DOCUMENT No. 261

APRIL, 1941.

AVIATION SALVAGE AT SEA

TO THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES:

Two reports have heretofore been made to the Association on this subject,—namely, Document No. 230 in December, 1935, prior to the drafting and signature of the Convention, and Document No. 254 in May, 1940, subsequent to signature of the Convention.

The State Department is at present considering whether to send the Convention to the Senate for its advice and approval with respect to ratification. A corresponding bill, S. 7, has been introduced in the Senate, designed to enact the principles of the Convention into Statute law.

The question whether the Convention and the Bill, or either of them, is suitable, and also the question of whether they are timely are therefore presented.

It is thought essential to proceed first with the Bill, for the reason that the Convention contains an express promise that a ratifying country will conform its law to the principles of the Convention. It would be hazardous as well as impolitic for the Senate to make such a promise before the House has concurred in a Bill.

This order has been followed in previous instances. Thus in 1910 the Maritime Salvage Convention was signed; on August 1, 1912, Congress enacted the Salvage Act making the changes necessary in our law to comply with the Convention, and the Convention was subsequently ratified.

Likewise in 1929 the Load Line Convention was signed; Congress thereupon passed the Load Line Act of 1929, adopting the text even prior to signature; the Convention was ratified later on.

The Convention and the Bill affect both the aviation industry and the maritime shipping industry. The matter is primarily one of insurance, and the Boards of Marine Underwriters of the two leading ports, New York and San Francisco, have both passed resolutions endorsing the Convention and have filed the same with the Secretary of State. There appears to be no ascertainable opposition to the Convention and the Bill on behalf of the merchant shipping community. The Convention and the Bill are undoubtedly advantageous to merchant shipping in that they clarify the status of aircraft and air cargoes for the purpose of salvage and the duty owed by ship commanders when hearing a call for help from an aircraft at sea. These are desirable clarifications.

Both by treaty and by statute the Federal Government has already done much to standardize and clarify the law of salvage and the duty of rendering assistance and saving life at sea. This has been done through the Stand-by Act of 1893 (33 U. S. Code 367), the Maritime Salvage Convention of 1910 (U. S. T. S. No. 576; 37 Stat. L. 1658), ratified in 1913, the Salvage Act of 1912 (46 U. S. Code 727-731), which made the changes in our domestic law required by the projected ratification of the Convention of 1910; also by the Safety of Life at Sea Convention of 1928 (U. S. T. S. No. 910; 50 Stat. L. 1121), ratified in 1936, and the various Acts passed as a consequence of the *Morro Castle* disaster. The Convention and the Bill are in line with the legislation above listed.

The only ascertained opposition comes from the operators of long-range overseas air lines. Their responsible spokesmen say that in the present state of the art a rigid statutory obligation to heed an SOS call and do something about it imperils the safety of these long-range overseas operations. It appears to be essential for some time longer to conduct these operations on the more flexible basis of regulations rather than on the basis of statutory duties.

It is therefore suggested, to meet this view, that the Maritime Law Association might properly endorse the Bill with the following amendment to Section 4:

> "*Provided:* That the Civil Aeronautics Bureau, upon application made to it showing that compliance with such obligation does or might cause a hazard to the safety of any particular aeronautical operation, may, by appropriate

> action entered upon its minutes, relieve any scheduled airline or airman or aircraft from such obligation on such conditions and for such period of time as said Bureau may find suitable."

It has been suggested that the Bill ought to provide penalties or sanctions and it has also been suggested that the Convention Article 2(6) is mandatory and not permissive concerning penalties and sanctions.

The draftsmen of the Bill have thought that it is not essential to go into the matter of penalties. This is a subject which everyone connected with both the shipping industry and the aviation industry would like to see avoided. A situation where each country creates penalties of its own could be exceedingly troublesome. It is suggested that if the United States, taking an early lead in this matter, should assert the view that a system of penalties is not needed and should itself refrain from creating penalties, it would be easier to persuade other nations subsequently to adopt the same course. Those anxious to fly to and in the United States would be inclined to avoid systems of penalties as a matter of reciprocity. On the other hand, if the United States deliberately set about creating a system of penalties, it would be only natural for every other country to follow suit.

A memorandum is attached hereto stating briefly the reasons why there should be a Convention and why this particular Convention is suitable.

The American Bar Association House of Delegates on March 18, 1941, adopted the following resolution:

> "III. That the Committee on Admiralty and Maritime Law, the Committee on Aeronautical Law and the Section of International and Comparative Law consider the subject matter of aviation salvage at sea jointly and make a joint report to the House."

These groups expect to meet in Washington during the week of May 5, 1941.

Respectfully submitted,

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Chairman.

THE CASE FOR THE 1938 BRUSSELS AVIATION SEA SALVAGE CONVENTION

I. Why an Aviation Sea Salvage Act?

Aircraft, with their cargo and occupants, occasionally fall into the sea. The aircraft and their cargoes are usually insured; the underwriters are deeply interested in encouraging salvage of property, in order to reduce their total loss accounts and bring about partial recoveries of values. The crew of the aircraft and the passengers need prompt assistance; they, and the general public, are interested in an orderly system for rendering such help.

At common law, the position of a volunteer is peculiarly unsatisfactory; he is entitled to no recompense, or at most a *quantum meruit,* and he is liable for the results of any negligent performance of what he undertakes, just as though he were employed to do the job. The common law does not encourage salvors.

Aviation is a wholly new field, and the courts are reluctant to extend the settled law from other fields to aviation, unless so directed by statute. For example, Mr. Justice Holmes, writing for the Supreme Court, decided that the Federal Motor Vehicle Theft Statute should not be extended by analogy to cover the theft of an airplane. *U. S.* v. *McBoyle,* 1931 U. S. Av. R. 27; 283 U. S. 25. On the same principle, a great many State Legislatures have specifically extended the liverymen's and garage keepers' lien laws for the benefit of hangar owners. Quite plainly it was felt that such liens would not be extended to hangars without an express direction by the Legislature. This is not a new attitude. Thirty years ago, Legislatures were likewise extending the livery stable keepers' lien to the garage keepers.

The only aviation salvage case which has reached the courts resulted in a decision that the principles of maritime salvage should not be applied by analogy to flying boats and their cargoes. *Watson* v. *R. C. A. Victor Co., Inc.,* 1935 U. S. Av. R. 147; 50 Lloyd's L. L. R. 77 (Scotch).

In general, this attitude of the courts reflects the views of operators of airlines and their counsel, who feel strongly that aviation is a separate legal topic and that the laws and principles relating to other legal topics should not be applied to aviation by analogy. Consequently it is unlikely that salvage principles will be extended by the courts to aviation without legislative direction.

The British Parliament has already given the legislative direction. *Air Navigation Act of 1936* (Acts of 1936, ch. 44) provides in the Fifth Schedule, Section 11, that:

> "Any services rendered in assisting, or in saving life from, or in saving the cargo or apparel of, an aircraft, in or over the sea or any tidal water, or on or over the shores of the sea or any tidal water, shall be deemed to be salvage services in all cases in which they would have been salvage services if they had been rendered in relation to a vessel; and where salvage services are rendered by an aircraft to any property or person, the owner of the aircraft shall be entitled to the same reward for those services as he would have been entitled to if the aircraft had been a vessel.
>
> The preceding provisions of this subsection shall have effect notwithstanding that the aircraft concerned is a foreign aircraft, and notwithstanding that the services in question are rendered elsewhere than within the limits of the territorial waters adjacent to any part of His Majesty's dominions."

Consequently, as a minimum, an Act of Congress of the same purport as the Act of Parliament is indicated.

Some day there will be an aviation disaster at sea which will spotlight this situation in the public eye and bring about the enactment of such a law. If eventually, why not now?

II. Why an International Aviation Sea Salvage Convention?

Salvage at sea is peculiarly international. It is impossible to predict what the nationalities of the parties will be, nor into what jurisdiction they may come. The high sea is *regio nullius*. So is the air space over the high sea.

Before 1910, all maritime nations had laws and customs concerning maritime salvage. The underlying principles were the same, but the details were different. These differences constituted a genuine disadvantage. They promoted litigation which cost the parties and their underwriters unnecessary money. They caused salvors to hesitate during precious moments when prompt decision was essential to save substantial values from total loss. This situation drove the shipowners and their underwriters into the

Maritime Salvage Convention of 1910, which standardized the details as well as the principles of salvage for all countries.

It is inevitable that aviation salvage at sea will follow the same course. If each nation is left to make its own salvage statute for itself, the statutes are bound to differ in detail although presumably similar in principle. In the course of time, these differences of detail are bound to drive the interested parties into the conclusion of a general international salvage at sea convention. If eventually, why not now?

III. Why the particular text agreed upon by the Brussels Diplomatic Conference on Private Air Law of 1938?

Only one feature of the 1938 Convention has aroused any opposition, and that opposition emanates from only one type of overseas air transport operator. The provision objected to is Article 2, imposing a duty on the commander of an aircraft to give heed to an SOS. The opposition comes from the operators of extremely long range trans-oceanic airlines. They state that in the present state of the art, the calculations upon which long range flights are conducted are of necessity so nicely adjusted that any interference —especially in the shape of an Act of Congress, rather than a flexible regulation—is bound gravely to imperil the safety of such long range trans-oceanic flights. This statement is unquestionably true at the present date. We cannot foresee how long the state of the art may remain in its present balance; it may remain as it is today for many years, or it may alter in a relatively short time.

In all other respects, and for all other types of aviation, the Convention appears to be soundly constructed and suitably expressed.

This poses the question whether the public advantage of the Convention in promoting the saving of property and the saving of life and the adjustment of air transport to sea transport in matters of salvage should be postponed because of that single difficulty.

It would seem wiser to enact the principles of the Convention with an exception or proviso relieving commanders of long range trans-oceanic aircraft from the duty imposed by Article 2.

If and when the conditons of long range trans-oceanic flying alter in future, so as to make it reasonable to impose the duty of heeding SOS calls upon the commanders of such aircraft, that will be time enough to consider withdrawing the suggested exception in their favor.