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ADMIRALITY JURISDICTION IN AIR LAW

CARL ZOLLMANN*

BEFORE Congress passed the Air Commerce Act in 1926 a long drawn out debate took place on the floor of the American Bar Association and in the columns of many law reviews. There were those who were dissatisfied with all existing constitutional provisions and therefore advocated the adoption of an amendment to the federal constitution conferring the necessary power on Congress. Another group contended that the treaty making power of the federal government should be dragged in by the hair and made to do yeoman service.[1] A third group argued that the interstate commerce clause should be the cornerstone of the building despite the obvious fact that this would leave intrastate flying to state action, thus complicating regulation. To avoid this objection a fourth group fought vigorously for the admiralty clause of the constitution as the basis of the assumption of power by Congress.

The proponents of the admiralty theory advanced many cogent analogies. Airships engage in aerial navigation, take off from airports in charge of pilots and are required to carry red and green lights on their wings just as ships carry such lights on their sides. The regulations as to registration and nationality of aircraft, the requirements as to their log books, their flag and the rules of the road which they must follow bear a striking resemblance to the rules applicable to ships.

However this theory was not successful. Congress chose to base its action on the Interstate Commerce Clause and thus ended the debate. However this action did not remove admiralty completely from air law. While ordinary airplanes were assimilated to automobiles rather than to ships there remained the seaplanes and the amphibians to be considered. These (particularly the seaplanes) spend their inactive life on water and are like autimobiles only when they take to the air. While they are on the water they are not merely analogous to ships, but are ships, though they may not be very seaworthy and may be unable to ride out a gale. Fortunately their status was judicially determined by a great jurist-judge whose death the nation has but recently mourned.

The claimant before the court had been employed to care for a sea-

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[1] The reasoning was somewhat like this. The United States should conclude treaties with foreign nations concerning air navigation and then pass laws to enforce the treaties and by this indirect means should assume jurisdiction over the entire subject matter.

plane moored in navigable waters at Gravesend Bay, Brooklyn. The plane began to drag its anchor and the claimant waded out to turn it about and was injured by the propeller. If he was struck by a vessel the jurisdiction of admiralty was clear and excluded the jurisdiction of the New York Industrial Commission.[2] This was the question decided by Justice Cardozo in *Reinhardt* v. *Newport Flying Service Corporation.*[3] The opinion, in the best Cardozo manner, is substantially as follows:

The latest of man's devices for locomotion has invaded the navigable waters, the most ancient of his highways. Riding at anchor is a new craft which would have mystified the Lord High Admiral in the days when he was competing for jurisdiction with Coke and the courts of common law. The craft, though new, is subject, while afloat, to the tribunals of the sea. Vessels in navigable waters are within the jurisdiction of admiralty. Any structure used, or capable of being used, for transportation upon water, is a vessel. The word has been construed liberally. It includes a canal boat drawn by horses, a bathhouse on floats, a raft, a scow, a dredge, a temporarily sunken drillboat—anything upon water where movement is predominant rather than fixity or permanence. A seaplane, while afloat on water capable of navigation is subject to the admiralty because location and function stamp it as a means of water transportation. To the extent that it is a seaplane it is a vessel, for the medium through which it travel is the water. If incapable of flight it breaks its moorings and causes damages or injury there is a remedy against the offending *res.* If while moving on the water it becomes disabled and is rescued it is subject to a lien for salvage. Admiralty has jurisdiction though the structure is seaplane and airplane combined. Although the jurisdiction is excluded while it is acting as an airplane there is no reason for such exclusion when the mischief is traceable to its functions as a seaplane, secondary though they may be. Collision does not cease to be collision and a peril of the sea because the structure is amphibious. The chance of peril is not remote. Seaplanes abandoning the air have for days moved upon the water. They must always move for some time on water before ascending into the air. Jurisdiction does not vary as the distance is shorter or longer. A plane therefor is a vessel and within the jurisdiction of the admiralty when it is in the fulfillment of its functions as a traveller through water and has put aside its functions and capacities as a traveller through the air.

This decision of Justice Cardozo, of course, is confined to seaplanes and to amphibians while the latter are using the water rather than the

[2] Knickerbocker Ice Co. v. Steward, 253 U.S. 149, 40 Sup. Ct. 438, 64 L.ed. 834 (1920).

[3] 232 N.Y. 115, 133 N.E. 371, 18 A.L.R. 1324 (1921).

land for their take-off, their landing place, or their abode while at rest. The court therefor refers with approval to a federal decision rendered in 1914 holding that an ordinary landplane which had fallen into a bay of Puget Sound was not subject to the admiralty jurisdiction for the purpose of salvage.[4] This decision, though rendered only by a District Judge, has received support by the passage of the Air Commerce Act and may therefor be accepted, as it was by Cardozo, as stating the law.

It does not follow of course that a seaplane while on the water must necessarily lose its character as a flying machine. In a Missouri case a traveller on a seaplane flying from Miami, Florida, to the Bahama Islands was insured, but the policy excluded injuries sustained "while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith." The seaplane while in plain view of its destination was forced to descend on a rough sea and shortly after a successful descent was overturned by a wave and the insured perished. The court held that the plane remained a mechanical device for aerial navigation after it was forced down on the water and that hence there could be no recovery under the policy. The interval during which the craft was supported by the water instead of by the air was as much a part of the flying trip as any other. Though admiralty may disregard the air function of the craft on facts bringing it within its jurisdiction, courts of law may properly regard it as an air vehicle when being used as such though afloat on water.[5] The admiralty jurisdiction therefore is not under all states of fact exclusive of common law jurisdiction though the craft is on the water at the time.

The decision of Justice Cardozo was in part based on various departmental rulings treating seaplane as vessels for the purpose of the Tariff Law or of registration. Similar rulings have followed the decision. Compasses for seaplanes have therefor been held to be entitled to free entry as compasses for vessels.[6] The New Jersey Board of Commerce and Navigation has decided that seaplanes are vessels for the purpose of registration.[7] The Attorney General of Wisconsin has defined a seaplane as "a boat propelled by means of a motor attached to propellers moving in the air," and has held that its owner has the right to use the inland navigable lakes of the state as a landing place.[8] The Circuit Court of Appeals for the Ninth Circuit has held that seaplanes are not vessels subject to maritime liens during their repair in

[4] The Crawford Bros. No. 2, 215 Fed. 269 (W.D. Wash. 1914).
[5] Wenddorff v. Missouri State Life Ins. Co., 318 Mo. 363, 1 S.W. (2d) 99 (1927).
[6] 30 T.D. 232.
[7] 1930 U.S. Av. Rep. 193.
[8] 1930 U.S. Av. Rep. 288, 289.

a hangar.[9] Seaplanes have been held by the Attorney General of California not to be "vessels" within a constitutional provision exempting vessels from taxation.[10]

Two foreign decisions are entitled to notice. A seaplane set out from Stettin, Germany for the island of Bornholm off the Swedish coast. It broke a propeller and came down on the water near its destination. A passing ship took it in tow without transferring its passengers. Before land could be reached the sea became rough and capsized the plane. A number of passengers died. The "Seeamt" (admiralty court) of Stettin investigated the disaster and made findings and recommendations for regulations to prevent a similar disaster in the future. It investigated its own jurisdiction in the matter and decided that a seaplane on the water is covered by the statutory word "Kauffahrteishiff" (merchant vessel). Hence it held that a seaplane as soon as it lands on water, whether voluntarily or involuntarily, is a ship unless it is already a wreck when it reaches the water.[11]

A flight in a seaplane attempted by George P. Hutchinson in September 1932 from New York to Europe in company with his wife, his two daughters and a crew of four ended in a forced descent off Cape Dan, Greenland after the plane had managed to send out an S. O. S. which was picked up by the Lord Talbot, a fishing vessel. When the Lord Talbot reached the location of the descent an all night search finally disclosed that the plane had been able to make its way to a rocky island, devoid of bird life, vegetation or shelter and surrounded by an ice pack where the passengers and crew inevitably but for the help rendered must have perished. A cinematograph camera and equipment worth 3,000 pounds sterling had been on board the plane for the purpose of taking pictures and obtaining sound records as a commercial enterprise for gain. This was on the island when the rescuers arrived. A claim of 300 pounds sterling was made for salving this apparatus. The Sheriff's Court of Aberdeen, Scotland reluctantly sustained the contention that no salvage service were rendered for the reason that the property saved from destruction was not part of a ship's cargo, the seaplane not being considered as a ship. The court stressed the fact that the primary function of a seaplane is travel through the air, and held that the fact that its construction permits it to float on the sea and even navigate a short distance is immaterial. The language of the Merchant's Shipping Act defining a vessel as any ship or boat "used in navigation" was stressed and it was held that the

[9] United States v. Northwest Air Service Inc., 80 F. (2d) 804 (C.C.A. 9th, 1935), reversing 6 F. Supp. 579 (W.D. Wash. 1934).
[10] 1937 U.S. Av. Rep. 141.
[11] 1 Archiv fuer Luftrecht 54, 2 J. Air. L. 588, 590.

seaplane was not used in navigation within the meaning of these terms.[12]

One more New York case must be mentioned to complete this paper. New York in 1913, before seaplanes were in practical operation, had provided that any person who operates a boat, vessel or other floating structure on certain inland lakes propelled by a gasoline engine must run the exhaust through a muffler on pain of being guilty of a misdemeanor. A pilot operated a seaplane over Lake George without such a muffler. He proved that it is impossible to construct a muffler for an airplane because the great heat of the exhaust would destroy it. The lower court very properly held that a seaplane while it might be covered by the words of the statute was not within its meaning and that hence the pilot was not guilty of a violation of the statute.[13] This decision on some unfathomable form of undisclosed reasoning was reversed in a memorandum decision by the Appellate Division on the authority of the decision of Justice Cardozo above discussed.[14] Since its effect would be to throttle air navigation over the wonderful lake system of the state, the New York legislature in 1929 amended the statute by providing that "hydroaeroplanes shall not be deemed boats or floating structures within the meaning of this section."[15]

The attempt made by the Commissioners on Uniform Legislation in drafting the Uniform State Law of Aeronautics to delimit the respective jurisdictions of admiralty and common law in relation to seaplanes deserves a passing notice since this act is in force in about one third of the states. In defining the terms used by the act it is provided that "a hydroplane, while at rest on water and while being operated on or immediately above water, shall be governed by the rules respecting water navigation; while being operated through the air otherwise than immediately above water, it shall be treated as an aircraft." Of course state legislatures have no power to define admiralty jurisdiction and hence this provision is largely in the nature of a gesture. It probably has no more force than has any other resolution by the legislature. It however states the proposition as well as can be done and therefor may have some influence on the courts. The decision of Justice Cardozo, which we have discussed probably forms the basis of this provision.

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[12] Watson v. R. C. Victor Co. Inc., 50 Ll.L.R. 77 (1934), 1935 U.S. Av. Rep. 147.
[13] People ex rel Cushing v. Smith, 119 Misc. 294, 196 N.Y. Supp. 241 (1922).
[14] 119 Misc. 294, 196 N.Y. Supp. 241 (1922); 206 App. Div. 726, 199 N.Y. Supp. 942 (1923).
[15] Chapter 187, Laws of New York (1929).