

## AVIATION LAW COMES HOME TO THE MAIN STREET LAWYER

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Over the past two decades many ambitious young men have asked, "What should I study to become an aviation lawyer?" Even ten years ago I tried valiantly to answer and felt I had done so fairly well. Now I am not so sure.

Whether such a subject for separate study as "aviation law" exists seems now a very debatable question. Aviation is nothing more than another form of transportation—aircraft the mobile instruments employed, airports; the passenger and freight stations or docks used. The legal principles applicable to aviation generally, and air transport, particularly, range through the old student categories of contracts, torts, personal property, real property, etc., with, however, occasional jolts from unexpected and somewhat concealed statutory, regulatory or treaty provisions. And it is the average practitioner at the bar, rather than the student or specialist, who may get the jolt.

Comparatively few companies are engaged solely in aviation—manufacturing or transport. If consolidations continue, as will probably occur, such companies will be fewer and not more. The number of lawyers on their staffs will always be limited. But as aviation continues to grow and air transport becomes a more integral part of the normal life of the business and social world, lawyers in the big cities and the small towns will more and more frequently be called on to advise their regular clients on its problems—and a "crack-up" may well result. The purpose of this article is to point out a few of the danger signals.

It seems only yesterday that I first read an advance sheet copy of the opinion of the U. S. Supreme Court in *Adams Express Co. v. Croninger*.<sup>1</sup> The intervening 32 years have never quite effaced the mental shock. It happened to be my first experience, in practical form, of the ability of Congress under the "Commerce Clause" to take over a field involving everyday business relationships (in that case, between shipper and common carrier) and set aside completely the common law and state statutes as I had known them. Certain statements of the court have always remained with me:

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<sup>1</sup> 226 U. S. 491 (1913).

"The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the State, or by the acts of Congress regulating interstate commerce.

"That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier, of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority.

"But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and non-feasance committed within its limits, although interstate commerce may be indirectly affected."<sup>2</sup>

And again:

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."<sup>3</sup>

Congress having intervened and by Federal regulation occupied the field, woe to the lawyer who thereafter advised his client based on his predetermined views of the common law, or the statutes of his state.

And so my first advice to the average practitioner at the bar is this: If a client wants advice, or is involved in litigation concerning aviation in any of its phases, postpone your decision until you re-read the "Civil Aeronautics Act of 1938"<sup>4</sup> (assuming that you have ever read it). In that act, Congress has quite effectively taken over the regulation of many of the phases of aviation. And this is true to an extent that may be found rather surprising.

Suppose, for example, that you represent a local bank in a small county seat. Your client undoubtedly makes occasional loans on chattel mortgages. The bank has a customer who has purchased an airplane to use locally, for instance in dusting farm crops in the vicinity. The customer needs some funds for further business expansion and offers his airplane as security. The bank approves the loan, sends the customer to you to draw the chattel mortgage. This is done. You search the records at the courthouse, find no judgments against the customer, approve the loan

<sup>2</sup> *Id.* at 499-500.

<sup>3</sup> *Id.* at 505-506.

<sup>4</sup> 52 STAT. 973 (1938), 49 U. S. C. (1940 ed.) §401 *et seq.*

and advise the bank to record the chattel mortgage under your state statute just as would be done on farm machinery, or other similar collateral. All goes well until a few months later when the bank hears that the customer has had some disastrous losses and a petition in bankruptcy has been filed against the customer by creditors in an adjoining county. Then your troubles begin.

The attorneys for the unsecured creditors challenge the bank's mortgage, claiming that the creditors had no actual knowledge of its existence, and citing Sec. 503(b) of the Civil Aeronautics Act<sup>5</sup> as follows:

"(b) No conveyance made or given on or after the effective date of this section, which affects the title to, or interest in, any civil aircraft of the United States, or any portion thereof, shall be valid in respect of such aircraft or portion thereof against any person other than the person by whom the conveyance is made or given, his heir or devisee, and any person having actual notice thereof, until such conveyance is recorded in the office of the secretary of the Authority. Every such conveyance so recorded in the office of the secretary of the Authority shall be valid as to all persons without further recordation. *Any instrument, recordation of which is required by the provisions of this section, shall take effect from the date of its recordation, and not from the date of its execution.*" (Emphasis supplied.)

The chattel mortgage not having been recorded with the Civil Aeronautics Authority in Washington, the validity of the lien is certainly open to serious attack by the unsecured creditors having no actual notice of its existence. In the absence of any decision which has yet come to my knowledge, I suspect that the bank will lose its lien and that you will lose a client. (Any views to the contrary will be welcome—there was a time when I represented a bank.) In any event, be safe and record any instrument affecting title to an aircraft with the CAA in Washington.

Assuming that you weathered that jolt (or knew the answer in advance) and still represent the bank, your troubles are not yet over. This time the bank decides to lend some money on a nice real estate mortgage. A new airport is being laid out in a nearby town and a customer of the bank owns adjoining property which appears suddenly valuable. The customer has a very bright idea. New airport—new travelers into that part of town—hotel needed—in fact, a nice four-story brick hotel. The plans are drawn, and the bank will loan the money. All you do is to approve the title for the bank or the local title insurance company. You search the records and everything is clear. The mortgage is closed. The bank's customer lets a firm building contract and construction on the hotel starts—and suddenly stops. An injunction has been served on the building contractor and the bank's customer, owner of the property. Then everyone becomes very unhappy—the contractor, the owner, the bank, and particularly you. For the injunction papers disclose the fact that the location of the customer's hotel is directly in line with the end of what will be the most used runway on the airport, that the thoughtful municipal authorities coincident with establishing the airport had adopted a local zoning ordinance limiting the height of structures adjacent to the airport—and that the hotel as planned

<sup>5</sup> 52 STAT. 1006 (1938), 49 U. S. C. (1940 ed.) §523(b).

violate the zoning regulations. The fact that you never heard of this regulation is not going to help very much. When you examine the cases and the textbooks,<sup>6</sup> you find that the ordinance is probable valid as a "reasonable exercise of the police power of states and local governments,"<sup>7</sup> that no compensation can be collected by the landowner—and that he is probably going to be sued by the building contractor. What happens to the banker and you, his lawyer, is fortunately not my worry. This is written in the shadow of scholastic quiet where such matters seem far away.

An examination of the Civil Aeronautics Act might possibly have been helpful. For you would have found that the Federal government had *not* sought to regulate airport zoning, even could it practically or constitutionally do so. The field was therefore left to the state or local governments, as the case might be. And the moral is—wherever you see an airport, be sure to find out the status of restrictions on the use of nearby real property before you approve another mortgage or accept a title.

But these difficulties are quite simple compared to another field into which you as a lawyer with a normal general practice may unexpectedly be plunged. Few of us have not at times been called on to advise a client on the right to or extent of recovery arising from the death of or injury to a passenger, or damage to or loss of baggage or cargo. If the carrier involved is an air carrier, you will be very wise to determine immediately whether the transportation in question involved directly or indirectly actual or intended carriage beyond the forty-eight states of the continental United States. If you find that a simple intrastate or interstate movement is alone to be considered in connection with the accident or loss involved, you have (as yet) no general Federal statutory intrusion into the field of procedure or right of recovery normally covered by your state statutes or decisions. You will note, I stated "as yet." Actually, legislation is now pending in the Congress which, if passed, might change the situation to some extent.

But if, in getting the facts from your client, you find that the air transport movement in question involved a trip or shipment actually or intended to extend beyond the forty-eight states, quite a different situation must be faced. You must deal with an almost unique situation in our jurisprudence in which the Constitution of the United States, and the treaty making power delegated through it to the Federal government, have preempted a field of commercial relations and thereby set aside all common law or state statutory rights and remedies otherwise applicable.

The provisions of Article VI, paragraph 2, of the Constitution are, or were in student days, familiar to us:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

<sup>6</sup> RHYNE, AIRPORTS AND THE COURTS (1944). See also Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, *supra* this symposium, p. 539.

<sup>7</sup> RHYNE, *supra* note 6, at 189.

But the effect of this provision, so far as a treaty being part of the "supreme Law of the Land" is something which is not often brought home to the average lawyer. Briefly, the signature of, or adherence to, a treaty by the United States, and subsequent ratification, without further act of Congress can quite effectively amend prior inconsistent Federal legislation and set aside all conflicting state statutes. And this is exactly what has occurred in reference to the rights and remedies of passengers and shippers in international air transport.

In 1943 the United States by adherence under the constitutional procedure applicable became a party to and hence bound by the so-called "Warsaw Convention," more formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air."<sup>8</sup> Before you ever advise another client on the rights of passengers and shippers against an air carrier, read the treaty very carefully. Otherwise, you will get a most unexpected and unpleasant jolt. Because without an accurate understanding of its provisions, you cannot possibly decide what constitutes "international transportation" by air, nor the rights of your clients.

The Warsaw Convention was signed at an international conference held in 1929, at which most of the principal nations of the world were represented, except the United States. It was part of a general international program initiated at an earlier conference in Paris in 1925, having for its object uniformity of private air law throughout the world. The advisability, if not necessity, of such uniformity is obvious. And a series of multilateral treaties, each dealing with one subject, was wisely determined to be the only sound method of attaining such international uniformity. Later conferences were held at Rome in 1933<sup>9</sup> and at Brussels in 1938 to consider other treaties in the contemplated series. But these have not yet been ratified by the United States.

At the outbreak of World War II the Warsaw Convention was in force through most of Europe (except Portugal), Australia, New Zealand, India, British, French and Dutch colonies, Mexico and Brazil, as well as the United States. In the extent of its territorial effect and importance of its subject matter, it takes first rank in the various existing pieces of private international air law. If at any time you are in doubt as to the extent of its coverage, the Department of State will furnish you with a down-to-date list of the countries in which it is effective. Without this information you are quite helpless to determine whether a particular cause of action is or is not governed by its terms. For the convention, before setting out the detailed rights of passengers and shippers and the liability of the carrier, thus defines the scope of the convention and the term "international transportation":

"(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

<sup>8</sup> The official French text, with English translation will be found in U. S. Treaty Series 876, 49 STAT. 3000 (1936), Eng. trans. at 3014. Also in 1934 U. S. Av. R. 245.

<sup>9</sup> The writer of this article was chairman of the United States Delegation to the Rome Conference

“(2) For the purposes of this convention the expression ‘international transportation’ shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

“(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.”<sup>10</sup>

An examination of the above provisions discloses among other things, the following:

- (a) The convention applies equally to transportation for hire and to gratuitous transportation. (Query: Does it thereby set aside the customary “no liability” pass agreements?)
- (b) The contract of carriage of the passenger or shipper, not the destination of the aircraft, will determine whether the convention applies in a particular case. Consequently, in an airplane scheduled from Country A to Country B, thence to Country C, when A and C but not B are parties to the convention, the airplane having crashed between A and B, passengers with tickets to B as destination are not covered by the convention, while those destined for C are covered.
- (c) In an airplane scheduled from a point in Country A (party to the convention) via a point in Country B (not a party to the convention), thence to another point in A, passengers with tickets to B are not covered, while those with tickets to the last stop in A are covered, although *their departure and destination points are in the same country*. (Your client proceeding from the United States by air to Alaska via a Canadian stop is covered. If the flight to Alaska is non-stop, he is not covered!)
- (d) Paragraph (3) above—transportation by successive carriers—is open to varying interpretations—all difficult. Your client is proceeding from Chicago to London via New York. The trip from New York to London is certainly covered by the convention. He takes a ticket from Carrier X from Chicago to New York, and requests Carrier X to make a reservation on Carrier Y from New York to London. The passenger is injured while a passenger with Carrier X between New York and Chicago, an interstate operation.

<sup>10</sup> U. S. Treaty Series 876, pp. 16-17, 49 STAT. 3014-3015 (1936).

But is the entire trip "regarded by the parties as a single operation" so that the convention applies? Please do not quote me as advising you—you are advising the client, and I am (again in the safety of scholastic quiet) simply pointing out the danger signals.

Having decided that your client's case is covered by the convention, an examination of its later technical provisions will disclose that it:

- (a) Requires certain forms of passenger tickets, baggage checks, and air way bills to be used by the carrier;
- (b) Declares the carrier liable for death or injury to passengers, damage to or loss of baggage or goods (as well as delay); but the carrier can rebut such presumption of liability by proving that "he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures"; that as to goods and baggage, the carrier has an additional defense if he proves "that the damage was occasioned by an error of piloting, in the handling of the aircraft, or in navigation, and that in all other respects he and his agents have taken all necessary measures to avoid the damage"; that the defense of contributory negligence will be applied by the trial court under local law;
- (c) Limits the liability of the carrier in terms of gold francs so that such limitation is approximately \$8,300 for death or injury of a passenger, and \$16.60 per kilogram for loss of or damage to goods or baggage;
- (d) Makes void any agreement to relieve the carrier of liability or to fix a lower limit than stated above;
- (e) Prevents the carrier from limiting his liability if the damage is caused by his "wilful misconduct" or that of his agent within the scope of his employment;
- (f) Provides for the place at which action may be brought and fixes a two-year statute of limitation.

In no event should you rely on this summary. The convention is quite technical and must be carefully read. The sole purpose here is to give you a very general outline of its scope and importance. You will at least note, however, that within its field, the treaty has fully taken over practically every important right or remedy as between the carrier on the one side and passengers and shippers on the other.

Technically the treaty is self-executing. No statute was passed, nor was one needed to put it into effect. As part of the "law of the land" under the Constitution, it overrides and entirely displaces state statutes or decisions as fully as if it had been enacted by Congress under the Commerce Clause of the Constitution. If you have occasion to consider the Warsaw Convention in more detail, some of the pertinent authorities are cited below.<sup>11</sup>

<sup>11</sup> *Wyman v. Pan American Airways*, 181 Misc. 963, 43 N. Y. S. (2d) 420 (1943), *aff'd* 293 N. Y. 878, 59 N. E. (2d) 785, *cert. den.* 324 U. S. 882 (1945); *Indemnity Ins. Co. of No. America v. Pan American Airways*, 58 F. Supp. 338 (S. D. N. Y. 1944); *Garcia v. Pan American Airways*, 269 App.

The three examples cited in this brief discussion include, as you have noticed, one situation (created by certain provisions of the Civil Aeronautics Act) in which Congress under the Commerce Clause, has preempted part of the "aviation law" field; a second (airport zoning) in which it has left another part of the field to state and municipal authorities; and a third (the Warsaw Convention) in which the exercise by the Executive and the Senate of the treaty making power of the United States has taken from the states still another part of the field.

If Congress should amend the Civil Aeronautics Act to include provisions for interstate carrier liability similar to those applicable under the Warsaw Convention to international operations, or if the Senate should ratify the Rome Convention as to liability for damage to third parties on the ground, and the lesser known Rome Convention which limits the rights to attach (prior to judgment) aircraft used in international commerce, then additional parts of the aviation law field will be removed from the states and be unified by Federal action. These are problems which the average lawyer must understand if he is to advise a client whose rights or remedies are affected.

This discussion has purposely omitted many problems, both statutory and regulatory, which are of great importance but applicable largely to the practice of the aviation law specialist, as, for example, such questions as obtaining certificates of convenience and necessity by a carrier before engaging in air commerce, pilots' and other airmen's licenses, safety regulations, etc. In all of these, and many other technical sectors, Congress has by legislation or delegation of regulatory powers preempted the field to the exclusion, more or less, of the states. But such questions are not of the same day-to-day concern to the average lawyer. His problem arises when aviation affects his client who is engaged in quite other lines of endeavor. Perhaps these rather desultory remarks may save such a lawyer some future embarrassment.

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Div. 287, 55 N. Y. S. (2d) 317 (1945), motion for leave to appeal to Court of Appeals granted, 56 N. Y. S. (2d) 526 (July 18, 1945); Grein v. Imperial Airways, Ltd. [1936] 2 A. E. R. 1258, 52 T. L. R. 681, 155 L. T. 380, 1936 U. S. Av. R. 211; Latchford, *The Growth of Private International Air Law* (1945) 13 GEO. WASH. L. REV. 276; Latchford, *The Warsaw Convention and the C.I.T.E.J.A.* (1935) 6 J. OF AIR L. & COM. 79; Orr, *The Warsaw Convention* (1945) 31 VA. L. REV. 423; Sack, *International Unification of Private Law Rules on Air Transportation and the Warsaw Convention* (1933) 4 AIR L. REV. 345; GOEDHUIS, NATIONAL AIR LEGISLATION AND THE WARSAW CONVENTION (1937); TOMBS, INTERNATIONAL ORGANIZATION IN EUROPEAN AIR TRANSPORT (1936) 130-135.