transatlantic — On the important North Atlantic route, the IATA Conferences voted to narrow slightly the differential between tourist and first class fares and to apply small increases to both to meet rising costs. The basic North Atlantic fare between London and New York will be $400 one way and $720 round trip, as against the present $395 and $711. The tourist fares would be $290 one-way and $522 round trip, as against $275 and $495 at present. Off-season round trip fares, from November 1st through March 31st, would be $640 first class and $425 Tourist, as against the present $611 and $425. New tourist services across the Atlantic to Lisbon would be inaugurated.

Fares on the mid-Atlantic route between the Americas and Europe would remain largely unchanged until October 1st, 1954, when tourist services across this route would be introduced. After that date, there would be upward adjustments in first class fares. First class fares between Europe and South America over the South Atlantic would rise about 7 per cent, due largely to currency fluctuations.

Europe — On the basis of eight months’ trial and error since the first introduction of tourist fares into Europe last May, the IATA Conferences voted a number of readjustments in various sector fares in Europe, with slight increases on short routes to compensate for increased free baggage allowances, and slight decreases on longer routes. There would be a better balance between frequencies and amounts of first and tourist class service in Europe and the price differential between them would remain at 15 to 20 per cent.

In addition to the expansion of tourist network itself, the Conferences also agreed upon “special tourist” services between the North of England and Scotland and Scandinavia which would permit further reductions of 10 per cent below tourist in 28-seater DC-3 aircraft.

Europe-Africa — Small increases had been agreed for both tourist and first class Europe-Africa fares, ranging from 5 pounds sterling on the London-Johannesburg fare to five per cent on other fares. The differential between the two classes would remain at 15 to 20 per cent. In addition, new “B” class services in older, slower, non-pressurized aircraft had been agreed between Cyprus and Khartoum at fares 10 per cent below tourist.

Europe-Middle East — Fares between Europe and the Middle East would rise about 10 per cent for both tourist and first class. Tourist fares would run about 18 per cent below first, and fares on the existing “B” class network would be about 12 per cent below tourist.

Europe-India — The London-Bombay off-season fare from September 15th to April 15th would continue at 100 pounds sterling, but the on-season first class fares would be increased five pounds. Tourist fares would go up about three per cent.

Europe-Far East — Fares from Europe to Singapore and Tokyo would be adjusted along various sectors of the route by increases ranging up to 10 per cent on both tourist and first class. Fares between Europe and Australia, and between India and East Africa would remain unchanged.

Far East — First class fares within the Far East and in the South Pacific would generally remain at their present levels, and tourist fares would be introduced on a number of routes at fares about 20 per cent below first. In addition, there would be a special $222 round-trip 30-day excursion between Tokyo and Hong Kong at 30 percent below normal round-trip.
CARGO RATES

Rates for scheduled international air cargo would generally remain as they are, except for a five per cent increase between Europe and points in the Middle East, Far East, Africa and South America. A new bulk discount of 30 per cent for shipments over 440 lbs. (200 kgs.) would be allowed on the transatlantic and North and Central Pacific routes. As a result of representations by the United Nations Educational Scientific and Cultural Organization (UNESCO), and to assist international cultural exchange, the IATA airlines voted to extend to Europe 50 per cent cargo discounts for books which already applied elsewhere.

RESTRICTED ARTICLES

A new set of cargo regulations for the international airlines which would allow shipments of such special cargoes as radioactive isotopes for medical purposes throughout the world on an interline basis had been also approved. The new regulations made the airlines the first form of transport to have standard worldwide rules for acceptance and treatment of cargoes which required special handling. Because of existing differences in procedures, these "restricted articles" had not been movable between many points which were connected only by the services of two or more carriers. Now, however, commodities such as radioactive isotopes, which had very short effective lives, and could often be transported only by air, would be available in territories which they could not reach before. The new regulations should also facilitate shipments on interline basis of water purifiers, chemicals, disinfectants and similar goods which must be rushed in bulk into disaster areas.

The new code was the result of almost three years of study and drafting by a special airlines working group. It provided for the classification, certification, labelling and packaging of several thousand commodities which required special stowage and handling and enumerated those which the airlines would not carry at all.

In the case of radioactive isotopes, the code required that they be kept at specified distances from human beings; be shielded in lead; and that no single aircraft might carry more than four packages of the material, each emitting no more than 10 milliroentgens per hour of all types of radiation. Other restricted articles included corrosives and caustics, gases and inflammable substances. Some were carried only on all-cargo aircraft. Included in the new code were standard pictorial labels which used symbols as well as color codes to alert all cargo handlers to the kind of material involved and indicated the special treatment required. The new labels would help overcome language difficulties and eliminate the risk of occasional color blindness among cargo-handlers. Radioactive materials would have a new symbol based upon one which had been discussed jointly by American and British atomic energy control authorities—a white cloud emitting jagged rays against a red or blue background.

While the IATA resolutions do not become effective until all interested governments agree, a number of states have already approved and the new code and its labels would probably be progressively introduced by IATA member airlines. Provisions of the new code have been made flexible so that more rigid local requirements could be met within the framework of the worldwide standards, and so that new commodities could be added or other changes made.
IATA CONDITIONS OF CARRIAGE—PASSENGERS AND BAGGAGE—CARGO

After five years of drafting a standard set of rules governing the carriage of passengers and cargo has been put before the IATA Traffic Conferences and unanimously adopted as a Conference Resolution effective January 1st, 1955. As of that date, IATA airlines shall include in their Conditions of Carriage or Rules Tariff certain uniform rules which were agreed upon in Honolulu. These rules cover a wide variety of subjects including the validity of tickets, stopovers, fares, revised routings, reservations, refusal to carry, cancellation of flights, baggage regulations, rules relating to schedules, delays, refunds and finally rules relating to liability of the carrier, limitation of claims and actions. These Conditions of Carriage have been adopted in two basic parts; one deals with passengers and baggage and the other with cargo.

The adoption of these uniform Conditions by the Traffic Conferences was considered to be a great step forward in the conduct of interline air transport industry. For the first time IATA airlines will be able to accept an interline ticket or an air waybill with the knowledge that the conditions promulgated by the issuing carrier are identical with their own. For the first time, carriers, operating under a legal system, which requires that tariffs or conditions be available for inspection by passengers and shippers, can have the full confidence that this requirement has been largely met.

It should be noted that the adoption of the Conditions of Carriage does not obligate carriers to comply with a specific form in which the uniform Conditions of Carriage are to be published; nor is there any requirement as to what additional provisions will be set forth by carriers in their Rules Tariff and General Conditions of Carriage. It is understood, however, that carriers will not add to this set of Rules provisions altering the meaning or limiting the application of the basic Conditions of Carriage adopted in Honolulu.
INTERNATIONAL OBSERVATIONS AND COMMENTS ON CASES

BATORY VS. SEAPLANE

Lambros Sea Plane Base (Libelant) against M/S Batory, Gdynia America Shipping Line Ltd., (Claimant Respondent), United States District Court, Southern District of New York, N. Y. Dec. 7, 1953. It was provided by the Convention of Paris 1919 (Art. 23) that the principles of Maritime Law should apply to the Salvage of Aircraft wrecked at sea unless there was special agreement to the contrary. The Paris Convention has, however, now been superseded by the Chicago Convention of 1944 which contains no provisions as to salvage. The Salvage of Aircraft at Sea Convention of 1938 is yet to be ratified by any signatory party: as such it has no legal status in International Air Law. Though no useful purpose would be served by examining in detail its provisions, yet Art. 2(2) is worthy of note as “the master of a vessel is bound to render assistance to any person who is in danger of being lost at sea in an aircraft or as the result of a casualty to an aircraft. . . . Salvage means any help which can be given to a person at sea in danger of being lost having regard to the differences between maritime and aerial navigation. The Convention does not expressly impose any obligation to salve ships, aircraft or other property, but provision is made for such service. (Shawcross and Beaumont p. 503-504).”

According to English Law, by the Civil Aviation Act of 1949 Sec. 51, “any services rendered in assisting or saving life from or in saving the cargo or apparel of, an aircraft in, on or over the sea . . . shall be deemed to be salvage services.”

As such there was up to the present case under discussion no law pertaining to salvage of aircraft. The importance of the decision contained in the Batory case lies in the three distinct legal principles evolved regarding salvage of aircraft.

(i) that a seaplane as a species of aircraft is to be deemed a vessel, (ii) that it is a subject of salvage claim, (iii) that there should be no negligence in rendering a salvage aid.

First we will give a brief survey of the struggle that ensued to establish the first rule. In United States v. Peoples (DCND. California 1943. 50 Fed. Sup. 462) for the first time under a criminal statute, a seaplane was not considered a “vessel” when a stowaway was charged for the misdemeanor of secreting himself in a naval transport plane. Under the Civil Action there is a long line of authority which did not hold an aircraft to be a vessel. Historically speaking, in Andrew Foss v. Crawford Bros. June 27, 1914, 215 Fed. 269. (USAvR 1928 p. 1) in an action in rem for repairs to an aeroplane, Cushman D. J. said, “They are neither of the land nor sea and not being of the sea or restricted in their activities to navigable waters, they are not maritime.” (Ibid., p. 3.) In Reinhardt v. Newport Flying Service 22 Nov. 1921 (Ibid., p. 4) an attempt was made by Cardoza J. to equate a seaplane to a vessel. By analogy he contended that if

(1) a canal boat drawn by horses, Robert v. Parsons; (ii) a bath-house upon floats, Public Bath; (iii) a raft, Mary; (iv) a scow, Sunbeam

or anything upon the water where movement is predominant rather than fixity or permanence, could be held a vessel then, the attributes of a seaplane justified its name as a means of water transportation.

Since this decision there emerged two acts passed by Congress—

(1) The Civil Aeronautics Act, 49 U.S.C.A. Sec. 401 etc.

1 P. Balachandrian, Member of the Institute of International Air Law.
(2) The Air Commerce Act 1926, 49 U.S.C.A. Sec. 171 etc. whose provisions exclude aircraft of every description from the term "vessel." This led the court to express a forceful but subtle opinion in cases like Noakes v. Imperial Airways Ltd. D.C. 1939 29 Fed. Sup. 412-413. (1939 USAvR 1) by distinguishing between the primary and incidental activities of this novel instrumentality. To alight on water when a seaplane reached its destination is purely incidental and therefore it did not function as a vessel.

Facts of the Case

From these decisions we can safely go the Batory Case whose facts are briefly as follows: The pilot of a single seater seaplane, 50 miles from New York and 25 miles south of Fire Island called for help from the commander of the Batory. The pilot's story was that he had no fuel and was not equipped with a compass, a story discovered later which in fact was not true. The Batory commander rescued both the pilot and the seaplane and proceeded on his voyage to Southampton where he handed over the aircraft to Her Majesty's Receiver of Wrecks in accordance with the British Law to await collection by the true owner. Shortly before the ship's arrival at Southampton the owner of the aircraft demanded the return of the plane, for which the owners of the Batory counterdemanded transport charges. This being refused the plane was sold by public auction and proceeds satisfied storage charges.

The plane-owner's chief contention was that a seaplane was not a proper subject of salvage. To this McCrobey D. J. in the court below positively disagreed and referred to the U. S. Code mentioned supra which defined the word "vessel" also quoted above. As such he contended that if by analogy (i) a canal boat drawn by horses, The Robert W. Parsons, 191 W.S. 17, 29-33; (ii) a floating dredge, Ellis v. U. S., 206 U. S. 246-249; (iii) a scow, The Sunbeam (2 C-A) 195 Fed. 468; (iv) a Bathhouse built on boats, The Public Bath, No. 13, 61 Fed. 692 (SD. N.Y.); (v) a raft, The Mary, 123 Fed. 609; (vi) a floating fish net, Colley v. Todd Packing Co., 198 A.M.C. 181, 77 F. Sup. 956 could be included in the term "vessel" then such an analogy could be extended to a seaplane. The learned Judge further cited Reinhardt's case quoted above and commented on the valuable service rendered by the Batory. Here we have the wisdom of Solomon speaking again. But its pride of place was once again apparently threatened.

In the appeal court Kaufman D. J. reversed the judgment but on different grounds. The learned Judge dwelt at length on the qualities of a reasonable man and whether the captain of the Batory measured up to such a mythical creature. He also commented on the motives that prompted the Batory commander to radio to New York Times "to create a favorable atmosphere of publicity" (page 7 in the brief) while agreeing with the plane-owner's contention (a) "that a salver is entitled to recover salvage even if it later proved that the salvage services requested were not needed." (p. 9) (b) "that prospective salvors should be encouraged to render speedy assistance when a vessel appears in peril," (p. 8); "in none of the cases cited was it urged with the force urged here that the alleged salver was negligent and reckless to the extent established here" (p. 10). In other words there were two states of mind based on fault (a) recklessness, (b) negligence. He further likened the injury to the plane owner so far sustained (i.e. mere deprivation of his property) to an actual loss or damage while attempting to salvage it or return it to the U. S. Though it is too late to complain of (i) motive which is irrelevant in the law of torts, (ii) degrees of negligence which is a reduction ad absurdum, (iii) legal fiction; nevertheless the law on the salvage of a seaplane is taking root. It is confirmed that a sea plane
is a vessel and that it is a subject of salvage. For in the words of the
learned Judge "... it is unnecessary for me to determine whether a seaplane
may be considered a vessel and hence the subject matter of salvage. In any
event Judge McGhoy passed upon the question in the affirmative on a pre-
liminary motion in this case" (p. 12).

The rule of law may thus be stated. A seaplane is a vessel: as such it
is a subject matter of salvage: that there must be no recklessness or care-
lessness in rendering salvage aid. The last is a principle of Maritime Law.
Thus Kennedy L. G. in his treaties on "The Law of Civil Salvage," 3rd
edition, p. 162 says, "Misconduct in extreme cases may cause forfeiture of
all right to reward"—this reward was held to be forfeited when claimants
of salvage improperly had retained possession of the salvaged ship and
cargo, and dealt with the cargo by selling it in disregard of owner's inter-
est. (p. 163.)

The ice is broken: the thin end of the wedge has been inserted. One
can only be optimistic that the law will soon embrace species of aircraft
other than a seaplane as fit subject of salvage.

AIRTRAFC LTD. v. TRANSOCEAN AIRLINES INC. (SWISS FEDERAL
COURT, MAY 16, 1952)

Transocean, an irregular carrier domiciled in Oakland, Calif., undertook
by agreement with Airtrafc, a travel agency at Zurich, to transport a group
of 26 travellers by air from Zurich to New York via Havana, and back on
the same route. Airtraffic paid for the transportation to New York, effec-
tuated by Transocean, but declined to pay the amount agreed upon for the
return trip for which the services of Transocean had not been used.

The Court of First Instance (Handelsgericht Zurich, December 19, 1951)
directed Airtrafc to pay to Transocean the amount of further Sw. Frs.
20,760—for the return trip. It considered that the contractual relations
between parties were subject to the law of California, but according to a
rule of civil procedure, as it had no definite knowledge of that law, it applied
Swiss Law as a substitute (Ersatzrecht).

The Federal Court confirmed former decisions according to which the
existence as well as the effects of the contract are subject to the law to which
the contract has the most real connection ("den engsten raumlichen Zusam-
menhang"), i.e. to the law of the domicile of the party whose obligations
are characteristic of the contract. In contracts of carriage, this is the law
of carrier’s domicile, in the case at hand the law of California. However,
the Federal Court is not competent to review the application of a foreign
law by Cantonal-Courts, even if substituted by Swiss law as a substitute,
and thus, the Federal Court had to decline to enter into the merits of the
case.

A rather important change has, however, occurred since the decision
was made in this case. On August 31st, 1953, in the Kunzle v. Bayrische
Hypotheken und Wechselbank case, the Federal Court overruled former
decisions and held that parties are free to agree upon the law to be applied
before as well as after the conclusion of a contract, even during litigation
and even by implication, i.e., by common reference to the same law. Thus,
if they refer to Swiss (Federal) law, Swiss law will be applied in such
cases not only as a substitute and the Federal Court will be competent to
review its application by Cantonal Courts.

DR. WERNER GULDIMANN