

St. John's Law Review

Volume 16
Number 2 *Volume 16, April 1942, Number 2*

Article 2

July 2013

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Recommended Citation

Gartland, John J. (1942) "Limitation of Liability and the Seaplane," *St. John's Law Review*. Vol. 16 : No. 2 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol16/iss2/2>

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LIMITATION OF LIABILITY AND THE SEAPLANE

WHILE nearly all peacetime civilian activities are being curtailed to aid the efforts of this country to win the war, there is one activity which has wisely been continued—commercial transoceanic flying.

With the use of airplanes as a means of transportation (increasing steadily as the safety of air travel becomes recognized by the general public, and passenger surface ships are turned to wartime duties) many new problems arise respecting the position of the airplane in the broad field of law.

One of the most pertinent problems is whether or not a seaplane owner should be entitled to limit his personal liability the same as a shipowner.

In 1851, the United States Congress passed a limitation of liability Act¹ for the specific purpose of encouraging investors to supply the capital necessary to rebuild our failing merchant marine. The United States was following the steps taken by England in 1734.² Thus the two major maritime countries of the world recognized a doctrine which first appeared in 1343³ on the statute books of Peter III of Aragon for the consular jurisdiction of Valencia. This placed the United States on a legal parity with other maritime nations. Prior to 1851, the United States Courts ap-

¹ LIMITED LIABILITY ACT of March 3, 1851, 9 STAT. 635, re-enacted by Act February 28, 1871, 16 STAT. 458, R. S. 4281-4286, now contained with amendments in 46 U. S. C. §§ 181-196. The original Act, together with the history of the statute since 1851, may be found in THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, COMMITTEE REPORT CONCERNING LIMITATION OF SHIPOWNERS' LIABILITY, January 30, 1935.

The Commonwealth of Massachusetts passed a shipowners' limitation of liability Act in 1818 (revised in 1836), and Maine passed a similar Act in 1821.

One contributing cause of the Act of 1851 was the denial of limitation by the United States Supreme Court in *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344 (U. S. 1848).

² ENGLISH SHIPPING ACT of 1734, Act of 7 George II. Amended by Act of 7 George III (1736), and by Act of 53 George III (1813).

³ CONSULAT DE LA MER (1336 to 1343 A. D.) c. 34, Boucher's Translation (First 45 Chapters).

Although it was not found in the twelfth century LAWS OF OLERON (ABBOTT ON SHIPPING, 93) nor in the early mediaeval maritime codes of the City of Trani (eleventh century), nor in the laws of Wisby or the Hause Towns (see *The Rebecca*, D. C. Maine, Fed. Cases 11,619 [1831]; *The Main v. Williams*, 152 U. S. 122, 14 Sup. Ct. 496 [1894]), it is found in the laws of other Mediterranean cities—Statutes of Marseilles of 1253, cc. 19-25, 4 PAR-

plied the ancient common law doctrine of *respondere superior*.⁴

After the passage of the Act, many questions were presented to the courts for judicial interpretation of the statute⁵—among which were: the constitutionality of the Act (which was upheld);⁶ the administration of the Act;⁷ who are owners within the meaning of the Act;⁸ when was the owner

DESSUS 266; ESTABLISSEMENTS DE MONTPELLIER, 4 PARDESSUS 255; ASSISI OF JERUSALEM, cc. 41, 46, 1 PARDESSUS COLLECTION DES LOIS MARITIMES, 272, 276, 280; Statute of Genoa (1588) lib. 4, cap. 13, 4 PARDESSUS 527. It appeared in northern Europe by Statute of 1603 of Hamburg (Statute of 1603, tit. 18, art. 3, KURIKE, JUS MARIT. HANS, tit. 6, art. 2, p. 766); Swedish Stadtzlagh statute of 1618 (Putnam [1883] 17 AM. L. REV. 1); Swedish statute of 1667 (MARITIME CODE OF CHARLES II, pt. 1, c. 16); Holland laws of 1624 (GROTIUS, DE JURE BELLI ET PACIS, liv. 2, c. 11, par. 13; VOET, AD PAND, liv. 14, 1, 15; HUBER, PRAEL. JUR. CIV. L. 14, 1, 19; VINNIUS, PECCIUM, note p. 155); France, 1647 (CLEIRAC, US AND COUTUMES DE LA MER. NAVIG. DES FLURES ET RIVIERES, art. 15, ed. 1671, p. 502; 1 VALIN 363, 629, 666; EMERIGON, c. 12, 3; BOULAY PATY, 2 COURS DE DROIT MARITIME, 297 V. 1, 149); and by 1681 French statute (ORDONNANCE DE LA MARINE, L. 1, tit. 14, art. 16; liv. 3, tit. 3, art. 24; CODE DE COMMERCE 191, note 11, p. 307); Hanseatic Ordinance of 1644 and Ordinance of Rotterdam of 1721.

⁴ *Respondere superior*—imposes upon every man a duty, in the management of his own affairs, whether personally or by his servants, so to conduct his affairs as not to injure another. If he or his servant fails in that duty, and another is thereby injured, he shall answer for the damage. *Hantke v. Harris Ice Mach. Works*, 152 Ore. 564, 54 P. (2d) 293 (1936); 37 WORDS AND PHRASES (Perm. ed. 1941) 423-428; 2 BOUVIER, LAW DICTIONARY (1914) 2922. See also *The Bulley*, 138 Fed. 170 (S. D. N. Y. 1905); *The China*, 7 Wall. 53 (U. S. 1868). Chancellor Kent traces this doctrine to the Bible. (2 KENT, COMMENTARIES 269, n.1.)

See also application of this doctrine in *The Rebecca*, Fed. Cases 11,619 (D. C. Me. 1831); *The Main v. Williams*, 152 U. S. 126, 14 Sup. Ct. 496 (1894); *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344 (U. S. 1848).

⁵ See nn. 6, 7, 8, 9, 10, 11 and 12, *infra*.

⁶ Under the commerce clause of the United States Constitution, Art. I, § 8; *Lord v. Goodall*, etc. SS. Co., 102 U. S. 541, 26 L. ed. 224 (1880); *Providence & N. Y. SS. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 279 (1883). Under the judicial clause of the Constitution (admiralty)—*Butler v. Boston SS. Co.*, 130 U. S. 527, 9 Sup. Ct. 612 (1889); *In re Garnett*, 141 U. S. 1, 12, 11 Sup. Ct. 840 (1891); *The Hamilton*, 207 U. S. 398, 404, 28 Sup. Ct. 133 (1907).

⁷ "No court is better adapted than a court of admiralty to administer precisely such relief." *Norwich Co. v. Wright*, 80 U. S. 104, 20 L. ed. 585 (1871). In 1872 the United States Supreme Court outlined the procedure for limitation proceedings by ADMIRALTY RULES 54-57, 80 U. S. xiii-xiv. The Supreme Court upheld its power to make rules in *Providence & N. Y. SS. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379 (1883). These rules were amended on December 6, 1920 by ADMIRALTY RULES 51-54.

⁸ "The owner of any vessel" includes "the charterer of any vessel in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement"; *REV. STAT. § 4286*, 46 U. S. C. 186 (1928); a corporation; *Standard Acid Works v. Chesapeake L. & T. Co.*, 16 F. (2d) 765 (C. C. A. 4th, 1927); stockholders in a ship-owning corporation who by state law are

free from privity and knowledge in incurring the liability;⁹

made proportionately liable for the corporations' obligations; *Flink v. Paladini*, 279 U. S. 59, 49 Sup. Ct. 255 (1929); a marine underwriter to which a stranded vessel had been abandoned and which undertakes salvage operations; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 Sup. Ct. 97 (1891); but an "owner" does not include a manufacturer who has parted with possession although retains legal title to protect the purchase price; *American Car & Foundry Co. v. Brassert*, 289 U. S. 261, 53 Sup. Ct. 618 (1933); a charterer other than one considered an owner *pro hac vice*; *Jones & Laughlin Steel Corp. v. Vang*, 73 F. (2d) 88 (C. C. A. 3d, 1934); *The Barnstable*, 181 U. S. 464, 21 Sup. Ct. 684 (1901); *Thorp v. Hammond*, 79 U. S. 408, 20 L. ed. 419 (1870); an owner *pro hac vice* does not prevent the general owner from limitation in respect to the same vessel; *Quinlan v. Pew*, 56 Fed. 111 (C. C. A. 1st, 1893); *Monongahela River Consol. Coal & Coke Co. v. Hurst*, 200 Fed. 711 (C. C. A. 6th, 1912).

Foreign owners may limit in the United States against claims in this country. The laws of the United States are applied. *The Titanic*, 233 U. S. 718, 34 Sup. Ct. 754 (1914). A foreign owner cannot limit, however, in case of a wrongful act on the high seas, against a right of action granted to those wronged by the law of the foreign ship's flag. *The Vestris*, 53 F. (2d) 847 (S. D. N. Y. 1931).

⁹ The intent of Congress was to "relieve shipowners from consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own wilful or negligent acts"; 19 STAT. 251 (1877), 46 U. S. C. 183 (1938); *In re Reichert Towing Line*, 251 Fed. 214 (C. C. A. 2d, 1918), *cert. denied*, 248 U. S. 565, 39 Sup. Ct. 9 (1918); *United States v. Eastern Transportation Co.*, 59 F. (2d) 984 (C. C. A. 2d, 1932); *The Vestris*, 60 F. (2d) 273 (S. D. N. Y. 1932). *Cf. The Republic*, 61 Fed. 109 (C. C. A. 2d, 1894).

"Privity" means some fault or neglect in which the owner personally participates. "Knowledge" means personal cognizance or means of knowledge of which the owner is bound to avail himself, of contemplated loss or condition likely to produce or contribute to loss, unless proper means are adopted to prevent it. Mere negligence does not necessarily establish existence on the part of the owner of such privity or knowledge. *The Carroll*, 60 F. (2d) 985, 993 (D. C. Md. 1932). The privity or knowledge must be actual, and not merely constructive. *The 84-H*, 296 Fed. 427, 431 (C. C. A. 2d, 1923), *cert. denied*, 264 U. S. 596, 44 Sup. Ct. 454 (1924); *cf. The Princess Sophia*, 278 Fed. 180, 188 (W. D. Wash. 1921).

Unseaworthiness of the vessel does not preclude limitation; *The Galileo*, 54 F. (2d) 913 (C. C. A. 2d, 1931), *aff'd*, 287 U. S. 420, 53 Sup. Ct. 200 (1932); *Standard Wholesale Phosphate v. Chesapeake Lighterage*, 16 F. (2d) 765 (C. C. A. 4th, 1927); *The Yungay*, 58 F. (2d) 352 (S. D. N. Y. 1931); unless owner has failed to exercise due diligence to make the ship seaworthy. *The Malcolm Baxter, Jr.*, 277 U. S. 323, 48 Sup. Ct. 516 (1928).

In dealing with corporate owners, the following persons' knowledge is imputed to the corporation: a president; *Weisshaar v. Kimball SS. Co.*, 128 Fed. 397 (C. C. A. 9th, 1904); a works manager; *Spencer Kellogg & Sons v. Hicks*, 285 U. S. 502, 52 Sup. Ct. 450 (1932); a manager of the entire fleet; *Boston Towboard Co. v. Darrow-Mann Co.*, 276 Fed. 778 (C. C. A. 1st, 1921); the sole manager; *The Benjamin Noble*, 244 Fed. 95 (C. C. A. 6th, 1917); superintendent of entire fleet in remote waters; *Parsons v. Empire Transportation*, 111 Fed. 202 (C. C. A. 9th, 1901); marine superintendent; *In re Penn R. R.*, 48 F. (2d) 559 (C. C. A. 2d, 1931); manager at a terminal port; *In re Jeremiah Smith & Sons*, 193 Fed. 395 (C. C. A. 2d, 1911). The following are not persons whose knowledge is imputed to the corporation: a tug captain who also was a director; *The Marie Palmer*, 191 Fed. 79 (E. D. Ga. 1911), *aff'd*, 202 Fed. 1023 (C. C. A. 5th, 1913); a marine engineer; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 Sup. Ct. 97 (1891); an inspector in charge of

the measure of value;¹⁰ the type of liabilities;¹¹ and what types of vessels are included within the Act.¹² These problems related only to ships plying the seas.

salvation operations; *Craig v. Continental Ins. Co.*, *id. supra*; a supervisor of repairs; *The Columbus*, 25 F. (2d) 516 (E. D. N. Y. 1927), *aff'd*, 25 F. (2d) 518 (C. C. A. 2d, 1928); a shore captain; *Pocomoke Guano Co. v. Eastern Trans. Co.*, 285 Fed. 7 (C. C. A. 4th, 1922); an assistant to the secretary and treasurer; *In re Eastern Dredging Co.*, 159 Fed. 541 (C. C. A. 2d, 1905); a port engineer; *M'Gill v. Michigan SS. Co.*, 144 Fed. 788 (C. C. A. 9th, 1906); a stevedore; *The Colinia*, 82 Fed. 665 (S. D. N. Y. 1897). The master's knowledge was not imputed to the corporation; *Lord v. Goodall SS. Co.*, 15 Fed. Cases 884; *Quinlan v. Pew*, 56 Fed. 111 (C. C. A. 1st, 1893), but by amendment of 1936 [49 STAT. 1479 (1936), 46 U. S. C. 183 (1941 supp.)] is now within the scope of those whose knowledge is imputed to the owner.

¹⁰ The owner's liability shall not exceed "the amount or value of his interest in such vessel, and her freight then pending". 49 STAT. 960, amended in 49 STAT. 1479 (1936), 46 U. S. C. 183 (1941 supp.). An owner may transfer his interest, that is, an owner may discharge his liability by surrendering the ship and freight, or its equivalent; *The Benefactor*, 103 U. S. 239, 26 L. ed. 351 (1881); or the owner may pay into the court the value of ship and freight, or file a stipulation of value therefor. *The Scotland*, 105 U. S. 24, 26 L. ed. 1001 (1881).

The measure of the owner's "interest" in the ship is not in the statute, but was determined by judicial decision in 1882. *The Scotland*, *supra*; *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. 1150 (1886), to be the value of ship and freight immediately following the disaster. The meaning of "freight" is the earnings of the voyage, from the carriage of passengers and merchandise, demurrage, prepaid freight; *The Main v. Williams*, 152 U. S. 122, 14 Sup. Ct. 486 (1894); *The Great Western*, 118 U. S. 520, 6 Sup. Ct. 1172 (1886); *The Giles Loring*, 48 Fed. 463 (D. C. Me. 1890). Freight does not include salvage money; *In re Meyer*, 74 Fed. 881 (N. D. Cal. 1896); unearned freight; *The Main v. Williams*, *supra*, nor a government subsidy which is not apportioned to that particular voyage; *The Scotland*, *supra*; *The Great Western*, *supra*; nor insurance; *The City of Norwich*, *supra*; *Butler v. Boston SS. Co.*, 130 U. S. 527, 9 Sup. Ct. 612 (1889); *The Princess Sophia*, 61 F. (2d) 339 (C. C. A. 9th, 1932).

¹¹ The statute applies to all collision damage; *Norwich Co. v. Wright*, 80 U. S. 104, 20 L. ed. 585 (1871), and by amendment of 1884 applies to "all debts and liabilities" except wages, whether or not maritime in nature. Act of June 26, 1884, 23 STAT. 57, 46 U. S. C. 189 (1928); *O'Brien v. Miller*, 168 U. S. 287, 18 Sup. Ct. 140 (1897). It applies to all obligations, *ex contractu* and *ex delicto*, except those in which the liability was for the owner's own fault, or neglect, or his personal contracts, as for instance: a charter party containing a warranty of seaworthiness; *Pendleton v. Benner Line*, 246 U. S. 353, 38 Sup. Ct. 330 (1918); contracts for repairs and supplies; *Gokey v. Fort*, 44 Fed. 364 (S. D. N. Y. 1890); *The Amos D. Carver*, 35 Fed. 665 (S. D. N. Y. 1888); *The Leonard Richards*, 41 Fed. 818 (D. C. N. J. 1890); contracts for insurance; *Laverty v. Clausen*, 40 Fed. 542 (S. D. N. Y. 1889); or a yearly contract for salvage; *Great Lakes Towing Co. v. Mill Trans. Co.*, 155 Fed. 11 (C. C. A. 6th, 1907); or any personal contract; *Richardson v. Harmon*, 222 U. S. 96, 32 Sup. Ct. 27 (1911).

¹² "Vessel" includes "every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water". REV. STAT. § 3 (1878), 1 U. S. C. § 3 (1938). Included within the above definition of "vessel" are: a wrecked steamer; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 Sup. Ct. 97 (1891); a barge without motive power and used for transporting excursion parties; *In re Meyers Excursion & Navi-*

In 1939, nearly ninety years after the passage of the original Act, the courts first received a petition to limit the liability of an owner of a seaplane.¹³ This raised the question—Is a seaplane a “vessel” within the meaning of the Act, and within the admiralty jurisdiction of the United States Courts?

The airplane, being an instrument of travel, has been placed by some within the field of admiralty, and by others within the field of land vehicles. The different types of airplanes, making use either of land, water or both, added complications which could not and did not arise in the judicial consideration of vessels or vehicles. As a consequence, today, seaplanes are under the general jurisdiction of the admiralty;¹⁴ while land planes are within the province of the civil courts.¹⁵

In 1914, it was observed that aircraft being “neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, are not maritime.”¹⁶

But in 1921, Judge Cardozo, then sitting on the New

gation Co., 57 Fed. 240 (E. D. N. Y. 1893), *aff'd*, 61 Fed. 109 (C. C. A. 2d, 1894); a scow with a pile driver permanently attached thereto; *In re* Sanford Ross, 204 Fed. 248 (C. C. A. 2d, 1913); a temporary sunken drill boat; *Eastern SS. Corp. v. Great Lakes Dredge, etc.*, 256 Fed. 497 (C. C. A. 1st, 1910); a derrick boat; *Patton-Tully Trans. Co. v. Turner*, 269 Fed. 334 (C. C. A. 6th, 1920); a motor boat; *Warken v. Moody*, 22 F. (2d) 960 (C. C. A. 5th, 1927); a ferry boat; *Grays Landing Ferry Co. v. Stone*, 46 F. (2d) 394 (C. C. A. 3d, 1931); a fishing vessel; *Whitcomb v. Emerson*, 50 Fed. 128 (D. C. Mass. 1892); a tug; *In re* Vessel Owners Towing Co., 26 Fed. 169 (N. D. Ill. 1886); and all sea-going vessels, and all other vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters; *REV. STAT.* 4289 (1886), 46 U. S. C. 188 (1926). But the following are not considered “vessels” within the meaning of the statute: a sunken barge which had not been used for a year or two; *In re* Diamond Coal & Coke Co., 297 Fed. 239 (W. D. Pa. 1921), *aff'd*, 297 Fed. 246 (C. C. A. 3d, 1924); a drydock capable of being floated; *Berton v. Tietjen & Lang Drydock Co.*, 219 Fed. 763 (C. C. A. 1st, 1914); a wharf boat incapable of being used as a means of transportation; *Evansville Co. v. Charo Cola Bottling Co.*, 271 U. S. 19, 46 Sup. Ct. 379 (1926); a floating boathouse used as a warehouse; *Woodruff v. One Covered Scow*, 30 Fed. 269 (E. D. N. Y. 1887).

¹³ *Dollins v. Pan-American Grace Airways*, 27 F. Supp. 487 (S. D. N. Y. 1939).

¹⁴ KNAUTH; 1 BENEDICT, ADMIRALTY (1940) 118, 119.

¹⁵ AIR COMMERCE ACT, Act May 20, 1926, c. 344, § 7, 44 STAT. 572, 54 STAT. 1238 (1940), 49 U. S. C. 177 (1941 Supp.). There is also a Uniform Aeronautical Law passed by several states for the regulation of intrastate aeronautics.

¹⁶ *The Crawford Bros. No. 2*, 215 Fed. 269, 271 (W. D. Wash. 1914).

York Court of Appeals, and viewing the subject as a common law court, observed: ¹⁷

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.

We think the craft, though new, is subject, while afloat, to the tribunals of the sea. Vessels in navigable waters are within the jurisdiction of the admiralty.

In 1926, when Congress passed the Air Commerce Act,¹⁸ and for some years prior thereto, legal scholars centered their attention on the place in American jurisprudence of this new device, the airplane. The power of Congress to legislate respecting airplanes was hotly debated. Some advocated a constitutional amendment; others contended that the treaty making power of the Federal Government conferred this power; others argued that the interstate commerce clause of the Constitution was sufficient and that the independent states should regulate intrastate flying; and still others contended the admiralty clause of the Constitution gave such power to Congress.¹⁹

Those favoring the use of the interstate commerce clause of the Constitution emerged the victors, for Congress passed the Air Commerce Act in 1926 upon that theory.²⁰ Contained in that statute is a section that has given to the courts an additional problem:

Section 7. Application of existing laws relating to foreign commerce. (a) The navigation and shipping laws of the United States, including any definition of "Vessel" or "Vehicle" found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft * * *.

This poses the question—What properly should be considered within the shipping and navigation laws of the United States?

¹⁷ Reinhardt v. Newport Flying Service Corp., 232 N. Y. 115, 133 N. E. 371 (1921).

¹⁸ AIR COMMERCE ACT, 1926, note 15, *supra*.

¹⁹ See Zollman, *Admiralty Jurisdiction in Air Law* (1939) 23 MARQ. L. REV. 112, 116.

²⁰ See note 18, *supra*.

In 1932, it was held by a district court that a repairman could get a maritime lien on an airplane,²¹ but the Circuit Court of Appeals reversed this holding, stating:

* * * although a seaplane, while afloat on navigable waters of the United States, may be a vessel within the admiralty jurisdiction * * * it is not such a vessel while stored in a hangar on dry land, with its engine in a shop, also on dry land, undergoing repairs, nor does the making of such repairs create a maritime lien.²²

This decision does not go so far as to deny the right of a maritime lien to a repairman who repairs or furnishes supplies to a seaplane which is afloat on navigable waters at the time the repairs are made or supplies furnished. This latter point has never been judicially determined.

In 1939, the question of the right of an owner of a seaplane to limit his personal liability was presented to the district court sitting in admiralty.²³ The court held that since Congress never contemplated the inclusion of aircraft when passing the limitation of liability statute in 1851, the aircraft was not a "vessel" within that statute.

Later in the same year, the question was raised again, and another judge of the same district court, held,²⁴ after a review of the authorities including the above case, that since the primary purpose of a seaplane was to fly through the air, and used the water only for the incidental purposes of alighting thereon and taking off therefrom, it was not a "vessel" within the statute defining a "vessel"²⁵ and hence not subject to limitation of liability. The court therein observed "that the trend of the statutes and the courts is to treat aviation as *sui generis*. It is a subject which can best be dealt with by legislation."

The district court in this case further observed that a seaplane or a "flying boat" of the type of the Cavalier²⁶

²¹ United States v. One Fairchild Seaplane, *et al.*, 6 F. Supp. 579 (N. D. Wash. 1924).

²² United States v. Northeast Air Service, 80 F. (2d) 804, 805 (C. C. A. 9th, 1935).

²³ Dollins v. Pan-American Grace Airways, note 13, *supra*.

²⁴ Noakes v. Imperial Airways, 29 F. Supp. 412 (S. D. N. Y. 1939).

²⁵ REV. STAT. § 3 (1878), 1 U. S. C. § 3 (1927).

²⁶ The Cavalier, a flying boat, owned by the Imperial Airways, Ltd. (British), which was forced down upon the high seas while en route from New York to Bermuda.

was practically incapable of being used as a means of transportation on water. As to this statement there probably are many conflicting opinions among aerial-minded persons. With the ultimate holding of the court in that case, that an owner cannot limit his liability in the same manner as a shipowner, there are many divergent views.²⁷

One commentary, in discussing the decision, stated:

Considering the character of construction of large flying boats now in transoceanic service, designed for surface navigation in the event they are forced down, it seems strange that a craft such as was involved in the principal case, utilizing the sea surface as an incident to transportation should be without the purview of statutes drafted to aid the development of maritime matters. It is paradoxical that while a court of admiralty retains jurisdiction of a cause of action alleged to have arisen in the air it should deny that a transoceanic craft breaking up on the water is not within the extensive statutory definition of a vessel. The need for Federal legislation is acute.²⁸

The same judge who decided the above case of "*The Cavalier*", two years later, in 1941, had the question²⁹ whether or not the widow of a lost member of the crew of a transoceanic "clipper plane" could sue under the Jones Act³⁰ for death aboard a "vessel". Instead of deciding the question on the basis of the reasoning employed in the prior decision, that a seaplane was not a "vessel", the court held that since the Air Commerce Act of 1926³¹ provided that the shipping laws of the United States were not to be applied to seaplanes, and since the Jones Act was part of the shipping laws, the action could not be maintained.³²

A few months after the latter decision, another judge of the same district court had a similar question presented,³³ except that it arose under the Federal Death on the High Seas Act.³⁴ He refused to decide that a seaplane was not a

²⁷ See (1940) 8 GEO. WASH. L. REV. 852; N. Y. L. J., March 28, 1940, p. 1398.

²⁸ (1940) 8 GEO. WASH. L. REV. 852.

²⁹ *Stickrod v. Pan-American Airways Co.*, S. D. N. Y., Civ. 9-393, opinion filed Jan. 11, 1941, unreported.

³⁰ Act March 4, 1915, c. 153, § 20, 38 STAT. 1185, amended June 5, 1920, c. 250, § 33, 41 STAT. 1007, 46 U. S. C. 688 (1928).

³¹ Act May 20, 1926, c. 344, § 7, 44 STAT. 572 (1926), 49 U. S. C. 177(a).

³² See note 29, *supra*.

³³ *Choy v. Pan-American Airways Co.* (S. D. N. Y.) 1941 A. M. C. 483.

³⁴ Act March 20, 1920, c. 111, § 1, 41 STAT. 537, 46 U. S. C. 761.

“vessel”, and did not adopt the argument that this death Act, even though codified in the shipping section of the United States Code (same as the Jones Act), was part of the shipping laws. He said:

The language of the statute [Federal Death on the High Seas Act] makes no reference to the navigation of vessels nor to any feature of their construction or operation. A reading of the Air Commerce Act indicates an intent to set up a scheme of control of air commerce either without or within this country with a system of admission, registration and regulation peculiar to itself and the obvious and only sense [of the applicable section] was to avoid any conflict that might arise between its provisions and any of the statutes regulating the admission, navigation and control of vessels. The fact that the Death on the High Seas Act is included within [the shipping section of the United States Code] does not necessarily require its definition as a shipping statute. The present codification of the statutes—concluded after the enactment of the Air Commerce Act of 1926—was an attempt to associate statutes under a heading that would make an approach to them convenient; it had no other purpose and the preface of the code disclaims any other purpose.

This court stated that, in 1920, when the Death on the High Seas Act was passed by Congress, “the International Committee on Aviation had already met three times and the aeronautical commission of the Peace Conference was a year old. The International Flying Convention had been drafted in 1919 and, while it was never ratified by the United States, maybe it had, at that time, been submitted for ratification. It is true that our transoceanic air commerce had not yet been established but it had been discussed and few people in 1920 regarded its establishment as an improbability. The Death on the High Seas Act was intended to confer a right and we recognize no reason why its language should be narrowly construed whatever doubt may exist that a given set of facts was in the minds of any of the legislators who framed or adopted it. Laws giving a right of action for tort are never definite in their language and intentionally so. This follows from their nature for no one can imagine all the exigencies out of which causes of action arise and legislators wisely refrain from attempting to state them.”

The reasoning employed in the above case, the latest dealing with the seaplane, might equally be applied to the

limitation of liability statute, despite the fact that it was passed in 1851, before the airplane was invented.

Another feature of air law was developed at the Warsaw Convention of 1929, at which it was recommended that the liability of an aircraft owner be limited. The resolution of this convention was adhered to by the United States, by presidential proclamation in 1934, as advised by the United States Senate.³⁵ However, as pointed out by one district court, there is no enabling act by Congress, and therefore an American owner cannot avail himself of the benefits of the treaty in our courts.³⁶

Mention should be made of two conflicting foreign decisions, one in which a disabled seaplane towed on the surface of the water was held to be a merchant vessel in German courts,³⁷ and the other in which a contrary conclusion was reached in Scotland.³⁸ However, since the latter decision was handed down, the English Parliament expressly extended the principle of maritime salvage to aircraft and their cargoes in distress upon navigable waters.³⁹ The Irish Free State thereafter enacted it into its laws.⁴⁰

The opposing reasons for support of the divergent views, as expressed in the above cases, leaves the layman and the legal student in a quandary as to the place of the seaplane in the field of law.

There is little doubt but that the subject of air law is *sui generis*. It is conceded that when Congress passed the Limitation of Liability Act in 1851, it did not envisage the "flying boat"; and when the Jones Act and the Death on the High Seas Act were passed they were never intended to apply to a seaplane; nor when the Air Commerce Act of 1926 was passed, did Congress conceive of transoceanic flights. But is this reason enough for denying the benefits of these statutes to persons who would be entitled to such benefits if

³⁵ 49 STAT. 3000 (1934); REPORT OF WARSAW CONVENTION, arts. 17, 22, Oct. 12, 1929.

³⁶ See note 33, *supra*.

³⁷ 1 Arch Fuer Luftrecht 54 (1931); 2 J. AIR L. 588, 590 (1931).

³⁸ Watson v. R. C. Victor Co., 1935 U. S. Av. Rep. 147.

³⁹ 1937 U. S. Av. Rep. 415.

⁴⁰ IRISH NAVIGATION ACT of 1936, Public Statutes of the Oireachtas No. 40 of 1936, Part VII.

the courts predicated their decisions upon a common sense, rather than legalistic basis?

It must be remembered that the Air Commerce Act (which excludes the seaplane from the definition of a "vessel" under the shipping laws) was enacted before Lindbergh's historic flight in 1927 across the Atlantic to France, which flight was followed by an epidemic of similar ones. It antedates by many years the present passenger and freight services. The Congress certainly could not have imagined the volume of air traffic as it is today, or will be in the future.

The modern "flying boat" is capable of surface transportation, despite the fact that its primary purpose is travel by air, even though its seaworthiness in riding out a storm or gale upon the surface of the high seas might be questioned. The courts, burdened with the prior decisions, are reluctant to include the seaplane within the scope of the statutes heretofore discussed. Legal reasoning might substantiate some of these decisions, but on principle alone, it would seem to the average person that seaplane owners are entitled to the same benefits as shipowners, and statutes created for the benefit of shipowners should be extended for the relief of seaplane owners.

If the courts will not take upon themselves the task of including the seaplane within the definition of "vessel", as the court did when applying the Death on the High Seas Act (*supra*), the old accusations of "narrow legal interpretation" which do not permit the injection of new ideas and theories to aid the old doctrines, again will be the subject of newspaper editorials and legal debates.

But is the fault with the courts? It is academic that judges should not "judicially legislate", for this field belongs to Congress alone. For many years, in the judicial and legislative history of this country, the courts have been accused of doing just that, justly and unjustly.

The limitation of liability statute was enacted to encourage capital in ships and shipping, and this purpose will necessarily have to be applied, in the near future, to the air transport business, and especially is this true if the United States is to maintain its lead in transoceanic and Pan-American commercial flying.

But whether the present statute is adequate to cover the unique questions involving the airplane is another problem. It seems clear that judicial decision can do little in view of the present state of the law. It is a task for Congress which undoubtedly must sooner or later be undertaken.

The need for legislation is apparent, for under the different opinions expressed by the courts, airplane owners do not know whether or not they are entitled to the benefits of the statute. Perhaps, since most disabled planes are either totally lost or worth very little after a crash, the remedy would be to enforce the English rule, namely, that the value of the ship be measured just prior to the disaster, or something similar thereto—as for instance—a limitation to a fixed sum per gross ton of the plane.

Mention should be made of those who advocate abolition of all limitation of liability statutes. The argument advanced is that with our modern insurance system, together with modern communications eliminating many of the risks of the high seas as well as subordinating the master of the vessel to a secondary position under the owner, the necessity of limitation of liability is no longer apparent. This, however, is a problem for Congressional action, or perhaps international treaty, with which we are not concerned at present.

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