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SALVAGE AS BETWEEN VESSELS AND AIRCRAFT*

ARNOLD W. KNAUTH†

The appearance of increasing numbers of large, able and costly flying boats on the sea routes of the world will inevitably lead to an increase in the number of instances where persons in aircraft and in vessels lend assistance to distressed aircraft and ships. There are likely to be important instances of salvage services rendered to aircraft and their cargoes by persons along the coasts. There is little risk in prophesying that the nearer future will produce a substantial number of cases of salvage of aircraft and their contents by the agency of other aircraft and of vessels, and a fair number of salvage services to distressed vessels and vessel cargoes in which flying boats will play a part. American flying boats are particularly active, numerous, valuable and successful on the long sea and coastal routes; and the American interest in a suitable statement of the law is very great. The lead in the matter, however, has been assumed by Continental experts, and two efforts by American experts to influence the course of events have not been sympathetically received. The American views have been belatedly expressed; it is regrettable that the American participation in the work of the international experts was not initiated at an earlier date.1 The object, however, is to obtain the best possible statement of the law

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1. The C.I.T.E.J.A. was organized in 1926; the United States did not join the organization, appropriate funds and send delegates to participate in its discussion meetings until September, 1935. An observer attended several meetings before that time. No American has ever been a President of a Commission or a Reporter on any of the subjects under study.
to be applied, and a fair criticism is never too late. The work of the experts and even of the diplomats is preliminary; the final object is the acceptance of the text as domestic and international law. The following comments are submitted with a full recognition of the value of the work which has been done, and with genuine regret that the matter has progressed to a point where it has been thought that discussion of fundamental points had been exhausted.\(^2\) It is believed that the following considerations demonstrate that there is honest need of further discussion.

Salvage is a principle peculiar to maritime law which appears to be suitable for aviation over oceans, seas, lakes, rivers and other navigable waters. The principle, briefly stated, is that volunteers who assist in saving ships and their cargoes and freights, and incidentally human lives, from peril of loss in navigable waters, are entitled as a matter of law to a reasonable allowance, out of the values saved, as compensation for their own personal risk, their skill, courage, quickness, their disbursements and their loss of the use of any property which they have devoted to the service.\(^3\) The salvor has the usual secret maritime lien on the ship and cargo and freight saved, independently of possession. His award cannot exceed the value saved; in practice it rarely exceeds 50% and averages 5% to 20%. The award is fixed by the Court, there being no jury in Admiralty. The salvor's lien is not lost by the making of a salvage contract, provided the contract is on the terms "no cure, no pay"—that is, conditioned on success. If the owner or custodian of the property in peril refuses assistance, the Court usually denies salvage; but if the refusal is unreasonable, and the salvor nevertheless intervenes and produces a useful result, he may have an award. The salvage remedy is of special social usefulness as a check on the temptation to steal when a wreck has been abandoned.\(^4\) It is readily evident that the principles of maritime salvage are wholly foreign to the common law and do not regulate the relations of persons and lost or abandoned property on land.\(^5\)

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2. In C.I.T.E.J.A. Doc. 203, July 15, 1936, the Reporter in charge of this subject was led to state that "discussions of substance will not be resumed."


4. *Cf.* Florida Wrecking and Salvage Rules, Benedict on Admiralty (5th ed.) (1936) Vol. 2, p. 1076. In October, 1936, the Spanish liner Cristobal Colon was stranded on Bermuda and abandoned on the reefs by her crew. Some weeks later, six persons who removed part of her equipment were prosecuted and convicted as thieves. A. P. despatch, Dec. 7, 1936.

The basic difficulty is the fact that salvage is traditionally limited to vessels and vessel cargoes and freight; hence an aircraft, not being a vessel, is not a subject of salvage, nor is its cargo. Watson v. RCA-Victor Co., 50 Lloyds List Law Rep. 77, 1935 A. M. C. 1251. The British Parliament has reversed that decision and solved the British local difficulty rather simply by enacting that an aircraft is hereafter to be regarded as a vessel for salvage purposes. If the American Congress were to enact a similar law, a suitable local result could be achieved. But the effect on private international law would still be distressingly complicated whenever a salvage service has been rendered by parties of different national allegiances on the high seas. The old confusion of maritime salvage laws brought about the general adoption of the Maritime Salvage Convention of 1910. Confusion of air salvage laws seems bound to force an ultimate agreement on salvage of aircraft at sea. The leading American and British interest in overseas aviation already amply justifies a strong effort to bring about a suitable convention text at the present time.

The Citeja, under the leadership of Professor Georges Ripert of France as Reporter and M. Wolterbeek-Müller of Holland as Chairman of the Third Commission, has been working on this salvage convention for several years. On October 2, 1933, a text was prepared at a meeting in London. The Citeja thereupon consulted the Comité International Maritime, which set up a Sub-Committee “to formulate any views, suggestions and proposals they might deem advisable.” The Sub-Committee met in Paris on April 29, 1934. No American was invited to attend; the two British members were unable to attend. The British Maritime Committee filed a report urging two of the criticisms which are still directed at the text. The Belgian, Italian, Dutch, Portuguese and Yugoslav Maritime Law Associations sent memoranda with various suggestions. The Sub-Committee’s report, together with the memoranda, was printed in March, 1935. There was a good deal of

6. Air Commerce Act, section 7 A.
9. A description of the organization and work of the C.I.T.E.J.A. will be found in 6 JOURNAL OF AIR LAW 84 (1935).
10. The “American Section” now has four members. The “American Advisory Committee,” which has never met, consists of some twenty persons nominated, upon the invitation of the State Department, by various organizations interested in the development of private international air law. The Maritime Law Association is the only organization in this group which may be said to represent the shipping industry.
11. The convention has heretofore been entitled Convention Relating to Assistance to and Salvage of Aircraft. The present title reveals that the text also relates to salvage by aircraft, but does not adequately disclose that the text deals largely with the duties and obligations of vessels, shipmasters and shipowners.
discussion of the 1910 Salvage Convention, but, curiously, no mention at all of the Safety of Life at Sea Convention, London, 1929, which provides, in Article 45, very precise conditions for the regulation of the obligation to deviate from the ship's course in order to save life at sea. The report made two explicit criticisms and recommendations: that the salvor of goods should have a remedy only against the owners of the salved goods, and that the salvage remedy should be limited by the value of the goods saved and not by the value of the aircraft before the accident. Only the latter recommendation has been embodied in the present text.

There seems to be a general feeling that it is appropriate to apply maritime salvage principles to aircraft at sea. The Paris 1919 Convention, Article 32, and the Habana 1928 Convention, Article 26, both provide that, in the absence of special agreements, the salvage of aircraft lost at sea shall be governed by salvage principles. This is important, because there is a good deal of general hostility to the application of maritime doctrines to aviation. No text-writer or authority in the industry seems to have opposed the application of salvage principles. On the contrary, this has been strongly advocated. And the English and Irish Parliaments have enacted specific laws for the purpose.

It may probably be assumed that the industry, the underwriters, and the interested Governments are now in favor of applying maritime salvage principles to aviation over navigable waters by means of suitable domestic legislation and an international convention. The immediate question is whether the text proposed by the Citeja at Berne in September, 1936, is suitable for the purpose.

Two questions are sharply presented: (1) whether the text is acceptable to the aviation industry and its underwriters; (2) whether it is acceptable to the Merchant Marine industry and its underwriters.

I. IS THE CITEJA 1936 SALVAGE TEXT ACCEPTABLE TO THE AVIATION INDUSTRY AND ITS UNDERWRITERS?

The following comments are submitted as an indication of the major points which would not appear to be acceptable to the aviation industry. The comments are presented in the order of the Articles

13. English Act, 26 Geo. 5 & 1 Edw. 8, c. 44, Irish Act, No. 40 of 1936.
14. Text adopted by the International Technical Committee of Aerial Legal Experts during its Eleventh Session at Berne, Switzerland, in September, 1936. The original text is in French; the translation thereof, which appears in 8 JOURNAL OF AIR LAW 75 (1937) is the text hereinafter referred to.
commented upon, which does not indicate the order of their importance.

**Article 2. Life Salvage**

(1) *Aircraft Bound to Aid Persons at Sea.*

Any person exercising the functions of commanding officer aboard an aircraft shall be bound to render assistance to any person who is at sea in danger of being lost, insofar as the aircraft can, without serious danger to itself, its crew, passengers or other persons, go to the scene with the possibility of rendering useful aid.

This binds all aircraft to go to an aircraft or vessel which sends out an S. O. S.

The purpose is sound. The 1910 Maritime Salvage Convention laid down the rule that assistance must be given to persons found at sea—*trouvé en mer.* (Art. 11.) Literally, these words—*trouvée en mer*—do not require a vessel to deviate from her course. The words have never been construed by a court. The memorandum of the British Maritime Committee (Bull. 97, p. 31) considers that they impose a broad general "duty to render assistance to persons who are in danger at sea." The Paris Subcommittee (Bull. 97, p. 6) was "of the opinion that the obligation to assist persons who, at sea, are on board an aircraft in danger of being lost, is already laid upon ships' captains under Article 11 of the Brussels International Salvage Convention of 1910. * * * Article 11 is couched in general terms." The meaning of Article 11 has become largely academic, because the more complete Article 45 of the Safety at Sea Convention, London, 1929 has superseded it.

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15. **SAFETY OF LIFE AT SEA CONVENTION, LONDON, 1929.**

**ARTICLE 45.**

49 U. S. Statutes at Large —.

**DISTRESS MESSAGES. PROCEDURE.**

1. The master of a ship on receiving on his ship a wireless distress signal from any other ship, is bound to proceed with all speed to the assistance of the persons in distress, unless he is unable, or in the special circumstances of the case, considers it unreasonable or unnecessary to do so, or unless he is released under the provisions of paragraphs 3 and 4 of this Article.

2. The master of a ship in distress, after consultation, so far as may be possible, with the masters of the ships which answer his call for assistance, has the right to requisition such one or more of those ships as he considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of the persons in distress.

3. A master shall be released from the obligation imposed by paragraph 1 of this Article as soon as he is informed by the master of the ship requisitioned, or, where more ships than one are requisitioned, all the masters of the ships requisitioned, that he or they are complying with the requisition.

4. A master shall be released from the obligation imposed by paragraph 1 of this Article, and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 of this Article, if he is informed by a ship which has reached the persons in distress, that assistance is no longer necessary.

5. If a master of a ship, on receiving a wireless distress call from another ship, is unable, or in the special circumstances of the case considers it unreasonable or unnecessary to go to the assistance of that other ship, he must immediately inform the master of that other ship accordingly, and enter in his
almost everywhere. It is submitted that the purpose of Article 2 (1) and (2) would be best achieved by adopting the precise language of the Safety Convention 1929, Article 45, expanding it to include "aircraft commanders" and "aircraft" in each instance, thus promoting uniformity of law and text as far as possible.

The American Delegates at Berne, in compliance with resolutions passed by American maritime bodies, sought to obtain some statement of the limitations to be placed upon the duty to make search, but no further information was given, and the limits of the duty to search for occupants of fallen aircraft remain somewhat uncertain.

Article 3. Life Salvage Indemnity

(3) Who Shall Pay Life Salvage?

"The life salvage indemnity shall be paid by the operator of the aircraft assisted." This is a wholly novel provision in the law of human relations. Heretofore "life salvage" has been an unremunerated humane activity, except that in one situation, since 1894, life salvage has sometimes been payable out of the proceeds of property simultaneously saved from the same peril. The purpose of those laws is obviously merely to rectify the unfair result produced when, after a wreck, Salvor A picks up the lifeboats with their human loads, without reward, while Salvor B tows the wreck into safe harbor and is well rewarded. But when no property log-book his reasons for failing to proceed to the assistance of the persons in distress.

6. The provisions of this Article do not prejudice the International Convention for the unification of certain rules with respect to Assistance and Salvage at Sea, signed at Brussels on the 23rd September, 1910, particularly the obligation to render assistance imposed by Article 11 of that convention.

Ratified by the President, July 7, 1936. Effective for the United States November 7, 1936.

The 1929 Safety of Life at Sea Convention originated with the invitation of the British Government. It has been ratified or adhered to, and is now in effect in, the following countries: Germany, Argentina, Australia, Belgium (and colonies), Brazil, Bulgaria, Canada, China, Danzig, Denmark (excluding overseas possessions). Egypt, Estonia, United States of America, Finland, France (including colonies), Great Britain (including all crown colonies, territories under mandate and possessions), Hungary, Iceland, India, Irish Free State, Italy (and colonies), Japan (including Chosen (Korea), Taiwan (Formosa) and Kwantung), Netherlands (including colonies), New Zealand, Norway, Panama, Poland, Portugal (including colonies), Spain (including colonies), Sweden, Union of Soviet Socialist Republics, and others.

The 1910 Salvage Convention originated with the Comité International Maritime. It has been ratified or adhered to, and is now in effect in, the following countries:

Germany, Austria (pre-war Empire), Belgium (and colonies), Brazil, Denmark (excluding overseas possessions), United States of America, France (and colonies), Great Britain (including the Dominions, the Irish Free State, and the pre-war colonies, but not Egypt), Greece, Hungary, Italy (including pre-war colonies), Japan (including Chosen (Korea) and Taiwan (Formosa), Mexico, Norway, Netherlands (excluding colonies), Portugal (including colonies), Romania, Russia (pre-war Empire), Sweden.

16. (British) Merchant Shipping Act, 1894, sec. 544; (U. S.) Salvage Act, 1912, 37 Stat. 242; (International) Maritime Salvage Convention, 1910, Art. 9: 37 Stat. L. 1670. The 1910 Salvage Convention originated with the Comité International Maritime. It has been ratified or adhered to, and is now in effect in, the following countries:

Germany, Austria (pre-war Empire), Belgium (and colonies), Brazil, Denmark (excluding overseas possessions), United States of America, France (and colonies), Great Britain (including the Dominions, the Irish Free State, and the pre-war colonies, but not Egypt), Greece, Hungary, Italy (including pre-war colonies), Japan (including Chosen (Korea) and Taiwan (Formosa), Mexico, Norway, Netherlands (excluding colonies), Portugal (including colonies), Romania, Russia (pre-war Empire), Sweden.

values are at stake, the saving of human life in peril on the waters is, as ever, the Golden Rule—do as you would be done by. The sailor who saves his brother-seaman today may himself be saved by another brother-seaman next year. It seems quite doubtful whether the aviation industry and its underwriters are really ready to detach themselves from this universal rule, and embark upon a positive policy which will require all owner-operators (exploitants) of all aircraft to pay for all maritime life-salvages of occupants of aircraft from henceforth forever.

The record of aviators callously left to drown does not substantiate the need of this unprecedented remedy. There are reasons for believing that the proposal, if squarely presented to the responsible heads of the Industry, would not meet with approval.

(4) (a) Limit of Indemnity per Life Saved.

The said indemnity cannot exceed the sum of 125,000 francs per person saved and, if no persons have been saved, the sum total of 125,000 francs.

This was proposed by the Belgian memorandum in 1934; the amount is identical with that specified for passenger lives in the Warsaw Convention of 1929 relating to Air Carriers, and for injuries to third parties in the Rome Convention of 1933, relating to damage done by aircraft to persons and property on the surface of the earth. The Belgians proposed it as a minimum value to be available if the aircraft were worth less; but in its present form it is a maximum even if the aircraft is worth more.

The par of exchange is the French gold franc of 1935; Art. 3 (4-d). At present values, the equivalents are $8,300 U. S. or £1,670 Sterling.

It is certainly wise to fix an over-all maximum. Opinions will always differ as to what the maximum should be, and criticism of any given figure can only proceed from a consideration of actual examples. The extreme examples of the present day are:

Lowest: An airplane with one occupant; maximum possible life-salvage indemnity award, $8,300.

Largest: The Zeppelin Hindenburg, with 100 occupants; maximum possible life-salvage indemnity award, $8,300,000. Article 3 (4) (c) was added in order to limit this gigantic sum to $132,800.

(4) (bb) Additional Limitations of Indemnity—Aircraft Operators.

And the aircraft operator shall not be liable beyond the value of the aircraft, such value being determined on the basis of 250
This value works out at about $7.50 per lb., or $7,500 for a small two-seater airplane weighing 1,000 lbs. This results in quite a large liability fund for larger aircraft, such as are likely to go to sea. A 25-ton airplane would have to provide a fund up to $375,000. The British memorandum of 1934 proposed adding the pending freight to the fund, but this has not been done; the fund seems adequate in amount without adding the freight.

In the 1933 draft, the aircraft owner was allowed to apply the aircraft limitation value to the aggregate of his salvage liabilities: the aircraft itself, the lives, and the cargo. This was vigorously condemned by the four leading Maritime Law Associations—Belgian, British, Dutch and Italian—in their memoranda. The Belgians put it tersely:

“We fail to understand why the owners of a cargo of gold in bullion, the whole of which has been salved, should have the right to limit the salvage indemnity due by them to the value of the aircraft before the accident.”

The provision is now retained only for life-salvage. But there are still difficulties, which are discussed under Article 4 (5).

The American delegates at Berne stated that “the term total maximum load has no special significance in the air regulations of the United States,” and recommended further study of its meaning. The record of the proceedings leaves it doubtful whether any further study is under contemplation. The Reporter in charge of the subject has stated: “At its session of The Hague in 1935, the Citeja . . . accepted the draft which was published in the minutes. . . . While such acceptance has been considered as exhausting discussion on the subject, the Committee decided that it would not immediately transmit to the French government the text which it had just adopted. . . . The study of this convention to be made by the Citeja in its Berne session will therefore be the final examination, it being understood that discussions of substance will not be resumed . . . .” To which position, the American delegates filed a general caveat.

(4) (c) Aggregate Limit of Liability for Life Salvage.

The aggregate is limited to two million francs, or $132,800. In practice, this means that the full possible award of $8,300 per
life saved is only available in situations involving the saving of not over sixteen lives. This limit was added to the text after the American delegates to the February, 1936 meetings, had pointed out the huge sums which might have to be paid in an accident like that of the Macon.18

The American delegates on that occasion also stated six points as to which shipping interests desired clarifications; but these were not formally received because not on the agenda, and the subsequent course of the matter indicates that no weight has been attached to them.

It seems reasonably clear that the over-all limit applies only to the life-salvage. The omission of the words owner and armateur seems to indicate that this over-all limit is granted only to aircraft operators. There is no explanation why this limit is not equally granted to owners and armateurs of ships.

(6) Operator's (Exploitant's) Liability Where Use of Aircraft Is Unauthorized.

The Citeja has consistently grappled with the problem of the Schwartzfahrer—the law-evader or "bootlegger" who engages in any human activity without the licenses, permits or certificates which the law happens to require. The problem is familiar in the field of automobile law: Shall the owner of an automobile be held liable for damage done by his car in the hands of a thief, or even a mere unauthorized person? A suitable formula was evolved in the drafting of the Rome Convention;19 and this formula has subsequently been used in the drafting of the other Citeja Conventions.20 This formula requires the exploitant of an aircraft to "take the necessary measures to avoid wrongful use of his aircraft". Evidently aircraft have to be kept always under lock and key, and under guard of responsible watchmen. This squints towards the doctrine of the dangerous instrumentality. The formula also extends the benefits of limited liability to the Schwartzfahrer; it may be logically and socially questioned why a wrongful aviator should be given the benefits of the limited liability of the rightful aviator.

There is no provision about the unauthorized use of vessels. Yet ships, both small and large, can be and often are used without the authority of their owners. In the past few months, many Spanish vessels have been at sea without the consent or authority of their

20. Salvage Convention, Article 4 (6); Collision Convention, Article 3 (3). Neither is yet in effect.
owners. If it is fair to exonerate the non-consenting owner of an aircraft, it is not equally fair to exonerate the non-consenting owner of a ship?

**Article 4. Property Salvage**

(1) *Who shall Receive Salvage.*

In a case of assistance and salvage of aircraft or of property on board aircraft, a ship or aircraft which shall have rendered assistance shall be entitled to remuneration to be determined on the following basis:

The corresponding passage of the 1910 convention merely provides that “the remuneration is fixed by the court, according to the circumstances of each case, on the basis of the following considerations.”

**Basis of Remuneration.**

(a) First, the measure of success obtained, the efforts and the deserts of the salvors, the danger run by the salved aircraft, by its passengers, crew and cargo and by the salving aircraft or vessel, the time expended, the expenses incurred and losses suffered, and the risks of liability and other risks run by the salvors, and also the value of the property exposed to such risks, due regard being had, the case arising, to the special adaptation of the salver’s equipment;

(b) Second, the value of the property salved.

The foregoing rule is applied to salvages of ships by aircraft by subsection (5).

The foregoing text is an exact duplication of Article 8 of the 1910 Maritime Salvage Convention with one important omission—it omits (at the point indicated by an asterisk) the words “and by the salvors” (in the French original “et par les sauveteurs”). In other words, “the personal danger run * by the salvors” (in the French text, “le danger couru . . . par les sauveteurs”) is no longer to be considered as an element in fixing a salvage award. This seems to mean that there is to be no further reward to individuals for personal courage. That plainly proposes a fundamental break with the historic conception of salvage.

It is, of course, true that the modern predominance of steamers and motorships, and the organization of professional salvage companies, has had the result that Lord Justice Kennedy’s “exceptional allowance” of salvage to shipowners has become a rather general rule. The crew’s share nowadays is seldom over a quarter or a third. In the past fifteen years only one case has been noted where a crew—that of a small tugboat—exhibiting extraordinary
personal heroism, has been given a share of over 50% of a salvage award. Perhaps the time has come to shift the whole basis of salvage from the human salvor plus his employer's ship or other equipment, to the incorporated shipowner plus his employees. If so, the same change should be made at once in the 1910 Maritime Salvage Convention, for the rule, whichever it is, should and indeed must be uniform everywhere.

No evidence or argument has been presented for changing the rule of the 1910 Convention. No government has asked for a new conference to revise that convention. Hence the old rule, which now prevails almost everywhere, should not be changed.

The American delegates at Berne directed attention to these comments, which have been endorsed by resolutions of various American maritime organizations, but the text was accepted without alteration.

(2) *Simultaneous Salvage of Life and Property.*

Example: Ship A picks up 20 persons from an aircraft. Ship B picks up the aircraft cargo consisting of gold, money, stocks, bonds, motion picture films, and saves one of the engines. Ship A's expenses are $10,000; ship B's expenses are $5,000. These expenses are to be "equitably allocated." There should be no difficulty in doing so, if there is not money enough to go around. Subsection (5) of this Article 4 seems to apply the same rule, *mutatis mutandis,* when aircraft (alone or with vessels) accomplish a salvage of maritime property.

**Article 5. Combined Salvage of Life and Property**

This provision is analogous to the 1910 Convention, Article 9 (par. 2). But under the 1910 convention the life-salvor's *entire* recovery is out of the property salvage. Whereas under this aviation convention, the life-salvor would first recover his out-of-pocket from the owner and/or operator of the wrecked ship or aircraft, and then come in on the property salvage for an extra award, based on his courage, skill, speed, and success. To that extent the new convention goes beyond the existing law. The new proposal is not unattractive. The need of revising the present salvage law has been repeatedly urged by laymen since the *Vestris* disaster in 1928, where the facts suggested that the Captain may have delayed his S. O. S. in the hope of obtaining the needed assistance from a sister-ship.

20a. See comment on Article 3 (1), *infra.*
Article 7. Who Shall Pay Salvage Awards

(1) Remuneration.

The remuneration due for the operations of assistance or salvage shall be payable by the operator of the assisted aircraft or the owner or the armateur of the assisted ship.

(2) Recourse of Aircraft Operators.

The operator of the aircraft shall have a recourse against the owners of goods for such part of the remuneration as pertains to assistance and salvage of such goods.

This Article presents the most serious difficulties. The present law is that a carrier—a bailee of goods for carriage—is bound to deliver them safely at the destination unless

(1) prevented by force majeure or Act of God;
(2) prevented by enemies of the State;
(3) prevented by the inherent vice or character of faulty packing of the goods themselves;
(4) excused by the terms of the contract or by the local or international legislation, such as the Warsaw Convention, the 1919 Paris Convention and the 1928 Habana Convention, whose provisions as to salvage have already been mentioned.

What then is the carrier's duty when an accident happens and the aircraft cargo is salvaged from the sea by a stranger? We will assume that the accident has happened under circumstances which excuse the air-carrier from liability. Let us say that the aircraft has been shot down by an enemy of the State, and forced to land in the sea. The situation will then be either

(1) that the aircraft can be repaired and complete the journey; or,
(2) that the aircraft is beyond repair and is an actual or constructive total loss.

If (1) is the case, the aircraft will be in a position to deliver the cargo subject to the salvor's claim or lien; the consignee will have to pay the salvage in order to obtain his goods. But how is the carrier to get the goods out of the possession of the salvor? Shall it be on maritime or on terrene principles?

Especially in situation (2) must we decide whether to adopt the maritime principle that "the goods are bound to the (ship) (aircraft) and the (ship) (aircraft) is bound to the goods"; or the railroad principle that the carrier is bound generally to the goods,
and that the particular train or car is a matter of absolute indifference? This question seems never to have been publicly discussed in this connection. It is, however, fundamental. If we accept the maritime principle, then the total loss of the aircraft terminates the venture then and there, so that the carrier need do no more than notify the cargo owners, shippers and consignees, where their goods are, so that they can go and get them and treat directly with the salvors. If we accept the railroad principle, then the loss of the particular aircraft is of no consequence; the air-carrier must send another aircraft to the scene, pick up the cargo, and carry it to the destination. And thus necessarily, under the railroad rule, the air carrier must treat with the maritime salver, for he cannot otherwise obtain possession of the cargo in order to carry it forward.

The difficulty of carrying a single principle, like salvage, from one field of law into another, without the matrix of other maritime principles in which it is imbedded, is hereby neatly illustrated. For a railroad, after an accident, never has to treat with salvors. It never has to pay legal charges to volunteers who help pull goods out of the burning wreck of the train. It can pick up the packages with its own employees, dismiss the volunteers with appropriate thanks, load the goods into a new train, and proceed to the destination.

But ships and aircraft at sea cannot proceed so simply. They do not control their right of way with organizations of employees. They must pay off the volunteer helpers in court with salvage money.

There is no competitive reason for burdening aviation, on either land or sea, with greater obligations than those imposed upon the competing rail and water carriers. The sense of the matter therefore is to deal with salvage on land under railroad law, and salvage on navigable water under maritime law. It would seem to be perfectly feasible to apply the railroad carrier law whenever aviation has accidents on land, and the maritime rule—including the principle that the aircraft is bound to the cargo and the cargo to the aircraft—whenever the accident occurs on the water. In other words, the maritime principles necessary to work out the maritime salvage principle can be imported to the extent necessary to apply the maritime salvage principle itself.

If this solution is accepted, Article 7 (1) and (2) should be
abandoned, and in its place should be stated the maritime principle that the goods-owner, being notified of the abandonment of the voyage, goes and attends to his own salvage charges. If the goods are, as usual, insured, this involves no hardship, as the cargo insurance companies are well-organized to attend to such situations all over the world.

It appears that there are some decisions in Italy holding that the entire salvage award in respect of both ship and cargo should be decreed against the shipmaster alone. In that case, the captain summoned the salvors, and was condemned in his character as bailee of both ship and cargo. The accompanying “observations” suggest that this is the “almost invariable form of proceeding,” and cite instances in Egypt, Algiers, Holland and Belgium. Those are jurisdictions where the right in rem is not applied as it is in the English and American Admiralty. The explanation of these court rulings appear to lie either in the fact that the master voluntarily contracted for the salvage service, thus assuming primary responsibility, or in considerations of the forms of procedure, the venture being personified in the master rather than as with us in the ship. It is interesting to note that the memoranda submitted by the various National Maritime Law Associations in 1934 express the contrary view. The Belgian Association, for example, there stated (p. 28) “We are of opinion that the operator should not be made responsible for the payment of the indemnity or remuneration due by the goods on board the aircraft.” The British memorandum states (p. 33) “We think the salvage remuneration should be payable, not by the owner of the aircraft, nor by the shipper of the goods, but by the actual owner of the goods.” The Italian memorandum asks (p. 45) “Instead of reserving to the aircraft alone the right to recover against the goods, why is a direct remedy not given to the Salvor?” The Netherlands Association said: (p. 60) “It may be asked if this responsibility should not be imposed on the owners of ** the merchandise salved, who are the first to benefit by the salvage.” There would seem to have been an impressive unanimity of opinion at that time against the proposal to saddle the initial liability for cargo salvage on the exploitant or owner-operator of the aircraft. It is submitted that the passages quoted from the memoranda of the various National Maritime Law Associations correctly reflect the maritime tradition; and they are cer-

23. Cf. note 11.
tainly in accord with the well-settled law in the British Empire and the United States.

This point was stated in the resolutions of the American maritime bodies which considered the matter in 1936, but was presented by the American delegates at Berne only in an alternative form; the suggestion so made was not accepted by the conference.

**Article 8. Property Immune from Salvage**

Neither the personal effects and baggage of the crew and passengers, nor articles transported under the regime of postal conventions, are to be included in the property, either for purposes of calculating the remuneration, or with regard to the recourse to be exercised.

Some of these exclusions have been customary in various countries, but this is the first attempt to insert all or any of them in an International Convention text. The American law is not in accord with these provisions. The 1910 Maritime Salvage Convention does not so provide.

One result of this provision would seem to be that if baggage on a ship is salved through the combined efforts of another ship and aircraft, the baggage might be liable for salvage to the other ship but not to the aircraft.

Shipowners should also consider that most of the property in aircraft is likely to consist of personal property, baggage, and postal matter. When a ship renders salvage service to an aircraft, a large part of the value in the aircraft is, therefore, proposed to be immune from salvage. This seems quite wrong.

**Article 9. Time for Suit, One Year**

The 1933 text limited the time to two years. The 1910 Maritime Convention also limits the time to two years. One year seems unreasonably short for a tort action which may necessitate investigation of facts in very distant places. No reason has been advanced for shortening the period from two years to one.

The American delegates at Berne urged the two-year rule, being supported by resolutions addressed to the State Department by many bodies representing American maritime interests, but without success.

24. *Cf. note 38.*
Article 11. Jurisdiction of Salvage Suits

(2) International Co-operation of Courts to Prevent Limitations of Liability Being Exceeded.

If different salvors bring actions before courts situated in different countries, the defendant may, before each one of them, submit a statement of the total amount of the claims and money due, with a view to preventing the limits of his liability from being exceeded.

This novel and useful provision allows the defendant who is sued by different salvors in different countries on account of the same salvage to produce statements to the various courts of the aggregate claims allowed, so that his aggregate liability under the Convention may not be exceeded.

It contemplates international co-operation between the Courts. A similar provision is found in the Brussels Convention of 1925 relating to Limitation of Shipowners' Liabilities, and is now in effect in France and nine other important European maritime countries.

A similar article in the Rome Convention, Article 11, has resulted in the inclusion of such a provision in the British Carriage by Air Act 1932 (2nd schedule (4)). The principle appears to have possibilities of great usefulness, but the method of co-operation between courts of different sovereignties is as yet quite unexplored.

Article 12. Definition of "Exploitant"

Any person who has the right to use an aircraft and who uses it for his own account shall be termed the exploitant of the aircraft. In case the name of the exploitant is not recorded on the aeronautic register or any other official document, the owner shall be deemed to be the exploitant subject to proof to the contrary.

The French text reads: Est qualifiée exploitant de l'aéronef toute personne qui en a la disposition et qui en fait usage pour son propre compte. Au cas où le nom de l'exploitant n'est pas inscrit au registre aéronautique ou sur tout autre pièce officielle, le propriétaire est réputé être l'exploitant jusqu'à preuve du contraire.

The text has defined the word "exploitant" in relation to aircraft. This definition corresponds to that found in the Rome Aviation Convention relating to damage to persons and property on the surface of the earth, Article 5. That definition has been much criticized and is not thought to be adequate. Exploitant is a French commercial term used in connection with the conduct of a busi-

ness. It is not ordinarily used in relation to shipowning or ship operating. Thus the French word for a shipowner is *propriétaire*; a carrier is a *transporteur*; an operator who “mans, victuals and supplies the ship” in the American statutory phraseology, or who “manages and navigates the ship” in the British statutory phraseology, is in French called sometimes an *armateur* and sometimes a *fréteur*. A time-charterer is an *affréteur*, and if a ship is taken merely for a voyage, it is a *charter pour le voyage*. The French sometimes refer to the *propriétaire* as the *armateur*, when he manages his own vessel property.27 But the word *exploitant* does not seem to have any particular meaning in the maritime field.

It is fairly obvious that the word *exploitant* is used in the sense of the English word *operator*, although the British Maritime Association indicated in 1934 that it might be translated as *charterer by demise*, “to include the classes of persons who would be covered by the provisions of section 9, sub-section 4, of the Maritime Conventions Act, 1911,” which states that “This Act shall apply to any persons other than the owners responsible for the fault of the vessel as though the expression ‘owner’ included such persons, and in any case where, by virtue of any charter or demise, or for any other reason the owners are not responsible for the navigation and management of the vessel, this act shall be read as though for reference to the ‘owners’ there were submitted reference to the charterers or other persons for the time being so responsible.”

It would seem well worth the effort to secure, at this time, a better understanding of the terms which are being used in the different languages, and to come to an agreement as to their translations. The adaptation of existing terms from the field of railway or motor-car law, or from shipping, may not adequately express the concepts desired in the aviation field. “It may very well be necessary to invent new words and phrases as characteristic for aviation as are the words taxi and charter in relation to motor cars and ships.

*Definition of Armateur.*

The text uses the word “*armateur* in relation to ships and ship-owning and ship-operating, but fails to define its meaning.

The basic difficulty is that the French define the *armateur* as the person who *derives the profits*, whereas the Americans and the English think of the corresponding *owner pro hac vice* as the person who *directs and pays* the bill for manning, victualling, managing

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27. Ripert, Droit Commercial, ch. 2. See also Danjon et Leparneur, Manuel de Droit Maritime (2 ed., 1929) sec. 10.
and navigating the ship. The profit may be split several ways between shipowners, managers, freighters and brokers, to such an extent that the definition of armateur in terms of profits may become vague. Giving directions and paying the bills, on the contrary, is usually concentrated in one agency.

The American and British difficulty with the word armateur is that it does not precisely fit into their schemes of limitation of ship-owners' liability.28 No person can limit his liability unless he is either actually the owner (propriétaire) or the demise charterer (charter à coque nue) or owner pro hac vice. Substantially the same thing is true in Great Britain. Consequently the use of the word armateur or the word operator is quite useless from the point of view of shipowners and ship operators.

The Brussels Convention of 1925 relative to Limitation of Shipowners' Liability had to deal with this identical problem, and it was solved by the use of the single expression "propriétaire du navire" (shipowner). It then provides in Article 10 that the right to limit shall be extended to such an "armateur non-propriétaire ou affrétateur principal" (the non-owning company or the principal chartered owner) as is liable for any of the classes of lien-claims against which a shipowner may limit his liability. This language was carefully chosen by fully empowered delegates of shipowners, marine insurance underwriters, judges, and representatives of the Admi-
ralty Bar, for the particular purpose of adapting the Convention to the terminology and legal thought of all countries, whether under the Roman and Civil Law or under the English Admiralty and Common Law. After ten years, there is still no reason to suppose that the phraseology so carefully chosen in the 1925 Limitation Convention is not suitable for the purpose. The 1925 Limitation Convention is now in satisfactory operation as the law in France and in nine other European countries.29 Its method and phraseology should be adopted.

The solution therefore is to strike out the word armateur wherever it occurs in connection with ship-owning and operating, and to concentrate all the rights and duties in relation to ships upon the owner—the French word is propriétaire.

The settled statutory and case law of the British Empire and

S. Limitation Acts, RS 4181-4189; 6 U. S. Code 181-189; as amended August 29,
29. The (Brussels) Convention for the Unification of Certain Rules Relative
to the Limitation of Shipowners' Liability, 1925. See generally, Report on the
History and Status of Laws Relating to Limitation of Shipowners' Liability,
by Merss. Poor, Dean and Niles: Maritime Law Ass'n Doc. 196, at page 2926.
Since that report was made, France has adopted the Convention.
the United States and Article 10 of the Brussels Limitation Convention, relating to the extension of the owners' rights and liabilities to bare-boat charterers and owners pro hac vice will then take care of armateurs, bare-boat charterers, etc., etc., according to the well-settled rules already familiar to the Bar.

**Article 13. Application of Convention to Government Ships and Aircraft**

This Convention shall apply to government ships and aircraft, including military, customs and police ships or aircraft, with reservation of the provisions of Article 11 relating to jurisdiction and, as regards military, customs and police ships or aircraft, with reservation of the provisions of Article 2 relating to the obligation of assistance and salvage.

Government ships and aircraft are relieved from the obligation to answer the S. O. S. and go to the scene where persons are in danger.

The 1910 Salvage Convention (Art. 14) is not applied to government ships in public service. Since 1910, however, there has been a strong swing away from sovereign immunity for government vessels. The Safety at Sea Convention, 1929 applies to all public vessels except ships of war. The proposed text conforms in this tendency, and is desirable.

The American delegates at Berne proposed to exclude government aircraft from the operation of the convention, thus expressing the old stiff rule as to sovereign immunity, which Congress has so notably abandoned in the Acts of 1920 and 1925 relating to suits in Admiralty against government vessels in both commercial and non-commercial service. The proposal was not accepted by the conference.

**Conclusion as to the Aviation Industry**

While the convention text is in general approaching satisfactory shape, the interests of the aviation industry would seem to require the abandonment of the life-salvage indemnity provisions, the recognition of the personal service of the salvor as well as the property-interest of his employer, the abandonment of Article 7 requiring the aircraft owner-operator to pay the salvage due from the cargo, the extension of time for suit to two years, and the better definition of "exploitant." There should be a "sister-aircraft" clause, like Article 5 of the 1910 Convention.
II. Is the CITEJA 1936 Text Acceptable to the Maritime Shipping Industry and Its Underwriters?

The answer to this question is immediately, No. An earlier form of the text was submitted to a Sub-Committee of the International Maritime Committee in 1934; it received only qualified approval, and in its present form the text is quite opposed to the views of the 1934 Sub-Committee. The 1935 text was reviewed by several bodies representing American maritime interests, and was strongly criticized as to six points. The American delegates at Berne put forward only two of these criticisms; they put forward a third in an alternative form merely. The other three points were not even submitted to the Citeja by them.

From the maritime point of view, there are two fundamental objections to the Citeja 1936 text.

The Citeja's 1933 text was strictly limited to salvage of aircraft, aircraft cargo, and persons in aircraft; it made no change in the law as to ships, and in fact expressly provided that if persons in aircraft assist a vessel, "the conditions upon which this assistance shall be rendered and remunerated shall be determined by the same rules as though salvage had been rendered by one ship to another." In other words, the 1933 text provided that in a mixed situation involving aircraft and vessels, the maritime law and the Maritime Salvage Convention of 1910 should control.

The new (draft) convention provides precisely the reverse: If adopted, it would set up the principle that the new convention shall apply to all interested parties whenever either a salvor ship or aircraft, or a salved ship or aircraft flies the flag of a government which ratifies the new text. In other words, vessels shall all be brought under the new Air Salvage Convention whenever an aircraft plays a part—however minor—in the salvage situation, as either salvor or salvee. The consequence would be that the Maritime Salvage Convention of 1910, now happily the law in the United States, the whole British Empire and seventeen other leading maritime countries, would thereafter govern only salvage situations in which no aircraft plays any part at all.

The second point of the greatest fundamental importance is that the new text apparently seeks to shift the theory of salvage from its present basis as a personal service rendered to persons and property, to a new basis as an affair merely between ships and shipowners. It is proposed that hereafter salvors are to be, not indi-

30. For list of adhering States, see note 16.
individual persons generally, but only shipowners and aircraft operators. In seeking to accomplish this, the new text seems to destroy the present salvage rights of individuals, including those of ship masters and the crews of vessels. The purpose appears to be quite deliberate, for there are two alterations in the phraseology of the statement of the basis of salvage remuneration in Article 4, which is in every other respect an exact copy of Article 8 of the 1910 Salvage Convention. In furtherance of this purpose to shift the basis of salvage from individual salvors to property owners, the "sistership" clause (Article 5) has been omitted; and the "application of provisions" clause (Article 15) has been wholly recast. This is a far-reaching change; and if it is to be made, its purpose and scope should be thoroughly understood by the maritime shipping industry.

In the interval, the Citeja has been elaborating and reworking the text, until by a series of gradual alterations the matter has reached its present form, which seriously threatens the present basis of all maritime rights and duties in the matter of salvage.

**Article 2. Obligation to Render Assistance**

(2) *Ships Bound to Aid Persons in Aircraft at Sea.*

Every ship captain shall be bound, under the circumstances contemplated in paragraph (1), to render assistance to any person who is at sea in danger of being lost in an aircraft or as the consequence of damage to an aircraft.

The Paris Sub-Committee and the Belgian and Italian Maritime Associations considered that this provision merely duplicates the Salvage Convention of 1910, Article 11. It appears to state the rule of the Safety at Sea Convention, Article 45, in an abbreviated and indirect form.

In the interests of harmony, safety and uniformity, the rule should be stated identically for both aircraft and vessels.

(3) *No Obligation Unless on a Voyage or Ready to Depart.*

Such obligation shall not exist unless the aircraft or the ship is (1) in the course of a trip or; (2) ready to depart.

Neither the 1910 Convention nor the Safety Convention, Article 45 (1) and (2) excuses a vessel which is in port from answering a call of distress if the circumstances make it reasonable for her to go. It seems quite illogical to require a vessel in a port to go to sea to aid a distressed vessel, but to excuse her from going to aid a distressed aircraft. It is submitted that any ship or aircraft which can go, should go. The rule should in both cases be the same.
This sub-section should either be deleted, or be extended to all vessel situations in the Safety Convention 1929.

(4) *Obligation Ceases, When.*

The obligation of assistance shall cease when the person who is under such obligation has notice that assistance is assured by others under similar or better conditions than it could be by himself.

The provisions of the Safety Convention, Article 45, (3) and (4) cover this same point in clearer and more positive terms. The rule as to release from the obligation should be identical, regardless of whether the persons in distress are on a vessel or an aircraft. It is confusing to have two rules, differing lightly.

**Article 3. Life Salvage Indemnity**

(1) *Aid Rendered Pursuant to Obligation—Indemnity Based on Expenses and Losses, Although No Useful Result.*

Any assistance rendered in discharge of the obligation contemplated in the foregoing article shall call for an indemnity based on:

1. the expenses justified by circumstances;
2. as well as the damage suffered in the course of the operations.

The present maritime law does not know this sort of an indemnity, which is a complete legal novelty. The familiar maritime remedy provided by the 1910 convention, Article 11, is also contained in this new convention in Article 5. The new convention thus proposes two concurrent indemnities for a single life-salvage service:

Article 3 (1)—expenses and losses, paid by the shipowner, and Article 5—a share in the property salvage award.

The text does not explicitly state who is to receive either the salvage indemnity or the remuneration. The context seems to indicate that no one but the shipowner can receive salvage. This is more fully discussed under Article 4 (5). The Belgian memorandum pointed out the need of clarifying this point. It asks: (page 30)

"To whom is this indemnity payable? Is it to the crew, the operator, or the owner? To each of them, or only to one of them?"

The present text does not indicate any answer to these questions.

Example A: A large liner deviates to rescue one person from an aircraft. The aircraft operator (not the owner nor the rescued
SALVAGE AS BETWEEN VESSELS AND AIRCRAFT

person) is liable to the owner of the liner for expenses and losses up to $8,300 (125,000 gold francs).

Example B: An aircraft deviates to a large liner in distress and brings about the rescue of 1,000 persons. The vessel owner and armateur are liable to the aircraft operator for expenses and losses up to $8,300,000 (125,000 gold francs per person).

Query: If the lives are saved by a combination of the service of the aircraft and the service of a surface vessel, does the surface vessel share the aircraft fund?

If this new convention is to regulate the affairs of ships as well as of aircraft, it is obviously necessary to reconcile Article 3 (1) with Article 9 (par. 2) of the 1910 Maritime Salvage Convention.

It is submitted that if life salvage is to be paid for at all, the reward should consider skill, speed and courage of the master and crew. The 1910 Maritime Salvage Convention does not limit life salvors to mere out-of-pocket. Thus in the Shreveport, \textsuperscript{31} the Spanish SS. Aldecoa rescued the crew and the award was $5,000, 4-5ths to her owners and 1-5 to her crew; while the Mariners Harbor salved the hull and cargo after arduous efforts, resulting in various personal awards for special skill, and $25,000 divided 2-5ths to her crew and 3-5ths to her owners and charterers. Plainly the Aldecoa received much more than her owner's out-of-pockets for the life salvage. Under the proposed aviation convention, the crew of vessels which save lives of aviators apparently get nothing; this seems entirely unfair, if they exhibit courage and skill.

(2) Aid Without Obligation—Indemnity Based on Expenses and Losses, if Useful Result Achieved.

If the assistance was rendered in the absence of any obligation to do so, the assister shall have no right to an indemnity unless he has obtained a useful result by saving persons or by contributing thereto.

This provision seems to be applicable in only three situations.

Example A: An aircraft or vessel finds someone in distress along her course, without an S. O. S. or other message, and consequently without any obligation to deviate to assist.

Example B: An aircraft or vessel in an airport or harbor and not ready to depart, and hence excused from going by Article 2 (3), nevertheless heeds an S. O. S. and goes to the rescue. For this service, if successful, the owner may collect his out-of-pocket, but the crew get nothing for speed, courage and skill. It is diffi-

\textsuperscript{31} 42 Fed. 2d. 524, 1930 A. M. C. 1310.
cult to evaluate in advance the significance of these provisions. It may indeed sometimes be desirable to deter aviators, who have no other occupation at the moment, from flying to the scene of an accident in fine weather at the expense of the owner of the aircraft or vessel in peril. But in stormy weather, fog and darkness, when accidents are most likely to occur, is it wise to discourage ships and aviators from starting out on the chance of a rescue?

Example C: A person on a vessel in distress, who is under no contractual duty to take action (as for example a passenger, or a stowaway) goes to work as a volunteer to help the crew in the moment of peril; if his efforts contribute to a useful result in saving persons, he would be entitled to the indemnity provided by the convention.

(3) **Who Shall Pay.**

The indemnity shall be payable by the operator of the aircraft assisted or by the owner or the armateur of the ship assisted.

This is a wholly novel provision. Heretofore, life salvage has been payable, if at all, out of the proceeds of property saved from the same peril. British Merchant Shipping Act, 1894, sec. 544; U. S. Salvage Act, 1912, 37 Stat. 242.

The text does not suggest whether the owner and armateur of the vessel are to be jointly or severally liable, nor whether either may have contribution from the other. These points need to be clarified unless the word armateur is dropped, as is suggested in the comment on Article 12.

There is absolutely no present basis for supposing that it is desired or sought by any responsible body in the shipping industry. The Paris Sub-Committee approved it only in respect to aircraft. The British and Belgian memoranda plainly stated that it was not the maritime law; and at that stage the text did not propose to change the law for vessels. It cannot be thought that the saving of lives from the *Vestris*, the *Philippa* or the *Morro Castle* would have taken any different or more successful course if the rescuing vessel had known that they could collect their out-of-pockets from the owners of those unfortunate vessels up to the sum of $8,300 per life saved.

If this new liability is imposed, it will have to be covered by suitable insurance. The nature of this coverage—whether tacked onto hull or liability policies—and the necessary premium rates, do not appear to have been considered at all up to the present.
The underwriters who might cover the risk have not yet been consulted.

If the risk is insured, it must be considered whether the underwriter will incur direct liability to life salvors under the English Third Parties (Rights against Insurers) Act or under the New York Insurance Law, section 109. This was pointed out by the Belgian memorandum in 1934; but the present draft does not indicate that any answer has been developed.

(4) (b) Additional Limitations of Indemnity—Shipowners.

Furthermore, the owner or armateur of the ship shall not be liable beyond the limits fixed by the laws and conventions in force with respect to his liability.

This superimposes a general reference to the shipowners' limitation of liability laws which may be in effect in the place where the life-salvor seeks to recover his indemnity. It is by no means clear whether the life-salvage indemnity it to be ranked with other claims against the usual limitation fund, or whether the life-salvage indemnity ranks alone against a second fund, equal in amount to the usual fund. A question of this sort was asked by the Belgian Association in 1934. The present text does not suggest any answer.

(5) Salvage by Several Ships or Aircraft

In case there has been assistance by several ships or aircraft, and the total sum of the indemnities due exceeds the limit fixed in the foregoing paragraph, a proportional reduction of the indemnities shall be made.

The want of harmony between the 1910 Maritime Salvage Convention and the proposed Aviation Salvage Convention would seem to make it quite impossible to apportion a life-salvage award under both conventions at the same time. One or the other must prevail, unless both are now harmonized. The new convention must therefore be treated as a fundamental attack upon the existing 1910 Maritime Salvage Convention.

Article 4. Property Salvage

(5) Salvage Services Rendered by Aircraft to Ships

The same rules shall apply in case of assistance and salvage of a vessel or its cargo by an aircraft, in which case the owner or

armateur of the ship is reserved the right to avail himself of the
limit of liability fixed for him by the laws and conventions in force.

This provision wholly reverses the text of 1933, which reads:

"ART. 2.—(1) Every Captain or Pilot of aircraft
must render assistance to any person in peril on a ship at
sea or being in peril in consequence of damage to a ship.

(2) The conditions upon which this assistance shall be
rendered and remunerated are to be determined by the
same rules as though salvage had been rendered by one
ship to another."

There appears to be a fundamental difference of opinion about
the scope of the 1910 Maritime Salvage Convention and about the
nature of salvage services, and the character of the parties who are
entitled to receive salvage awards. At the meeting of the Citeja
Third Commission in February, 1936, Professor Ripert stated that
the 1910 Maritime Salvage Convention is interpreted to apply only
if two ships are concerned. This seems to imply that it has no ap-
lication if the salvor does not happen to be in a salving ship; it
seems to overlook Article 15, which states that the convention ap-
plies to persons (les intéressés). If in the future, the Air Salvage
Convention is intended to take over the whole field of salvage at
sea, except when only two ships are concerned without any aircraft
present, then his statement confirms the view that the new con-
vention is a challenge to the older one of 1910. If on the other hand
he meant that, in his view, the theory of maritime salvage is limited
to relations between two ships, then it is submitted that the English
and American maritime law of salvage is firmly settled to the con-
trary. It is submitted that a salvage service rendered by persons
in aircraft to vessels, vessel-cargoes and persons in or ex-vessels, are
today and always have been entitled to remuneration under the 1910
Salvage Convention, or at least under the traditional English and
American case law. Lord Justice KENNEDY on "The Law of Civil
Salvage" (second edition, 1907), says, at page 123:

"Every act of effectual assistance if it is done voluntarily
to save that which is at the time in danger is of the nature
of salvage,"

and catalogues many different forms of service, many of which do
not involve the use of an independent vessel by the salvor.

At page 71 Lord Justice KENNEDY also says:

"The court of admiralty as a general rule makes two re-
quirements of those who claim to rank as salvors: (1) that
they have been *personally engaged* in the service in respect of which they claim reward, (2) that they have undertaken the services as volunteers."

He quotes Sir Christopher Robinson in the *Thetis*, 3 Hagg. 14, 41, as saying:

"Salvage in its simple character is the service of those who recover property from loss or danger at sea, rendered to the owners, with the responsibility of making restitution, and with a lien for their reward. *It is personal in its primary character, at least;*** for by whom can the service be said to be ostensibly performed but by those who recover the thing?*** the Court looks primarily to the actual salvor. **There is no principle of constructive assistance in civil salvage."

At page 73 he points out that an exception, however, is made in favor of the owners of the salving vessel, and quotes Lord Stowell in the *Vine*, 2 Hagg. 1, 2:

"It is the general rule that a party not actually occupied in effecting a salvage service is not entitled to a salvage remuneration. The exception to this rule, that not infrequently occurs, is in favor of owners of vessels, which, in rendering assistance, have either been diverted from their proper employment or have experienced a special mischief occasioning the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed."

It is firmly settled in the British Empire and in the United States that *salvage is paid primarily to persons for their services, and not to shipowners for the diversion of their ships*. The proposal of a system based on the view that salvage is payable primarily to the owners of ships and aircraft therefore requires the most serious attention. The adoption of a differing system seems sure to lead to great complications in situations where a ship is liable for salvage service in part to an aircraft and in part to persons on other ships, or to persons on neither a ship nor an aircraft. The debates and reports on the new convention do not indicate that these possibilities have been adequately explored, nor that they have ever been considered by the owners of ships and by marine underwriters.

The provision allowing a shipowner to limit his salvage liability for property salvage under national laws may be considered in three aspects:
(1) his interest in life salvage of persons in his ship;
(2) his interest in his own property, the ship and her freight;
(3) his interest as bailee of his cargo.

The life salvage matter has already been dealt with under Articles 2 and 3.

The shipowner's interest in his ship and freight is not capable of further limitation under the United States statutes, because our laws measure the owner's whole liability (other than for life) by the value of the ship and freight after the accident. The German law is to the same effect.

In other countries, where the owner limits to £8 a ton (as in the British Empire) or to not exceeding £8 a ton (as in the 1925 Limitation Convention countries), the proposed provision would apparently mean that the shipowner's salvage liability could never exceed those values.

Example A: A vessel of 5,000 tons, with a limitation value, at £8, of £40,000, is in peril and is saved by a tug under the guidance of an aircraft. If the salvage award exceeds £40,000 (a most unlikely event), the shipowner may limit the award to £40,000.

Example B: The same vessel, after the salvage, reaches port with an actual value of only £5,000. If in England, the owner still has to respond up to £40,000. If in France or some other convention country, he may limit (as in the United States and Germany) to the actual value, namely: £5,000. But of course the salvage award cannot exceed the salved value, Article 4 (3). Hence the reservation of the right to limit seems illusory.

The Belgian memorandum of 1934 suggested another possible interpretation (page 27,) namely, that "the owner of the aircraft (and/or ship) may be called upon to pay for the salvage of persons an indemnity equal to the value of the aircraft (and/or ship) before the accident, and, in addition to this, if the aircraft (and/or ship) is salved, an indemnity for its salvage."

It is at least uncertain whether the award for salvage of the ship is to be lumped with all other liens and ranked against the limitation fund, or whether there are to be two—or possibly three—funds, each measured by the maritime limitation laws: one fund for life-salvage (Article 3,) one for ship-property salvage (Article 4) and the third for all ordinary maritime lienors. Such a result

34. Maritime Law Ass'n Doc. 196, supra, note 29.
35. List of adhering States: Belgium, Brazil, Denmark, Finland, France, Italy, Netherlands, Norway, Portugal, Spain, Sweden.
would be most distressing for shipowners, and would force them to use every possible device to avoid using aircraft in situations involving any possibility of salvage. This would be socially disadvantageous.

There remains the possibility that the shipowner is liable for the salvage awards on account of his cargo, and may limit his liability against that eventuality. The 1933 text, as already stated, did in fact propose exactly that. The Paris Sub-Committee objected to it, and it seems fairly clear that the 1936 text has abandoned the idea. To prevent any uncertainty, however, it is suggested that there should now be an unequivocal statement from the Citeja that there is no longer any intention to impose on shipowners a liability for cargo salvage awards.

**Article 7. Who Shall Pay Salvage Awards**

(3) *Recourse of Shipowners*

The recourse of the owner or of the armateur of the ship against owners of goods shall remain subject to maritime rules.

This was emphatically opposed by the British, Belgian, Italian and Dutch memoranda; and the Paris Sub-Committee took a positive stand against this article. Nevertheless, it is still retained in the text.

This provision appears to mean that the shipowner or aircraft operator is *always* primarily liable to salvors of cargo, and, after he has paid the salvors, is entitled to seek reimbursement from the cargo owners. Nothing is said about the possession of the cargo. If the shipowner pays the cargo salvage, he ought to get possession of the cargo. But why should the cargo be given to the shipowner? The shipowner does not necessarily have any interest whatsoever in the cargo, and the adjustment of cargo salvage ought to be attended to by the salver and the cargo owner and his cargo underwriters, without requiring the intervention of the shipowner who may have no interest therein. Of course, if the shipowner wishes to act as bailee for the cargo, that situation should not be forbidden but after the vessel is a total loss and the voyage is broken up, there is no necessity or logical reason why the shipowner or ship operator should be injected into the direct relations between cargo salvors and cargo owners. The provision that shipowners shall have recourse against cargo owners "subject to maritime rules" is hardly

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86. Kennedy, op. cit., note 1 (2d ed.) p. 210. See the discussion under Article 7 (1) and (2), supra.
a satisfactory way of stating the subrogation rights of a bailee of the cargo.

Article 11. Jurisdiction of Salvage Suits

(1) *Option of Plaintiff*

To hear indemnity or remuneration actions the following authorities shall have jurisdiction, in the territory of each one of the High Contracting Parties, at the option of the plaintiff:
1. the judicial authorities of the defendant's domicile,
2. those of the place where the operations of assistance and salvage were affected and,
3. if there has been an attachment of the aircraft or of the cargo salved, the judicial authorities of the place of such attachment.

English and American members of the Comité have been uniformly opposed to jurisdictional clauses. French members on the whole have strongly advocated such provisions. It is self-evident that jurisdiction can be had in situations 1 and 3. There seems little reason for the second unless the property is attached there, in which event the third applies.

The Anglo-Saxon sentiment is undoubtedly opposed to the inclusion of this article.

The 1910 Convention has no analogous provisions.


The provisions of this Convention shall be applied with respect to all interested parties when either
1. the assisting or salving ship or aircraft or
2. the assisted or salved ship or aircraft
belong to a government of one of the High Contracting Parties or is registered therewith.

The statement of the scope of the Convention fully proves the argument heretofore advanced that the 1936 (draft) Air Salvage Convention is intended wholly to supersede the 1910 Maritime Salvage Convention in all mixed salvage situations where both ships and aircraft are concerned. If it were adopted, the 1910 Convention would thereafter apply only to situations relating exclusively to ships, with no aircraft present as either a salvor or a salvee. At the present time, with some 20,000 ships sailing the high seas and not more than 200 aircraft regularly engaged in crossing the high seas, this may not seem important. But the small number of aircraft, passing at very high speeds, already cover a relatively large mileage
as compared with the ships; and with the number of aircraft increasing, as they are sure to do, it will soon be a major question, whether in mixed salvages concerning aircraft and ships, the ship law shall follow the aircraft or the aircraft law shall follow the ships. A decision on this fundamental matter of policy is now required. This decision should be made after the fullest consideration by the interests concerned, most especially by the shipowners and the marine insurance underwriters.

Conclusions as to the Maritime Shipping Industry

The 1936 text has never been submitted to a full meeting of the Comité Maritime International, nor to any other maritime body. It differs so widely from the 1933 text, and cuts so much more deeply into the existing body of maritime salvage law, that the Sub-Committee's partial approval given to the 1933 text can not be in any sense regarded as an approval of the 1936 text. American maritime organizations have already expressed themselves in opposition to the text, in its 1935 form. It seems certain that the same organizations will feel much more hostile to the 1936 text which is now newly disclosed, for it repeats and emphasizes all the points towards which American criticism has already been directed, and seeks to subordinate the existing international salvage law of the great established shipping services of the world to a new system devised in favor of the new-born aviation services.

The six recommendations made by the American maritime bodies which have considered this matter are:

1. Elimination of provisions as to salvage services rendered by aircraft to vessels, vessel cargoes and freights, the same being already adequately covered by law.37

2. Cargo to pay the salvor directly for the salvage service, instead of through the carrier, who has no interest therein.38 The Convention should provide a maritime lien or a lien in the nature of a maritime lien directly upon all aircraft property, aircraft cargo and aircraft freight to which salvage services are rendered at sea by persons, aircraft and vessels.

37. This point, endorsed by the Maritime Law Association, the American Bar Association, the Boards of Marine Underwriters of New York and San Francisco, and the Admiralty Committee of the Bar Association of the City of New York, does not seem to have been presented to the C.I.T.E.J.A. by the American delegates who went to Berne.

38. This point, endorsed by the organizations mentioned in Note 30, was presented by the American delegates at Berne in the following form:

“It is recommended that Article 7 be amended to provide that remuneration due for assistance and salvage of cargo shall be payable by the operator of the aircraft or directly by the owner of the cargo.”

This alternative form of statement, without any suggestion of how the choice of alternatives is to be guided, obviously fails to meet the issue.
3. The definition of "cargo" to include all property in the aircraft, specifically baggage, personal possessions, parcel post and general mail matter.39

4. An S.O.S. under the Aviation Salvage at Sea Convention to have precisely the same legal meaning and effect as an S.O.S. under the Maritime Safety at Sea Convention, London 1929, Section 45.40

5. Reward of successful lifesaving efforts, requested by S.O.S. should consider speed, skill and courage in rendering or attempting to render the service as well as out-of-pocket expenses.

6. The obligation to search for fallen aircraft should be limited to such as the circumstances require, within the reasonable discretion of each ship master or aircraft pilot concerned.

The present program of the Citeja, it is understood, is to present the new (draft) Air Salvage at Sea Convention to a Diplomatic Conference in 1937, to be accepted and signed by all participating governments, and subsequently ratified and put into effect.

It happens that the Comité Maritime International is also now planning a meeting for August, 1937; and both meetings are expected to be held in Paris. An opportunity to bring about an expression of maritime opinion is therefore likely to occur.

The matter has never come before a full meeting of the Comité, which has not met since 1933. It should, obviously, be placed on the Agenda for the next meeting, and no action should be taken by the Citeja until the Comité has had full opportunity of debate.

**CONCLUSION**

The draft Salvage at Sea Convention merits further analysis and discussion of points which are fundamental both to the aviation industry and to the maritime shipping industry. In several respects, it requires better adjustment to the 1910 Maritime Salvage Convention and the existing legal concepts prevailing in Great Britain and in the United States.