Universality \textit{versus} Nationality of Aircraft

Margaret Lambie

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
Margaret Lambie, \textit{Universality versus Nationality of Aircraft}, 5 J. Air L. & Com. 246 (1934)
https://scholar.smu.edu/jalc/vol5/iss2/5

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
III. Theories for Determining Nationality of Aircraft.

Definition of the nationality of aircraft is a matter of public law, but the effects of such definition of nationality, although at times matters of public law, are more often matters of private law, according to Schreiber. He believed that "freedom of nationality" of aircraft is repugnant to the political interests of all nations, as also any principle of nationality which would virtually leave private interests free to choose the nationality of the aircraft. The advantages sought from adopting the principle of nationality for aircraft are primarily to prevent "freedom of nationality," Schreiber stated.

Of course it will never be possible to entirely prevent people from choosing the nationality they desire for their aircraft; they will always have imagination enough to find a way through the meshes of the law. But it is nevertheless necessary to accept provisions defining the principles of the nationality of aircraft as based upon the nationality of some individual or legal entity.

Criteria advocated for determining the nationality of aircraft include (1) nationality of the owner; (2) domicile of the owner; (3) place of construction; (4) nationality of the pilot; (5) nationality of the holder or operator; (6) state where the aircraft is kept; (7) state of registry, according to one of the above rules; (8) state of registry, having freedom to determine its own rules.

(1) Theory According to Nationality of the Owner:

Nationality of the owner is the rule adopted in most countries for determining the nationality of aircraft, or, in other words,
an aircraft may be entered on the aeronautical register of a state if the owner is a national of that state.

Under this theory the status of aircraft would be fixed and satisfactory in the majority of cases. Diplomatic protection of aircraft would not be separated from that of its owner, diplomatic protection of the owner being determined by his nationality. Among the advocates of this theory are Paul Fauchille, A. de La Pradelle, and Amedeo Giannini.\textsuperscript{140} Giannini defends the rule for determining nationality of aircraft according to nationality of the owner, even if the fiction of a ship as part of national territory could be eliminated with respect to vessels. In his opinion the difference may be quantitative but not qualitative and he uses a hydroplane floating upon the high seas to illustrate the fact that in such a situation aircraft may be in all respects like a ship. A ship is movable property, an object, a means of communication, he says, and the relations between a state and its ships are not simply control of a means of transportation but involve political and economic matters. These motives in maritime law as applied to aircraft are justified, according to Giannini, in order to favor national construction of aircraft for economic reasons and for preparedness in time of need for defense, and in order to be assured that aircraft are owned by nationals in case of war. The latter he considers more important than ownership of vessels by nationals because of the ease with which a civil air fleet could be turned into military uses. Even more important than for crews of ships, he considers, is nationality requirement for the civil personnel on board aircraft, because of the smaller number of persons on aircraft and the great need for trained air pilots during war. He concludes his arguments for determining nationality of aircraft according to the owner of the aircraft by pointing out that the social element of air navigation and subventions needed in development of rapid communication require the definite designation of the relation between aircraft and the state, giving to aircraft a legal individuality like that of ships, namely, a nationality, creating rights and obligations on the part of the owner and of the state.

Under this system a foreign-owned aircraft as such is noticeable because of its foreign license. For purposes of sequestration or requisition this may be advantageous, but it does not enable the authorities to distinguish quickly between aircraft owned by foreigners domiciled within the state and those merely passing.

\textsuperscript{140} Giannini Amedeo, "La Nazionalita degli Aeromobile," Rev. Aeronautique Internationale, 348, No. 5 (1932).
through the state. Aliens domiciled, perhaps for many years, within a state and having few, if any, connections with their state of origin often encounter much inconvenience and expense in having their aircraft licensed and inspected in the latter state annually and after each accident or repair. They may be discouraged or even prevented by this system from owning aircraft.

Among the disadvantages argued against the rule of fixing nationality of aircraft by nationality of the owner is that exclusive sovereignty of a state within its own territory does not exist if the state is a member of an international convention allowing foreign-owned aircraft to be operated within the state. A solution has been proposed, if standards were made reasonably uniform in the different countries, to have inspection by competent persons or by an inspection company in the state where the aircraft is kept, with registration at the consulate of the state of which the owner is a national, provided the consulate does not have on its staff an aviation expert to make inspections.

Manufacturers selling aircraft abroad have not been able, it appears, to retain property rights in the aircraft sold by them until payment was finally completed, because the buyer had to have the aircraft registered in his own country as belonging to a national or a company of that country. Another objection is that aircraft belonging to an owner of a given nationality cannot be operated entirely abroad because the government of the country in which the aircraft are registered is without jurisdiction abroad as to navigability, licenses, and pilot regulation.

Objections to this theory are advanced by Pittard as follows:141

Comment se détermine actuellement la nationalité d’un aéronef? En dehors des législation nationales, il est un texte officiel qui donne à cet égard toutes les précisions possibles: c’est la Convention portant réglementation de la navigation aérienne en date du 13 Octobre 1919, dite Convention de Paris. L’Article 7 est ainsi conçu: “Les aéronefs ne seront immatriculés dans un des Etats contractants que s’ils appartiennent en entier à des ressortissants de cet Etat . . .” Il en résulte que l’aéronef est inscrit dans l’Etat dont le propriétaire est ressortissant. Cette règle démontre l’exactitude de ce que nous disons plus haut à savoir que l’aéronef n’a ou ne prend une nationalité que par son propriétaire; mais elle peut créer une situation juridique anormale.

Ainsi, il existe à l'Aéroport de Genève un gros avion de tourisme qui appartient à un citoyen anglais. Comme la loi exige l'immatriculation dans le pays d'origine du propriétaire, cet avion est immatriculé en Grande-Bretagne où il n'est peut-être jamais allé; en revanche, il est garé constam-

ment en Suisse où il circule librement en vertu de la Convention anglo-
suisse de 1919; la Grande-Bretagne ne peut exercer à son égard ni contrôle
 technique, ni surveillance puisqu'il se trouve constamment à l'étranger, par
 contre la Suisse, qui pourrait assumer cette charge, n'a qu'un droit de police.
 Si cet appareil cause un dommage, quel sera le for judiciaire? Le lieu
d'immatriculation? Ce seraient donc les tribunaux anglais qui seraient com-
pétents et l'on voit toute la portée de cette règle et les inconvenients par-
ticuliers qu'elle crée; on a cherché à obvier à cet inconvenient par une
dérogation legale de for, c'est-à-dire en admettant la compétence du tribunal
du lieu de l'accident; si l'accident se produit en Suisse, le tribunal Suisse se
trouvera compétent non pas parce qu'il est le lieu où l'appareil a son port
d'attache, mais en raison de cette dérogation de for.

Si l'on considère cette question du point de vue de la coopération entre
les aviations civiles, on peut constater qu'il y a un avantage indéniable à
conférer des droits et à imposer des obligations aux exploitants dans les
lieux où ils travaillent, tandis qu'il est contraire à une saine pratique de
renvoyer à des juridictions étrangères la connaissance de litiges nés dans un
lieu dont les tribunaux, par suite d'une simple fiction de nationalité, ne
seraient pas compétents.

Cet article 7 nous paraît donc défectueux; mais il y a plus, et l'article 6
confronté avec l'article 7 est encore plus curieux. L'article 6 est ainsi conçu:
"Les aéronefs ont la nationalité de l'Etat sur le registre duquel ils sont
immatriculés conformément aux prescriptions de la Section 1 de l'Annexe
A."

Cet article pose donc comme règle que l'immatriculation confère
la nationalité; or, c'est un pléonasme puisque seul un national a le droit d'im-
matriculer un aéronef dans son pays; c'est une hérésie s'il s'agit de donner
par là une nationalité propre à l'appareil en plus et quelquefois en dehors
de celle que possède son propriétaire ou son exploitant. Aujourd'hui les
juristes tendent de plus en plus à substituer à la nationalité la notion de
domicile; cette orientation nouvelle correspond à l'évolution des relations
internationales et au développement toujours plus grand du cosmopolitisme.

In objecting to the test of ownership, Schreiber said:142

The fact that some of the more recent legislation rejects the principle
of the nationality of the owner would seem to point to the possibility that
a mistake was made when it was taken as the basis of the Convention of
October 13, 1919, and of the national laws of most countries.

Reference has previously been made to the Protocol of 1929
amending the Convention of 1919 as to Article 7,143 so that the
rule of determining nationality of aircraft by the nationality of
the owner is no longer imposed upon adhering states. But states may
retain or adopt any rule for the registration of aircraft in accord-
ance with their laws. In practice today most states have the rule
of nationality of the owner.

142. Schreiber, Otto, Principles of Draft Convention on Nationality of
Aircraft, cit. note 138 supra.
143. See Part I, 5 JOURNAL OF AIR LAW 1, 16, and Theory (8) infra.
The fact that an American citizen, for example, can buy but not register an aircraft in France, since it must be registered in the United States where it would have to be sent for technical verifications, and the fact that the legal owner of an aircraft in France, if an alien, may not operate it there, influenced the International Chamber of Commerce to recommend to all governments to renounce in their legislation the principle of making registration of aircraft depend upon the nationality of the owner.

In like manner the Air Transport Cooperation Committee of the League of Nations adopted the following resolution:¹⁴⁴

The Committee notes that the last ratifications of the Protocol of 1929 will shortly confer on states parties to the 1919 Convention the freedom which other states not parties to the Convention already possess to settle each for itself the conditions under which aircraft are to be registered. It considers it desirable that, in national laws, the registration of aircraft should not depend solely on the owner's nationality; it should also be possible to register aircraft, the owners of which are foreigners settled in the territory.

(2) Theory According to Domicile of the Owner:

Domicile of the owner as a test for determining the nationality of aircraft has been advocated from several points of view. The Air Transport Cooperation Committee of the League of Nations in its above-mentioned resolution denouncing the test of nationality for aircraft according to nationality of the owner, concluded as follows:

It [the Committee] also expressed a hope that, the rule based on the effective domicile of the owner, subject to any rules laid down by national law concerning duration, will be uniformly adopted for this registration. It being admitted that each aircraft must be registered in one country and in one country only, these uniform rules should allow the possibility of registering aircraft belonging to the national companies having some foreign capital or directors.

An early discussion of foreign-owned aircraft reads as follows:¹¹⁵

On éviterait ces inconvénients, en permettant aux étrangers d'acquérir pour leurs aéronefs, la nationalité du pays dans lequel ils ont leur domicile. Cependant, ceci pourrait avoir des inconvénients non seulement pour des raisons de sécurité nationale, mais aussi dans le cas où un aéronef ayant la nationalité du pays où son propriétaire est domicilié, passerait dans le pays natal de ce dernier. Il s'élèverait alors la question suivante: "L'Etat,

¹⁴⁴. May 9-12, 1932.
UNIVERSALITY VERSUS NATIONALITY

Wegerdt also advocates the theory of domicile of the owner.\(^\text{146}\)

The difficulties which present themselves if the registration of aircraft is made to depend on the nationality of the owner could be more easily avoided by the decision that the proprietor of aircraft must have his domicile in the country in which the aircraft should be registered.

The International Chamber of Commerce has declared its preference for the method of choosing nationality of aircraft according to the domicile of the owner. In this connection for corporations, it favors siège social, the headquarters or principal place of business.

Residence in a country, particularly for a long period, implies, it is claimed, a connection with that country which, in the case of aliens, often creates a sense of attachment, and with such attachment an understandable desire to own personal property in the same manner as nationals of that state. Under the theory of domicile of the owner, it would be possible for aliens to own aircraft and register aircraft in the country where the alien owners live, on the same terms allowed nationals domiciled in the state.

A distinction is sometimes made between the “domicile” of a person and his “residence,” the former usually being the basic place, his legal residence for certain matters, and the latter, a home, or a more temporary place, for purposes of local taxation, public health, and police regulations, etc. Confusion arises from the interchange and undefined meaning of these words. “Residence” is the term used in naturalization procedure of the United States. Permanent abode is the meaning preferred by those who support the domicile theory for registering aircraft.

Jurists who advocate the test of domicile for determining nationality of aircraft are in accord as to the general principle, but vary on the point of whether the domicile to be used as the test shall be that of the owner of the aircraft, that of the operator, or of the aircraft itself. Some jurists maintain that the domicile of

the aircraft, together with registry of the aircraft in the locality of such domicile, give nationality to the aircraft independent of the nationality or domicile of the owner of the aircraft.

The domicile theory in general is discussed by Pittard:147

Il est conforme au droit et à la logique de soumettre l'individu et ses biens aux lois du pays dans lequel ils se trouvent. Le domicile est le centre légal de l'activité humaine et il semble normal de soumettre les rapports juridiques à la connaissance des tribunaux du lieu où leur auteur a fixé sa demeure. Nous savons que la notion de domicile n'a pas partout la même signification juridique; aussi n'est-il pas dans notre intention de déterminer le domicile du propriétaire ou de l'exploitant par une formule qui, vraisemblablement, heurterait la conception juridique de ce terme dans l'esprit de plusieurs législations.

Ce que l'on est en droit d'exiger dans le domaine aérien comme dans la marine, c'est qu'il n'y ait pas de vaisseaux fantômes; un navire doit avoir un port d'attache; un aéronef doit également avoir un domicile.

Repoussant donc la nationalité comme critère de l'immatriculation, nous admettons le lieu où l'aéronef aura son port d'attache; nous admettons comme raisonnable et conforme aux exigences modernes la législation de la République Argentine, qui accorde l'accès de son registre d'immatriculation à toutes personnes établies sur son territoire.

An objection to this system is that nationals of one state domiciled in another state would own aircraft licensed by the latter state. When such owners return in their own aircraft to their state of origin, they would arrive in a "foreign" plane, and might find themselves in embarrassing situations. Would the registering state give them diplomatic protection as against the government of the state of which they are nationals?

(3) **Theory According to Place of Construction:**

Place of construction as the test for giving nationality to aircraft was proposed as being the place of origin of the aircraft.148 The contention was that an aircraft must have a certificate of navigability before it takes the air, and that this certificate would be naturally obtained at the place in which the machine has been constructed. Applicable also to this theory is the argument used in favor of nationality for ships, namely, protection of secrets of manufacture and training of expert builders. The objections to this theory are that an aircraft might have a body of one make and engine of another, constructed in different countries; that this test for nationality of aircraft might confer a special privilege.

---

147. Pittard, E., Report to Air Transport Co-operation Committee, cit. note 141 supra.
tending toward the exclusion of aircraft manufactured in other countries; and that it might also lead to many administrative difficulties. The theory has found little support.

(4) Theory According to Nationality of the Pilot:

Nationality of the pilot as a criterion for determining the nationality of aircraft is a theory based primarily on a desire to protect points of military importance against espionage by one who may become in the future an enemy alien, and to a less degree by the desire to keep all the chances of gain resulting from aviation for the state's own citizens, as well as to ensure that the pilot will be readily accessible for the purpose of redressing any wrongs committed by him. This rule is not necessary to accomplish these ends, Kingsley points out, because civil liability, by most national laws, has been attached to the owner, either in lieu of or jointly with the pilot or operator, and because some protection against espionage is assured by the fact that prohibited zones are closed to national as well as to foreign aircraft. Administrative problems would appear to be numerous under this test because of frequent shifts in the personnel of aircraft.

(5) Theory According to Nationality of the Holder or Operator:

Nationality of the operator as a test for conferring nationality upon aircraft was advocated by Schreiber on the ground that ownership is not sufficient to determine nationality of the aircraft. Operation is the closest economic tie between an aircraft and a person, he believed, and he gave examples where the operator or the person in control is held responsible. Usually the owner is the operator, but frequently the operator is a lessee or a buyer who has not yet acquired full property rights in the aircraft.

Because of his right of ownership the owner of an aircraft may do anything with the aircraft he pleases, as long as he does not disobey the law, interfere with the rights of others or, with the public safety. Operation of an aircraft is distinguished from ownership. Often the owner never intends to operate his aircraft himself, but to lease it.

The registration by the holder instead of the owner could not be accepted in Germany, according to Wegerdt, since the concept

150. Schreiber, Otto, Principles of Draft Convention on Nationality of Aircraft, cit. note 138 supra; cites the law of Argentina, where aircraft operated within the national territory may be registered in that state.
of a holder is not sufficiently clear to justify inscription in a public register.\textsuperscript{181} Whether the holder or operator should be enrolled on the aeronautical register, whether the owner or operator of aircraft shall be liable separately or jointly, and whether such liability shall be absolute or limited has caused much discussion.\textsuperscript{192}

Objections to this theory are that operators and holders may change frequently, and that under this rule it would be difficult to determine nationality of aircraft, especially in international service.

(6) Theory According to Place Where the Aircraft Is Kept:

The place where the aircraft is kept, sometimes called the place of registry, \textit{port d'attache}, or domicile of the aircraft, has a number of supporters as a theory for determining the nationality of aircraft. An analysis of the admiralty term, “port d'attache,” is given by Henry-Coïannier.\textsuperscript{158} He asks why the analogy of a “port d'attache” for ships is applied to the place where the aircraft is registered, explaining that the expression “port d'immatriculation” appeared in the maritime world before the term “port d'attache,” which was used in the French law of 1852. In 1874 the use of “port d'immatriculation” again appears. The English Merchant Shipping Act of 1854 contains the term “registered port,” and a very early law of the United States speaks of “home port.”\textsuperscript{159} Henry-Coïannier considers the latter expression the equivalent of “domicile,” the use of which word he prefers, and the interpretation of “domicile” he gives as the “place of registration.” He considers that nationality is not alone sufficient and that in addition to nationality an aircraft must have a “domicile.”

A distinction is made by Spaight between “port d'attache,” interpreted as the “port of registry,” and the airdrome which is the aircraft’s “home.” Spaight believes that an aircraft should have a fixed headquarters and that the aircraft should be reg-

---

\textsuperscript{151} Wegerdt, Alfred, “Germany and the Aerial Navigation Convention at Paris, October 13, 1919” cit. note 146 supra.

\textsuperscript{152} When a German owner, for example, leases a plane to an Austrian air transport company which operates the aircraft in Italy, if the state flown over imposes absolute liability on the owner, and if the owner has relied upon the operator’s taking out insurance, the owner may find himself liable for damages which he never contemplated. His protection is to carry insurance as well as having the operator do so, but that appears to be adding too great a burden: Wegerdt, Alfred, “Das Eigentum am Luftfahrzeugen,” Text in German and French published in Rev. Aeronautique Inter. 215, No. 4 (1932). See Draft Convention Relative to Liability for Damages Caused to Third Parties on the Surface, adopted by the International Technical Committee of Aerial Legal Experts, Treaty Information, Department of State, Bulletin No. 36, p. 14 (1932).


\textsuperscript{154} Act of December 31, 1792.
istered in the state in which the headquarters of the aircraft are situated.¹⁵⁵

In general, the domicile, port d'attache, or place of registry, would be the same as the domicile of the owner, according to Oppenheim.¹⁵⁶ But the test of domicile of the aircraft in preference to the owner's nationality is defended on the ground that some people have double nationality, some have doubtful nationality, and others have no nationality at all.

If the aircraft changes its "home," then Spaight says its registration and its "quasi-nationality" would be changed, but he believes there should be no greater frequency of changes under a system based on domicile of the aircraft than under that based on nationality of the owner. He mentions, for example, cases where aircraft are sold to foreigners.

In fixing the identity of the aircraft there are advantages in looking solely to the aircraft's actual physical location. Customs and police authorities are in close touch with all airports and therefore could keep track of the foreign-owned aircraft usually placed there. On the other hand, when there is no distinction as to the marks on foreign-owned aircraft, there is less likelihood that a foreign plane might be discriminated against in matters of landing, securing assistance and obtaining witnesses.

The state from which the aircraft operates is more concerned than the state of the owner's nationality. The former has power to exclude aircraft or refuse flying privileges. It might find it easier to requisition aircraft under this theory. Divald¹⁵⁷ considered the test of port d'attache the best one because it gives the state where the aircraft is habitually located power to refuse registration, if necessary to protect its security, and to stipulate special conditions in the exercise of its sovereignty. Another argument advanced for taking the domicile of the aircraft as the test of nationality of aircraft is that acts and relations resulting from air navigation must be under legal regulation from the point of view of public law, and that certain questions under private law, such as mortgages, would be determined by the law of the state where the aircraft has its permanent abode. Added to the legal reasons are economic ones, especially in small countries where the development of air navigation is in the hands of foreigners and where, in some cases, subsidies are given to foreign companies.

¹⁵⁶ 1911 Annuaire de l'Institut de Droit International 307, 310.
In answer to the objection that a state under this system would assume protection of aircraft belonging to foreigners, Divald replies that the aircraft itself would have a nationality in international relations independent of the owner. He cites precedents for this situation in commercial treaties providing mutual benefits for products of the respective countries and certain rights given to foreign traders and manufacturers who live and work permanently in a state. As to the objection that during war foreign aircraft could not be distinguished, Divald suggests that all aircraft in a state would have the same nationality, that of the registering state, and therefore all could be seized by the government of that state, regardless of ownership by nationals or by foreigners.

Arguments for using domicile of the aircraft to determine the nationality of the aircraft are in general the same ones which are used against the test by nationality of the owner, especially as to corporate owners. Kingsley adheres to the view of *port d'attache* as the test for determining the place of registration of aircraft. He suggests that by a subordinate agreement, the nations parties to the international conventions on air navigation could well provide for inspections of aircraft to be made by the country of the aircraft's *port d'attache*; for the registering authority to assign to each aircraft an identification mark, indicating, as do the present marks, the nationality of the owner; for determining corporate ownership according to local law, and joint ownership according to the nationality of the owners of the majority interest, or by election of a nationality when co-partners are equal.158

In arguing against the test of nationality of aircraft according to the domicile of the aircraft, Henry Fabry says:159

On pourrait parfaitement concevoir que l'aéronef dût obligatoirement avoir la nationalité du pays de son port d'attache. . . Le port d'attache entraîne *ipso facto* la nationalité, le principe est simple et d'application facile. . . En effet, des étrangers peuvent posséder un aéronef dans un pays dont ils ne relèvent pas. Si l'on attribue à l'appareil dont ils sont propriétaires la nationalité du port d'attache le contrôle et la surveillance de cet aéronef appartenant à un étranger seront illusoires, car un avion ayant le pavillon du pays qu'il survole habituellement passe plus facilement inaperçu qu'un avion battant pavillon étranger. . . Si donc l'on adoptait le système de *lex soli*, les agents diplomatiques et consulaires se verraient dans bien des cas obligés d'entretenir en faveur d'une personne étrangère à raison du fait qu'elle posséderait un avion battant pavillon de leur pays. . . C'est donc à bon droit qu'il a été repoussé.

On the other hand, Visscher\textsuperscript{160} does not believe that in adopting the rule of determining nationality of aircraft by the domicile or \textit{port d'attache} of the aircraft, the aircraft itself would acquire a nationality effective beyond the limits of the state boundaries, or, in other words, that the aircraft would, as a "personality" apart from the owner, attract in foreign countries diplomatic protection by the state of the \textit{port d'attache}.

In discussing domicile of aircraft, Henry-Coüannier writes:\textsuperscript{161}

La nationalité d'un aéronef n'est pas suffisante pour permettre de l'atteindre surement. Il faut encore que l'aéronef soit attaché à un lieu déterminé, à un "domicile." Nous avons employé cette expression en parlant de l'acte de nationalisation. Nous la substitutions à celle de "port d'attache" qui a été employée jusqu'ici par les différents auteurs. Ils l'avaient choisie par analogie à la navigation maritime. Outre qu'elle a un caractère trop national, étant une expression spéciale au droit français, elle a le défaut de laisser supposer que l'on n'envisage dans la navigation aérienne que des voyages d'un point d'attache à un autre point d'attache déterminé. Nous avons déjà dit, en parlant du droit à l'atterrissage, ce que nous pensons de cette manière de voir: ses partisans négligent les nécessités techniques de la locomotion aérienne et manquent de confiance en son avenir.

La répartition sur le territoire des points où un aéronef devra être déclaré dépend des règlements intérieurs...

La question des ports d'attache est différent en ce sens qu'elle ne consiste pas à déterminer à quelle nation l'aéronef appartient, mais à quel lieu il est attaché.

A composite picture of the above interpretations of this theory presents a fuzzy appearance. There is room for clarification of concept and terminology concerning the "place where an aircraft is kept" and its bearing upon the so-called nationality of aircraft.

(7) \textit{Theory According to State of Registry}:

The state of registry as a criterion for determining nationality of aircraft, the power to register being determined by one of the above rules, was the theory at first adopted in the Convention of 1919, which combined it originally with above rule (1), namely, nationality of the owner. A state may adopt above rule (2), namely, domicile of the owner, or may combine above rules (1) and (2), in which case the owner must be a national and must also have his domicile in the registering state. The other four rules may also be the basis of registration to give, under this theory, nationality to aircraft.

\textsuperscript{160} Visscher, Ferdinand de, "Le Régime Juridique Atmosphérique et la Question de la Nationalité des Aéronefs," 2 Zeit. für das Gesamte Luftrecht 18 (Text in French) (1928).

The place of registration of the aircraft for determining the nationality of aircraft is a theory which was well received before 1919 by the British subcommittee of the International Juridical Committee on Aviation, by the Institute of International Law at the Madrid Conference of 1911, and by the Commission which was appointed by the International Federation of Aviation, which drew up an International Convention at Brussels in May, 1912. The Institute adopted a rule recognizing the right of a state, whose law forbade its citizens to register their aircraft abroad, to refuse to recognize within its own jurisdiction foreign registration of aircraft owned by its citizens. According to Spaight, there is much to be said for taking the place of registration as the criterion, so long as it is also the place of the aircraft's headquarters or its "home."

Registration of ships, dating from 1660 in England, was originally designed to restrict British commerce by sea to British ships, but that purpose has long been outgrown and now the register is the appointed record of title to property in British ships. Registration does not confer nationality upon British ships but nationality, so-called, apparently results automatically from the ownership of a ship by a British subject or corporation. Registration and nationality of ships are interconnected in admiralty, but this occurs for reasons which do not appear to apply in the case of aircraft. If nationality is allowed to aircraft, according to Spaight, it should be a quasi-nationality, perhaps a conditional nationality which will come into being only in certain circumstances, as, for example, when the aircraft is passing over the high seas.

Pittard suggests that the domicile of the owner and the port d'attache of the aircraft should determine the nationality of aircraft. He compares aircraft to automobiles. In that case, the method used for registering automobiles of resident aliens could be applicable to aircraft.

Only one place of registration would be allowed an owner of aircraft, whether an individual or corporation, under this theory, even though the owner had "residences," or business branches in other states, the exchange between states of lists of registered aircraft making this limitation practicable, it is claimed.

Concerning national flags for aircraft and the import of such

---

162. See Pittard quotation under Theory (2).
163. See Spaight, J. M. Aircraft in Peace and the Law, cit. note 154 supra, p. 15, referring to 2 Rev. Juridique Inter. de la Locomotion Aérienne 116 (1912); 2 Rev. 289 (1911); 3 Rev. 123 (1912); 5 Rev. 15 (1914).
flags, two French writers\textsuperscript{164} say that a distinctive mark was deemed necessary in case of liability, making known at the same time both the nationality and the domicile of the aircraft:

 Ils proposent d’ajouter . . . : "tout aéronéf devra porter une marque distinctive établissant sa nationalité. . . . Dans le cas où le domicile de l’aéronéf ne serait pas situé dans l’état dont il a la nationalité il devra porter en outre la marque du pays où il a son domicile."\textsuperscript{165}

The chief objection raised to the place of registration as a test for determining nationality of aircraft is that a friendly airship could not be distinguished from an enemy suspect. On the other hand, if all states agree upon one rule, there would at least be some advantage in uniformity.

(8) \textit{Theory According to State of Registry}:

Each state entirely free to determine its own rules is the theory adopted in Article 8 of the Pan American Convention on Commercial Aviation and in Article 7 of the Convention of 1919 as amended.\textsuperscript{166} This theory represents a compromise concerning methods for determining nationality of aircraft, and at the present time receives considerable support. It presents a working basis for certain practical difficulties, but it does not solve all the difficulties. If states are free to determine their own rules, some states are likely to enact or retain on their statute books legislation embodying some of the features objectionable from an international viewpoint. Uniformity of rules, if desirable, will be less easily attained under this theory, and it is even possible that, because of lack of uniformity of the national rules, an owner of aircraft may find himself unable to register his aircraft in any country. He may, however, be so situated that he could register several aircraft in as many countries, provided he maintains residences in foreign states in addition to the legal domicile in his own state, and provided the state laws permitted such registration. This might also apply to corporations having business branches abroad.

A report written in 1911 throws some light on the reasoning resorted to in working out theories of nationality of aircraft.\textsuperscript{167}

Les deux institutions [Comité International Juridique de l’Aviation et Institut de Droit International] s’accordent de même sur les points suivants: "Chaque aéronéf doit avoir une nationalité et une seule dont les marques doivent être extérieurement reconnaissable. Tous les aéronéfs doivent être

\footnotesize
\textsuperscript{164} Marguerie and Carpentier.
\textsuperscript{165} See Rev. Juridique Inter. de la Locomotion Aérienne 76 (1911).
\textsuperscript{166} See Part I, 6 JOURNAL OF AIR LAW 1, 43-46.
\textsuperscript{167} Meyer, Alexander, "Le Droit Aérien," cit. note 145 supra, p. 298.
"immatriculés." (Cf. art. 2, 6 des résolutions du Comité, nos. 2 et 3, des résolutions de l'Institut). Au contraire, les résolutions prises au sujet des circonstances déterminant la nationalité, sont différentes. Tandis que l'Institut veut faire dépendre la nationalité de l'aéronef de la nationalité du lieu d'immatriculation (Rés. 2), le Comité la fait dépendre de la nationalité du propriétaire. Il y a ici la différence pratique, que, d'après les résolutions de l'Institut, des aéronefs appartenant à des étrangers peuvent obtenir la nationalité du pays qui les immatricule, car le lieu d'immatriculation est décisif. Les résolutions du Comité rendraient cela impossible, la nationalité du propriétaire déterminant la nationalité de l'aéronef. D'après les résolutions de l'Institut, l'immatriculation d'un aéronef serait la seule condition de l'acquisition de sa nationalité; tandis que, d'après les résolutions du Comité, l'immatriculation ne serait que sa condition d'exploitation, mais ne déciderait pas de la nationalité (Cf. art. 6 du projet). Dans ce cas, l'immatriculation ne ferait que confirmer la nationalité de l'aéronef, pourvu que les lois de l'Etat en question permettent l'immatriculation. Car les résolutions du Comité remettent aux États le droit de régler les conditions d'immatriculation. D'après les résolutions du Comité, il serait donc possible aussi que des aéronefs étrangers fussent immatriculés dans le pays où ils stationnent. Mais l'immatriculation ne leur procurerait jamais la nationalité du pays dans lequel elle a été prise; elle ne serait que le confirmation de la nationalité étrangère par les autorités du pays. Si, d'autre part, l'État en question, par exemple l'Allemagne, n'admet que l'immatriculation d'aéronefs du pays, les résolutions de l'Institut, concernant l'immatriculation des aéronefs étrangers (no. 2, phrase 4), perdront leur raison d'être. Ce cas n'est pas hors de question, vu que l'Institut ne règle pas non plus les conditions d'immatriculation des aéronefs, mais remet aux différents pays le droit de les fixer.

Malgré la différence principale des résolutions des deux corporations, le résultat pratique pourrait donc se trouver être le même. Ceci sera le cas, si tous les pays décidaient par cilement de n'admettre à l'immatriculation que les aéronefs appartenant à leurs nationaux. La nationalité des aéronefs coïnciderait alors toujours avec celle de leurs propriétaires. Naturellement, chaque État devrait décider que les aéronefs étrangers se trouvant dans le pays se fissent enregistrer au consulat de leur pays originaire, en vue de l'acquisition ou de la confirmation de leur nationalité ou pour acquérir la permission d'exploitation. Cette dernière condition nous paraît indispensable, dès qu'on fait dépendre la nationalité de l'aéronef de celle du propriétaire. Il nous paraît impossible qu'il soit de la compétence des autorités d'un pays, de conférer ou de confirmer la nationalité étrangère à des aéronefs étrangers. Au contraire, on pourrait bien exiger que les consulats remettent à la police du pays la liste des aéronefs étrangers.

(9) Theories Based on International Control:

In addition to the eight specific theories for determining nationality of aircraft, it is important to consider other proposals bearing upon the subject.

A plan for the internationalization of civil aviation was presented by the French delegation to the Disarmament Conference.
of the League of Nations. The object is to place civil aviation, bombing aircraft, also certain aeronautical material at the disposal of the League of Nations, or of an international authority which would be constituted to ensure the cooperation of non-members of the League of Nations, for the creation of a preventative and punitive international force and for the protection of civil populations.

The prevalent doctrine today and all the texts of existing agreements are based on the conception of national aircraft flying through national air space, and not of aircraft subject to the sovereignty of one nation alone, flying through an air space subject to a common international jurisdiction. This is an essential factor, according to the survey of the Air Commission of the League of Nations, since all proposals for the internationalization of civil aviation must either be limited to the provisions of the existing law or involve the revision of that law. It would appear to be difficult to reconcile the original text of Article 7 of the Convention of 1919 with several of the proposals made in regard to the internationalization of aviation, since the latter assumes that the ownership of the machines is shared among persons of different nationality, or that they belong to associations possessing an international status, or at least to associations of a less exclusively national character than those referred to in the text, according to the above survey. It continues to state that it is of interest to note that it was the desire to prevent the use of civil aviation in war which led the authors of the Convention of 1919 to adopt that text, which ran counter to other efforts with the same object in view.

Other proposals were also presented to the League of Nations by which every type of international aeronautical activity would be subjected to international supervision. For instance, the aeronautical equipment would, under one plan, become international and bear the mark of the proposed international supervising body. Aircraft, under such a plan, would have no nationality, and would be allocated to the various ports of navigation by the international authority. The navigating personnel under the plan would be regarded strictly as international. They would take an oath before the international authorities, undertaking in particular never to use their aircraft for military purposes, except in cases laid down

---

by the League of Nations. Military training of such personnel would be prohibited.

To encourage the operation of foreign companies engaged in regular international transportation and to procure a less rigorous enforcement of the sovereign right of state, proposals have been made to the League of Nations by the Air Transport Cooperation Committee.\(^\text{170}\) The stand was taken that increased international cooperation depends largely upon a modification in the strictly national character of aircraft and upon a decrease in the practice of subsidizing companies which, in consequence of such government action, tends to assume a political character.

The proposals for internationalization of civil aviation and for modification of the present system do not appear to have been adopted by the League of Nations but they are interesting in the light of trends in world development away from extreme nationalism and political domination toward world unity.

IV. RATIONALE AND CONCLUSION.

The Nature of Aircraft:

In the general concept of nationality and its application to persons, corporations, ships and aircraft, there is apparent some misuse of words and lack of focus of thought. Reality is occasionally lost to view when derivative meanings and analogy have been resorted to in the development of aeronautical terms and technique. What is the nature of an aircraft as a mechanical device, as property, as a "personality?" Does an aircraft have "nationality," and, if so, how is it acquired and what is the quality and degree of its nationality? Is nationality an essential attribute of aircraft? May aircraft have "domicile," and if so, is such domicile determined by location, an act, an intention, and if so, whose location, act, intention—and so forth? The first step toward an answer might well be to divest oneself of mental heirlooms and face the present state of facts.

To the perceptive faculties an aircraft is a machine with power of locomotion and ascension, having speed surpassing other machines used for the transportation of men and goods. Man's urge to go somewhere, everywhere—an impelling energy—led his inventive mind to enlare his physical person for the accomplishment of his purpose. Having no fins with which to traverse the water,

\(^{170}\) Sessions May 9-12, 1932. See also, League of Nations IX. Disarmament, 1932, IX. 43 cit. note 169, supra, pp. 31-45.
he used his arms for swimming and extended them with oars. Later he devised the sail for ships and the propellor for motorboats to increase speed and lessen distance. On land he used wheels and the strength of beasts. He utilized wind, steam, oil and electricity to attain velocity astounding the succeeding generations. At last earth’s gravity was overcome and man now soars on high. Instead of the slow and devious pathways enforced by obstacles on the earth’s surface, the flight of aircraft most nearly approaches a straight line as the shortest route between two points.

These ideas plus action created physical instruments which in turn were set in motion by man’s will and further acts until today man has the most animated means of transportation—the airplane. But strong and swift as may be this machine, it has neither mind nor will—it has no consciousness.

As the product of scientific invention, aircraft in their physical aspect present many characteristics of water and land vehicles. Capacity to go on land and sea is not new, but the technique of aircraft when so manoeuvered varies somewhat from that of navigating ships or motor driving.

Obviously the unique features of aircraft are power of ascension and method of avigation. Aircraft go into the air space and are immersed in the air as fish are immersed in the sea. They sustain themselves in an element which, without additional support, is inadequate for other types of transport. Motor vehicles and ships in their respective elements of land and water cannot safely perform such acrobatics as looping and riding upside down. A new species of genus machina has been evolved for universal service.

Annihilation of time and space is popularly credited to the airplane, yet there is a limit to the flight of aircraft. If aircraft should attempt to emerge beyond the stratosphere, they would find themselves in another element where they would fail to function solely as air vehicles. In order to navigate interplanetary space must not another species of machine be invented to work in a vacuum as well or better than in the air? Today aircraft can

171. The subject of navigable airspace needs only to be mentioned in this article. According to Wenneman, the public right of flight in the navigable airspace owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States regardless of ownership of the adjacent or subjacent soil: Wenneman, J. H., Municipal Airports (Cleveland: Flying Rev. Pub. Co., 1931), Ch. 1.

See also, Air Commerce Act of 1926, cit. note 186 infra, Sec. 10: Navigable Airspace—As used in this act, the term "navigable airspace" means airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under section 3, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this act.
navigate high in air space, and from that vantage point, they may send forth gliders, but all eventually must descend to earth. Will the future see rockets shot from aircraft into the interplanetary space? Even so, it is conceivable that at whatever point mechanical improvement would fail, the force of gravity from the nearest planetary body would inevitably work its nemesis upon man's most perfect machine. For the waxen wings of Icarus a building was too high for take-off; for the device of da Vinci, a mountain was too lofty; if Mars is reached, there are other worlds to conquer!

Possession by man makes these machines his personal property, as much as any piece of baggage. Since an airplane is too large an object to carry by a strap-handle, the owner conveniently makes the machine carry him. Man's ego expands, but does the process change the nature of the aircraft?

The legal nature of aircraft is discussed by a British authority as follows:172

Before going further we may pause to inquire what manner of thing in the eye of the law an aircraft is. It clearly belongs to the category of movable property. Ships are movable property, but, from the point of view of jurisdiction and other matters, they are property of a peculiar kind; they have a nationality, unlike a caravan or a motor-car, the nationality of the country in which they are registered, and almost a personality in that actions can be brought against them, that is, in rem, in a court having Admiralty jurisdiction; persons who are, and events which happen, on board a ship are to a large extent governed by the "law of the flag" of that ship, that is, the law of the country whose flag the ship carries, sometimes exclusively as in the case of State ships, sometimes concurrently with another legal system. On the other hand, caravans and motor-cars do not possess these characteristics. An assault in an English car by one passenger touring in France upon another is just as much subject to French law as if the car stopped and let them fight it out in an estaminet. An English motor ambulance is sent to Marseilles to meet a lady who is hurrying home from India in order to have her confinement in London. The baby is born en route in France. It is just as much, or just as little, French as if it were born in a French ambulance or a French hospital. If it had been born on a P. and O. liner before reaching Marseilles the "law of the flag" would have been a relevant factor, but a motor ambulance has no law of the flag.

Must an aircraft be assimilated to a ship or to a motor-car? The use of such nautical terms as "airship," "aircraft," "navigation," have led us into habits of thought which we might have escaped if we had been able to confine ourselves to terms like "balloons," "flying machines," "aeroplanes."173

From a juristic point of view, McNair has no hesitation in submitting the opinion that the analogy between a ship and an

173. See also, Laude, Emil, "Comment s'Appellera le Droit qui Regira la Vie de l'Air?" 1 Rev. Juridique Inter. de la Locomotion Aerienne 16 (1910).
a aircraft is fundamentally wrong and misleading, and that the sooner we eradicate it from our minds the better. "That need not prevent us," he says, "from borrowing from the law relating to ships certain useful provisions and applying them to aircraft by the deliberate process of legislation, but any general attempt to invest the aircraft, as such and wherever it may be, with the characteristic legal panoply which belongs to a ship will be disastrous."

Support for this view is found in a book on air law published in 1919 by a British expert, before the signing of the Air Navigation Convention of that year. Spaight maintains that to assimilate an 'aircraft entirely to a ship and to assign it that full nationality which historical reasons have attributed to vessels, so that, in French law and to some extent in British, a ship is a floating part of the national territory, would seem to be going too far. He finds more similarity between a flying machine and an automobile than between the former and a ship, though the analogy to an automobile is far from perfect.

These observations remain true, in spite of the great development of aviation and of recent air endurance tests, according to McNair. "The aircraft is not, as a matter of English common law, a new kind of ship," he states, "but is a piece of movable property to which certain specific marine characteristics have been and will be attached by legislation, and which is thereby gradually developing a legal quality *sui generis*.

Maritime analogies, apparent and real, are discussed by Dr. McNair. After speaking of shipping terminology applied to aircraft as delusive, he says, "My view is that as a matter of common law, of the law maritime, and of existing legislation, the analogy of the ship has no general application to aircraft. That is to say, we must not assert that an aircraft is a new kind of ship, just as a steamer was once a new kind of ship, and that, therefore, *eo ipso* and as a matter of principle, the law relating to ships applies to aircraft *mutatis mutandis*. At the same time it has already been, and will in future doubtless be, convenient from time to time specifically to apply to aircraft by treaty and by legislation rules which have been found convenient in the case of ships. It will not be surprising if we find that such application is more likely to occur in the case of aircraft operating over or on the sea than it is in the case of those operating on or over the land."

---

Preference for comparison between aircraft and automobiles is voiced by a Swiss authority, Pittard.176

Jusqu'à ce jour et d'une façon générale les juristes ont appliqué aux aéronèfs la notion de nationalité; c'est là une analogie avec le droit maritime.

Nous estimons que c'est une erreur dont nous avons pris nous-même une large part et qu'il est temps de supprimer. Ne serait-il pas plus logique d'assimiler l'aéronèf à l'automobile ou à la locomotive? Il est vrai que l'automobile comme le chemin de fer circulent sur des routes tracées et connues et qu'à la frontière d'un État, on peut non seulement vérifier la provenance de l'appareil, mais encore l'empêcher de passer; l'aéronèf est plus semblable au navire qui trace lui-même sa route; il ne connaît comme frontière que le sol, de même que le navire ne réalise la frontière que par le rivage. L'assimilation que l'on a voulu faire de l'aéronèf avec le navire est insuffisante par elle-même pour justifier la nationalité.

La nationalité des navires provient de la fiction selon laquelle le navire constitue une portion flottante du territoire national. L'aéronèf échappe à cette fiction; il a conservé son caractère de meuble et nombreux sont les juristes qui dénient la possibilité juridique de le grever de droits réels. L'aéronèf est un objet et ne peut pas être considéré comme un sujet de droit; il n'a de valeur que par celui qui le détient ou qui en la maitrise et si l'on devait lui reconnaître une nationalité se ne serait que par l'intermédiaire de son propriétaire ou de son détenteur. Et là encore quelle confusion! Comment résoudre la question de droit qui se poserait dans le cas où le propriétaire aurait une nationalité différente de celle de l'exploitant; or, nous devons surtout considérer l'aéronèf comme moyen de communication plutôt que comme un simple objet de valeur extrêmement variable.

Le but de l'immatriculation n'est pas de créer un rapport personnel entre l'État et le propriétaire de l'aéronèf, mais de soumettre l'appareil au contrôle de l'État, de fixer son domicile et de lui assurer une certaine protection; des différentes personnes qui peuvent intervenir dans le domaine aéronautique pour l'utilisation ou l'exploitation d'un aéronèf, il faut certainement admettre, du point de vue de la coopération des aéronautiques civiles, que c'est l'exploitant qui est la plus intéressé et la plus importante.

Comme nous le verrons dans la suite de cet exposé, si nous abandonnons le critère de nationalité pour prendre celui de domicile, nous supprimons la difficulté qui naît de la différence de nationalité entre les diverses personnes qui ont des droits sur l'aéronèf.

The cases in which the analogy of the ship is wholly or in part applied to aircraft are listed by McNair as mutual permission to enter national air space, nationality, airworthiness, certificates of competency, ship's papers, cabotage, rules as to lights and signals for air traffic, collisions, crimes, detention of aircraft, and wreck and salvage. The cases in which the analogy of the ship is rejected are listed as general average, maritime liens except

as regards certain incidents of a lien for salvage services which have been expressly applied by Order in Council to aircraft, and claims for necessaries, including repairs. As to whether an aircraft may be classified as “goods,” McNair believes that the peculiar incidents of a sale in market overt could apply to the sale of a motor car, a wireless set, or an aircraft, and that an aircraft is “goods” for the purposes of the British Sale of Goods Act, 1893; he also believes that an aircraft is a personal chattel for the purposes of the British Bills of Sale Acts of 1878 and 1882, but in view of the fact that changes in the ownership of a registered aircraft must be notified to the Air Ministry, it is arguable that Parliament ought to place transfers of registered aircraft outside the Bills of Sales Acts just as “transfers or assignments of any ship or vessel or any share thereof” have been excluded from the scope of the Acts of 1878 and 1882. He suggests that if the register of aircraft can be modified so as to record mortgages of aircraft, there is no reason why that means of notoriety of the creation of mortgages should not, as in the case of ships, suffice, but at present the objects of the aeronautical register have nothing to do with questions of title.

Aeronautical codes of today are incomplete because they follow the modes in aircraft, according to Mandl, who points out that present codes fail in that they do not cover motorless machines, gliders, parachutes, autogiros, and unknown species of flying machines which may be invented in the future, some of which might be capable of landing slowly and travelling upon the highways where they would be subject to rules for automobiles. He is opposed to any rule of registration in order to validate a commercial transaction covering aircraft, which would assimilate aircraft to real property.

Aircraft are personal property like automobiles, according to Wegerdt, who pointed out to the International Chamber of Commerce that the right of ownership of aircraft follows the same rules as the law of ownership of other personal property, especially as to purchase and sale, or, in other words, it follows the civil law as to personal property of each country, unless the laws of a country contain special provisions concerning aircraft. He mentions

177. Section 62(1): “‘Goods’ include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money.
France and Italy, where the transfer of ownership of aircraft, and France and Finland, where the mortgaging of aircraft is controlled by special provisions differing from the civil code. Such special provisions, stipulating that the transfer of ownership must be made in writing, which has no validity as to third persons unless it has been recorded in an aeronautical register, in effect makes registration a proof of ownership of the aircraft, and thus assimilates aircraft in a large degree to real property. Wegerdt finds this provision objectionable not only because of the difficulty of making such proof of ownership sufficiently certain, but also because a new restriction would be added under private law to every transfer which is already restricted in many countries by the rule of registration according to the nationality of the owner.

The International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.), encountering different theories for determining the nationality of aircraft, dealt indirectly with the subject of nationality by proposing draft conventions on mortgages and privileges related to aircraft, also on ownership of aircraft and the aeronautical register. It is proposed that in case the aircraft is encumbered with real charges on the register of one state, the inscription on the register of another state shall be subject to proof that the creditors have been paid or have agreed to the transfer of the inscription.

Henry-Coüannier questions the analogy of aircraft to ships: Pourquoi s'obstiner à traiter toujours les deux navigations, aérienne et maritime, par analogie? On pouvait, au début de la science aéronautique, assimiler l’aéronéf à un navire, et pousser jusqu’au bout ce procède. L’aéronéf était alors l’aérostat—le véhicule mecanique n’existant pas.

In preferring the analogy of aircraft to automobiles, he says that the “nationality” of automobiles was born the day when free international circulation was created, but it must be noted that he wrote the above before the Convention on International Circulation of Motor Vehicles was amended.

Even automobiles had a “nationality” according to indications in the Convention with respect to the International Circulation of Motor Vehicles, as follows:

---

180. Article 12 of the French law of May 31, 1924, and Article 7 of the Italian Royal Decree of August 20, 1925.


UNIVERSITY VERSUS NATIONALITY

Arrangement of Identification Marks on Motor-Cars—

No motor-car shall be allowed to pass from one country into another unless it carries, fixed in a visible position on the back of the car, in addition to the number plate of its own nationality, a distinctive plate displaying letters indicating that nationality.

The word "nationality" does not appear in the International Convention Relative to Motor Traffic, which modifies the above-mentioned Convention on International Circulation of Motor Vehicles of 1909. The later provision reads as follows:184

Distinguishing Mark—

Every motor vehicle, to receive international authorization to travel on a road to which the public have access, must carry, in a visible position in the rear, a distinguishing mark consisting of from one to three letters written on a plate or on the vehicle itself.

For the purpose of the present Convention the distinguishing mark corresponds either to a state or to a territory which constitutes a distinct unit from the point of view of the registration of motor vehicles.

The word "nationality" does not appear in the Pan American Convention for the Regulation of Automotive Traffic. The Convention contains the following provision:185

All vehicles before admission to international traffic shall be registered in the manner prescribed by the state of origin. In addition to the registration plate of the state of origin, each vehicle shall carry a plainly visible international registration marker, of the form and type of plaque markers provided for by the International Convention for Circulation of Automobiles, 1909, as amended in 1926.

How are aircraft of the United States classified and how far are they assimilated to ships? Under provision of the Air Commerce Act of 1926,186 "aircraft means any contrivance now known or hereafter invented, used, or designed for navigation or flight in the air, except a parachute or other contrivance designed for such navigation but used primarily as safety equipment."

Aircraft in the United States are personal property. Registration and licensing are not required under the federal act, unless the aircraft is to be used in interstate or foreign traffic. States of the United States have their respective legislation as to personal property for taxation and other purposes, including registration and licensing for intrastate flights.187 The main purpose of federal

---

186. Air Commerce Act, 1926, Ch. 244, 44 Stat. L. 568, Sec. 3(c).
and State legislation is to encourage air commerce and to provide for public safety.

Personal property as such has no nationality. It is said in law to "follow" the owner, and the owner's legal residence or domicile fixes the legal location of such property. In popular parlance a man's possessions are frequently described as having the national character of the country to which the owner belongs; sometimes they are described according to the manufacture or make. Many citizens of the United States own imported cars, which are currently known as "French" or "British," as the case may be.

Parts of aircraft may have been imported from one or more foreign factories to be assembled in one country, or the complete machine may have been made in one place, but regardless of source of construction, it is the ownership, by purchase, gift, or otherwise according to law, that determines the status of personal property for jurisdictional purposes. It is likewise for ships in the United States whether or not the ships are registered.

The Air Commerce Act of 1926 provides that the collection of fines may be effected by a proceeding in rem against the offending aircraft, whether of land or water variety, as well as by an action in personam, and the rules of admiralty are held to apply. These provisions are similar to those found in the International Convention on Air Navigation of 1919. In the opinion of Hotchkiss:

It is obvious that hydro-aircraft may at times function practically as a ship and to that end be subject to admiralty rules. There is also a faint parallel in many situations between aircraft and ships. But despite this similarity it is believed that admiralty rules will be enforced only when statutory authority demands that this be done. The Air Commerce Act of 1926 makes no provision for salvage. It may be argued that the rescuer of a hydro-aircraft or a balloon at sea, should be entitled to the rights of a salvo.

As to the application of navigation and shipping laws of the United States to aircraft, the Air Commerce Act of 1926 states:

Sec. 7(a). The navigation and shipping laws of the United States, including any definition of "vessel" or "vehicle" found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft.

---

189. Such a right is specifically given in England by Section 11 of the Air Navigation Act of 1920, 10-11 Geo. V, Ch. 80.
190. Note that Section 3 of the Revised Statutes provides that the term "vessel" when used in an Act of Congress "includes every description of watercraft or other artificial contrivance used or capable of being used as a
The legal concept of aircraft as property appears mainly to support their classification under personalty, the determining relationship being that of ownership by an individual or corporation. The cases where legislation permits proceedings against aircraft *in rem* appear to be for the purpose of facilitating procedure and securing settlement or reward, rather than assimilating aircraft to real property. Real property is determined by the fixity of its location. Comment upon the policy of such exceptions is not within the purview of this article, unless it bears upon the point of whether aircraft have individuality or personality in the eyes of the law to the extent that such individuality or personality could attract to it the attribute of nationality.

All types of aircraft should have a nationality, according to Henry-Coüannier, because the future development of aircraft manufacture and use of aircraft is impossible to foresee. Different rules for different types of aircraft would lead, in his opinion, into all sorts of entanglements.\(^1\)

If nationality be allowed to an aircraft, it should only be a quasi-nationality, an attenuated nationality, perhaps a conditional nationality which will come into being, according to Spaight, only in certain circumstances, as when the aircraft is passing over the high seas.\(^2\)

It has been pointed out that the "personality" and "nationality" of ships registered in the United States, which, if such attributes exist in law, do not compare with those of persons and are at best of very restricted quality and degree. The so-called maritime analogy between "nationality" of ships and aircraft appears extremely limited in scope, irrespective of legislation on the subject. One of the principal claims of ships to possess nationality seems to be based upon their individuality evidenced by admiralty law which recognizes proceedings against ships *in rem*. In the absence of similar legislation for aircraft, there seems little basis for the legal personification of aircraft.

Mere ownership is insufficient to confer "nationality" upon personal property. If it were otherwise, would not objects, whether...
or not similar in nature to aircraft, have legal nationality as objects apart from their respective owners? Instead, a fiction in the popular mind sometimes causes people to describe an object of personality as being of a certain nation because the owner of that object is a citizen of that country or because the object itself was manufactured there. As has been previously shown, legal nationality is conferred by governments through legislation. Such nationality falls upon persons and corporations and symbolizes certain relations between the conferring state and the recipient person or corporation. The nationality or citizenship received by corporations is less in kind and degree than that received by persons. The nationality received by persons also varies in kind.

What sort of nationality, if any, have aircraft owned in the United States?

The United States is not a party to the International Convention on Air Navigation of 1919, and therefore the provisions and terminology of that Convention as to nationality of aircraft do not apply to aircraft of the United States.

The Air Commerce Act of the United States of 1926 provides that if registration is requested, it must be by a citizen owner of the aircraft. It does not appear to use the term “nationality” as applied to aircraft, but speaks of “aircraft of the United States,” and Section 9(f) reads: “The term ‘aircraft of the United States’ means any aircraft registered under this act.” Section 6 is entitled “Foreign aircraft” and speaks of “foreign aircraft not a part of the armed force of the foreign nation.”

The United States is a party to the Pan American Convention on Commercial Aviation of 1928 and therefore the provisions and terminology of that Convention apply to aircraft of the United States so far as such aircraft are affected by that Convention. In Article 7 it is stated that aircraft shall have the nationality of the state in which they are registered.

Bi-lateral agreements of which the United States is a party offer further evidence of commitment to the idea of nationality for aircraft. Take as an example the Reciprocal Air Navigation Arrangement between the United States and Norway, wherein it states that all aircraft shall carry clear and visible nationality and registration marks. Ground, therefore, exists for inferring that the government of the United States has, for the purpose of

---

193. See Part I, 5 JOURNAL OF AIR LAW, footnote, pp. 7, 8.
194. See Air Commerce Act of 1926, Sec. 3(c)(d), Sec. 6(c), Sec. 11(a).
196. Reciprocal Air Navigation Arrangement between the United States and Norway, October 15, 1933, Article 8, 5 JOURNAL OF AIR LAW 135, 137.
giving effect to such agreements, given some kind of nationality to aircraft owned and registered in the United States, and has recognized nationality granted by certain other governments to aircraft owned and registered in their respective countries. Such nationality is determined in the United States by the owner of the aircraft, who, in order to register the aircraft, must be a citizen of the United States. In the absence of specific legislation on the subject, in definite terminology, there is room for discussion as to the kind and degree of such "nationality" as may have been indirectly conferred upon aircraft by the government of the United States. At best such nationality would seem to be so atrophied in character as to be a mere shadow of the prototype conferred either upon individuals or corporations as citizens of the United States. Its apparent purpose is mainly to accomplish identification of the aircraft.

If aircraft are personalty, and if nationality is not transmitted to personal property through mere ownership, does registration of aircraft by the owner attract nationality to the aircraft? Some authorities, as shown above, apparently consider such to be the case. The above-mentioned agreement between the United States and Norway would seem to make some distinction between the two terms "nationality" and "registration." An adequate discussion of this point would here be too lengthy, for it involves questions of public safety and security, as well as other motives of a government for requiring registration of aircraft. Comparison, also, would be interesting in the case of Great Britain, where formerly registration was demanded of British ships in order to restrict commerce to British owned vessels, and where today registration of ships is for purposes of title.

As to legal ownership, Schreiber, in discussing principles of a draft convention on aircraft, says:197

But clearly a person conferring nationality upon an aircraft must stand in a certain relation to the aircraft, and the problem is essentially one of determining the legal relations connecting the person and the aircraft. As to these relations, they must: (a) be governed by private law; (b) be recognized by the laws of all countries; (c) be susceptible of simple and clear definition; (d) be of a certain duration; (e) be such as to ensure the closest legal and economic ties between the person and the aircraft. . . . The principle of ownership, the legal relation accepted at present by the laws of most countries fulfills the requirements of (a) to (d). But it does not possess the characteristic (e); and this leads me to believe that a mis-

take was made in choosing the personal nationality of the owner to apply it to aircraft.

The legal notion of ownership is relatively clear. But from an economic point of view ownership is not at all well defined. Sales subject to the retention of ownership until payment is complete, the "trustee" of English law and the various corresponding legal provisions in continental law, ownership at the place of the security and chattel mortgages, under German law, and long leases of movable objects, all such devices familiar to modern lawyers have gone far to separate the "owner" from his "possession." They clearly show that ownership does not present the character of "ensuring the closest economic tie between the person and the aircraft."

The operator of an aircraft, whether owner, lessee or buyer, of the aircraft, was Schreiber's choice for determining nationality of aircraft. To support his contention he cites provisions in the air laws of various countries to show that, by statutory provision, certain situations in regard to aircraft have been treated from the economic point of view of the operator rather than of the owner. He says:

It is a remarkable fact that the time when the principles of maritime law were being borrowed to define the nationality of aircraft, shipping in-
terests began to find that these same principles of maritime law were no longer very well adapted to existing economic conditions. It is no less remarkable that in air law very different solutions had been arrived at of very similar problems.

Regulations for air navigation distinguish between (a) enrollment or registration of aircraft, and (b) navigation permits showing the airworthiness condition of the aircraft and the qualification of the pilot. In differentiating "registration" from "nationalization" of aircraft, it has been said that the former is for the purpose of individualizing the machine, whereas, the latter gives, among other things, indications of the type, volumetric capacity, carrying load, horsepower, and the location of the aircraft, for the purpose of identifying the relationship of the aircraft to the state.

If the act of registration operates to give to aircraft the nationality of the registering state, it is not easy to discern what thereby are the advantages to the aircraft received from the state and the obligations thereby imposed upon the aircraft by the state, or what thereby are the duties undertaken by the state because of such resulting nationality. With respect to persons and corporations nationality indicates a certain relationship to the state and carries with it definite rights and obligations on the part of the persons, corporations, and the state.

A recent experience concerning the theory of nationality in proposed legislation is recounted by Judge Brinton:

This question has presented itself in acute fashion in Egypt, where the recently proposed air code has been, temporarily at least, rejected because of difficulty over this very point, by the General Assembly of the Court of Appeals of the Mixed Courts, a body whose approval is required before legislation can be applied to foreigners. The situation in Egypt brings into sharp relief the difficulties inherent in the practical application of the ownership-nationality theory introduced in the Convention of Paris of 1919 but against which there has been directed a steady stream of protest by various countries, and which resulted in the amendment of 1929, permitting signatory states to adopt other criteria of nationality (such, for instance, as domicile). The Egyptian law proposed to confine Egyptian nationality to all-Egyptian owned aircraft, and to refuse the right of circulation over Egyptian territory to aeroplanes not possessing an accredited foreign nationality. Egypt is a country where large and highly developed foreign communities have been established for generations,—in many cases for centuries. It was at once pointed out that the proposed act might render it impossible for large classes of foreigners to own and operate aeroplanes in Egypt, since there was no assurance that it would be either legally or

200. Extract from letter dated September 5, 1933, from Judge Joseph E. Brinton, of the Cour d'Appel Mixte, Egypt, to Fred D. Fagg, Jr., Director of the Air Law Institute, Chicago, Illinois.
practically possible for all foreigners wishing to employ this normal means of transport, to obtain from their several home governments—or, even having obtained, to maintain the required registrations, and which necessarily involve compliance with inspection laws. It was suggested that while some foreign countries might undertake to arrange for inspections in Egypt—through consular offices or exchange of courtesies with Egyptian administrative bureaus, others might not be in a position to do so—and that the result would be to place the foreigner in Egypt—most of whom still enjoy the protection of the capitulatory right of liberty to circulate and freedom to trade—in a position of inferiority to the Egyptian himself. Moreover, in the case of aeroplanes owned by partnerships comprising some foreign members, it might easily result that no registration was possible anywhere.

The solution to the problem indicated has not yet been found. One solution would be to allow foreign-owned aircraft to be registered, like automobiles, and permitted to circulate in Egypt—but without thereby acquiring Egyptian nationality. Another solution would be to substitute for the ownership test of nationality some other act which would permit such aircraft to acquire such nationality—as, for instance, the domicile of the owner in Egypt.

In discussing nationality of aircraft as an error, Mandl says in part:

L'Etat d'aujourd'hui représente une jonction des éléments personnel et territoriaux: l'Etat est constitué tant par ses citoyens que par son territoire, mais il n'est constitué que par ces deux agents. Les autres objets ne font pas d'éléments créateurs, ils appartiennent seulement à un Etat, sont liés à celui-ci, soit en raison des personnes, soit en raison de la terre. Les citoyens et le territoire seuls établissent l'existence et l'individualité d'un Etat dans les relations internationales, et la nationalité signifie cette participation active à la formation d'une unité de valeur internationale. Avoir la nationalité, c'est être assuré d'être respecté du point de vue international; l'Etat seul étant un individu internationalement valable, les personnes et la terre étant seuls fondateurs de l'Etat, il s'ensuit que la nationalité se trouve motivée exclusivement à propos des personnes ou à propos de la terre.

Les autres objets ont aussi quelques relations avec l'Etat mais leur rapport est seulement passif;—ils ne forment aucune unité de valeur internationale; ils ne participent même pas à la formation de celle-ci,—ce rapport est indirect, il s'effectue par l'intermédiaire des personnes ou de la terre: "Mobilia sequenter personam domini, immobilia sunt obnoxia territorio." De tels objets n'ont aucune nationalité, ils sont soumis à la nationalité des êtres supérieurs qui sont seuls qualifiés.

Les aéronefs ne font aucune exception parmi les objets non doués de la nationalité: selon les articles 6, 7, de la Convention du 13 octobre 1919, on les a soumis à la nationalité de leur propriétaire, "mobilia sequenter personam domini." On les a fait enregistrer pour pouvoir mieux les surveiller, tous les biens, non seulement meubles, mais aussi ceux destinés à changer de place, en particulier les moyens de locomotion, pour lesquels,—vue leur mobilité—est augmentée la possibilité d'entrer en collision avec des

UNIVERSALITY VERSUS NATIONALITY

Mandl gives above a concise presentation of the concept of a state as composed of and created by the union of two elements, persons and territory. He points out that objects are only related to the state either through persons or the land, that only persons and territory as creators of the state can have nationality, and that the state as a unit alone has international status. The fact that personal property follows the owner, in his opinion prevents objects from having nationality independently of the owner. He explains the requirement of registration of aircraft as a precaution for preservation of public safety and as a warning that aircraft are potentially dangerous instruments, declaring that identification marks are not "proud banners of nationality."

After analyzing the fundamental nature of aircraft and the basic relations of aircraft to persons and to the state, nationality for aircraft seems not only inappropriate but ineffective. The principle of nationality of aircraft should be discarded. The noticeable trends toward a universal outlook in political, economic and social spheres, and the growing demands for more freedom in flight of aircraft seem to point toward a concept of universal or cultural citizenship for individuals, with localized political affiliation in matters of public safety, police protection, legal jurisdiction and administration. Some kind of universal certificate of airworthiness for aircraft, based upon a minimum standard, might be practical if state governments would cooperate in maintaining efficient inspection services. Such a plan might be made without an elaborate and dictatorial supervisory body by utilizing the aeronautical bureaus of the respective states, recognizing their responsibility for certifying the minimum standard, and having a general representative committee to make regulations and review complaints. Local registration would be chiefly for purposes of identification, taxation, and designation of a person to be responsible in case of need. The naming of a responsible person upon the application for registration would eliminate some of the controversy about owner, lessee or operator, and so forth, as the test for "nationality." It is somewhat analogous to registering the name of an agent with the Secretary of State in the case of a corporation created in one State and doing business in another. The main concern of the government registering aircraft is to know where
to attach the responsibility for aircraft as personal property in time of need.

Conflict of Laws: Jurisdiction:

McNair discusses the following points:  

(1) how will the rules of English law determine the country or countries whose national law and jurisdiction govern persons in, and events happening in, an aircraft at any point of time; and (2) in the case of England, which of two systems of law applicable to persons and events within its jurisdiction, namely, the common law or the law maritime, is applicable to the facts under consideration.

In the absence of judicial precedents he refers to the Convention of 1919 for indirect light, quoting Articles 1 and 6. He then refers to the British Air Navigation Act of 1920, in which the preamble recites that the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto. Article 1 of the Consolidated Order made under the Act enacts the provisions of the Convention of 1919 as to nationality, Section 14 of which provides:

(1) Any offense under this Act or under an Order in Council or regulations made thereunder, and any offense whatever committed on a British aircraft, shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.

(2) His Majesty may, by Order in Council, make provision as to the courts in which proceedings may be taken for enforcing any claim under this Act, or any other claim in respect of aircraft, and in particular [may confer jurisdiction upon any court exercising Admiralty jurisdiction]. (Italics added.)

Subsection (3) of Section 14 applies section 692 of the British Merchant Shipping Act, 1894, with the necessary modifications, to the detention of any aircraft in any circumstances in which a ship may be detained by official action under that section. McNair says that at the time of writing the only exercise by the Crown of the power conferred by subsection (2) above quoted consists of the Order in Council as to Wreck and Salvage.

The Consolidated Order made under the Act states that the provisions of the Order apply, unless the contrary intention appears:

203. Ibid., p. 88.
(a) To all British aircraft registered in Great Britain and Northern Ireland wherever such aircraft may be;
(b) to other British aircraft and foreign aircraft when such aircraft are in or over Great Britain and Northern Ireland;
and for the purposes of liability under this Order, other than liability for want of registration, where an aircraft is not registered, and by reason thereof has no nationality for the purposes of this Order, this Order shall apply to such aircraft when flying within Great Britain and Northern Ireland in like manner as it applies to aircraft registered in Great Britain and Northern Ireland.

Having thus summarized the law of Great Britain as to the main statements of principle, McNair indulges in theory regarding the places in which an aircraft may find itself, as follows: on land, on tidal and non-tidal inland waters, on territorial waters, on the high seas, or above any of these places, and the same list of locations in the case of aircraft in a foreign jurisdiction. He classifies aircraft as British when registered in Great Britain or Northern Ireland, other British aircraft, foreign aircraft and stateless aircraft, the latter being assimilated to registration in Great Britain and Northern Ireland.

The legal systems which ought to apply to the several categories of legal events, crimes, torts, contracts, quasi-contracts, salvage, births, deaths, marriages, making of wills and conveyances of property, and so forth, occurring upon each of the three classes of aircraft above mentioned when in the various locations, are discussed by McNair. As to collisions between aircraft in the air he believes that when the collision occurs above land, including inland waters, the common law court exercising jurisdiction over the subjacent land or water will have jurisdiction as it has in the case of a collision between two vehicles on the road, but when it occurs over water upon which an admiralty court would have jurisdiction in the case of torts committed upon or in the water, he believes that the admiralty court would have jurisdiction. But he submits that there is nothing in such a collision per se to attract the maritime law, that the court would apply the common law relevant to an action based on negligence, and that the action is in personam and not in rem. When an aircraft is manoeuvring under its own power on the water, it is required by Consolidated Order to conform to the Regulations for Preventing Collisions at Sea, and, for the purposes of these Regulations it is deemed to be a steam-vessel, except as to lights and sound signals. McNair does not think that this means that the aircraft becomes a steam-vessel for any other purposes, such as that of attracting the admiralty
procedure in claims brought against its owners or the special rules administered by admiralty courts in dealing with collisions between ships. Apart from the Consolidated Order he suggests there are circumstances in which an admiralty court would take jurisdiction, such as in the case of collision damage done to an aircraft by a ship upon water over which an admiralty court would have jurisdiction where damage is done by one ship to another ship, that the maritime law applies, that a maritime lien can attach to the ship and an action could lie in rem. Also in the case of collision damage done by an aircraft to a ship which is upon water over which an admiralty court would have jurisdiction in the case of damage done by one ship to another, an admiralty court would have jurisdiction, maritime law would apply, no maritime lien could attach, and the action would be in personam and could not lie in rem.

One of the most important consequences of the assumption that an airship cannot be assimilated to a ship is, according to McNair, to deny to events taking place on board an aircraft that peculiar association with the state of the flag carried by a ship, sometimes loosely expressed, as he says, in the misleading fiction that a ship is deemed to be a floating part of the territory whose flag she carries. “It is true that aircraft, like ships, can have a nationality,” declares McNair, “but my submission is that their nationality does not, like the nationality of ships, possess the peculiar legal quality of attributing to events happening on board an aircraft the locality of the State in which it is registered.”

In cases of births, deaths and marriages occurring in an aircraft over land, on inland or territorial waters, he maintains that an English court will apply the law of the subjacent state, regardless of the nationality of the aircraft, to determine the legal consequences, and will treat them as if they had occurred on the subjacent land or water. When an aircraft is over or on the high seas and a birth occurs in the aircraft, the legal effect is discussed by McNair as follows:204

Persons “born within His Majesty's dominions and allegiance” are, by the British Nationality and Status of Aliens Acts, 1914 to 1922, natural-born British subjects. Among the extensions of this rule are “any persons born on board a British ship whether in foreign territorial waters or not,” but for the reasons already given I am not prepared to assimilate an aircraft, even a seaplane, to a ship for this purpose. It is probable that the rule also includes persons born in foreign territory occupied by British troops among natural-born British subjects. So much for the jus soli. But

204. Ibid., pp. 107-108.
by section 1(1)(b) of the Act of 1914, as amended in 1918 and 1922, applying the *jus sanguinis*, natural-born British subjects also include "any person born out of His Majesty's dominions, whose father was, at the time of that person's birth, a British subject," and who fulfils certain other conditions of which one is the registration of his birth at a British Consulate within one year. It is difficult to see how a person born in an aircraft on or over the high seas can become a natural-born British subject *jure soli*; he is born out of the King's dominions and His Majesty cannot be said to be in occupation of the part of the world in which he is born. It seems, therefore, that it is only *jure sanguinis*, that is, as the child of a British subject who satisfies the conditions of section 1(1)(b) of the Act of 1914, amended as aforesaid, that a person born in an aircraft on or over the high seas can be a natural-born British subject. So a child of French parents born on a British airship over the high seas would appear to be French only and not both French and British.

As to marriages in an aircraft on or over the high seas, McNair says that he is not prepared to apply, *eo ipso*, and as a matter of common law, the same law as that applied to marriages on board a ship.

Fixing the venue of offenses committed or of contracts entered into on board an aircraft *in transitu* during an international flight presents interesting problems. An illustration of venue in the case of an offense committed upon a railroad train or watercraft passing through several political subdivisions in the United States has thrown some light on the subject. In the absence of constitutional limitations, legislation in States of the United States permitting the venue of criminal prosecution for offenses committed in or upon public conveyances, such as railroads or watercraft *in transitu*, in a county [political subdivision of a State of the United States] other than the county in which the crime was actually committed, but through which the public conveyance passed, would appear to be valid. Such statement was based on the theory that it is competent for legislatures to change or modify the common law principle that venue must be proved as laid.\(^{205}\) In the State of Illinois, even where the Constitution provides for trial by jury in the county or district in which the offense is "alleged" to have been committed, it has been held that statutes are constitutional providing that the local jurisdiction of all offenses not otherwise provided for by law shall be in the county where the offense was committed, but that where any offense was committed in or upon any railroad in the State or on any watercraft navigating any of the waters within the State, and when it cannot be readily determined in what county this offense was committed, the of-

fense may be charged to have been committed and the offender tried in any of the counties through or along or into which such railroad or watercraft may pass or come, or can be reasonably determined to have been, on or near the day when the offense was committed, the theory being that the constitutional right is with respect to the place "alleged" as the locus of the crime. The court said:

"It thus became a settled rule of the common law that persons accused of criminal offenses should have a right to be tried by a jury of the vicinage of the alleged crime. Though originally more limited, the vicinage or neighborhood came to be understood to be the county where the offense was committed, and such was its signification at common law at the time that system of jurisprudence was adopted in this state. Chitty, Crim. Law, 177; 3 Reeves, History of Eng. Law, 476; 4 Bl. Com. 349. Undoubtedly the right to a trial by jury of the county in which the crime charged was committed is ordinarily a substantial and important legal right. It secures to the accused a trial among his neighbors and acquaintances, and at a place, where, if innocent, he can most readily make that fact to appear. But it is difficult to see how that can be the case where the offense is committed on a railway train, and the circumstances are such that it cannot be definitely located in any one of several counties through which the train passes. Those who were on the train are, for the time being, completely segregated from the communities through which they are rapidly passing, and there is ordinarily no circumstance which can make it more advantageous for a person accused of such a crime to be tried in one county than in another."
another. The right in such case to a trial in a particular county, if it exists at all, is at best a technical right, having no substantial importance or value to the accused. . . . The phraseology of that section of our present Constitution which related to the place of trial in criminal prosecutions differs materially in one respect from that of the corresponding provisions of the Constitutions of 1818 and 1848. The Constitution of 1818 provided that, in all criminal prosecutions, the accused should have a right to "a speedy public trial by an impartial jury of the vicinage;" and the Constitution of 1848 provided that he should have a right to "a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed." It must be admitted, probably, that both these constitutional provisions were susceptible of but one construction, viz., that of limiting jurisdiction in all criminal prosecutions absolutely to the county where the crime alleged was actually committed. The framers of our present Constitution, recognizing, as we may assume, the infirmity of this rule, particularly in its application to cases like the present, where it is impossible to determine in which of two or more counties a particular crime was committed, revised the section so as to make it read as follows: "In all criminal prosecutions the accused shall have a right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The modified phraseology may fairly be regarded as evidencing an intention to relax in some degree the rigid rule formerly prevailing. The prosecution may now be had in the county or district in which the offense is alleged to have been committed. The allegation here referred to is doubtless that made by the indictment, that being the only document in which the proper allegations as to the vicinage of the crime are ordinarily made. The Constitution then may be regarded as empowering the general assembly to provide, in its discretion, for the presentment of indictments in which the allegations as to the vicinage of the offense may not be in accordance with the actual fact. If this is not so, the words inserted in the present Constitution are meaningless, and the instrument must be interpreted precisely as though they had not been used. While at common law, and by the rule established by both our former constitutions, criminal offenses were regarded as strictly local and subject to prosecutions only in the counties where they were committed, our present Constitution vests in the general assembly the power to change that rule to such extent as it may see proper. It may now determine by law when offenses are to be deemed to be local, and when and within what limitations they are to be treated as transitory.

The following British cases throw light upon the question of venue:

Reg. v. French—

The Recorder.—I think that by the combined operation of the 7 Geo. 4, c. 64, and the Central Criminal Court Act, this indictment is properly preferred and tried in this court. There is here but one journey, and although the carriages are distinct, they 'all form but one conveyance. The fact that

207. Reg. v. French, cit. note 203 supra (Assault, venue, offense committed in course of journey); Reg. v. Sharpe, cit. note 203 supra (Larceny, venue, carriage passing through different counties).
the prosecutrix and the defendant rode in different carriages after the assault was committed does not appear to me to affect the question. It is the same as if they had occupied different parts of one and the same carriage. As to the interpretation sought to be put on the words, "through which any carriage shall have passed," I cannot think it has any foundation. The words clearly speak with reference to the time of the trial, and not to the time when the actual offense was committed. Any place within the limits of the beginning and end of this journey may be taken to be the venue, in whatever part of the journey the assault took place.

Reg. v. Sharpe & another—

Jervis, C. J.—There can be no doubt about that. The provision is quite general; it applies to "any carriage whatever employed in any journey." The object of the enactment is clear enough. If property is stolen during a journey, it may in many cases be quite impossible for the prosecutor to ascertain at what part of the journey the offense was committed. The statute, to get rid of that difficulty, provides that the offender may be indicted in any of the counties through which the carriage passed in the course of that journey.

As to conflict of law and jurisdiction of the courts in matters concerning aircraft, Schreiber expressed the following views, which appear to have points in common with maritime law in that the nationality of an aircraft would attract the law of the state of the aircraft's nationality:

1) Lex loci actus.
   (a) During an air voyage whether or not it extends beyond the boundaries of a single state, the lex loci actus is the law of the state of the aircraft's nationality.
   In theory a distinction has hitherto been made between an air voyage within the boundaries of a single state and an air voyage extending beyond them. Regulations based upon such distinction would be so complex as to give rise in practice to many difficulties.
   (b) The law of the country of the aircraft's nationality is to be applied whenever territorial law would normally be applied.
   (c) "Air voyage" and "extend beyond the boundaries of a single State" will have to be defined in the draft Convention. Such definitions will be entirely independent of those given for "national voyage" and "international voyage" in international law governing air transport contracts.

2) Jura in re.
   (a) In connection with property and other rights over things, the aircraft is everywhere governed by its national laws.
   This rule is subjected to the general principles governing the application of foreign laws.
   (b) Distraint and other similar legal acts are performed under the authority of the laws of the court having jurisdiction.

3) Jurisdiction of the Courts.
   The Jurisdiction of the Courts is governed by civil law. But in cases

---

where the aircraft's national law is applicable the case may be brought before the Courts of the country of the aircraft's nationality. The Courts of the place where the aircraft is registered will always have jurisdiction. This rule in no wise affects the jurisdiction of other Courts either of the country of the airship's nationality or of foreign countries.

On the question of jurisdiction, Fauchille wrote:209

M. de Bar fait sur l'article 13 de mon projet l'observation suivante: "Il n'est pas exact tous les actes passés à bord d'un aérostat doivent être jugés selon la loi du pavillon de l'aérostat. Je crois que simplement les règles du droit international privé ou penal doivent être appliquées et qu'on doit établir seulement que l'aérostat en l'air fait partie du territoire de l'Etat dont il a le droit de porter le pavillon, tant qu'il n'est pas en contact avec le sol de cet Etat."

Quoiqu'en pense M. de Bar, je suis sur ce point en parfaite communion d'idées avec lui. En effet: 1° Mon article 13, ... ne s'occupe que des actes passés à bord des aérostats dans l'espace ... dans un aérostat lorsque celui-ci est à terre, il n'y a rien que soit spécial au régimes des machines aériennes et on n'a qu'à appliquer les règles du droit commun ... 2° En ce qui concerne les actes passés dans l'atmosphère à bord d'un aérostat, l'article 13 de mon projet n'attribue pas pour tous ces actes compétence à la justice et à la loi du pavillon, puisque son alinéa 2 réserve aux tribunaux et aux lois de l'Etat territorial "les actes portant atteinte au droit de conservation de l'Etat sous-jacent ou qui causent un dommage à son territoire ainsi qu'aux biens ou aux personnes de ses habitants."

Escape from contact with the land by aircraft from the place of departure to the place of landing, together with the fact that while en route aircraft are comparatively free from supervision by police and other authorities of the state, form the chief reason for using the analogy of ships on the high seas to grant jurisdiction over civil and criminal acts taking place on board an aircraft in flight. Such analogy would place jurisdiction in the state which gives "nationality" to the aircraft, diplomatic protection by the registering state thus following the course of the aircraft. Even with modern motor cars, police protection is a difficult problem on land, because automobiles pass rapidly through county, State, and even international boundaries. Offenders are apprehended usually when and where the car stops, but abandonment of the car frequently aids escape.

Commenting on misdemeanors and crimes on board aircraft, Visscher said:210


La loi compétente pour la répression de ces crimes et délits [commis à bord et n'atteignant le territoire d'aucun État] est la loi nationale de l'aéronef. Tel est le principe adopté à la fois par un parti important de la doctrine et par diverses associations scientifiques. Il a été consacré par l'article 10 de la loi française précitée, tout au moins en ce qui concerne les crimes et délits commis à bord d'aéronefs étrangers. Le recours à la notion de nationalité de l'aéronef présente a priori des avantages pratiques certains en cette matière. Mais la valeur du système se trouve absolument compromis par le mode de détermination de la nationalité. . . . Et c'est bien pourquoi la loi française, qui abandonne à la loi nationale des aéronefs étrangers la répression de ces crimes et délits, s'est gardée de proclamer sa compétence pour les mêmes faits commis à bord d'aéronefs français en dehors du territoire national.

Le vice de cette application de la loi nationale pour la détermination de la loi compétence est ici particulièrement apparent. Il n'y a aucun lien logique ou normal entre la nationalité du propriétaire, dont la qualification nationale de l'aéronef n'est que le signe extérieur, et les intérêts qui justifient l'attribution d'une compétence répressive à un État en particulier. La nationalité de l'aéronef est ici une donnée sans valeur parce qu'elle est commandée par une circonstance indifférente au point de vue de la détermination de la loi compétente.

Visscher also said:211

. . . la notion de nationalité des aéronefs n'est après tout, en ces matières, qu'une abstraction commode, mais non pas indispensable. Rien n'empêche la loi ou la doctrine de remonter directement aux circonstances de fait qui justifient tantôt certaines présomptions de volonté, tantot l'intérêt spécial d'un État à l'application de ses lois d'ordre public.

His suggestion for jurisdiction during an international journey is not to apply the law of the country of the parties or of the state registering the aircraft, but to give jurisdiction to the state upon whose territory the aircraft first alights after the commission of the misdemeanor or crime in question. On this point he cites the codes of France and Belgium. For jurisdiction over contracts taking place during flight he prefers the application of the law of the state of the aircraft's port d'attache. In regard to corporations carrying on international transportation he maintains that the operating headquarters of a corporation (siège social) gives the corporation a contact in connection with crimes which would solve the question of jurisdiction without going into the nationality of the corporation, for which latter problem he finds no solution.

Mandl discusses rights apart from the owner of the aircraft.212

For acts on board during flight he prefers the jurisdiction of the

---

211. Ibid., p. 22. See also, French Code, Art. 5, 7; Art. 10, par. 2, French Law of May 31, 1924; Belgian Code, Art. 6-14.
212. Mandl, Vladimír, Address before the Xth International Congress on Air Law, cit. note 178 supra.
subjective state, as if the act were done in that state (locus regit actum). He cites Article 1 of the International Convention on Air Navigation of 1919. He advocates diplomatic protection only through the nationality of the owner of the aircraft (status personal), or as a result of acts done by enrollment on a register at the owner's domicile (status loci). On the high seas, if no rules of private international law allow, he suggests the analogy used in all other gaps of the law.213

While ships have some extraterritorial prerogatives, Mandl points out that the analogy to ships advocated by Fauchille was not accepted, because the theory of freedom of the air was rejected. During the war rights of ships were restricted, and even such restricted rights were not given to aircraft after the war. He cites an exception in Article 32 of the Convention of 1919 wherein a military aircraft may benefit from privileges granted to foreign war batiments.

Before the use of an aircraft is authorized by a state, a certificate of airworthiness must be issued and the aircraft must be entered in the official register. The main purpose of the register is, according to Oppikofer, administrative. It serves in the first place the requirements of the traffic police, but, he says, this does not prevent various countries from also using the register for promulgating and establishing certain private rights to aircraft (title, mortgage).214 He believes that explanation of the requirement of registration according to the nationality of the owner as based upon rules of maritime law concerning registration of vessels may have been true of the earliest attempts to construct a theory of air law, but he states that it cannot explain a legal clause which has been applied with such persistence by the legislation of the majority of countries.215

It is, in the last resort, political considerations which are here paramount. In so far as the state does not impose restrictions upon itself through international treaties, it desires in principle to reserve its territory to the aircraft of its own nationals, and in this way to give them precedence over foreign owners of aircraft. It has frequently been pointed out in recent times that, while regulations of this kind have very few positive advantages, their negative effect is to impede international air traffic. They do not insure the protection of national interests. Aerial

215. Ibid., p. 102.
espionage, for example, is just as practicable from aircraft belonging to a national. Regulations which consist in registering only aircraft belonging to nationals become an administrative absurdity in cases where international conventions oblige the state to permit the passage of foreign aircraft over its territory.

In observing that nearly every country has recognized the legal principle that aircraft acquire, by registration, the nationality of the registering state, Oppikofer says that the legal importance of this nationality is shown mainly by the fact that, in international private law, administrative law and penal law, it is regarded as the determining factor in applying national rules.\(^{216}\)

A state's concern for the welfare of its inhabitants is its excuse for being. This involves trusteeship in the interest of public safety, under which comes the exercise of licensing authority and supervision over things and acts of potential danger. The destructive range of aircraft is the greatest of any modern instrument. Aircraft not only in the ordinary course of events threaten the safety of man's daily life, but in emergencies commercial planes can be rapidly equipped for military purposes to drop heavy bombs to destroy persons and property, or spread poison gas to kill the populations of cities. The usual dangers from aircraft are provided against by certificates of airworthiness and registration of the aircraft, licenses for pilots, police surveillance and other precautions on the part of governments. The possibility of the greatest hazard, war, and its potential use of civil aircraft, forms an undercurrent in nearly all legislation and conventions concerning air navigation.

The reverse side of the menacing picture depicts the constructive possibilities of aeronautics in developing trade, transport, communication, and in carrying out health and police regulations, air mail, assistance to agriculture, as well as many other services which lead civilization into a more unified world.

A state exists only so long as it retains its component parts—territory and nationals. If one state attempts or appears to attempt to acquire more territory or to foster inordinate economic gain, rumors of war arise and nationalism becomes rampant. Science, instead of producing instruments to promote peaceful pursuits, devises destructive inventions to aid in the more rapid disintegration of material possessions and human institutions. Man's

\(^{216}\) Ibid., p. 105. Note: Oppikofer believes that the adoption of the nationality of aircraft as a criterion, must in international law, often lead to unsatisfactory solutions, when the nationality of aircraft is determined not by the aerodrome where the machine is stationed or by the nationality of the operator, but by its registration and, therefore, indirectly by the nationality of its owner.
struggle for existence in a materialistic civilization tends to obliterate his opportunities for an inward or spiritual civilization and for the development of moral education. The recognition that war connotes error, destruction and decomposition will turn man's consciousness, mind, and will away from exploitation toward freedom for individuals and nations to realize their highest aspirations.

Plans for civil aviation and for aerial warfare are incompatible because they are based upon opposite principles, the one unifying and constructive, the other disintegrating and destructive.

By turning vengeance into channels of the law for punishment of a wrong-doer, there evolved the ethical difference between retaliation in kind against an offender, or an offending instrument, and opportunity offered to an offender for reform, together with compensation to the person injured. By the metamorphosis of national egoism and aggression into moderation and cooperation a way could be made clear for the greatest development of civil aviation and for simplified judicial or arbitral settlement of claims arising therefrom. At the same time various incentives for war would eliminate themselves with surprising ease. If, however, the choice of the world is, even unwillingly, toward war, states raise the standards of strong nationalism. The aggressive features of nationality permeate legislation and become affixed to such situations as the present so-called nationality of aircraft.

Separate plans for normal times and for unusual times of emergency or war would seem to be the wiser course. In case of war, history usually reveals immediate stoppage of peace time regulations. This being so, a government could, upon declaration of war, commandeer all aircraft within its borders, and checking the registered aircraft it could utilize or sequester aircraft according to its laws for personal property of nationals and aliens. The effectiveness of such a manoeuvre on the part of the government would largely depend upon the efficiency of its administration of civil aeronautics and its police.

It seems almost futile to struggle over definitions and specifications for different types of aircraft for use in peace and war. All types have duality, the choice depending upon the guiding hand of man. A bomb may be carried in any aircraft—or in a suitcase. World restrictions in manufacture and limitations in output call for super-human intelligence and insight, together with infallible administration. Had restrictive policies been applied
to motor cars, would the industry have attained its present growth and would the use of automobiles have been so universal?

The only aircraft which appear rightfully to have any direct claim to a nationality are the aircraft owned by national governments and employed in the service of those governments for purposes of peace and war. Such nationality, however, is derivative in the same sense that an airplane, privately owned, may be said to have a nationality reflected from its owner. A national state, as a corporation, may possess personal property. Such property is said to be publicly owned and to belong indirectly to the individuals who compose the state. The United States, as a national government owning and operating aircraft, would appear to endow such aircraft with a national character more precisely than an individual citizen of the United States could endow his privately owned machine with a national character. Yet in the Air Commerce Act of 1926, the latter are spoken of as "aircraft of the United States."

A modern national state is an artificial being, a corporation created by natural persons and founded upon territory. It may be said to have "reality" independently of its component parts, i. e., people and land. This "reality" has the fiction of a "personality" which acquires the attribute of nationality. This nationality the state shares with its territory, and, under specified conditions, with certain natural and artificial persons, i. e., its "nationals" and corporations created by the state. It is this reality of the state as a unit which enters into relations with other national states.

International relations need only brief analysis in this article. They may be said to fall generally into political, economic and social divisions, which in the world today have reached a climax of complexity and tension and of uncertain balance between peace and war.

The concept of nationalism originally offered liberty and opportunity to individuals, together with security of person and property, but today, on the contrary, there are indications that the administration of nationalism is hindering the development of individuals and lessening their security. This appears to be due to the fact that many politically nationalistic minds hold tenaciously to governmental precedents which have been outgrown by economic and social progress. A self-contained state is as much of an anomaly in modern times as is a "subsistence homestead" in an industrial community. Interdependence of nations in supplying the
needs of their inhabitants, and at the same time the ascending importance of individuals as factors in the social fabric, call for changing concepts on such subjects as government, property, education and even religion.

"In the near future it may be possible to fly over countries at altitudes which will make sovereignty an empty word because all control will be illusory," writes Bouché. He continues:

Doubtless the defensive reaction against this violation, which is today scarcely perceptible, will be greatly intensified: nationalism in the air will be all the more vehement because it will be obviously against the nature of things. International cooperation in the air is necessary and will therefore be particularly difficult because compulsion—even the compulsion of nature—is never willingly endured.

The problem of the hour is neither technical nor economic, but purely political. Before anything can be done, there must be the will in political circles to pay heed, in a spirit as international as air traffic itself, to the technical and economic realities by which this mode of transport is limited.

The principle of territoriality is discussed by Oppikofer in part as follows:

One—and perhaps the most important—element of uncertainty in international aerial law and traffic as they exist today is the principle of territoriality, that is to say, the principle which subjects the aircraft, its crew and its passengers to the legal regime of the state flown over. Unless the domestic legislation of the state flown over makes a distinction between foreign aircraft and national aircraft, all the legal rules of the private, penal and administrative law of that state apply to aircraft flying over its territory.

The formula which expresses territoriality is found in the great majority of air-navigation Conventions, but its meaning and wording are not always the same, and its interpretation is sometimes very questionable.

The main source of all competence of the state flown over would seem to reside in the police regulations, the necessary preventive measures against nationals and foreigners whenever public order and security are threatened, a never-failing means of intervention and one which is, in fact scarcely open to attack from the point of view of international law.

Jurisdiction is an important subject in international civil aviation and is at the base of several arguments for nationality of aircraft. Geographically speaking, and taking into account the present sovereign rights of states over their respective territories and territorial waters, there might be comparatively little difficulty

---


in determining the competent court, if a method could be agreed upon applicable in the cases where the aircraft is upon or above parts of the earth's surface not subject to the sovereignty of any state or where doubt arises as to the exact location of an aircraft at the moment an event in question took place on board, or where an aircraft escapes detection of the subjacent state. This would be chiefly upon or above the high seas and crossing national boundaries.

Owners and lessees, in undertaking international flights for their aircraft, voluntarily submit such aircraft, their personal property, to the jurisdiction of the states flown over. Passengers in such aircraft likewise submit themselves to those jurisdictions. Should anything happen to an aircraft or its passengers in or above any one of those states, the law of that state applies and its courts have jurisdiction, provided the place and time of the event in question can be reasonably determined in relation to the territory or territorial waters of that state.

In cases involving doubt as to the exact location of the aircraft, since there has already been, by the owner or lessee of the aircraft and by the passengers, voluntary submission to the jurisdiction of all states flown over, none can reasonably object to the jurisdiction of any state flown over. Therefore, it could be made possible in doubtful cases, for stipulations to be entered into as to which state should take jurisdiction. Such provision could be arranged by international agreement.

In matters of contract executed during flight where stipulations as to jurisdiction were not written into the document, or in torts or crimes committed in aircraft when the exact location cannot be readily determined, a logical and feasible place for jurisdiction to attach is the state in which the aircraft first lands after the event in question. Generally, the criminal is there apprehended, the tangible evidence is there available, and the witnesses are present. A simplified procedure, if agreed upon in international conventions or bi-partite treaties, could facilitate judicial action in the presence of the witnesses and before a jury or, where possible, release witnesses upon proper affidavits. If damage had been committed to persons or property in one state but the aircraft lands in another state, rules could provide for extradition and transfer of evidence. In some cases jurisdiction has been given to a state where a criminal has been found or apprehended, instead of to the state where the crime involved was committed.
Many angles of this jurisdictional problem can be thought of which cannot be followed through in this article, but it is believed that even complex details could be satisfactorily disposed of at an international round table of experts on air law, when once the bothersome principle of nationality of aircraft is discarded. Where the high seas enter the picture and a tort or crime has been committed in an aircraft thereupon or thereover, jurisdiction could be permitted to the state bordering the high seas and flown over or landed upon at the point where voyage over the high seas terminated. If an aircraft is abandoned at sea, the state where the survivors first arrive would take jurisdiction. In matters of contract, and possibly also in torts and crimes, a choice might be given between the terminating point and the starting point of the voyage. In contracts, the state where performance is to take place might also be considered for jurisdictional purposes. The principle of permitting allegations as to the place of the happening of events in unknown locations, is one which has been used in connection with railroad trains in transit and might well be considered for international air traffic. The liberty might even be allowed to make allegations as to the happening of the event in any one of the subjacent states passed during the flight.

Arrangements for such legal procedure as above suggested presuppose full cooperation on the part of governments and individuals concerned, and implies that the law of averages would give states their fair proportion of cases in return for action by their courts with justice and dispatch.

The procedure might, in many instances, be in the nature of an arbitral settlement. Annoyance and delays often caused by technical obstructions in court procedure have encouraged the spirit of arbitration in civil disputes between individuals or groups; this spirit may well be fostered and carried into the complexity of international relations between individuals and groups, even to the extent of permitting more direct presentation of cases than is today possible. International claims, as now classified, are those in which governments concerned sponsor and present the claims on behalf of their nationals. Proposals have been made for international courts where individuals may have their cases tried without the services of a department of state or foreign office.


demands of aviation may bring about something on this order, especially if the local citizenship status of individuals receives liberal world recognition and if universal courts could be made to take original jurisdiction in aviation cases where certain facts could be alleged, such as (1) diversity of citizenship; (2) place of the event in question, either doubtful or upon or over the high seas; (3) additional grounds. Appellate jurisdiction could also be considered for such courts in cases originally brought before local or state courts. Functioning of the Federal Courts of the United States could be studied in connection with the above points, also problems as to terms and locations of sessions of such courts, exclusive or concurrent jurisdiction with local or state courts, and similar questions which occur because of the relation between the Federal government and States of the United States.

As to what law shall govern—the civil law, common law or admiralty, statutory or international law—the laws of the state taking jurisdiction would control. But it might be possible for an international round table to dispose of the rather bothersome problems in this connection by recommending the incorporation in international agreements of clearly defined classifications as to the types of cases arising from the legal nature of aircraft. Some law, domestic or international, must govern the subject matter in litigation. If gaps in law occur, “equity” and “justice” are applied until such time as domestic legislation and international law shall close the gaps. The three legal relations of man to the state, i. e., as to his person, his property and his acts, which first manifested themselves within the territorial limits of the state, according to Zeballos cease to be local or territorial when they are carried into an adjoining state.221  Such a transfer of legal relations character-

point of the issue whether individuals are the subjects of international law or are bound by it. The report concludes that they cannot be. But when one examines the law of contraband, which places the individual under definite duties and liabilities, when one notices the convention establishing the Central American Court of Justice and the proposed prize court giving individuals the privilege of suing in the international forum, the answer given by the report, even if it be deemed important, is open to grave doubt. International law and treaties accord rights for the benefit of individuals and impose duties restraining individuals . . . . . . As to the point that foreigners might receive more favorable treatment than is accorded to nationals under certain circumstances, Borchard says, “This has its element of injustice, perhaps . . . . It has, however, compensatory value in exerting an important influence in raising to the international standard the level of administration for everybody.”

221. Zeballos, E. S., La Nationalité au Point de Vue de la Legislation Comparée et du Droit Privé Humain (Paris: Librairie de la Société du Recueil Sirey, 1914), Tome Premier, pp. 1, 14, 8, et seq. Zeballos recognizes that difficulty arises in determining what legislative authority would decide the legal principles and cases of conflict among sovereign states as to provisions of the universal law. He observes that among nations the conscience of civilization controls, and that supernational law is in fact derived from the law of sovereign states. Private universal law consequently would vary more or less as the criterion of civilization in the states is more or less liberal or restrictive. Zeballos continues to say that the Republic of Argentine is the first state to have codified supernational law by imposing silence as to its
izes the extraterritoriality of the law, and they become not only international and intercontinental, in his opinion, but the law previously founded on sovereignty becomes transfused into *droit humain* (human law), because it applies its rules on the basis of humanity, whatever may be the source and the nature of the legal relation.

Instead of "private international law," Zeballos proposes to substitute the expression "private human law" (*droit privé humain*). This he claims would, in place of regulating conflicts in the law of nations, control the conflicts in private law, and, therefore, such a proposed law belonging to humanity would be placed above national legislation. He also uses the term "supernational," because as soon as such law is declared, the voice of the local or national law ceases to be heard. It is not opposed to the principle of sovereignty, Zeballos believes, because sovereign states, interested in avoiding interference with their reciprocal and unified development, would agree to create and to recognize such law tacitly or expressly. It is consequently, in his opinion, the outgrowth of local sovereignties producing, as it were, a fusion of their laws in order to codify all rights for all men, out of which fusion develops a positive universal law.

Discrimination between the fundamental principles or the enduring ethical bases for law, and the temporary or administrative necessities in human relationships is important. Present and future problems of international aviation cannot be solved by tinkering with administrative details or by making rules for the exceptional cases. They need a bold facing of facts with far-reaching vision to evaluate the essential elements of aviation in relation to human progress and universal purpose.

---

own laws whenever a foreign law is reasonably applicable. He cites as one example among many that the civil capacity of a person twenty-one years of age is recognized in the Republic of Argentina because of the law of that person's domicile abroad, although the national law of Argentina requires a person domiciled in Argentina to be twenty-two years of age in order to exercise the same legal rights. Zeballos also cites, as examples of the application of supernational law, the United States of America and the British Commonwealth as being composed of co-existing sovereign or national units each having laws, but whose unity is maintained because courts apply "supernational" law in the spirit of equity, supernational law thus having the double mission of a regulator for humanity when the application of state or local laws permits, and of territorial organization when domestic conflicts have been settled and the action of all component parts is carried abroad.