Universality *versus* Nationality of Aircraft

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UNIVERSALITY VERSUS NATIONALITY OF AIRCRAFT

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The concept of nationality has from early times been applied to persons in certain relations between individuals and the community. Today nationality is an attribute not only of persons, but of corporations, ships and aircraft. Resulting from the nationality of aircraft are problems, both practical and theoretical, which invoke the inquiry as to how inanimate objects and legal entities became personified to the extent of assimilating prerogatives created originally for human beings.

However important history and precedent may be, the vital points in the study of aircraft nationality are: (1) to analyze the nature of aircraft not merely as a mechanical device and an object with great potential power and speed, but also as related to persons and states; (2) to see how far, if at all, certain analogies to other objects somewhat similar in nature could be, or should be, applied to aircraft; (3) to examine existing legal systems as to their adequacy for covering situations arising out of air navigation; and (4) to suggest (a) a remedy for present difficulties, and (b) a plan for future development along the above lines.¹

Nationality of aircraft as a legal principle is at the present time generally accepted by states, and such nationality is, with a few exceptions, determined by the nationality of the owner of

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¹ Lack of space necessitates only brief discussion of these points and restricts illustrations chiefly to those drawn from the United States. Wherever the word "state" is used in this article, it refers to a national state, unless otherwise indicated; wherever capitalised, it refers to a State of the United States, unless in quotation it has the former meaning.
the aircraft. To inject into this seemingly crystallized condition of affairs a different idea may appear futile at first, but already there is an opening wedge in the fact that nationality of aircraft does not work out in practice as well as in theory.

Remedies usually suggested in the controversies on this subject center largely around the method of determining the nationality of aircraft. For example, instead of fixing nationality of aircraft according to the nationality of the owner, the test of domicile of the owner is often advocated, or the domicile of the aircraft, its place of registration, while others beg the question by preferring to leave the choice entirely to the provisions of municipal legislation of the different states. Some of these latter methods are in actual use by a few states.

The real difficulty, however, appears to be not with the method or the rule of determining nationality of aircraft but with the principle itself. The feasible remedy is abolition of the principle. The proposal of another approach to a subject already entrenched, and the suggestion of a name transcending the boundaries of states and the sovereignty of governments, may be severely criticized, but it is believed that scientific dissection of the subject, reason and foresight will support this viewpoint. If the legal mind, in matters of air law, be divested of undue influence from precedent, prejudice and conformity, aircraft may be acknowledged as a new species. A new concept may call forth a new principle, or an adaptation of an old rule.

Imagine a world without ships or automobiles, where aircraft would be the only means of transportation, with combination types adapted to go on water, on the street and in the air for universal service—a world where present modes of land and sea travel would be as obsolete as are today a canal-boat and a buggy. It is not improbable also that the speed of the airplaine and the complex drive of modern life may, sooner or later, in matters relating to air navigation, demand more direct and simplified legal procedure than is possible under present legal practice. Is there any significance in the fact that maps of an international airways company indicate no nations or continents but only localities connected by straight lines?

Military, economic, jurisdictional, political and social forces have contributed in various degrees to the development of the general concept of nationality. How far do these forces affect the

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2. See discussion, infra, of the three international conventions, bi-partite treaties and national legislation relating to air navigation.
status of aircraft today? To what extent have conventions, treaties, and legislation for promoting commercial relations between nations in time of peace been colored by the cloud of possible war? Since the contingency of war must be faced, can its necessities be rationalized with the present trend toward expansion of air transportation, insofar as private aircraft may be regarded as a war hazard or as convertible equipment for military and naval operations?

Under the present practice for determining nationality of aircraft, the question has been raised whether several foreign fleets of aircraft might not operate within a country, and, if the air service of a state is under foreign control, whether the government of the former state might not be inclined to impose conditions which might favor the aircraft of that foreign state to the detriment of the aeronautical industry and operating services of other countries.

There is a small plane owned jointly by two American citizens residing in Paris. The French will not enter this plane under French registry and it carries an American license on the records of the Aeronautics Branch of the Department of Commerce of the United States. This license has been renewed annually on two occasions, using an Aeronautics Branch inspection form executed by the French Bureau Véritas. This application for renewal is sent to the Aeronautics Branch in Washington and the renewed license returned. So far as is known in the Department of Commerce, these men have never had the plane out of France. What they should do if they wanted to fly it into another continental country or England is problematical since these other countries only allow tourist planes to travel over their territory and land thereon by special permission. This special permission is arranged through the State Department and its embassies with the ministries in Europe.8

These questions, and others arising from the principle of nationality of aircraft, lead into a search for the origin of nationality as a concept in general and into a brief study of ramifications of that concept as it has become applied to persons, corporations, ships and aircraft.

I. THE CONCEPT OF NATIONALITY

Nationality and Sovereignty:

In commenting upon the first international conference on the
codification of the law of nationality held at The Hague in 1930, one of the delegates of the United States writes:4

Most, if not all, branches of international law are in a sense political, but, when it is said that nationality is peculiarly a political subject, it is meant, no doubt, that the law of nationality is primarily a domestic matter as regards each state, to be determined by each state for itself, according to its needs, social, political, military, economic, etc. Thus no state is willing to surrender its sovereign prerogative in the matter of determining the way in which its nationality may be acquired. But this does not mean that international law has nothing to do with nationality. Wherever international relationships arise international law must follow, in one form or another, although its development and crystallization into definable rules may be a slow process. . . . Increase in facilities for travel, especially through the development of the airplane, will, no doubt cause a further increase in movements of people from country to country and still greater multiplication of nationality problems, and these problems must be settled sooner or later by international agreements, tacit or express.

It is generally accepted in principle that the sovereign power of a state extends over the territory and territorial waters of the state; also that the sovereign power extends over the airspace above the territory and territorial waters. The principle of sovereignty over airspace is evidenced by three international conventions, over one hundred bi-partite treaties and a considerable number of national laws concerning air navigation.5

Complete and exclusive sovereignty of a state over the airspace above its territory and territorial waters was first recognized by international agreement in the Convention relating to the Regulation of Air Navigation of October 13, 1919. There was also recognized in the Convention the right of innocent passage in time of peace by aircraft of a contracting state above the territory of other contracting states; the right of each contracting state for military reasons or in the interest of public safety to prohibit the aircraft of other contracting states from flying over certain areas of its territory; and the obligation of every aircraft which finds itself above a prohibited area to give signal of distress and land as soon as possible outside the prohibited area. It is provided that no distinction shall be made between private aircraft of the prohibiting state and that of other contracting states


5. Air Commerce Act of 1926 of the United States. 44 Stat. 568, 573; Sec. 9(b), Supplement VI, Code of Laws of the United States, Title 49, Chap. 6, Sec. 179(b): "As used in this Act— . . . The term 'United States,' when used in a geographical sense, means the territory comprising the several States, territories, possessions, and the District of Columbia (including the territorial waters thereof), and the overlying airspace; but shall not include the Canal Zone."
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with respect to flights over prohibited areas. Similar provisions are found in national legislation of certain states, including states not parties to the Convention.

In exercising sovereign power over their respective territories, states have, by statutory provision, for a long time conferred nationality upon persons owing them allegiance; have created artificial persons, called corporations, endowing these corporations to a certain degree with citizenship; and have registered ships, giving the ships such national characteristics that they are popularly spoken of as “floating territory” of the registering state. But hardly fifteen years have passed since states first officially asserted sovereignty over airspace and applied nationality to aircraft.

Due perhaps to the fact that the principles of sovereignty over airspace and nationality of aircraft usually have been declared simultaneously, some writers have deduced that nationality of aircraft is derived from sovereignty over airspace. This view has been questioned as follows:

Thus, it has been asserted that the present criterion of nationality determination [for aircraft] is a direct corollary of the principle of “complete and exclusive” sovereignty [over airspace], and that the criterion has been selected expressly for the purpose of securing the benefits of aerial navigation to nationals of certain States to the exclusion of nationals of other States. The method of determining nationality [of aircraft] can hardly be brushed aside so easily, for it must be remembered that the criterion is no more a direct corollary of the sovereignty [over airspace] view than that of a nearly opposite position. Was it not Fauchille—proponent of the general principle: “l’air est libre”—who urged, in 1911, the same criterion—determination of nationality [of aircraft] according to the nationality of the


7. Air Commerce Act of 1926, cit. note 5 supra, Sec. 6(a) (b) (c) : “(a) The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone.

“(b) Foreign aircraft not a part of the armed forces of the foreign nation shall be navigated in the United States only if authorized as hereinafter in this section provided; and if so authorized, such aircraft and airmen serving in connection therewith, shall be subject to the requirements of section 3, unless exempt under subdivision (c) of this section.

“(c) If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Secretary of Commerce may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States, and may by regulation exempt such aircraft, and/or airmen serving in connection therewith, from the requirements of section 3, other than the air traffic rules; but no foreign aircraft shall engage in Interstate or Intrastate air commerce.”

owner? And did not M. de Lapradelle support the doctrine, at the same Madrid sitting of Jurists, with reasons of a distinctly juristic nature?

"Freedom of the air," as a principle opposed to that of sovereignty over airspace, need not be discussed here except in so far as the analogy to the high seas has perhaps influenced the formulation of regulations for aircraft. It was suggested by Fauchille and others who followed him that, because of the fact that no sovereignty is exercised by states over the high seas, an analogy of high air could be made and, likewise, the fiction of nationality of ships could be applied to a certain extent to aircraft. It thus appears that the principle of nationality of aircraft was in fact derived from the theory of freedom of the air.9

Diplomatic protection of its citizens and the property of its citizens abroad is an exercise of the sovereign power of a state. It is the converse of permitting foreigners to reside, hold property and carry on trade within the territorial limits of the state.10 In accordance with custom and comity of nations, treaties and legislation, more or less freedom in international relations is permitted as to persons and personal property. It is in this connection that states extend the influence of their sovereignty not only upon the high seas but also into the territory of other sovereign states. In air navigation this has taken the form of freedom of innocent passage for foreign civil aircraft, carrying with it the corresponding right of diplomatic protection from the state in which the aircraft is registered. There is, therefore, not only a give and take between a state and its citizens as to certain rights and obligations evidenced by national legislation, but also an interchange and cooperation between states in accordance with international law and international agreements.

9. In 1900 and 1902, before the invention of the airplane, Fauchille, when advocating freedom of the air, discussed balloons only. He proposed that the nationality of a balloon depend, as in the case of a ship, on the nationality status of the owner, and that the owner, commandant and three-fourths of the crew of the balloon be citizens of the same state. He considered that it was not so much the balloon itself as the crew chosen by the owner which could cause international complications. Fauchille probably arrived at these conclusions from the fact that France confers French nationality only upon ships where the captain, officers and three-fourths of the crew are French: Fauchille, Paul, "Rapport et Projet du Régime Juridique des Aérostats," 19 L'Annuaire de l'Institut de Droit International 19 (1902), 8 Rev. Gén. de Droit International Public 471 (1901), 1 Rev. Juridique Internationale de la Locomotion Aérienne 101, 172 (1910).

10. A state is composed, speaking generally, of (1) territory, (2) population, and (3) sovereign power, legislative authority (imperium). In the early community where collective living prevailed, there was no private property, and "residence" was inconsistent with nomadic habits until individuals realized the advantages of permanent attachment to a locality: Zeballos, E. S., "La Nationalité au point de vue de la Législation Comparée et du Droit Privé Humain," (Paris: Recueil Sirey, 1914—2 vols.), Vol. I.
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Application of Nationality Doctrine to Persons:

The term "nationality" when used today generally indicates the relation between a state and a natural person; or, in other words, nationality is the status of an individual who is attached to a state by the tie of allegiance. "Nationality" has a broader meaning than the word "citizenship," in that the word does not emphasize unduly the power of the state on the one hand or the civic rights of the individual on the other.\(^1\)

Some countries base citizenship on the principle of blood relationship (*jus sanguinis*), which provides that a child, regardless of the place of birth, receives the same citizenship its parents possess; whereas other countries consider as nationals all who are born within and subject to their respective jurisdiction (*jus soli*), regardless of the citizenship of the parents. Certain countries, including the United States, combine the two systems, with the result that international complications are increased rather than lessened. These situations sometimes create for one individual dual or even triple nationality. Other methods of acquiring citizenship or nationality are by political incorporation of territory in a state, by treaty, by naturalization, and also by derivation in that parents may become naturalized in a country where the laws provide that naturalization of the parents impresses naturalization upon the minor child, and naturalization of the husband impresses naturalization upon the wife.\(^2\)

"National" is the preferred term from the standpoint of international law in referring to a natural person belonging to a parti-

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2. The word "nation" is derived from "natus": born within the group, indicating an element of consanguinity; "the body of inhabitants of a country united under a single government, whether dependent or independent": Webster's New International Dictionary (1931).

"La nationalité est le lien qui attache à l'état chacun de ses membres": Vattel. "State" and "nation" are used interchangeably in this article.

For brief discussion, "What is a Nation?" and comments on definitions ascribed to Mancini and described by Andre Weiss, see Piggott, Francis T., Nationality, Including Naturalization and English Law on the High Seas and Beyond the Realm (London: Wm. Clowes & Sons, Ltd., 1907—2 vols.), Vol. I pp. 4-10; and see also the following definition by Piggott, "Nationality is the status of an individual as subject or citizen in relation to a particular sovereign or state." See Note 27a, infra.

cular state. The body of nationals in any state is divided into those who have full political privileges, as well as civil rights, and those who enjoy civil rights only. Among the political privileges may be enumerated the privilege to vote and hold office; among civil rights of nationals is that of security to persons and property at home and abroad and diplomatic protection in accordance with the law of the state. Both classes owe allegiance and certain obligations to the state.\textsuperscript{13}

Theories and practice of citizenship determination for persons are important to consider here not only because of historical development and analogy to corporations, ships and aircraft, but also because the usual method of determining nationality of aircraft depends upon the nationality of the person owning the aircraft.\textsuperscript{14}

How long the general concept of nationality has been evolving and by what stages it has reached its present meanings applied to persons, corporations, ships and aircraft, probably can never be entirely deduced. History repeats itself. Customs, beliefs or needs of people cause rules and formulas to be established which often persist long after the customs, beliefs or needs have been forgotten. Continued use of the rule calls for explanation at some later period, and a policy is thought of which seems to reconcile the then-existing state of things with the rule, which in turn, adapts itself to the new reasons. The old rule, having received a new content, in time modifies its form to fit the latest meaning attributed to it. Such process may go on \textit{ad infinitum}.\textsuperscript{15}

Treatises have been written on the subject of nationality, yet comparatively few authors have gone fully into the evolution of the concept from the point of view of political status. The following concise quotation from James Brown Scott well serves the purposes of this article:\textsuperscript{16}

Without discussing supposititious situations, it is permissible to say that

\begin{itemize}
\item \textsuperscript{13} Citizens of the Philippine Islands are nationals, for example, of the United States, and, as nationals, receive diplomatic protection abroad from the United States. Consult, Borchard, Edwin J. (New York: Banks Law Pubg. Co., 1915); also see, Lambia, Margaret, "Presumption of Loss of Citizenship," 24 Am. Jour. of Inter. Law 264 (1930), discussing the Act of Mar. 2, 1907 (34 Stat. 1228).
\item \textsuperscript{14} For purposes of ownership of aircraft in the United States where such ownership is reserved to citizens, the term "citizen of the United States" means an individual who is a citizen of the United States or its possessions, or a partnership of which each member is an individual who is a citizen of the United States or its possessions, or a corporation; Air Commerce Act of 1926, supra, Sec. 9(a). See, infra, for definition of corporation under the Act.
\item \textsuperscript{15} Holmes, O. W., Jr., The Common Law (Boston: Little Brown & Co., 1881).
\end{itemize}
in primitive states the family, instead of the individual, seems to have been the unit, and that the aggregation of such units formed the group or society which we may, for present purposes, call the state; and that the family, as well as the groups of families forming the society, status, or state, was one of blood relationship. Later it appears that the state, conscious of its existence as a state, caused individuals beyond the blood relationship to enter into the family, and to possess the rights that members of the blood had alone previously enjoyed. The law permitted adoption, and the family was enlarged until it was no longer a matter of blood. The citizen was a creation of the state; all inhabitants were admitted to citizenship, and each and every citizen could say with pride: *civis romanus sum*, because of birth in the state, and without reference to blood relationship of the family. . . .

States had become feudal. A feud or estate was given for life, and later made inheritable, in return for which the tenant of the feudal estate swore allegiance and military service, and the feudal superior promised protection. Here, again, this feudal relationship had nothing to do with common blood or descent from common ancestors. The relationship was, on the one hand, one of *contract* and, on the other, one of *jus soli*, in Europe and in Asia, at the beginning of the nineteenth century. The reasons for the political compact and for citizenship by birth within a given country were admirably stated at the beginning of the nineteenth century, in two passages, one by an able Chief Justice of the United States, the other by the Dictator of Europe.

The Williams Case (Wharton's State Trials, 652), decided in 1799 by Chief Justice Ellsworth, in the Circuit Court of the United States, was one of citizenship. In the course of his opinion, the Chief Justice said:

The present question is to be decided by two great principles; one is, that all the members of civil community are bound to each other by compact. The other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community will protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful in its defense.

The second passage is from no less a person than Bonaparte. His opinion on nationality, and his preference for nationality by birth is thus stated in a work of authority, whose author, it should be said, was an uncompromising advocate of *jus sanguinis*. The First Consul (for that was then his position) sought to justify by the presumed attachment of a child for his native land the application of *jus soli* to the determination of his nationality.

17. The opposite of *civis* is *peregrinus* (alien), *hostis* (stranger or enemy) — for, to republican Rome, until she had completed the conquest of the then-known world, the two words were synonymous—and *barbarus* (barbarian). The status of a Roman citizen was composed of three constituent elements—freedom, city and family. It was not alone the enemy made prisoner by the Romans who became a slave, but the Roman who fell into the power of the enemy lost, at Rome, all his rights of citizen and freeman. Under such an institution, it is apparent that each soldier fought, not only for country, but for property, personal rights and freedom. From Morse, *Alexander Porter, A Treatise on Citizenship* (Boston: Little Brown & Co., 1881), pp. 17, 26, citing Ortolan, *Instituciones*, pp. 598, 240.

18. That there are now many ingredients in the status involved in any given nationality which resemble the ingredients of the contractual relationship (between state and individual) may be admitted, but the ingredients in question are of a late creation and have been forced upon the states by practical experience and commercial necessity; sometimes modified by political exigency; *Piggott*, *Nationality*, cit. note 11 supra, Vol. I, p. 6.
of origin; it could not but be the advantage of the state," he said in the
course of the debates in the Council of State, "to extend the empire of
French laws to the sons of foreigners who are established in France and
have the French spirit and French habits; they have the attachment which
anyone naturally feels for the country where he was born."

The law at the time of Ellsworth's decision, and of Bonaparte's state-
ment, was that of *jus soli* in Europe, as well as in the rest of the world.
It is admirably stated by the Frenchman, Pothier: "Citizens, true and native
born citizens are those who are born within the extent of the dominion of
France," and, he continues, "mere birth within the realm gives the rights of
a native born citizen, independently of the origin of the father and the
mother and of their domicile."

Why did not this state of affairs continue? The answer is that the
French Revolution had created a spirit of nationality and fraternity for
Frenchmen, as such, which spirit passed to the peoples of Europe. Every-
where across the Atlantic it became so strong and so determined that the
First Consul yielded to it at home, and the French Empire was ultimately
crushed by the patriotism which this spirit of nationality had created
abroad.10

At the time of the French Revolution, there was only one independent
country in America... The independent Republics of America are now
twenty-one in number. They were settled by emigration from Europe, with
considerable numbers of negroes brought as slaves to America, who are now
free, and nationals of the various American Republics. The immigrants
came overwhelmingly from countries in which, because of the French Revo-
lution, nationality by blood prevailed. If the doctrine of *jus sanguinis* and
that of the impossibility of expatriation without the consent of the mother
country had prevailed, it would have been difficult, if not impossible, for the
American Republics to have had nationals and citizens of their own, who
would have owed them exclusive allegiance...

The question is unavoidable: Why should not the waters of revolution
subside, and the principle of nationality, generally if not universally obtain-
ing before the convulsion in France, be restored...

For centuries, it appears, the method of determining the na-
tionality of persons has been a controversial subject. At the pres-
ent time, although partisans of *jus sanguinis* and *jus soli* form the
two largest factions, there are advocates of other theories, includ-
ing that of domicile.

Under the Roman law of citizenship, domicile (*domiciliium, incolatus, domus*) had an operation similar to *civitas*. Domicile is
the place which a man had voluntarily chosen for his permanent
residence, the headquarters of his activities. The doctrine of

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10. According to Baty, Hall maintains that a universally accepted rule
cannot be changed by individual nations, however numerous, but he would then
have to admit that the modern rule of adopting race as the test of nationality
has no international validity whatever. The new rule (*jus sanguinis*) was
adopted in the Code Napoleon "almost by accident." No country has adopted
it without modifications. How can it be fairly said to have replaced the old?
How could a state confer upon itself new subjects by its own legislation at
the expense of another? Baty, Thomas, "The Interconnection of Nationality
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domicilium still survives, at least as to forum and lex, in private international law. Anciently, under the civil law of Rome, domicile gave to a person, not the character of citizen, but that of inhabitant of the city where he was established. Citizenship was the result of origo, manumissio, alectio, adoptio. Later, under Caracalla, all inhabitants were deemed citizens.20

In a recent defense of the domicile theory for persons are found the following observations by John H. Wigmore:21

Our present legal principles of citizenship do not give the state sufficient hold on the loyalties and allegiance of its inhabitants. . . . The law should be changed. . . . The changes, specifically, should be three:
I. Citizenship should be identified with domicile (or residence, as distinguished from place of nativity or parental nationality); i. e., it should be territorialized or localized;
   (1) both internally, i. e., as affecting the state's rights over its citizens;
   (2) and externally, i. e., as affecting the state's rights against other states.
II. Citizenship should be compulsory.
III. Citizenship should be exclusive and single.

Wigmore then goes on to say that the contrast between domicile and fixed nationality as a basis for selecting the law applicable to a person's rights is at present dividing the world's laws, in the general field of conflict of law, i. e., for determining the status of marriage, the succession of property, etc., that Continental Europe and Latin America have favored nationality, while Anglo-America has favored domicile. In marriage and intestacy the former system of law applies the law of the country of which the person is a national the latter, that of his domicile. In connection with public law he says that the elements involved are a state's claims on its inhabitants, which claims are chiefly four: taxation; police and welfare measures; voting; military and political loyalty. The first and second are always based, even now, on residence—not nativity; the third is not, but, he says, might as well be; the fourth, military and political loyalty is not, but he says, ought to be. As the law stands today, a man may live in a country all his life, get his permanent living there, and yet not be a citizen. Wigmore continues:

The existing system is an anomaly, as the war showed us. It is an economic anomaly, because the alien shares our resources, and yet is privi-
leged not to share our risks. It is a political anomaly, because his alien citizenship makes him an element of political danger. It is a moral anomaly, because the spectacle of such a baseless privilege, which discriminates against the native citizen in favor of the alien, excites natural resentment on the part of loyal citizens.

There is no reason why the states of the world should have more concern over citizenship than the individual states of the United States have. You never hear of Indiana quarreling with Iowa over the treatment of Iowa citizens. It is an individual matter.

... citizenship, if localized on the basis of domicile, would cease to have a disturbing external effect. Not only in the United States would all of our residents be equally under United States control and protection and loyalty, but conversely when an American leaves America and goes to Farland to live he would equally come under Farland, with all its other residents, in citizenship and loyalty and local duty. So that our state would have no further duty or right to protect him. This result is the logical converse of the other.

This is the only sure legal means of securing international peace hereafter. The most serious international quarrels between states have arisen from the state’s duty, under the old system, to protect its so-called citizens when in another state.

Do we realize that, in this as in some other principles, the organization of our United States of America may well become the model for the United States of the World?

A British authority writes that in many important respects a man’s domicile has, in the determination of his rights and liabilities, superseded his nationality. It may be described as an effort of the law to create a new standard, by which certain important questions may be settled, in which others, besides the man himself, have a right to be considered. Domicile of origin in many cases coincides with nationality, says Piggott, but in other cases there is substituted for the law of the community to which by nationality he belongs, the law of that community among which the individual has elected of his own free choice to dwell permanently.

Still another suggestion for determining nationality of persons is proposed by Thomas Baty:

It will be noticed that both the acknowledged criteria turn on the physical fact of birth. It is either of a certain parent or else in a certain place. Cannot we apply a more spiritual and intellectual test? Education, in short, is the keystone of the system proposed. It depends on place, but not the irrational accident of the place of birth. The test of education be thought too subtle and difficult, then surely the test of domicile of the parent (in the Anglo-American sense) might well be adopted. The truth is, we need a readjustment of ideas regarding allegiance.

now that allegiance has become in the West a floating sentiment of devotion to an abstract idea, and no longer a definite duty owed to an individual person, the grounds which ought naturally to arouse that sentiment of devotion require to be determined anew, . . . by something personal to the individual.

An objection to such a theory is the difficulty of determining precisely the location of permanent settlement. “Intention” is too vague, as the proponent of this education theory himself admits. Both Wigmore and Baty suggest, as the test for determining domicile, a period of time during which a person must actually live in the country. In the United States a specified residence of five years in exacted of aliens who apply for naturalization. When naturalized, however, an individual retains his citizenship of the United States even though afterward he may change his domicile, but he is subject to the presumption of loss of citizenship and consequent forfeiture of the right to diplomatic protection from the United States, if he should remain outside the territory of the United States for prescribed periods of time without overcoming the presumption. Certain states in South America emphasize domicile in their present laws.

The most noticeable feature of Baty’s plan for a new citizenship basis is his effort to raise the concept of nationality to a higher level—that of culture—and to give to the individual freedom of choice in determining his state relationship. In this latter connection it is interesting to note that governments used to decide if a man should be allowed to change his nationality or his residence and frequently imposed burdens upon him even if he made such change. But in progressive states today a person may voluntarily expatriate himself. Is it not therefore important to look beyond the individual to the state? The right of life, liberty and the pursuit of happiness is made available by the United States, for example, to its citizens. The quest to find an environment for his highest development might take an individual into many states successively, each state offering perhaps a special attraction in commerce, art, science or philosophy exemplified by its great men. An individual thus would tend to become internationally minded,


while the state might be encouraged to create an all-inclusive culture to attract for permanent residence persons of intellectual attainment and spiritual outlook, for civilization includes the development of individuals and the training of nations. The quality of its people determines the spirit of a nation and the leadership of a state. If a man is essentially a social being, are not his attainments acquired as a trust for his fellow-citizens and his fellow-men? When he goes beyond his local habitat and political locality, he has the opportunity to enlarge his contacts, service and his faith. Citizenship being co-extensive with the community, he may become a citizen of the world, since, for him, the limit of the "community" is the earth itself.

The theory of organized world citizenship, as explained by an advocate, in brief, would include a supervising authority having legislative, executive and judicial powers over individuals in international relations, analogous to the control of the Federal government of the United States over citizens of the forty-eight States in Federal relations. Governments of the states would have full control of persons and property within their respective boundaries and would confer a local citizenship upon persons residing in their territory. In such manner not only might dangers of extreme nationalism be avoided, but unity in diversity could be achieved and preserved among the peoples of the earth. An Eastern prophet poetically said that we are the drops of one sea, the leaves of one tree, the fragrance of one rose garden: "Let not man glory in that he loves his country, but let him rather glory in this that he loves his kind."

Distinguishing between a state and a nation, an internationalist writes that statehood is objective, political, a condition of law, an enforceable obligation, whereas nationality is subjective, psychological, a condition of mind, a way of feeling.

I would define a nation as a body of people united by a corporate sentiment of peculiar intensity, intimacy and dignity, related to a definite home-


Another use of the word "nationality" is in connection with international claims; for example: "The nationality of the claim presented has been challenged. . . . The private nature of the claim inheres in it and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that it is subject to the absolute control of the nation espousing it."

country. Every nation has a home, though some nations... live for the greater part in exile. ... Once an American citizen, a man is always an American citizen until either the state is destroyed or his status is altered by process of law; but nationality, being subjective, is often mutable and intermittent. ...

Zimmern goes on to say that nationality, in fact, rightly regarded, is not a political but an educational conception—a safeguard of self-respect against the insidious onslaughts of a materialistic cosmopolitanism. As examples, he mentions the Scotch, Armenians, Jews. Instead of homogeneity of territory, ties of kindred, race, religion, occupation, former political affiliation frequently weld people together, although their political allegiance belongs to a modern national state. The difference in relationships properly called “inter-national” and “inter-state” is often overlooked.

The airplane makes it possible in the physical world for man to get a perspective picture of the geographical and political make-up of the world. Will it also be an instrument for man to look beyond the international to the universal? Is “nationality” of aircraft a source of limitation?

**Application of Nationality Doctrine to Corporations:**

Citizenship of corporations has a double interest in the study of nationality of aircraft; (a) from the view of historical development and analogy, and (b) from the fact that corporations as well as individuals own and operate aircraft and hence come under the rules which determine the nationality of aircraft according to the nationality of the owner.

For purposes of ownership of aircraft in the United States where such ownership is reserved to citizens, the term “citizen of the United States” includes the following definition:28

... a corporation or association created or organized in the United States or under the law of the United States or of any State, Territory, or possession thereof, of which the president and two-thirds or more of the board of directors or other managing officers thereof, as the case may be, are individuals who are citizens of the United States or its possessions and in which at least 51 per centum of the voting interest is controlled by persons who are citizens of the United States or its possessions.

The provision in the International Convention on Air Navigation of 1919 concerning corporate ownership of aircraft originally read as follows:29

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28. *Air Commerce Act of 1926*, cit. note 5 supra, Sec. 9(a) (3), 44 Stat. 673, Suppl. VI, Code of the United States, Title 49, Chap. 6, Sec. 179(a).

29. Art. 7. See *infra*, pp. 44, 45, discussion of protocol. See also note 124.
No incorporated company can be registered as the owner of an aircraft unless it possess the nationality of the State in which the aircraft is registered, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfills all other conditions which may be prescribed by the laws of the said State.

By coming into force on May 17, 1933, the Protocol of June 15, 1929, changed the above provision so that Article 7 now reads that the registration of aircraft shall be made in accordance with the laws and special provisions of each contracting state. It is pointed out infra that this change does not settle all conflicts regarding registration of aircraft by individuals or corporations.

For jurisdictional purposes in the United States a corporation is generally treated as a citizen of the State under whose laws it is organized. The status of a corporation as domestic, foreign or alien, is determined for certain purposes in the United States by the place of creation of the corporation, and not by the citizenship, domicile or alienage of its shareholders or members. On the other hand, in many other countries, particularly on the European continent, the nationality of a corporation is determined by the place of its principal business office (siège social). But for jurisdictional purposes, certain international arbitral tribunals have adopted the theory of control, in order to determine the nationality of corporations composed entirely, or in part, of aliens—a test more certain than the siège social. "The test of the nationality of corporations is to be sought in the nationality of its members or the majority thereof, without, however, losing sight entirely of other indications, for instance, the preponderance of one or more members."

Historically speaking, the view is supported by eminent writers that groups of men united by the reality or fiction of blood relationship into families, clans or tribes were recognized units of primitive society even before the individual was so regarded. They maintain that from such associated rights and collective entity, antedating individual rights and entity, the concept of corporation is derived.

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It is generally agreed that under the auspices of Roman jurisprudence there was evolved the prototype of the modern corporation and that the *collegium* or *universitas* of the civil law was clothed with practically the same elementary attributes that today distinguish the corporation from other associations of individuals. "Roman law," say Sohm, "contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping and distinguishing from its members the collective whole as the ideal unity of the members bound together by the corporate constitution; in raising this whole to the rank of a person (a juristic person, namely) and securing it a place in private law as an independent subject of proprietary capacity, standing on the same footing as other private persons."\(^{33}\)

The earliest Roman corporations, according to an authority, were those devised for the government of towns, villages and colonies. “But once established,” he observes, “the institution of the legal person was extended little by little to cases for which one would hardly have thought of introducing it. Thus, it was applied to the old brotherhoods of priests and artisans, then, by way of abstraction, to the state, which, under the name of *fiscus*, was treated as a person and placed within the jurisdiction of the court. Finally to subjects of a purely ideal nature, such as gods and temples.”\(^{34}\)

Corporations were classified under the Roman law as *civitates*, or municipal corporations, *collegia* of priests and other religious groups, *scribae* and similar organizations of public officials, and finally trade societies, exemplified by the *fabri*, *pictores* and *navicularii*. This last group, however, included many societies not incorporated, and distinguishable from the true corporations by tests similar to those now employed to mark the boundary between partnerships and corporations. This distinction was well established in Roman law, which recognized as essential corporate attributes, in addition to the complete separation of the rights of the *collegium* as a body from those of its members as individuals, the corporate right to acquire, hold and transfer property, to enact by-laws, not in conflict with the general law, for its own government, to sue and be sued by its agent (*syndicus*) and to so effect changes in its membership that its life and identity would be per-

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petual, subject only to the revocation of its license by the state, or its dissolution by voluntary act.\(^5\)

The beginning of corporations is ascribed by Blackstone to the political necessities of Numa Pompilius (715-672 B.C.) who, desiring to end the disrupting influence of the private war being waged between the Sabines and the Roman factions, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession.\(^6\)

The conclusion of Blackstone as to the source of the corporate idea having been quite generally accepted, law writers have likewise followed him in tracing the earliest forms of English corporations to the Civil Law, crediting the church with being the medium of transfer across the gap of the Middle Ages, although, according to Fletcher, it is said that corporations existed in England before the Civil Law was known there. There grew up in the England of pre-conquest days several classes of organizations embodying many of the elements of corporations. The first of these has been accredited to the church as growing out of the necessity of providing means for holding property. Out of this situation developed the corporation sole, an offset of the corporate concept and subsequently applied, by analogy, to municipal affairs and to the state.\(^7\)

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36. 1 Blackstone Commentaries 468, 469.

37. Contemporaneously with these ecclesiastical corporations, if not antedating them, there existed in England certain forms of temporal corporations known first as peace guilds, the members of which were pledged to stand together for mutual protection. These were of two classes, one including neighborhood groups, the other embracing groups exercising similar occupations. Both of these, in time, developed into an approximation of the modern municipal corporation, each exercising minute supervision over those under its jurisdiction; the one dealing with all persons living within a certain territory, and the other with all persons of like occupation residing within a certain district. As late as the time of Henry VI the terms "gildated" and "incorporated" were practically synonymous. Even the great trade companies and the trade guilds of England had a public object as well as a private one, the public perhaps dominating the private one. It was not until the middle of the seventeenth century that the great trading corporations of England came into prominence. These, such as the East India Company and the Hudson Bay Company, of all ancient forms came the nearest to approximating the commercial giants of today, but they were looked upon as public agencies, to which had been confided the duty of regulating foreign trade, just as the domestic trades were subjected to the government of the guilds. The division into public (or municipal) and private corporations thereafter began to exist: Fletcher, Cyclopaedia, cit. note 32 supra, Vol. I, pp. 6; also p. 7, as follows:

In America some of the colonies were themselves essentially public corporations, albeit they were charted companies, and others existed under crown governors or proprietors, neither of which, without specially delegated power, probably could have created or authorized the formation of private business corporations, such power remaining otherwise in the English government. It is interesting to note the reminder of Judge Baldwin: "The law of corporations was the law of their being for the four original New England colonies. It governed all the relations of life... whether the government to which they were subject was set up under a charter from the crown or those who had a royal patent, or a theocratic republic, owing its authority to the consent of the inhabitants." The one rested on the law of private corporations de jure: the other on that of public corporations de facto. . . . "Two Centuries' Growth of American Law," 261-265.
Business corporations in the United States developed slowly until the early part of the nineteenth century when there had been extended to this class of corporations the principle of free incorporation under general laws, and after the Supreme Court of the United States had given its sanction to the doctrine that a corporation, instead of having the right to do all things that a natural person could do, unless prohibited therefrom by its charter, had such powers only as were expressly granted to it by its enabling act.\(^8\)

In defining a corporation and describing its nature, the idea of a "body" of some kind is present. The general use of the word "company" in the early days and the comparatively recent use of "incorporated" in corporate names, reflect the thought now contained in the term "collective entity." The theory of corporate fiction, disregarding the corporate entity, escapes, according to Fletcher, the need of defining the word "corporation," or inventing a concept of a "body." But it faces other difficulties, such as a lack of an identifying name to distinguish it from other non-incorporate bodies, and not the least that of finding lodgment for attributes, which a corporation only can have, when their lodging place is abolished by making it a fiction.\(^9\)

A corporation is regarded as a "person," "resident," "inhabitant," or "citizen" within the purview of those terms as used in constitutional or statutory provisions, whenever this becomes necessary in order to give full effect to the purpose or spirit of the constitution or statute. The tendency is to regard corporations, as far as their inherent nature will permit, as standing on the same footing as ordinary individuals.\(^40\)

The word "persons" in a statute has often been construed as including corporations, but the latter are not so included if they are not within the purpose and spirit of the statute, as where the intendment is natural persons only. Corporations are not always or in all senses "persons," and therefore they are not for all purposes "citizens."\(^41\)


\(^{39}\) ibid., Vol. I, p. 11.

\(^{40}\) ibid., Vol. I, p. 16.

\(^{41}\) Continental Tyre & Rubber Co., Ltd. v. Daimler Co., Ltd., 1 K. B. 893 (1915). The interpretation of the word "person" as used in certain statutes has included corporations; for example, when relating to liens, including labor liens, attachment, public land laws, taxes, usury, banking, insolvency and bankruptcy, statutes of limitations and adverse possession, notice prior to bringing suit, venues, right to appeal, trespass, suit to quiet title, action for wrongful death, remedy against persons usurping public offices or franchises, quo warranto examination of a "living person" in his own behalf when the adverse person in interest is living, executor, crimes, torts—providing the tort to be one it is not corporately incapable of committing. A corporation comes within the meaning of the last clause of section 1 of the 14th Amendment to the Constitution of the United States. It follows that a corporation cannot be deprived of life, liberty or property without due process of law and that
A corporation is not in reality a person, but the law treats it as though it were a person by process of fiction, or by regarding it as an artificial person distinct and separate from its individual stockholders. Fletcher says, "It is a live thing with a separate existence which cannot be swept aside as a technicality," but it has no physical existence since it exists only in contemplation of law. Artificially personified, it lacks capacity for numerous capabilities of a natural person. The nationality characteristics of a corporation are fewer than those of a natural person, but, as is later shown, are more than the nationality characteristics attached to aircraft.

Whether a corporation is a fiction or a fact has provoked much discussion. Mr. Justice Holmes said, "It heads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with intent that it should be acted on as true." The word "fiction" is applied in different senses. According to Fletcher, (a) the corporate entity is sometimes disregarded as a "fiction" in looking through or beyond it to the real parties and facts; (b) less often, the abstract conception of an artificial being, apart from the persons who compose it, is pronounced a "fiction"; and (c) sometimes, in attempting to assimilate corporations to partnerships and other associations, they are spoken of as "fictitious," i.e., a mere name for legal or jural relations between persons, or a mere "method." An understanding of the particular sense in which a court or a writer uses the word "fiction," is therefore essential to any valuation of the fiction theory.
When it comes to naming and identifying the fact of a corporation, there is disagreement. The corporate "capacity," the corporate "entity" and the corporate "person" have been called the fact, or have been called a fiction with something else the fact. This disagreement gravitates into a discussion of the nature of the "corporate personality." Fletcher's opinion is that it is a fiction to call a corporation a person, unless by "person" is meant an entity, but the entity is not a fiction nor is its personnel fictitious, if by that is meant a collective or unitary body. It is for practical reasons, i.e., to lay down laws that men may know and apply, that the invention or fiction of a personality is attached to the fact of an entity. As to the nature of the corporate entity or personality, whether it is assumed to be either a fact or a fiction founded upon facts, confusion appears to have arisen from the use of the words "person" and "personality" in diverse senses without explaining them. According to jurisprudence, which deals only with outward acts, a corporation is a fact consisting in acts willed by the legislature and the individuals concurring in the outward acts which engender the corporate fact, and this fact, with other facts intervening, culminates in rights. The product of these acts, which are of will, is an intellectual, as distinguished from a material thing. Taking acts to be a species of facts, the corporation may be regarded as a composite fact, which has been set in motion by the acts to enjoy certain rights in the aggregate which the active persons did not enjoy in severalty, and the corporate entity is this composite fact or thing. "Entity" is but a concrete term invented to express this thought.

In questioning whether foreign (as between States of the United States) corporations shall be denied factual existence, the element of extraterritoriality is involved. Can it be said that a corporation has no existence beyond the boundaries of the State which created it, if, by comity and under regulation, the corporation may be admitted to do business in another State? If a corporation is merely a fiction outside of its domicile, the compo-

nent persons are all that remain, and these persons need no comity to admit them to exercise the privileges and immunities of citizens. It is interesting to inquire what is meant by saying that the fiction of nationality is applied to aircraft. What effect, if any, does it have extraterritorially, not only when aircraft are owned by corporations, but by individuals?

There is a general consensus among writers in the United States that a corporation is not positively, totally and continuously a fiction. The question of corporate citizenship was not settled by the courts until 1844 when there was repudiated the language on which the "fiction" theory has been ascribed to some of the early decisions.\(^\text{52}\) The reality or fictitiousness of the entity of a corporation is the essence of the "fiction theory." In applying the fiction theory to personality as a corporate attribute, the general view, according to Fletcher, seems to be that the personality is an artificial one, but nevertheless a reality, although it is not a human being. Artificial persons are creatures of sovereign or legislative act, and the corporate personality is law-created, or at least law-conferred, and put in motion and action by persons. In enumerating the attributes of a corporation, the capacity for action as a unit or entity as a consequence of the corporate being is something upon which all authorities in some measure agree. A comparison should be made between the creation of corporate personality and the so-called personality of aircraft, together with capacity for motion and action.

Corporate personality thus being a corporate attribute, the corporation is an entity distinct from its shareholders or members; its rights and liabilities are not the same as those of the shareholders or members individually and severally; and the corporation has a personality distinct from its officers. A franchise to be a corporation belongs to the individuals who compose the corporation; the powers and privileges vested in, and to be exercised by, the corporate body, as such, constitute the secondary franchise.

In commenting on "the corporate fiction of mystic entity" a recent writer says:\(^\text{53}\)

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\(^{52}\) Louisville, C. & C. R. Co. v. Letson, cit. note 30 supra, p. 555.


In the British case of Daimler Co., Ltd. v. Continental Tyre & Rubber Co., Ltd., the question arose whether trading with an incorporated company was trading with an enemy where the company was registered in England under the Companies Act and carried on business there. In the court below it was called an "English company" and likened to a natural-born Englishman. Admitting that the company is an artificial person and that its acts bound its members, it was held on appeal that the character of its incorporators can not be irrelevant to the character of the company, and that the artificial person should not be put in a better position than a natural person. The nationality or residence of a company was called at best a figure of speech, and cor-
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We are perhaps well on the road towards completely freeing ourselves from the troubles which arose because of the unhappy diversion of British lawyers three centuries ago. Remnants of the old confusions still plague us. It may be noticed, however, that wherever a modern economic fact collides severely with one of the old notions, the old notion goes under. Two cases may be cited as showing this tendency. In 1917 nothing was more firmly established in British law than the doctrine of the corporate fiction. The House of Lords had said flatly in _Broderip v. Salomon_ (1897 App. Cas. 30), that though one man owns all of the stock of a corporation, that corporation could by no means be confused with him. It was separate. It had been created by the king, and had a personality of its own. In 1917 a dispute was pending between an individual and a corporation whose stockholders were alien enemies of Great Britain. The question was whether the corporation in such a case was affected with the disabilities of the alien enemies. Logically there was no escape from the corporate fiction idea set up in the _Salomon_ case. Despite this the House of Lords in _Daimler v. Continental Tyre and Rubber Company_ (1916; II App. Cas. 307) enthusiastically reversed the King's Bench Division which had adhered to the theory of the continental fiction. Lords Halsbury and Parker held unequivocally that the character of a corporation, could, when necessary for purposes of determining if it was either friend or foe, be considered as the same as the predominant character of its shareholders. Through this wide breach of the corporate fiction many cases have traveled, and the doctrine which ten years ago was sacrosanct, today becomes an obsolescent survival. With it falls in large measure the doctrine of governmental creation. If the nature of a corporation is the nature of the individuals constituting it, there is not much chance for the claim that the state has done much towards creating that nature.

In America, from another flank, the old line doctrines received a staggering blow from the Supreme Court of the United States. In the case of _United Mine Workers of America v. Coronado Coal Company_ (259 U. S. 344; 1922), the coal company brought suit against a labor union which had never filed incorporation papers. Manifestly it was impossible to serve individually several million members, or to name them individually. Corresponds to the birthplace and country of natural allegiance in the case of a living person. The quality of enmity and amity, which are dependent on the chance of peace or war are attributable only to human beings, and, in cases where the active conduct of the company's officers has not already decided the matter, these qualities are to be derived from the predominant character of its shareholders and incorporators.

The opinion refers to the American case of _Bank of United States v. Deveaux_, 5 Cranch 61, 81 (1809), stating that in it Chief Justice Marshall's decision proceeds upon the assumption that for certain purposes a court must look behind the artificial person, the corporation, and take account of and be guided by the personalities of the natural persons, the incorporators. Another American case is referred to, _St. Louis & San Francisco R. Co. v. James_, 185 U. S. 1 (1898), in which the federal courts did not ignore the existence of the incorporators and did not fix their attention on the place where the corporation was chartered, or the State under whose laws it was registered.

In a British case, _The Hamborn_ (1919) A. C. 993, a steamship owned by a company incorporated in a neutral country whose flag the ship carried, was captured October 27, 1915, on a voyage from New York. The ship was held to be a German vessel, belonging to German owners, and therefore enemy property. Appellants contended that they were a limited liability company, incorporated in Holland according to Dutch law, and therefore entitled to fly the Dutch flag. The ownership by a Dutch company was considered only nominal: _Scott, James Brown_, "A Single Standard of Morality for the Individual and the State," Proceedings Am. Soc. of Int'l Law, 26th Meeting (1932), 11 et seq.
cordingly, the collective name was used and service was had on the union officers. Among others the defense was raised that not being a corporation no one was bound by this form of suit. Chief Justice Taft by way of dictum took up this subject, and pointed out that there was a unity in fact, a common fund of property and an aggregate entity existing without benefit of governmental action. On the one hand in England a governmentally created corporation is recognized as a frame for its stockholders; on the other, in America, an aggregate without the governmental frame is nevertheless recognized for some purpose as a corporate entity.

So has the circle come to complete itself. Anglo-Saxon corporation law, beginning at the same place as the Continental, has run a wide circle, and once more begins to approach the direct simplicity of the Roman universities, carried on through the trading societies of France and emerging as the share capital associations which are the modern French corporations of today. Once the difficulties of royal creation, mystic entity, and resulting limited powers have been removed, we shall be not very far from the continental theory, nor very far from the business idea, of what a corporation should be.

It has been said that corporate personality and existence are themselves fictitious, and that the citizenship or locality of a corporation is the fiction of a fiction, but this "fiction of a fiction" is indulged in when necessary to the maintenance of the rights or the enforcement of the liabilities of corporations. The word "resident" is applied to artificial persons from analogy to natural persons. The question of residence arises in connection with jurisdiction, venue, taxation, attachment and garnishment, recordation of chattel mortgages, security of costs for non-residents, and other legal matters.

Relative to situs of personal property of a corporation for purposes of taxation, the general rule is applied in the construction of the terms "resident" and "non-resident" in the bankruptcy and attachment laws, in the saving clause of statutes of limitation and in the construction of the federal judicial clause giving jurisdiction to the federal courts where there is diversity of citizenship.

A corporation at common law may not "migrate" from State to State, but it may do business and maintain agencies in another State, if the charter permits, and if that right is not denied by local law. It may be regarded as having local citizenship or residence as far as the operation of local laws is concerned. A corporation created by the laws of a foreign country does not become a citizen.

or resident of a State of the United States for purposes of federal
jurisdiction by doing business in such State and having an office
therein. The locality of the domicile of a corporation, its place
of incorporation, fixes the “nationality” of such juristic person, but
a nationality in the technical sense cannot be conceded to corpo-
relations.

“Place of business” of corporations is interpreted in certain
federal statutes of the United States as the place at which the
corporation does such business as makes it “found” within the
district for purposes of service, that is, business carried on in
such a manner and to such an extent as will warrant the inference
that it is present there through its agents, although it may be con-
sidered non-resident. “Principal office” and “principal place of
business” of corporations are not synonymous terms. The mean-
ing of “sége social” is a fixed position or place of business.

Railroad corporations in the United States are deemed to
“reside” in every county in the State in which their road is operated
or where corporate privileges or franchises are exercised, and in
many jurisdictions they may be sued in any county in which their
lines run or through which the road extends. A foreign (as be-
tween States of the United States) railroad corporation is con-
structively present in any State where it has property and carries
on its operations by means of agents, although the domicile or
citizenship of the corporation is in another State and remains
there. For purposes of taxation of railroads, it has been held
that a railroad company passing through and occupying lands in
several counties for carrying on its corporate business is to be
regarded as a resident of each town and county through which it
passes, and its real estate, therefore, is properly assessed in per-
sonam as the land of a resident, and not as the land of a non-

153 Fed. 301 (1907).
59. Infringement of letters patent, 26 U. S. C. A. 109; Act of March 3,
226 Fed. 34 (1917).
Rechtsstellung der Luftverkehrsgesellschaften;” Régime Juridique des Sociétés
de Navigation Aérienne, Revue Aéronautique Internationale, No. 3, March,
1932, p. 51.
62. Bristol v. Chicago & Aurora R. Co., 15 Ill. 436 (1854); followed in
(1923); affirming 224 Ill. App. 336; Lee v. Atlantic Coast Line R. Co., 150 Fed.
775 (1906); Morgan v. East Tennessee & V. R. Co., 49 Fed. 705 (1883). Stat-
utes permitting corporations to be sued in counties other than those of their
domicile should be construed strictly.
200 (1923).
resident as might be expected from the general rule regarding citizenship or residence of corporations. 64

Unlike a natural person, a corporation cannot change its residence, citizenship or domicile at will, and although it may be permitted to transact business where its charter does not operate, it does not on that account acquire a residence there. 65 By doing business away from its legal residence a corporation does not change its citizenship, but simply extends its field of operations. Even if a corporation becomes "domesticated" or adopted by another State, it does not, according to the weight of authority, affect the original character and status of the corporation under the State which created it as far as purposes of federal jurisdiction are concerned. 66

Questions of residence, place of business, extraterritoriality, jurisdiction and change in nationality recur in relation to aircraft. The prevailing criterion for determining nationality of aircraft has proved particularly bothersome in cases of corporate-ownership of aircraft.

Application of Nationality Doctrine to Ships

Since the idea of nationality for aircraft largely evolved from analogy to seacraft, it is important to understand systems of registration whereby ships acquire nationality. It is also pertinent to inquire briefly into the general principles of admiralty and maritime jurisdiction.

Nationality reappears in the law of the high seas, and, according to a British authority, 67 it is a question full of difficulty, in which allegiance, protection of the flag, the jurisdiction of the Admiral, and "floating territory," are interwoven to such a degree that the wonder is the simple solution of direct legislation had not long ago been resorted to. A short summary of the method used for registration of ships at the present time in the United States is useful in comparison with that used for the registration of aircraft.


67. Piggott, F. T., Nationality, cit. note 11 supra, Vol. I, p. 3. Note: Statutes on nationality have been enacted in Great Britain since Piggott wrote, but the discussions by him retain value today.
Registration of ships is not required in the United States, but ships which are not registered are denied certain advantages provided by law for registered vessels. "Registered" is the general term, but it is also the technical word for vessels in foreign trade, and "enrolled" is the expression for ships in domestic or coastwise trade, while vessels of less than twenty tons and more than five tons are "licensed." Ships registered or enrolled in the United States must be owned by citizens of the United States or by corporations organized and chartered under the laws of the United States or any State thereof, the President and managing directors of which are citizens of the United States. Ships owned by corporations are not allowed to engage in coastwise trade of the United States unless seventy-five per centum of the interest in the corporation is owned by citizens.

The place of registration is the district of the Customs in which the home port of the ship may be located. The home port is the port where, or nearest to which, the owner, or managing owner, resides. The title to the ship may vest in one or more individuals or a corporation, as above indicated, and in this connection the domicile of the owner is important.

The character of craft included in the admiralty jurisdiction is any movable, floating structure capable of navigation and designed for navigation. Rafts were within the original methods of water locomotion. Detached piers, piles or structures fastened

68. The Code of Laws of the United States of America, Title 46, Sec. 11, as amended, Supplement VI of the Code, Title 46, Sec. 11. Vessels entitled to registry; coastwise trade; ocean mail service contracts.—Vessels built within the United States and belonging wholly to citizens thereof; and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States; and seagoing vessels, whether steam or sail, which have been certified by the Steamboat Inspection Service as safe to carry dry and perishable cargo, wherever built, which are to engage only in trade with foreign countries or with the Philippine Islands and the Islands of Guam and Tutuila, being wholly owned by citizens of the United States or corporations organized and chartered under the laws of the United States or of any State thereof, the president and managing directors of which shall be citizens of the United States, and no others, may be registered as directed in chapters 2, 3, 4, 5, 6, 7, 8, and 9. Foreign-built vessels registered pursuant to this section shall not engage in the coastwise trade: Provided, That such vessels so admitted under the provisions of this section may contract with the Postmaster General under sections 667 to 665, inclusive, of Title 39, Postal Service, so long as such vessels shall in all respects comply with the provisions and requirements of said sections. (R. S. Sec. 4122; Aug. 24, 1912, c. 390, sec. 6, 37 Stat. 562; Aug. 18, 1914, c. 256, sec. 1, 38 Stat. 698; Sept. 31, 1922, c. 386, sec. 321, 42 Stat. 947.)


70. Regulations for registration of ships were originally promulgated by the Secretary of the Treasury of the United States, and as revised are now under the Secretary of Commerce.

71. Rev. St., P. 4141, 4155; Morgan v. Parham, 16 Wall. 471 (1872).


See also, The Mary, 123 Fed. 609 (D. C. 1903).
to the bottom, but surrounded by water, are within admiralty jurisdiction.\

A ship is classified as personal property, and for purposes of taxation, for example, is governed by the same rules applicable to other personal effects. The general rule in the United States is that the *situs* of personal property is the domicile of the owner, and a ship, therefore, is liable to taxation in the State where the owner resides.\

As personal property of the owner, if a citizen of the United States, a ship is entitled to protection beyond the boundaries of the United States, just as in the case of any other personal property, and such protection does not depend upon registration of the ship. In like manner, the right to fly the flag of the United States upon a ship is not dependent upon registration of the ship but upon its ownership by an American citizen. The flag is considered a symbol of American ownership and a notice to all the world that the ship, even though not registered, will be given protection by the government of the United States if needed.\

The title to a ship is acquired in the same way as other personal property. It may pass by delivery. Sale of a registered or enrolled ship is evidenced by a bill of sale on a government form, properly witnessed, or the title to the ship may be transferred by a sale in admiralty. Sale in admiralty gives a title which is good against all the world, whereas at common law the title conveyed can never be better than the assignor himself has. Changes in title, in the personnel in command or in the structure of a registered ship must be recorded in the office of the Collector of Customs, who will, upon request, furnish an abstract of title according to his books. A ship of American registry may not be sold to anyone not a citizen of the United States or placed under foreign registry except as provided by regulations.

Registration or enrollment fixes the home port of the ship and the ship is considered as belonging to the State of the United States in which such port is located. It has been held that for purposes of jurisdiction a ship upon the high seas is part of the territory of the State in which the owner resides, and for many purposes to be subject to the laws of that State. A Justice of the Supreme Court said, "We hold that she [the Arctic] was sub-

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75. It was held in *So. Pac. Co. v. Ky.*, 222 U. S. 63 (1911), that a corporation organized under the laws of Kentucky was liable in Kentucky for taxes upon ships enrolled in New York.

76. The British rule appears to be more strict: see footnote 91.

ject to the disposition made by the laws of Massachusetts and that for the purpose and to the extent that title passed to the assignee, the vessel remained a portion of the territory of that State."

The theory that a vessel registered in the United States is part of the Territory or State within which its home port is situated and as such a part of the United States, so that a child born on such vessel upon the high seas is born "in the United States," has been disapproved by judicial decisions. The fiction of territoriality of vessels on the high seas finds some measure of support in American cases involving alien seamen and the question of jurisdiction over crimes committed on the high seas, but this jurisdiction comes from the practical necessity of protecting the vessel, its passengers and crew and their possessions during the voyage. It "arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal, than of territorial sovereignty. . . ."

In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor.\(^7\)

The opinion further states:

In that view appellant is not without a country, but was born in allegiance to and under the protection of the Chinese government, with such temporary qualification only of the rights and obligations of that sovereignty as are recognized by the law of nations during the time the nationals of one country are being carried on the ships of another on the high seas. . . .

In another case is found the following statement:\(^7\)

In a metaphorical sense a vessel upon the high seas is sometimes spoken of as constituting a part of the territory of the country whose flag she flies; but this is only for restricted purposes.

On the other hand, persons born on ships registered in certain countries do acquire, under statutory provision, the nationality of the state whose flag the ship flies. Vessels of Great Britain, for example, are considered British territory for the purpose of determining the nationality of those born on board.\(^8\)

\(^7\) Lam Mow v. Nagle, Comm'r. of Immigration, 24 F. (2d) 316, 317, 318 (1928); and In re Lam Mow, 19 F. (2d) 951, citing Cunard S. S. Co. v. Mellon, 262 U. S. 100 (1923); and U. S. v. Wong Kim Ark, 169 U. S. 649, 659 (1898).

\(^8\) Wong Ock Jee v. Weedin, 24 F. (2d) 962, 963 (1928). Concerning employment on board American-owned ships counting as time toward "residence" for purposes of naturalization in the United States, see McDonald v. United States, 279 U. S. 12, and subsequent amendment to the Naturalization Laws of the United States (47 Stat. 165), Code of the U. S., Suppl. VI, Title 8, Chap. 9, Sec. 884.\(^4\)

\(^8\) Sec. 1(c), British Nationality Act of 1914. For list of states having
In admiralty law a ship is considered as having a personality of its own apart from that of its owner. This principle has been enunciated in an opinion of the Supreme Court of the United States, as follows:\textsuperscript{91}

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by a state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale.

The personification of ships and proceedings against them \textit{in rem} have been explained by the theory that civil and criminal liability go back to early forms of procedure which were grounded on vengeance.\textsuperscript{82} According to this theory the beginnings of Roman law and German law are traced to feuds which, as time progressed, were settled by composition or payment of money instead of by blood. The killings and house-burnings of an earlier day developed into common law actions, and the compensation recovered was the alternative of revenge. In Exodus there is a passage,\textsuperscript{83} "If an ox gore a man or a woman, that they die, then the ox shall be surely stoned, and his flesh shall not be eaten: but the owner of the ox shall be quit." Turning from the Hebrews to the Greeks, the same principle is erected into a system. Plutarch, in his Solon,
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says that a dog that had bitten a man was to be delivered up bound to a log; Plato made provisions for many such cases. If a slave killed a man, the slave was to be given up to the relatives of the deceased. If the owner failed to surrender the slave, the owner was bound to make good the loss. At first it appears that the ferocious animal doing damage was forfeited regardless of whether the owner was negligent. In the cases of master and servant, the master was liable, even where he had used the greatest possible care in choosing the servant. The principle was applied when the employees were freemen as well as chattel slaves. Later on ship-owners and inn-keepers were made liable for wrongs committed by those in their employ, due to the exceptional confidence necessarily reposed in carriers and inn-keepers, and sometimes negligence was imputed to the employer.

Inanimate objects were also included in the system of vengeance. In early English books, it says that, if a man fell from a tree, the tree was deodand. When murder was committed with a sword, the sword was broken. It was a rule of criminal pleading in England down to the past century that an indictment for homicide must set forth the value of the instrument causing the death in order that the king or his grantee might claim forfeiture of the deodand, "as an accursed thing."

The fact of motion is adverted to as of much importance in early English books and afterwards. In the time of Edward I it is reported, "Where a man is killed by a cart or by the fall of a horse, or in other like manner, and the thing in motion is the cause of death, it shall be deodand." Motion gave life to the thing forfeited. The most striking example of this sort, according to Holmes, is a ship. Old books say that, if a man fell from a ship and was drowned, the motion of the ship must be taken to have caused the death, and the ship was forfeited—provided, however, that the accident happened in fresh water. If the death took place on the high seas, forfeiture was made in a different court.

A ship was the most living of inanimate things at the time Holmes wrote. He comments that it is not surprising to find a mode of dealing with ships which has shown such extraordinary vitality in criminal law applied with even more striking thoroughness in the admiralty. "It is only," he says, "by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible," and, according to Holmes, on that supposition they at once become consistent and logical.
An example of collision at sea is given to illustrate the above point. A ship is under lease and the owner has no control over it. The owner is freed from personal liability, but there is a lien on his vessel for the amount of damage done, which means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach the ship. Such would not be the case with a horse and wagon let by a livery-stable keeper to a customer who was careless, in which case the only property which could be reached to pay for the wrong would be the property of the wrong-doer.

In a Supreme Court decision Mr. Justice Story said: "It is true that inanimate matter can commit no offense. But this body is animated and put in action by the crew, who are guided by the master."

By the maritime law of the Middle Ages the ship was not only the source, but also the limit, of liability. The desire for retaliation against the thing itself was turned into holding the object as security for reparation. There is thus a paradox, according to Holmes, of form and substance in the development of the law, precedent having survived long after the reason for it has been forgotten. For example, when the Congress of the United States enacted a law by which the owners of ships in all the more common cases of maritime loss could surrender the vessel and her freight then pending to the losers, whereupon further proceedings against the owners should cease, the legislators argued that, if a merchant embark a portion of his property upon a hazardous venture, it is reasonable to suppose that his stake should be confined to what he puts at risk. Grounds of public policy and needs of the community's commercial growth enter into such limitations of liability, as is also true in the case of modern business corporations where liability is restricted by law to the amount of the corporate property.

As a member of the bench of the Supreme Court of the United States later in his life, Holmes had occasion to hand down an opinion in a case involving the liability of a vessel, in which, as Justice, he said:

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84. The China, 7 Wall. 53 (1868).
85. Act of Congress, 9 S. L. 635 (1851); see The Rebecca, 1 Ware 187, Fed. Cas. No. 11619 (1831); Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. (U. S.) 104 (1871); Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 96 (1908).
86. Single ship companies are an interesting development of limited liability.
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If you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, "If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse to me."

While the common law considers a ship like any other kind of personal property and holds the owner liable for acts of his agent in charge of the ship within the scope of the employment of the latter, the maritime law retains an earlier concept of the common law, namely, that an owner should not be liable for the fault of others and should not be personally liable for events beyond his control. Liability in maritime law is limited to the ship itself or its equivalent in value. The maritime rule has been enacted into statutes, but even so it appears that the courts have been inclined toward the common law rule.8

In proceedings in rem, the thing itself against which the right is claimed or liability asserted is proceeded against by name, as a contracting or offending entity, arrested or taken into legal custody, and finally sold to answer the demand, unless its owner appears and releases it by bond or stipulation. It is a maxim of the law that proceedings in rem bind the world. No notice is served on the owner. It is presumed that a seizure of his property will soon come to his knowledge, and cause him to take steps to defend it; and when he appears for that purpose he comes in rather as claimant or intervener than as defendant. If the property does not satisfy, no judgment can be given against him. In England, however, the respondent is really a defendant, and judgment goes against him for any deficiency. This was because the procedure in rem in England was in its origin not based on any theory of direct responsibility attaching to the res, but as a means of compelling the owner's appearance. Their process to this day, though naming the ship and not the owners in terms, commands them to enter an appearance, and the arrest of the ship follows as an incident.89

The intermingling of mythology and history in early recorded stories of conquest and commerce by sea, the voyage of the Argonauts, the Trojan expedition, and the wanderings of Odysseus, reveal the combined role of merchant-warrier. The Rhodians had not only a commerce, but a Code, in which is found the germ of the law of general average. The Phoenicians planted trading colonies through the Mediterranean and were succeeded by the

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Carthaginians. Rome copied the Carthaginian trireme and, when maritime skill supplemented military prowess, Rome overcame the then-known world. Commerce followed the camp, and in the Middle Ages the Italian republics became the carriers of the world. The Anglo-Saxon was not addicted to maritime enterprise as were the Danes and Normans, but during the reign of Elizabeth, England’s sea policy developed in rivalry to Spain, Portugal, Holland, and France. A partial reaction took place during the reign of James I, and English commerce was retarded.

The leader in the attack on the admiralty by the partisans of the common law was Lord Coke. In consequence of his hostility not only was British commerce retarded, but also the jurisdiction of the admiralty. Continued leadership by the maritime rivals of England gave more opportunity to the common law judges to put fetters upon the admiralty law of England. Things continental or international in origin met their determined resistance. It was long before the English courts were willing to admit that the law and custom of merchants was a part of English law. In consequence, the English admiralty jurisdiction at the time of the American Revolution was more restricted than the continental admiralty, and far narrower than the present jurisdiction of the admiralty courts of the United States. In England, an act of Parliament was necessary to enlarge the admiralty jurisdiction to its ancient extent. The modern British admiralty jurisdiction is regulated by statute.

International trade relations and the progressive needs of society developed the law of the sea. Various compilations and treatises evidence the maritime law of their respective dates, having reduced concrete form maritime customs and practices.

90. Ibid, pp. 1-4. See also, Selden Society, Select Pleas in the Court of Admiralty (London: B. Quaritch, 1894), Vols. 1 & 2.

For the advancement of British trade, various privileges have been conferred upon ships belonging to British owners. Laws have been enacted, at different periods, requiring for certain branches of commerce ships, not only owned by British subjects but also built within the British dominions, and giving special privileges to ships of British registry (26 Geo. 3, c. 60). The Merchant Shipping Act of 1894 (57 & 58 Vict., c. 60) did not define a British ship, but apparently permitted any ship to be registered as a British ship, provided there was compliance as to qualifications of its ownership prescribed in the Act. A ship required to be registered, but which was not registered, was not recognized as a British ship. The port at which a British ship was registered under the Act was deemed its port of registry and the port to which it belonged. A ship required to be registered, but not registered, was denied the privileges and protection of a British ship, but was subject to payments and penalties as if it were a British ship: Abbott, on Shipping, p. 90.

91. These include the Digest in the Roman Civil Law, which quotes from the ancient Rhodian Code, and includes provisions on liability of vessels for injury to cargo, for punishment of thieves and for borrowing on bottomry or respondentia (Digest 14, 2: 4, 9; 22, 2: 47, 5; 47, 9); the Consolato del Mare, a collection of maritime laws antedating the fifteenth century, the author and date of which are unknown; the Laws of Oleron; the Laws of Wisbury; the Maritime Ordinance of Louis XIV; Selden’s Mare Clausum; Godolphin’s View of the Admiral Jurisdiction; Works of Sir Leoline Jenkins, and the second volume of Browne’s Lectures on the Civil and Admiralty Law; Selden Society’s Select Pleas in Admiralty; Abbott on Shipping; Arnold on Marine Insurance;
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The several American colonies had admiralty courts by virtue of commissions from the British crown, which conferred a jurisdiction much wider, it appears, than that of the admiralty courts in England. Upon the Declaration of Independence, each colony organized its own system of courts and practically adopted the jurisdiction of the colonial vice-admiralty courts. In 1789 the Constitution of the United States extended the judicial power of the United States “to all cases of admiralty and maritime jurisdiction.”

In order to find out the extent to which admiralty law is or may be applied in the United States in cases involving air navigation, a brief survey of certain admiralty provisions is necessary. The criterion of admiralty jurisdiction in the United States was finally determined to be whether the water was navigable, in contradistinction to the English standard of the reach of the tides. It includes inland and artificial waters when navigable for commerce of a substantial character.

In discussing British ships on the high seas, Piggott says that there are three general principles governing the application of law to them: (1) the common law applies on board; (2) there is a body of legislation specially applicable to ships at sea, part of which is the merchant shipping law, and the remainder the extension of the general criminal law to the high sea, or to places within the jurisdiction of the Admiral; and (3) statutes do not apply on board, unless (a) they fall within the previous principle; or (b) they are extra-territorial, applying beyond the realm without limit; or (c) they apply in terms, or are specially extended to them. He states, however, that the third principle is at variance with an opinion sometimes enunciated, namely, the “floating island” theory. He cites the leading case of R. v. Anderson, the facts of which were briefly that an American citizen, serving on board a British ship, caused the death of another American citizen, serving on board the same ship, the ship at the time being in the river Garonne, within the boundaries of the French Empire, but at a place below bridges, where the tide ebbed and flowed. In that case Byles, J., said:

Corver on Carriage by Sea. European and English codes and works evidence the general maritime law, but they are not part of the law of the United States, except in so far as provisions have been enacted into statutes.

92. Statute of Virginia, 1778.
93. Article 3, p. 2.
95. The Genesee Chief, 12 How. (U. S.) 443, 13 L. Ed. 1058 (1861).
96. The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. Ed. 900 (1870); Leovy v. U. S., 177 U. S. 621 (1900); Ex parte Boyer, 109 U. S. 629 (1883).
... the ship being a British ship was, under the circumstances, a floating island where British law prevailed: that the prisoner, though an alien, enjoyed the protections of British law, and was as much subject to its sanctions, as if he had been in the Isle of Wight.

The above case was decided in 1868 and was followed in 1882 by another case in which the court declined to accept the limitation to cases involving seamen.99

If the ship is territory, using the term as a fact and not as a metaphor, according to Piggott, it hardly seems necessary to dwell on the "protection of the flag," for the flag would then be no more than the indication of territory. The law of the high seas would certainly be simplified, and might be stated thus: the jurisdiction of the Admiral was created, and afterwards transferred to the Central Criminal Court, in order to reach certain floating portions of the territory beyond the jurisdiction of the Courts, which ends with the limits of the counties. He continues:100

The consequences of the floating island theory have not been worked out with sufficient completeness to warrant its acceptance without further examination. Not only would the common law apply on board, but also all statutes automatically. Yet this is certain, that if the ship goes above bridge, she would suddenly lose her national character, pass within the sole jurisdiction of the foreign country, and the common law and the statutes cease to apply, save in so far as discipline on board is concerned.

Again, even though ships are said to be territory, civil process cannot be served on board: for the civil principle corresponding to the county limit of criminal jurisdiction, is that the King's writ does not run beyond the sea. Neither can extradition warrants be executed on board.

It seems more than probable that the rule as to the civil writ, as to the county limit of criminal jurisdiction, and as to the territoriality of Acts of Parliament, are all variations or applications of the same principle, which is expressed more generally as the territoriality of the sovereign. Out of the jurisdiction of the Courts, but within the normal jurisdiction of Parliament is an anomaly: but one which must exist if ships are territory: for both the civil and the criminal rule of jurisdiction are inelastic.

But it is very doubtful whether the floating island theory has ever been advanced except in respect of the application of the criminal, or quasi-criminal law. Cockburn, C. J., gave it very qualified approval in R. v. Keyn,101 limiting himself to the words, "it [a ship] has been likened." And in the same case, Lindley, J., treated it as merely a metaphorical expression, giving reasons why it was not true strictly, and explaining the application of the common law on board ship by the very simple reason, that "otherwise the persons on board would be subject to no law at all."

After noting difficulties in regard to the extension of certain statutes to the high seas, Piggott observes similar difficulties in re-

garding the extension of the common law to the high seas. But he says that if we accept Lindley, J.'s reason for the application of the common law on board ship on the high seas, and if we bear in mind that the criminal law is extended on board, the common affairs of daily life are practically covered by the law.

"Floating island" as a legal expression is erroneous, according to Piggott. If it were sound legally and imported legal consequences, it would have been sufficient to decide the case of *R. v. Anderson* (supra). The only statement which he admits as possible is that ships upon the high seas are only what they profess to be—ships, with a law peculiar to themselves. He does not deny the broad principle given by Cockburn, C. J. that a ship on the high seas carries its nationality and the law of its own nation with it, and that all on board, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on its territory on land, but they are liable to that law alone. Piggott concludes this point by saying that it is a question for each country to determine how much of its law shall be in force on board its own ships.

The sources of admiralty jurisdiction, as in other branches of substantive law, subdivide into rights arising out of contract and rights arising out of tort. In the United States the rights arising out of contract are maritime when they relate to a ship as an instrument of commerce or navigation intended to be used as such or to facilitate its use as such. The rule by which to determine the maritime nature of a contract was given in an opinion of the Supreme Court in which it was stated that contracts, claims, or service, purely maritime and touching rights and duties appertaining to commerce and navigation are cognizable in the admiralty courts. In discussing the difference between the American and the British rule, the Court said:

As to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test) is entirely inadmissible and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And

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104. *The Belfast*, 7 Wall. 624 (1868).
it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom.

Rights arising out of tort are maritime when they arise on public navigable waters.\textsuperscript{106}

The test of admiralty jurisdiction in matters of tort is the locality. This includes navigable waters, natural and artificial, in their average state, but does not include wharves, piers, or bridges attached to the shore. Torts, to be marine, must be consummated on water, although the primal cause may be on land. The fact that a tort commences upon the water does not give jurisdiction if the injury itself was inflicted upon the shore.\textsuperscript{107}

Admiralty has its own doctrine as to the relative rights and obligations of ship-owner and crew, dating from early ages and growing out of the peculiar nature of the marine service. The liability is \textit{in rem} and \textit{in personam}, except in case of assaults, where it is \textit{in personam} only.

The relation between the passengers and the ship or her owners is governed by the general law of passenger carriers, except, in so far as modified by statute. Persons rightfully on a vessel are entitled to demand the exercise of ordinary care towards them on the part of the vessel, under the doctrine of implied invitation. In the United States there is, independent of statute, no right of action in the admiralty law for injuries resulting in death.\textsuperscript{108} A State statute may give a remedy for death injuries, enforceable by proceedings \textit{in rem} or \textit{in personam} in the admiralty courts, or by ordinary suit in the common law courts. There are many cases where there are concurrent remedies in the State and admiralty courts. The mere fact that a State statute may affect a ship or subjects over which admiralty has jurisdiction does not invalidate it, but it has been held that the common law court must apply the doctrines of admiralty law.\textsuperscript{109}

Although federal courts as a class derive their admiralty jurisdiction direct from the Constitution of the United States, Congress has enacted statutes affecting admiralty jurisdiction, such as rules of navigation, inspection of steamers, regulating the rights of merchant seamen. It was held that Congress derives some

\textsuperscript{106} Contracts of the crew are governed in the admiralty courts by the ordinary rules of contract except as modified by statute. The admiralty courts have jurisdiction of suits against pilots. Pilots are liable for negligence and the vessel is also liable, even though he may be a compulsory pilot. See \textit{Cooley v. Bd. of Wardens of Port of Philadelphia}, 13 How. (U. S.) 299 (1851); \textit{Atlee v. Northwestern Union Packet Co.}, cit. note 74 supra.

\textsuperscript{107} \textit{The Plymouth}, 3 Wall. (U. S.) 20 (1865); \textit{Ex parte Phenix Ins. Co.}, 118 U. S. 610 (1886).

\textsuperscript{108} \textit{The Corsair}, 146 U. S. 335 (1892).

\textsuperscript{109} \textit{Bo. Pac. Co. v. Jensen}, 244 U. S. 205 (1917).
powers of legislation from the admiralty clause of the Constitution as well as from the commerce clause.\footnote{110}

The right of action is governed by the law of the place where the action arose, or by the law of the flag, if it arose on the high seas, in so far as the relations of the parties under the flag are concerned. If death occurs from a collision between two vessels of different flags, there is no right of action as the result of fatal injury on one vessel against the other vessel, where the collision occurs on the high seas.\footnote{111} The end of the voyage is the time as of which exemption can be claimed by a ship, the voyage being taken as the unit. If the voyage is broken up by a disaster—as, for example, when the vessel is totally lost—that is taken as the time.

There are four different sets of navigation rules which courts of the United States may have to administer, namely, the International Rules for Preventing Collisions,\footnote{112} the Inland Rules for Coast Waters, the Lake Rules, and the Mississippi Valley Rules.

The relative duties of steam and sail vessels, of vessels under way and vessels at anchor, vary. Every vessel under sail, although by build a steamer, is treated as a sail vessel, and every vessel, under steam or propelled by machinery, is considered a steam vessel, the latter including electric and naphtha launches, which, as far as local rules are concerned are in the category of steam

\footnote{110. \textit{The Genesee Chief}, cit. note 95 supra; \textit{Ex parte Garnett}, 141 U. S. 1 (1891); \textit{The Lottawanna}, 21 Wall. (U. S.) 558 (1874); \textit{Ex parte Phoenix Ins. Co.}, cit. note 107 supra.}

\footnote{111. \textit{Lamington}, 87 Fed. 752 (D. C. 1898); \textit{Panama R. Co. v. Napi er Shipping Co.}, 186 U. S. 290 (1897); \textit{No. Pac. R. Co. v. Babcock}, 191 U. S. 150 (1894); \textit{Manning v. International Mercantile Marine Co.}, 212 Fed. 933 (1914).}

\footnote{112. 26 Stat. 320, amended by 28 Stat. 82; 29 Stat. 381, and 29 Stat. 885.}

Jurisdiction of the United States over vessels of foreign nations is described as follows:

"American courts of admiralty—that is to say, the United States district courts—take jurisdiction \textit{in rem} not only of domestic vessels but of ships flying foreign flags, and of controversies originating on the high seas and in foreign waters. The test is, whether the subject matter is within admiralty jurisdiction. The admiralty courts are not bound to take jurisdiction of controversies between foreigners, but they may exercise it in their discretion and frequently do so, applying the principles of international law or the lex loci contractus. In the exercise of their discretion to take jurisdiction of suits between foreigners, the courts give consideration to the wishes of consuls of the nations involved, though they are not bound to do so. The United States courts have jurisdiction \textit{in rem} for supplies furnished American ships in foreign ports and foreign ships in American ports. They may in their discretion take jurisdiction of claims for wages by foreign seamen against foreign ships in American ports, and, of course, of claims of American seamen against foreign ships. The principle upon which the court is to determine whether to exercise jurisdiction is whether the rights of the parties would best be served by retaining the cause or remitting it to the foreign court. Foreign governments sometimes own or operate merchant vessels, and a serious question arises, as yet undetermined by the Supreme Court, whether such vessels are, like naval vessels, exempt from maritime liens, or whether they are subject to the process \textit{in rem} of the admiralty courts. By the act of March 9, 1920, Shipping Board vessels are immune from arrest, but provision is made for suit \textit{in rem} against the government. Vessels of the Panama Railroad, although it is a government agency, are subject to suits \textit{in rem}:

vessels by express act of Congress.\footnote{29 Stat. 489.} Rules of navigation are the outgrowth of customs and are evolved from the handling of different types of vessels. They regulate the relations of sail to sail, steam to steam, and steam to sail.

II. Nationality as an Attribute of Aircraft.

Application of Nationality Doctrine to Aircraft:

(a) Suggested Reasons for Nationality Determination—In permitting a generally free use of their respective air spaces for navigation, states have manifested an understandable desire, according to an American writer,\footnote{Kingsley, Robert, "Nationality of Aircraft," 3 JOURNAL OF AIR LAW 50 (1932).} that this navigation should inure as much as possible to the benefit and as little as possible to the distress of their own citizens and of themselves. Kingsley summarizes the things states aim to accomplish as:

1. A reservation of commercial air traffic between points in the same state for nationals of that state—the principle of cabotage, which has long been familiar in coast-wise shipping laws;
2. A protection of the public interest of the state itself against the possibility that its secrets of national defense might be violated by the prying eyes of an observer from the air;
3. A means whereby the state might protect its citizens against injuries resulting from improper or careless activities of aviators and/or enable its citizens to secure adequate redress if such injuries should occur—that is:
   a. Some provision against unsafe craft and incompetent pilots taking to the air, and
   b. Some facility for identifying the persons responsible for any injuries which might occur;
4. Some mode of determining what law governed, and what tribunal had jurisdiction over, the redress for, or punishment of, conduct in aircraft.

The principal reasons for conferring nationality on aircraft, and by the same token, the chief consequences, according to a French authority,\footnote{de la Pradelle, 3 Rev. Juridique Inter. de la Locomotion Aérienne 116 (1912).} are (1) diplomatic protection of the aircraft abroad; (2) right of requisition of the aircraft during war by the "state of the flag," foreign aircraft being exempt; and (3) designation of civil and criminal jurisdiction over aircraft.

Motives which lead states to give nationality to ships, in so far as these motives in maritime law influence aeronautical law, are enumerated by Giannini.\footnote{Giannini, Amadeo, "La Nazionalita degli Aeromobili," Revue Aeronautique Inter. 240, 25 (1932).} The political and economic motives
he mentions are protection of construction to guard secrets of manufacture and to train men ready for building ships in case of need for national defense; development of a national merchant fleet for national trade or for defense; and reservation of places in crews in whole or in part for citizens. The practical motives he mentions are designation of a ship on the high seas by means of its flag for purposes of jurisdiction, giving it an individuality and one nationality.

Reasons for nationality of aircraft given by Henry-Coüannier are that by such nationality is the only way to ensure at the same time public security, good performance in air navigation, and respect for the rights of nations. For purposes of identification in case of damage to property a distinctive mark of nationality is necessary. An aircraft, he says, is properly speaking a ship, and, like a ship, has peculiar need of national protection. This protection cannot be made immediately available unless the aircraft has a nationality. By conferring nationality on aircraft, a state gives to the signatories of international conventions an indispensable guaranty, it obtains a means of controlling aircraft in respect to the conventions, and at the time it agrees to carry out the provisions of the conventions.

(b) Historical Summary of Steps Leading to Nationality Determination—A brief history of the principle of nationality of aircraft is given by Albert Roper, Secretary-General of the International Commission on Air Navigation, in his book, La Convention Internationale du 13 Octobre, 1919. He writes that the question before the Aeronautic Commission of the Peace Conference of 1919 was recognition of the principle that aircraft should possess the nationality of one contracting state only, and that aircraft should be registered in the state whose nationality the aircraft possesses.

Several steps led up to this concept. The draft Convention of Paris, 1910, of the International Conference on Air Navigation proposed that nationality of aircraft be conferred according to the laws of each contracting state, which could determine such nationality by the nationality of the owner or by the domicile of the owner in the territory of the state. This was a compromise between the rules for determining nationality of persons, repre-
sented in France and Italy, for example, by *jus sanguinis*, and in England and the United States by *jus soli*. The state could require, according to this draft, that its national be domiciled in its territory for purposes of registering aircraft or could permit registration of aircraft by resident foreigners. For a corporation registration of aircraft would be permitted if the principal place of business (*siège social*) is within the state. In the case of joint-ownership of an aircraft at least two-thirds of the owners should be domiciled in the state.120

At the beginning of the present century Fauchille had the foresight to direct the attention of the Institute of International Law to the importance of air law.121 He prepared a report which was discussed at Paris in 1910 and at Madrid in 1911. In his draft convention is Article 2:122

Tout aérostat doit avoir une nationalité. La nationalité des aérostats publics est celle de l’État au service duquel ils sont affectés. Celle des aérostats privés est déterminée par celle de leur propriétaire.

At Madrid the Institute adopted a resolution which stated that aircraft shall have a nationality and only one nationality, which shall be that of the country where the aircraft is registered; that each aircraft shall carry special marks of identity; that the state where registration is requested shall determine the persons to whom and the conditions under which registration shall be granted; that a state registering an aircraft belonging to a foreigner shall not give protection to the aircraft upon the territory of the state of which the owner is a national, if the latter state has legislation prohibiting its nationals to register aircraft abroad, and freedom of passage shall be provided except for the right of subjacent states to take certain measures to ensure their own security and that of the persons and property of their nationals.123

In 1913 the International Juridical Committee of Aviation adopted an International Air Code. Under the part devoted to public air law is found the principle that aircraft shall have a

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nationality and only one; that the nationality of aircraft shall be determined by that of its proprietor; and that if the owner is a corporation, the nationality of the aircraft shall be determined by the principal office of the corporation; and, if the aircraft has co-owners of different nationalities, the nationality of the aircraft shall be that of the owners who possess two-thirds of the value of the aircraft.\textsuperscript{124}

The foregoing resolutions, voted by the several international groups of jurists before 1919 indicate no divergence of viewpoint as to permitting aircraft to possess nationality, but they reveal differences of conviction as to how the nationality of aircraft should be determined. The general principle of nationality for aircraft was not adopted without some opposition, however, and a number of rules, other than above mentioned, for determining the nationality of aircraft were proposed during the debates. These theories will be discussed subsequently in greater detail.

**Existing Provisions for Nationality Determination:**

(A) **International Regulation**—

(1) **Multi-Partite Agreements—International Convention on Air Navigation of 1919 (CINA)**—In preparing the draft for the International Convention on Air Navigation of 1919, it was decided that, since an aircraft was to possess the nationality of the state which registered it, a state could not register an aircraft unless it belonged to a national of that state, and hence the principle of determining nationality of aircraft by the nationality of the owner prevailed.

The original text on nationality in the Convention on Air Navigation of 1919 is as follows:\textsuperscript{125}

\textsuperscript{124} Arts. 4 and 5, Code International de l’Air, Comité Juridique International de l’Aviation, Troisième Congrès, Francfort-sur-le-Main, 1913. Text in French published in Roper, La Convention Internationale, cit. note 6 supra, p. 252. The International Air Code was later modified by the International Juridical Committee on Aviation to read that aircraft shall have the same nationality as the state wherein they are registered; that registration shall be in conformity with the laws of each state; that a state shall register only aircraft belonging to its nationals; that if an aircraft belongs to several owners, it shall be registered by a state only when its nationals own more than half of the aircraft, and that if an aircraft belongs to a corporation one more than half of its directors must have personally the same nationality as the corporation and as the state and possess the majority of interest in the corporation, or, in the case of a stock corporation, the president and more than half of the directors must have the same nationality as the corporation and the registering state: Roper, La Convention Internationale, cit. note 6 supra, p. 334.

\textsuperscript{125} Ch. 2, International Convention Relating to the Regulation of Air Navigation, Oct. 13, 1919 (Roper), cit. note 6 supra. This Convention is in force in Belgium, Great Britain, Australia, Canada, New Zealand, India, Irish Free State, South Africa, Bulgaria, Chile, Czechoslovakia, Denmark, Finland, France, Greece, Iraq, Italy, Netherlands, Japan, Persia, Poland, Portugal, Roumania, Siam, Sweden, Territory of the Saar, Uruguay and Yugoslavia. Persia denounced the Convention on April 20, 1933, to take effect one year later.
NATIONALITY OF AIRCRAFT

ART. 5.—No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State, unless it has concluded a special convention with the State in which the aircraft is registered. The stipulations of such special convention must not infringe the rights of the contracting Parties to the present Convention and must conform to the rules laid down by the said Convention and its Annexes. Such special convention shall be communicated to the International Commission for Air Navigation which will bring it to the knowledge of the other contracting States. 126

ART. 6.—Aircraft possess the nationality of the State on the register of which they are entered, in accordance with the provisions of Section I(c) of Annex A.

ART. 7.—No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State. No incorporated company can be registered as the owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfills all other conditions which may be prescribed by the laws of the said State. 127

ART. 8.—An aircraft cannot be validly registered in more than one State.

ART. 9.—The contracting States shall exchange every month among themselves and transmit to the International Commission for Air Navigation referred to in article 34 copies of registrations and of cancellations of registrations which shall have been entered on their official registers during the preceding month.

ART. 10.—All aircraft engaged in international navigation shall bear their nationality and registration marks as well as the name and residence of the owner in accordance with Annex A.

The changes in Article 5 were made chiefly to permit contracting states to enter into aviation agreements with non-contracting states, while the changes proposed for Article 7 were made principally to reconcile the Convention with certain national legislation in some of the non-contracting states which objected to the rule of determining aircraft nationality by that of the owner, especially when the owner was not domiciled in the state.

In preparing for the protocol of June 15, 1929, 128 Germany led the movement to change the rule of registering aircraft from the test of nationality of the owner to the test of the domicile of the owner whether the aircraft belonged to individuals or corpo—

126. Art. 5 was amended to read as above in italics by a protocol dated in London, Oct. 27, 1922, which entered into force on December 14, 1926. This article is subject to further revision by a protocol dated in Paris, June 15, 1929, and would be inserted as the last article of Chapter 1.

127. Art. 7 was revised by a protocol dated in Paris, June 15, 1929, which provides that registration of aircraft shall be made in accordance with the laws and special provisions of each contracting state.

rations. The deletion of the entire Article 7 was also advocated. Austria proposed basing registration upon the operator. Spain suggested preserving Article 7, but adding thereto the derogations contained in the Ibero-American Convention; Switzerland favored the domicile of the owner; France and Poland upheld the original Article 7; and the delegation of the United States pointed out that its national legislation is more strict than Article 7, but proposed the substitution of Article 8 of the Pan-American Convention on Commercial Aviation. This suggestion prevailed and was incorporated in the protocol of June 15, 1929, to amend the Convention of 1919, which protocol came into force on May 17, 1933, as follows:

Art. 7. - The registration of aircraft referred to in the last preceding article shall be made in accordance with the laws and special provisions of each contracting state.

This compromise, leaving the method of determining nationality of aircraft to the choice of each state, may procure a workable compromise, but it does not settle the question to any degree of uniformity. It is possible that some owners of aircraft could not register their aircraft in a desired locality; and if some states retain the criterion of registration according to the nationality of the owner, certain difficulties remain.

(2) Multi-Partite Agreements - Ibero-American Air Navigation Convention (CIANA) - The Ibero-American Air Navigation Convention was signed at Madrid in October, 1926. It was intended to provide an opportunity for states which did not adhere to the Convention of 1919. Article 5 of the Ibero-American Convention allows contracting states to permit or prohibit flights within their respective territories by aircraft of non-contracting states, thus giving greater liberty than the revised Article 5 of the Convention of 1919. Article 6 and Article 7 of the Convention of 1919 are incorporated in the Ibero-American Convention in Articles correspondingly numbered, but the latter Convention has added to its Article 7 the two following paragraphs:

If any Ibero-American state, signatory to the Convention, finds that the requirements in this Article for determining the nationality of an aircraft are incompatible with the provisions of its own legislation, it may incorporate the necessary reservation in an additional protocol to the Convention.

Any state making such a reservation shall be free to regulate the regis-

129. Convenio Ibero Americano de Navegacion Aerea (C. I. A. N. A.) Gaceta de Madrid, Apr. 28, 1927: Text in French is published in Roper, La Convention Internationale, cit. note 5 supra, p. 317. This Convention has been ratified by Spain, Costa Rica, Dominican Republic, Mexico, and Paraguay.
tration of its aircraft and flights above its territory including its territorial waters, but in no case shall the advantages specified in this Convention be conceded to the other signatory or adhering states, except in the case of aircraft which fulfill all the requirements expressly defined in the first two paragraphs of this Article.

(3) Multi-partite Agreements—Pan American Convention on Commercial Aviation (PAC)—The Pan American Convention on Commercial Aviation was signed at Habana on February 20, 1928. The provisions as to nationality are as follows:

Art. 7.—Aircraft shall have the nationality of the state in which they are registered and cannot be validly registered in more than one state.

The registration entry and the certificate of registration shall contain a description of the aircraft, and state the number or other mark of identification given by the constructor of the machine, the registry marks and nationality, the name of the airdrome or airport usually used by the aircraft, and the full name, nationality and domicile of the owner, as well as the date of registration.

Art. 8.—The registration of aircraft referred to in the preceding article shall be made in accordance with the laws and special provisions of each contracting state.

Art. 9.—Every aircraft engaged in international navigation must carry a distinctive mark of its nationality, the nature of such distinctive mark to be agreed upon by the several contracting states. The distinctive marks adopted will be communicated to the Pan American Union and to the other contracting states.

As has been previously noted, the wording of Article 8 is incorporated in the protocol of June 15, 1929, amending the Convention of 1919.

(4) Bi-Partite Agreements—In the large number of bi-partite agreements between states on the subject of aviation, provisions deal with the admission of civil aircraft, the nationality of aircraft, the issuance of pilots' licenses and acceptance of certificates of airworthiness for aircraft imported as merchandise. Lack of space in this article prevents a detailed analysis of these agreements, but it is sufficient to note that nationality of aircraft


is an accepted principle, and that in most countries such nationality is determined by the nationality of the owner.

(B) *National Regulation—*

States which belong to the Convention of 1919 have their national laws in accord with the principle in the Convention, namely, that nationality of aircraft is determined by the nationality of the owner who must be a citizen or subject of the registering state. The same principle has also been adopted by states which did not join the Convention of 1919. Registration of aircraft according to the nationality of the owner of the aircraft prevails, for example, in the United States, which did not ratify the Convention of 1919. No civil aircraft is eligible for registration unless it is owned by a citizen of the United States and is not registered under the laws of any foreign country. Such aircraft is known as aircraft of the United States. In Germany, the national law requires that the owner of aircraft registered in the state be domiciled there.

Registration of aircraft rests upon the point of ownership. Usually the aircraft acquires the nationality of its owner; that is the nationality of the aircraft is that of its owner since the aircraft must be registered by the government of the state to which the owner owes allegiance. This principle has not been universally adopted by states. Exceptions are found in states which use the domicile of the owner as criterion for registration. Motives for such exceptions may possibly originate in the desire of a state to exercise its authority in emergencies to take control of any assets found within its boundaries, or to encourage the theory that domicile should be the determining element in matters concerning nationality. In Colombia, foreign navigation companies established within the Republic are considered as national, as are also private, pleasure or business aircraft owned by resident for-

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132. Sec. 3(a)(1), An Act to Encourage and Regulate the Use of Aircraft in Commerce, and for other Purposes, cit. note 5. *Sec. 3.—Definitions. As used in this act . . . (c) The term 'aircraft' means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air, except a parachute or other contrivance designed for such navigation but used primarily as safety equipment . . . *

"(f) The term 'aircraft of the United States' means any aircraft registered under this act."

"Sec. 3.—Regulatory Powers.—The Secretary of Commerce shall by regulation:

"(a) Provide for the granting of registration to aircraft eligible for registration, if the owner requests such registration. No aircraft shall be eligible for registration (1) unless it is a civil aircraft owned by a citizen of the United States and not registered under the laws of any foreign country, or (2) unless it is a public aircraft of the Federal Government, or of a State, Territory, or possession, or of a political subdivision thereof. All aircraft registered under this subdivision shall be known as aircraft of the United States."
eigners. In Argentina, nationality of aircraft is determined by registration. Aircraft within the country for at least four months are required to be listed on the national register by their owners, thereby annulling any former foreign registration. Reciprocally, registration in a foreign country is recognized only if the aircraft leaves the country and is transferred to persons or companies established abroad. A law identical with that in Argentina has been decreed in Bolivia. In Chile, only nationals of Chile may own aircraft registered in Chile, but the Chilean law assimilates to Chile foreign owners of commercial enterprises established in the country and foreigners who follow professions and certain industries. There are special rules for corporations. These exceptions to the prevailing rule of determining nationality of aircraft according to the nationality of the owner, together with persistent presentations by a few advocates of other rules, and recurring practical difficulties encountered in applying nationality to aircraft are sufficient to make legislators in countries where national laws on aviation are being proposed or re-considered somewhat cautious on the point of incorporating or preserving provisions on nationality of aircraft.134

Problems Arising Under Existing Provisions:

Examples of Situations Presenting Difficulty—Some instances of aircraft manufactured in the United States and sold abroad have been given by the Aeronautics Trade Division, Department of Commerce of the United States, to illustrate certain practical problems relating to nationality, licensing and airworthiness of aircraft.135

Great Britain has no reciprocal licensing agreement with the United States, but has allowed American airplanes owned by British citizens to operate within the country. An American company shipped several trimotors to its British branch which it is understood is controlled by British citizens. These were allowed to operate for demonstration purposes and had British registry. It is reported that they were flown on the continent with this British registration. An American monoplane with a wing manufactured abroad was sold and shipped to a British company. On

134. Egypt is a recent illustration of a state having rejected proposed legislation on aviation in which the principle of nationality of aircraft was questioned.
135. Letter to the author, dated Dec. 1, 1932. See this article, p. 3, for example previously given.
the basis of an Airworthiness Certificate for Export issued by the United States Department of Commerce, the operators were granted a permit to operate the airplane for charter and sightseeing flights. After a year the British Air Ministry, before it would renew the permit to operate, made the operators have Lloyd's inspect the plane and fill out a detailed inspection report. This was sent to the Department of Commerce, and a cable despatched to the Air Ministry to the effect that if a plane of the same type, and in the same condition as indicated by the report, were to be up for a renewed license in the United States, such United States license would be granted. It appears that this monoplane has been operated in England ever since. One of the trimotors mentioned above as having been exported to Great Britain was sold to a Frenchman, and it is understood, a French license was granted for it. This plane is reported to have toured throughout Europe under French registry and to have been wrecked on a flight to the Far East. There is an American airplane owned by an American citizen residing in Paris. This individual desired to get a new airplane, but before doing so wanted to sell his plane to a prospect he had in The Hague, Netherlands. He flew the plane to The Hague and a cable was sent to the Department of Commerce asking if the plane could retain its American license if flown by a Dutch pilot. This permission was granted. The United States was negotiating a reciprocal aviation agreement with the Netherlands, and the Netherlands authorities apparently were being lenient with regard to this particular plane, as was the Aeronautics Branch of the Department of Commerce in carrying it on the rolls.¹³⁶

Another interesting case was in Hong Kong, where an American monoplane had a United States' license and was owned by an agent for a firm incorporated under the China Trade Act, the principal stockholder of which was a citizen of the United States. The Hong Kong authorities would not allow this plane to be flown from their territory without renewal of its United States' license. The agent desired to fly it from a Hong Kong airport in order to deliver it to a Chinese provincial government, to which it had been sold. In order to renew the license, the Department of Commerce Trade Commissioner at Shanghai, who specializes on aeronautics, was allowed to go to Hong Kong to inspect the plane and issue a document to the Hong Kong authorities indicating that the plane was airworthy and eligible for a renewed license. The authorities then granted permission for it to be flown from

¹³⁶. See 4 JOURNAL OF AIR LAW 257 and 421 (1933).
Hong Kong to China. Upon delivery to the Chinese owner, the license of the United States was automatically cancelled since the aircraft was no longer owned by an American citizen.\textsuperscript{187}

Various problems, mentioned above and in Part II, arising from applying the principle of nationality to aircraft may be briefly classified as relating to (a) ownership of aircraft by nationals, aliens, corporations and states, including the question whether an aircraft has a personality and nationality apart from its owner; (b) purchase, sale and use of aircraft for business and pleasure, including different types and sizes of aircraft, the nature of aircraft, and effect of nationality of aircraft on aeronautical industry and transportation; (c) state sovereignty and freedom of passage for aircraft, including the question whether nationality of aircraft, as such, aids a state in upholding its sovereignty at home and in extending its diplomatic protection abroad; (d) state administration in the interest of public safety through certificates of airworthiness and licenses for aircraft and pilots, distinguishing navigability from nationality; (e) state responsibility in peace and war through regulations for civil and military aircraft; and (f) jurisdiction over aircraft in respect to location, whether over territory, territorial waters or high seas, in matters of contract, tort and crime, including the applicability of legal systems, common or civil law, statutes, and admiralty procedure.

\textit{(To be continued)}

\textsuperscript{187}. In this instance, as in similar instances and as is always done in the case of states belonging to the Convention on Air Navigation of 1919, the Chinese government recognized the airworthiness of the aircraft for the remainder of the existing one year period for which the United States had issued a certificate for the airplane.

An aviation agreement between the United States and Great Britain has been negotiated, and it is understood will become effective upon revision of the requirements for British and American certificates of airworthiness which are now under consideration at London and Washington.

Further variations in the problem were encountered by the Department of Commerce in connection with aircraft exported to Australia, which had no agreement on aviation with the United States and which placed an embargo on aircraft of countries not members of the International Convention on Air Navigation of 1919. An informal arrangement, however, was entered into in 1930, which allows the entry of American aircraft and permission for it to operate when such aircraft is not competitive with any existing British type or type available locally, from the viewpoint of performance and if price and delivery time for the particular American aircraft were not greater than the nearest comparable product to be obtained from Great Britain. New Zealand appears less strict than Australia in that it has allowed an American plane unrestricted flight over its territory. Another phase has presented itself in Egypt which has no agreement on aviation with the United States and which is not a member of the Convention of 1919. There appeared to be no Egyptian law prohibiting the licensing of American aircraft for civil operation in Egypt, but certain tests and periodic inspection were required to be conducted by the British Royal Air Force.