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(a) *L'Aviation de Tourisme et les Assurances.* René Blum, pp. 605-609.

This article is a continuation of the one appearing in the July-September issue of Droit Aérien (1930) at pp. 397-401, and summarized in 2 Jour. of Air Law 143. The essential problem pertains to the difficulty in calculating any satisfactory insurance premium relative to private flying. It is customary to refer to insurance based upon other activities, but such a method is not entirely serviceable as the factors are somewhat different.

Any aviation risks are at once related to the conditions of (1) weather reporting services, (2) day and night marking and signal services, including beacons, etc., and (3) the creation of additional landing fields. Further, the extent of these risks depends upon the ability of the pilot to utilize these services and the quality of his aircraft and what quipment it may carry—particularly, whether or not it carries radio apparatus. The very multiplicity of these factors makes the calculation of an insurance premium for private flying almost impossible.

Relative to the flying itself, there are three variables to consider carefully: (1) The navigation facilities—terrain, landing fields, etc.; (2) The character of the aircraft itself, and; (3) The individual capacity of the pilot. The author refers particularly to the percentage of accidents caused by errors of pilotage in the United States.

It is suggested that the conditions for insurance in private flying will be found less favorable than in commercial flying—due largely to the personnel and the lack of regular flying experience. This will doubtless cause hesitation on the part of the insurance companies to assume these relatively high and highly uncertain risks. But the author thinks a possible solution might be the formation of a sort of guaranty fund (provided by levy, contribution, etc.) to protect the insurance companies from loss. Once established, the difficulty in providing insurance would be obviated and the benefits which would flow from such protection be obtained.

(b) *La Responsabilité des Aviateurs pour les dommages causés à la surface du sol.* André Kaftal, pp. 610-616.

For many years, the question of the aviator's liability to persons and for property on the ground has attracted the attention of the jurists. The majority of the legislation has provided an extraordinary liability in case of injury caused on the surface. The idea of fault has been largely eliminated and the operator (exploitant) of the aircraft has been held liable for all damage done. The sole exception occurs in case of contributory negligence on the part of the injured. The concept of this liability has been an unlimited one. These legislative provisions are, the author points out, extremely harsh in that they place the operator

of the aircraft in a very difficult position. It is almost impossible for him to provide against these risks and even insurance will not entirely relieve him from the liability. This situation is particularly difficult in the case of private flying where one is constantly in danger of being forced to pay huge indemnities. It is much more severe than in the case of automobile transportation.

Thus the jurists have sought some means of modification of the unlimited liability so as to render the aviator's obligation less onerous while, at the same time, safeguarding the rights of the person on the ground. Some have thought it desirable to limit the liability to a fixed sum determined in advance either, (1) as an absolute amount apart from the aircraft, or (2) as an amount fixed in proportion to the value of the aircraft (such as five times its price). If a fixed sum be agreed upon, by whatever means calculated, some have wished it to be very low, while others would place it at a relatively high figure. Of course, if the sum be too high, it amounts to no limitation.

If the amount agreed upon be based upon the value of the aircraft, it may be acceptable to the aviator and entirely unacceptable to the injured party. In case of fire, a small airplane may cause as much harm as a large one and, it must be remembered, the injured person is concerned only with the amount of damage done—not the value of the object causing it.

Before proceeding with the analysis of liability limitation, it is well to consider the kind of injuries which aircraft are likely to cause to persons and property on the ground. As for injury to persons, the aircraft offers substantially no greater danger than do automobiles. In fact, the pedestrian in any city is probably in more danger from auto traffic than from any harm from aircraft. The only reason, then, for the greater responsibility of the aviator is that arising from the difficulty of proving the cause of the injury. In automobile cases, there is some possibility of the cause being determined. In aircraft cases, the cause can rarely be determined. The automobile owner can easily provide insurance against his risk and his liability seldom exceeds the amount of his insurance. Why, then, should not the same situation obtain in case of aircraft?

Relative to property damage, the aircraft can not be compared to the automobile. The automobile will ordinarily cause little real injury while the fall of an aircraft in a populated area is of serious consequence. Particularly from the fire which may follow from an explosion. The author here cites two actual cases. Since the great danger is from fire, the aviator is not so badly situated. Most of the structures on the land have already been insured against fire. The insurance companies must then pay the owners of the structures damaged and can recover from the author of the injury only upon a showing of fault. The legislation providing for the absolute liability of the aviator will not, according to the view of the author, extend to protect the insurance companies.

Injury from the fall of the aircraft directly (shock of fall) will almost never be insured against by the ground owner. Here, then, there must be provision for reparation. But this could be limited to 125,000 francs.

In summary, the author suggests the following: (1) In case of liability for injuries to persons— no modification of the law. The aviator can protect himself the same as an automobilist. Any limitation here would be extremely vexatious to the persons on the ground. (2) In case of liability for property damage, the legal liability should be limited to a fixed sum, not too high, together with the delictual liability of an unlimited amount for the operator of the aircraft. The position of the operator may be made less difficult by qualifying the delictual liability to that involving grave fault.

(c) *Le Droit public français et la reparation des dommages causés par les aéronefs d'Etat.* Robert Le Gall, pp. 617-623.

The author points out that, ordinarily, when a wrongful injury is caused by an officer in the exercise of his duties, the victim may demand reparation from two persons: (1) The officer, who is the direct author of the injury, by virtue of Article 1382 of the Civil Code, and (2) the principal, by virtue of Article 1384, which provides that "one is responsible not only for the damage which one has caused by his own act, but also for that which is caused by the act of those persons for whom one must answer, or those things which one has in his keeping."

The reparation of damages caused by aircraft is governed by the special provision of the Law of May 31, 1924, Ch. 4 (Art. 51 ff.). Article 53 provides that the operator of an aircraft is legally responsible for the damages caused by the movements of the aircraft, or any objects which detach themselves from it, to persons and to property located on the ground. This responsibility can be lessened or averted only by proof of fault (contributory negligence) of the victim. An Act of God or *force majeur* cannot be used to exonerate the operator.

Article 2 of the Law of May 31, supra, provides that "military aircraft and aircraft belonging to the State and set aside exclusively for public service are only subject to the application of the rules relative to the responsibility of the owner or of the operator." A careless reading of the text might lead one to suppose that the principles explained above would apply without distinction to all aircraft. But the purpose of the article mentioned is only to establish the principle that the responsibility of the State should be calculated the same as for single individuals, and that the State cannot invoke the doctrine of *force majeur* any more than can a private individual.

The principle of State responsibility has undergone many changes and the movement in favor of the responsibility of the State, timidly outlined by the laws of September 7th and 11th of 1790, have been extended until it has been recognized, despite the silence of the texts, that the State owes reparation for injuries caused by the fault of a public service. And the reparation of injuries caused by State aircraft is subject to the general principles of French public law. However, since Articles 1382 and 1384, above mentioned, do not apply when the State is considered the principal, it becomes necessary to determine whose the fault is. For example, suppose a military aircraft falls on private property. If the fall of the plane and the resultant injury springs from the personal fault of the pilot, the action should be brought before

the civil tribunals; if, on the contrary, the injury is imputable to some fault of the service, the administrative tribunals would have jurisdiction. In practice, it is often very difficult to distinguish the two faults. In the case given, it is possible that neither tribunal would admit fault of one or the other kind. Then, the injured party could obtain no recovery at all. Or, it might be that there was a joint cause of the damage. The *Conseil d'État*, in a decree of Nov. 9, 1928, following injuries caused by the fall of a military aircraft, stated: "Taking into consideration the circumstance that this accident would be the consequence of a fault committed by the pilot of a military plane, which would have the character of a personal act of such a nature as to involve the sentence of the pilot by the judiciary courts to costs, would not deprive the victim or those having the rights of the victim from taking action against the State responsible for the function of the public service incriminated for the reparation of the injury suffered; that it is the duty only of the administrative judge, while declaring the State responsible, as against the victim, for all the consequences of the accident, to take, while determining the amount and the form of the indemnity allowed to him, measures necessary to the end of prohibiting the decision from having the effect of procuring for those having right, in consequence of the indemnities that they could obtain before other courts by reason of the same accident, a reparation higher than the total importance of the injury suffered."

The author then reviews the suggestions offered to remedy the situation and to provide a single jurisdiction.

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IL DIRITTO AERONAUTICO—December 31, 1930, VII—6.

Aircraft Mortgage. Antonio Ambrosini, pp. 337-360.

The author believes a study of aircraft mortgage opportune in view of the amount of controversy it has aroused. In fact, the C. I. T. E. J. A., after carefully preparing a draft of an international agreement on the subject, dropped it showing that it believed the subject premature. The present study deals especially with Italian law and with the two most important international projects, that of the C. I. T. E. J. A. and that of the "Code de l'Air".

Theoretically aircraft being mobile, that is personal, property, should be subject to pledge (*pegno*), but several systems of air law including the Italian and several international proposals make aircraft subject to mortgage (*ipoteca*). Aircraft mortgage, like marine mortgage, was instituted for the purpose of allowing the owner to raise money which he needs to operate his aircraft while retaining possession of the same in order to carry on his business. A pledge must remain in the hands of the creditor.

Some authorities have raised theoretic objections to aircraft mortgage on the grounds that mortgage should apply only to real property. The author does not consider these objections valid; Anglo-Saxon law has always recognized chattel mortgage, and Latin and German law recognize mortgages on certain forms of personal property whose title is a matter of public record, such as ships, shares of stock, etc. Italian law formerly used the term pledge in regard to ships though the conditions of the contract were those of a

true mortgage, but now the term mortgage is used. The author sees no objection to aircraft mortgage in principle since all aircraft in Italy must be nationally registered and the title is therefore a matter of public record.

Practical objections to aircraft mortgage are the fragility, short life, and relatively low value of aircraft. The author admits the validity of the first two, and says there are also certain claims on aircraft which have priority over the mortgage, thereby reducing the security of the creditor. But he sees remedies. Italian law and the C. I. T. E. J. A. draft both extend the mortgage to the insurance due in case of loss or damage of the aircraft. Thus the mortgagee is protected by simply requiring the mortgagor to take out insurance. The development of aircraft insurance will be of great assistance to that of aircraft mortgage. If in addition, as provided in the C. I. T. E. J. A. draft, the mortgage be taken out on a number of aircraft considered as a unit it becomes more practical and may be a valuable aid to air transportation companies. An attempt has been made to reduce the prior liens to a minimum and make them of short duration. With all these safeguards the author considers aircraft mortgage practical and valuable. He does not go so far as to believe that it will greatly assist in installment buying of planes and thus develop private air travel, since the present system of installment sale with the seller retaining title is satisfactory.

In Italian civil law there are three kinds of mortgage; the legal, the judicial, and contractual. Aircraft mortgage must be by agreement. It is a real right of guarantee on an asset of the debtor or of a third party which remains in the possession of the owner; the mortgagee has the right to pursue the asset in the hands of any owner (*droit de suite*) and to demand the satisfaction of his claim before those of any creditors holding notes of the debtor; the aircraft mortgage is indivisible, that is every part of the aircraft is subject to it and guarantees the credit as a whole; it is specific in regard to the asset and to the sum guaranteed; it must be a matter of public record or it is without effect. However, in addition to the important difference that aircraft mortgage must be contractual, there are certain others. Aircraft mortgages are not recorded in the communal mortgage registers but in the National Aeronautic Register of the Ministry of Aeronautics; they are entered in the name of the aircraft itself, not of the owner; finally, the entry is not made for third parties only but the registration gives the mortgage validity between the contracting parties themselves.

Since the law states that the mortgaged object is understood to be the aircraft and its accessories, the author next proceeds to consider what are to be included in the term "accessories". Taking the marine mortgage as a precedent he concludes that all objects intended for the permanent use of the aircraft are its accessories. The engine presents a somewhat special case. The C. I. T. E. J. A. project states that "engines, tools, and in general all objects destined for the permanent use of the aircraft which are shown in its inventory or other documents are accessories thereof even though temporarily separated from it; reserving, however, the rights of third parties who may acquire them in good faith". This last clause was a concession to the German delegation who wished to have engines cease to be subject to the mortgage after they had been removed from the aircraft. The author

considers that to exempt the engines would unduly diminish the security offered the creditor, and that with present systems of registration it is well-nigh impossible for a third person to acquire an aircraft engine without knowing whether it is subject to encumbrance. He also believes that fuel, oil and provisions should be considered as accessories.

The indemnity paid the aircraft owner by virtue of insurance should be considered as an accessory and therefore subject to the mortgage. This is specifically stated in the Italian law and the author considers it important as it does away with the objection based on the perishability of aircraft. He is inclined to favor compulsory insurance, but in the meantime the matter can easily be settled by contract. The Italian law mentions only the case of destruction of the aircraft, but the author believes the same thing should apply in the case of damage, and this is covered in the C. I. T. E. J. A. dratt. Finally, if the contracting parties wish to exclude the insurance from the mortgage they may agree to do so.

The author next takes up the question of mortgages on aircraft under construction. These would be a valuable aid to the development of the industry and, since ships under construction may be mortgaged in Italy, some authorities have held that aircraft could also. The author is obliged to take the contrary view because as yet there is no public register of aircraft under construction as there is of ships. He thinks that such a register should be established so as to permit mortgaging an uncompleted aircraft under proper conditions.

By Italian law only the owner of an aircraft may mortgage it, not its operator. The mortgage may be a public or private document, but if Italian aircraft are mortgaged abroad the documents must be executed in the Italian consulate and thus become public, and when the document is private the signatures must be attested before a notary. The author gives details on the documents required.

He reverts briefly to the debates in the Italian parliament on air law as deriving from the civil code and from the commercial code as it applies to vessels.

There follows a section on the C. I. T. E. J. A. "avant-projet de convention relative aux hypothèques et privilèges aériens", or preliminary draft of a convention regarding aircraft mortgages and liens. This draft is more complete and detailed than the Italian law and differs from it in important particulars. The C. I. T. E. J. A. understands by mortgage a real guarantee (*sureté réelle*), no matter what its name and origin, which is recorded in the Aeronautic Register and makes the aircraft security for the payment of a debt whose amount is also recorded in the Register. The author considers that this is too broad and the draft should adopt some other name than mortgage. The C. I. T. E. J. A. draft also recognizes legal and judicial mortgages as well as contractual. Like the Italian law the proposed draft makes the insurance subject to the mortgage, but adds that the prior lien of privileged creditors does not extend to the insurance. Receipts are not subject to the mortgage unless the contract specifically provides that they shall be. The author repeats the C. I. T. E. J. A. definition of accessories. The draft also recognizes prior liens (*privilegi*) which take precedence over the mortgage but these are reduced to a minimum. The right of retention (*ritenzione*), even in states where it is recognized, is not to impede sequestra-

tion and sale nor to constitute a prior lien over the claims of privileged creditors and mortgagees. The draft expressly states that several aircraft or a fleet of aircraft considered as a unit of property may be mortgaged. This is intended to facilitate what is known in English as floating charge, and the author proceeds to explain this English phrase. In the case of several mortgages, their priority is determined by the order of their entry in the Aeronautical Register.

Consideration is then given to the "Code de l'Air", drawn up by the jurists belonging to the "Comité International de l'Aviation". This also provides for aircraft mortgage, but as in the case of the C. I. T. E. J. A. the word mortgage is taken in a broad sense; in fact the Code usually makes use of the words "sureté réelle" or real guarantee rather than the term mortgage. The Code states that aircraft may serve as real guarantees according to the laws of their several countries, provided that such guarantees be recorded in the Register of the country and in the log book. The Code therefore does not attempt to unify the type of real guarantees. On the other hand the Code provides that "legal guarantees established by common law on personal and real property do not apply to aircraft". The expression legal guarantees (*suretés légales*) seems to mean legal mortgages, and this is similar to the Italian law. The Code reduces privileged claims on aircraft to two: judicial expenses and expenses for salvage. To avoid legal conflicts the Code declares that aircraft incumbered by real guarantee cannot be sold to foreigners and that a real guarantee regularly entered upon and published in the country of registration of the aircraft shall be respected in case of sale or sequestration in a foreign country. The right of pursuing the mortgage aircraft in the hands of any owner (*droit de suite*) expires in case of judicial sale. Privileged creditors have prior lien over the mortgagee. The order of mortgages is determined by the dates of their recording in the Register. As in Italian law and the C. I. T. E. J. A. proposal, the mortgage includes the insurance, and in the Code de l'Air covers also damages paid to the owner of the aircraft by third persons.

The author concludes by a brief note on French law which provides for aircraft mortgage on the model of the mortgage on river craft, and also provides for mortgaging aircraft under construction.

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