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SURVEY OF AERONAUTICAL LAW IN 1954

By Arnold W. Knauth *

NINETEEN FIFTY-FOUR started the second half century of powered flight. The semi-centennial was celebrated with various ceremonies and accompanied by surveys of the progress since the Wrights first flew in 1903 at Kitty Hawk.

The year's aviation activity was very great. The transport fleet of the American domestic airlines attained 1,000 units, many of large capacity, and trans-continental non-stop operations at 18,000 and 19,000 feet became a commonplace. The non-skeds operated another 100 large transports, and contract and industrial transports numbered some 10,000. However, the number of small light planes decreased to about 30,000, and the more rigorous standards imposed by federal regulatory authorities raised the cost and price of such aircraft sufficiently to discourage the output. Cheap back-yard flying was a diminishing activity. The military fleet was obviously very large; and the Military Air Transport Service (MATS) issued press releases giving some idea of its tremendous and global activities. Some civil helicopters became available, but the military demand continued to absorb most of the production of this remarkable machine; it seemed that this type would be used to do much of the military work hitherto done by trucks.

Travel by air continued to increase in an extraordinary way. Over one million passengers crossed to and from Europe, exceeding the ship-carryings, which attained 840,000. The density of North Atlantic travel compelled an ICAO re-study of the existing traffic arrangements which have been constructed on a traffic spacing of 30 minutes between planes. In several areas overcrowding of airspace became a serious problem; many local conflicts were brought to the Air Coordinating Committee whose usefulness continues to increase.

STATE VERSUS FEDERAL POWER OVER AVIATION

Perhaps the leading event of the year in legal and constitutional significance was the seemingly off-hand denial of the writ of certiorari by the United States Supreme Court in the case of Western Airlines vs. People of the State of California, 348 U.S. 859, 1954 USAvR 347, 75 S.C. 87. The California Supreme Court had decided, by a division of 5-to-2, that the State commission was justified in asserting economic control over the intra-state transport business between the airports of San Francisco and Los Angeles—a wholly intra-State operation. Western Airlines vs. P.U.C. of California, 1954 USAvR 83, 258 Pac. 2d 581, 258 Pac. 2d 723, 42 Cal. 2d 621. The United States Supreme Court shrugged the matter off with the simple statement “for the want of a substantial federal question.” Thus vanished in one gesture a bugaboo which had plagued the airlines from the day of the enactment of the 1938 Act. Observers remembered that in 1939 Canadian Colonial abandoned an intra-State New York City-Buffalo service because of the threatening thunders of the CAB of that era.

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The Cedarhurst Case

The important dispute between the Village of Cedarhurst and the users of the adjacent New York Idlewild International Airport continued on its cumbersome way. The question whether the Village may drive the airmen upstairs to the 1,000 foot level, or whether a federal traffic rule may direct the airmen to pass over the Village at 460 feet in approaching a runway goes to the roots of the State-Federal conflict. The California court, like others, has conceded that "safety" has been appropriated by Congress as a federal matter, and that "economics" is left to the States, at least so far as it is intra-state and local. The safe flying of aircraft is one thing; the safe landing of aircraft may be another. Landings and airports are "local"; landing an aircraft may be a matter of "safety" only when landing is necessary to prevent accident, and a planned landing for business purposes may be classed as "economic." The classification of inter-state and intra-state economic control of landings presents the conundrum.

It may be remarked that Canada, under the Crown, and with a constitution exactly the reverse of ours in respect to distribution of dominion-provincial power, seems to be riding rough-shod over the interests of the dweller on the land in favor of the aviator. Canada has also produced an informing discussion of the right to fly over and land on a lake, as opposed to the rights of the dweller on an island to bring electric power to his island by wires strung over the water-level. Again, the aviator's legal rights surpassed those of the earth-dweller. The air, said the court, is a highway at all levels right down to the water-landing.

ACCIDENT LITIGATION

The appeals in the 1949 Washington National Airport accident cases remained undisposed of; but the Appeals Court of the District of Columbia dealt with the effort of the Bolivian pilot, Bridoux, to disemarrass himself of the default judgments entered against him by Eastern Airlines at a stage of the proceedings when the CAB report had fixed blame on him, and before the trial and jury verdict which exonerated him the courts said unpityingly that the decrees against him could be reopened, but that the decree foreclosing his personal right to sue for the personal injuries to himself could not be reopened.

The famous "Cairo" accident of 1949 came to trial in New York, and at the year end the result was still awaited. See, 1951 USAvR 437.

SOME MAJOR ACCIDENTS OF THE YEAR

On August 22, Braniff lost a DC-3 in a thunder-torm arrival crack-up at Mason City, Iowa; the 12 lives lost were the first in the line's 25 years of operation.

On December 22nd, a "non-sked" DC-3 ran short of gas, lacking half-a-minute for reaching Pittsburgh, Pennsylvania; the pilot set it down in the dark on the Monongahela river where 18 persons—all soldiers and crew—swam to shore, while 9 were lost in the river. The pilot, having escaped, plunged in to rescue one of the victims and was himself lost. The plane was almost intact when raised.

On December 18, an Italian Airlines (L.T.A.) DC-6 cracked up while attempting to make an instrument-controlled landing at Idlewild. All the crew but one were lost; and 18 of the 21 passengers.

B.O.A.C. lost two Comets which apparently disintegrated at their normal altitude of about 35,000 feet. Experiments led to the conclusion that the pressurizing of the cabins broke the skins suddenly with an effect like an explosion. The investigation was greatly aided by the extraordinary
success of the British Navy in picking up pieces of one of the Comets from the shallow sea near Elba.

A Northeast Airline DC-3 crossing the White Mountains in a December twilight found itself unexpectedly low, among mountains, in thick snowy weather. The pilot managed to set the ship down in soft pine trees; there was no fire; and several of the occupants survived two cold nights before being found by searchers.

M.A.T.S. lost a trans-Atlantic Super-Constellation in December under completely mysterious circumstances; the machine met some sudden fate within an hour or so after take-off from Maryland.

LEGISLATION

Under the prodding of the late Senator McCarran the Senate Committee on Interstate and Foreign Commerce conducted four months of hearings on proposals to re-state all the federal statutes relating to civil aviation in a single Act, with interesting rearrangements of some of the functions. Almost all segments of the industry came forward with testimony, and the record, released by the Government Printing Office in December, was a volume of some 1200 pages; the staff Report based on these hearings was released in January 1955.

STATE LEGISLATION

When the New York courts declared unconstitutional the 1953 Act which would permit a lawsuit against any airman who touched down at a New York airport, the interest of other States in such laws seemed to diminish. Closely related is the similar problem—now in the courts—as to the power of States to compel non-resident ship-owners to submit to personal jurisdiction (through the agency of some State official) as a condition to navigation in State waters and doing business in ports and harbors. The voices of Marshall and Story are heard again in the courtrooms as States seek to tax and regulate maritime, interstate and foreign business against the federal interest. The present Supreme Court has consented to wide State taxing power over aviation and shipping.

Will the State power be enlarged, or curbed? In Florida, a City was allowed to regulate the towing of advertising banners. In Los Angeles, the County Counsel was pessimistic about the extent of City control of aviation.

INTERNATIONAL AVIATION

Treaty Movement

Despite great reluctance in the aviation industry, a meeting of the ICAO Legal Committee at Rio decided to propose a protocol to the Warsaw Convention which, insofar as adopted by any country, would bring about a number of minor amendments deemed desirable although not essential. The protocol also proposes to increase the "Warsaw limit" on death and injury awards by 60 per cent: namely, in Poincaré francs from 125,000 to 200,000, and in U. S. Dollars from $8,300 to $12,800. These proposals will now go to a 1955 diplomatic conference scheduled for the Hague in September.

The Rights in Aircraft (Mortgages) Convention was ratified by Norway, but Switzerland and Germany were both considering amendment of their highly restrictive chattel mortgage laws so as to implement their expected ratifications. In the United States, the enactment of a statute for the admiralty foreclosure of foreign mortgages on foreign ships stood in sharp contrast to the State Department's refusal to accept the Mexican and Chilean ratifications of the Rights in Aircraft Convention. For Mexico and Chile both annexed reservations as to tax claims and local labor claims
(which the U. S. government refused to accept); while the Congressional extension of the Ship Mortgage laws contains a rider reserving local repair and labor liens, (to which the State Department made no objections). It would seem that the resistance to the Mexican and Chilean reservations is unrealistic and might properly be withdrawn. Americans want to sell both ships and airplanes to foreigners, taking back mortgage pledges which *ipsa facto* are transactions under foreign laws; it seems rather stiff to encumber these desirable business reforms with pronouncements that seem to impose a foreign will on what is essentially the domestic law of the foreign borrower.

At the year end, a proceeding was pending in the Panama Canal Zone which may throw strong judicial light on the Foreign Ship-Mortgage Act in its practical workings.

*International Regulation*

The obvious excellence of the work of ICAO in preparing its fifteen “Annexes” of International Standards and Recommended Practices brought about a strong movement to join in its work. The last of the 20 Latin-American republics adhered, and so did the states of South-east Asia which had not yielded to the Moscow-Pieping pressure. Poland was the only member from behind the iron and other curtains; its services to Western Europe served as the air link between the Moscow-dominated areas and the rest of the world.

India went forward with the resolve to take control of flight in that sub-continent to the exclusion of foreign airlines, and in January, 1954, gave a year’s notice of denunciation of the 1946 bilateral Convention under which American carriers have for a decade crossed India with fifth-freedom privileges. India is not at present interested in flying to any area controlled by the U.S.A., and there is little basis for a reciprocal bargain. The era is drawing to a close when foreign airlines could participate in the domestic intra-Indian traffic. In preparation for this new development, Pakistan acquired a fleet of long-range transports with which to operate an all-Pakistan trans-India air service between East and West Pakistan.

During the year, a Red China military air force wantonly shot down a British civil air transport on its regular run, following an off-shore high seas route, between Singapore and Hongkong; several occupants were rescued from the sea by American military fliers, who were in turn attacked by the Chinese and are said to have shot down an attacker. Before the year end, Red China paid Great Britain a sum as damages; the newspapers reported the settlement to have been over a million U.S. dollars. This was an unusually rapid settlement, especially in view of Red China’s non-recognition of the British government and disdain of the recognition offered by Britain in 1950.

A good deal of military air skirmishing occurred in northern Japan, along the China coast, and perhaps in other areas; a year-end announcement revealed that the U.S. Air Force had lost as many as 33 men in such encounters.

The United Nations voted, by 42 to 5 (with 6 abstentions) to take up with non-member Red China the question whether military airmen shot down or otherwise captured in the Korean war were military prisoners to be released under the armistice, or parachuted spies to be dealt with as spies.

It would seem probable that the flurry of declarations of off-shore sovereignty consequent on President Truman’s two proclamations of 1945 may produce more incidents and arguments about the freedom of air navigation beyond the 3, 4 or 6 mile limits, perhaps as far as 200 miles off the coasts.

The S.A.S., the airline of the three Scandinavian countries, arranged
with Canada and the United States in establishing a trans-polar scheduled service between Copenhagen, northern Greenland, Edmonton and Los Angeles. This was the first passenger route over the polar ice.

**OTHER LITIGATION**

*Conflict of Laws*

The "wrongful death" tangle continues to bedevil litigants who, having only a limited time within which to plead their claims to a court, are painfully astonished by the views of "public policy" announced by the courts after the litigant has made his irrevocable choice. Thus the Royal Indemnity Company, declared by the law of New York to have control of a death action by reason of its payments of statutory death benefits to the surviving parent (and the failure of the personal representative to institute action within 6 months) has not merely been ousted of participation in the action, but had its timely suit dismissed. The reason, if it can be so described, is that there is a possibility that the law of Portugal (where the accident happened) might consider "moral" elements as a basis for damages; and the federal judges considered that "moral" damages are unknown to the law of New York. Hence, rather than deprive the tardy personal representative of the possibility of moral damages, the courts have totally deprived the workmen's compensation insurer of its legal subrogation rights against the carrier defendant. Royal Indemnity Co. and Komlos vs. Air France, 1954 U.S.Av.R. (December).

A very evident result of the tangle is the copious duplication of lawsuits by parties who, fearing the belated hindsight of the courts after the time to re-plead an action has expired, crowd the files and dockets with pleadings asserting every imaginable—and much unimaginable—pleading. Thus the nuisance and costly uncertainty and argument is increased.

*Municipal Airport Hangars*

In 1937 a Texas court decided that a municipality which operates a hangar may be sued because of the destruction of a hangared airplane by fire. The case of Christopher vs. El Paso, 1937 U.S.Av.R. 158, 98 SW2d 394 (Texas) has often been cited and discussed. Now a federal court with Texas jurisdiction has discovered that a Texas statute of 1947 has effectively reversed the rule of the Christopher case, and established a new immunity for cities which operate hangars. Imperial Co. vs. City of Sweetwater, 1954 U.S.Av.R. 64, 210 F. 2d 917. In the unending battles over sovereign immunity, the customers of the municipal hangars and the fire insurance companies have lost a round.

**LEGAL LITERATURE OF THE YEAR**

Collections of National and International aviation law continued to appear, and such are very useful. In addition to the French volume by Lacombe and Saporta, the German volume by Meyer, the Argentine volume from the University of Cordoba, a well-compressed Belgian collection was edited. In August, the Aeronautical Law Committee of the American Bar Association brought in its annual report, reviewing the year's legal developments in the careful manner which has become usual. As usual, the principal output in the United States appeared in the columns of this Journal, and the cases and statutory material was collected in the quarterly parts of U. S. Aviation Reports. An eight-year Index Digest of these Reports brought the cumulative 1944 Digest down to the year 1952. The excellent volume by H. Drion: "Limitation of Liability in Air Law" appeared at the year's end, and sheds new lustre on the able group of students assembled by Professor John C. Cooper under the auspices of McGill University.