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John H. Wigmore

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AN OUTLINE OF AIR LAW PROBLEMS*

JOHN H. WIGMORE

International Law:

(1) In International Law, the first principal question is this: Must one nation allow the aircraft of another nation to come freely into the air space over the first nation's territory?

Already, for marine travel and land travel, this question has long been answered plainly in the negative. Each nation is sovereign on its own territory; therefore it may admit or exclude nationals of another nation in its own discretion. The only limitation is that it must make no unequal discrimination between other nations, so that any exclusion must be based on general conditions equally applicable to all. Should the same principle be applied to air travel?

This raises the question: Does each nation have sovereignty in the air-space above its territory, as on the land itself? Or is the air-space above the land free to all, like the ocean? No one nation can exclude nationals of another nation from the ocean. Is the air-space free to all, like the ocean?

Thirty years ago this question was answered in the affirmative by the Institute of International Law, a body of sixty jurists, who at their meetings attempt to formulate the principles of international law. But when the Great War came, in 1914-1918, it was perceived that national defense would be endangered, if the air-space over each country could be freely entered by aircraft from another nation. Hence, the opinion of jurists changed. It is now unanimously agreed that each nation has the same sovereignty in the air-space above that it has on the territory below. Hence no foreign aircraft can enter this country, except by license.

(2) But now a second problem arises. Commerce in the air would be obstructed unless the nations permitted free travel between all nationals in the air, as they already do on land. Hence, arose a distinction between military aircraft and civil aircraft. A military aircraft from another country cannot enter this country without express permission in each case, precisely as is the rule today for marine warships. But civil aircraft ought to be admitted freely, if they fulfill necessary conditions of safety. Therefore, interna-

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tional conferences have been held, to agree upon uniform conditions of safety to be observed before foreign civil aircraft may be admitted.

Such a conference was held at Paris, France, in 1919, at which time by international convention a committee was organized to adopt uniform rules. The United States delegates signed that convention; though it has not yet been ratified. The Committee thus organized is known by its French name, Commission Internationale de Navigation Aérienne, but usually it is named by the initials C. I. N. A.

The principal condition adopted by that Convention is that a civil aircraft coming from another country shall be certified by the administrative authorities of that other country to be a safely constructed ship and to be piloted by a competent person. Each country determines for itself the proper conditions for granting such licenses. When thus licensed, the foreign airship may freely enter the other country. But this permission applies only to countries which have become a party to the above convention. Hence, civil aircraft of other countries do not automatically obtain the benefit of this convention; they must in each case obtain permission to enter.

As the United States has not yet ratified that international convention, the entry of aircraft from *adjacent* American countries has meanwhile been facilitated by specific bilateral conventions made by our State Department with Canada, Mexico and other countries.

(3) But, thirdly, these conventions apply only to individual aircraft, not to airlines. There is a vital difference between an individual aircraft, coming when it pleases and carrying what it pleases, and an airline coming on regular service ("scheduled" service is the technical name) and holding itself out as a common carrier of passengers and goods. It is the distinction corresponding to that of the private carrier and the common carrier, in terrestrial traffic.

Thus our Government, if asked to permit the establishment of a foreign airline entering this country, has to consider several special aspects. For example, it must ask reciprocal privileges for an American airline to enter the foreign country; it may see fit to designate special routes of approach, ports of entry, and so on.

Up to this time no such license for entry of a foreign airline has been granted. The Secretary of Commerce by law has the authority to grant such licenses. But the State Department must do

the negotiating for the convention. And the Post Office Department is the authority to make the contract for mail. Hence, all these departments must cooperate.

The Imperial Airways Company of Great Britain has an application now pending for a transatlantic service, with reciprocal privileges offered to the Pan American Airways Company. Doubtless the German Zeppelin Company and the French Airways Company will before long offer other proposals.

This question did not arise when the Pan American Airways last year made its initial flights across the Pacific Ocean, because the way-stations and the terminal at that time were all in U. S. territory.

(4) But there remains one further limitation on foreign airline traffic. The permission to a foreign airline to come into a country extends only to its arrival and departure for *foreign* commerce. It cannot engage in domestic commerce.

This limitation is based on the analogy of marine law. All nations have always required that the marine commerce within the country shall be limited to its own nationals; for example, an American vessel is not entitled to engage in coastwise commerce in England or Canada, nor a British vessel in coastwise commerce in the United States. The same will be true of foreign aircraft. Each country reserves the internal commerce for craft of its own nationality.

(5) A final question remains in International Law. How shall we know to what country an aircraft belongs? That is, how is the nationality of an aircraft determined?

To answer this question, the analogy of marine ships has been adopted. Nationality is determined by registration. The ownership of the craft does not determine its nationality, but the place of its registration. If the airship is registered in the Bureau of Air Commerce of a particular foreign country, it has the nationality of that country. Each country determines the conditions of registration; usually the airship must be owned by a national of that country; and in the case of a corporation, a majority of the shareholders must be nationals.

This principle may thus result in occasional deadlocks; for example, if an American lawyer or business man residing in Paris or in Mexico City owns an aircraft, he cannot by law register it in that country; nor can he register it in the United States unless it is duly inspected and certified here. These anomalies will some day be straightened out.

Such are the main principles of International Law as applied to aviation.

National Law:

The other field of problems is National Law. Here the problems fall into two groups, problems of Public Law and problems of Private Law.

(A) *Public Law.* The problems of public law are mainly three. The first question is: How far should the Government regulate and control air traffic?

(1) The main consideration is that of safety. Aircraft are as safe as marine vessels if they are properly constructed and properly managed. In railroad transport, the Government has never attempted to license engineers and conductors, nor to inspect trains for safety. But in marine transport every ship's officer has to have a certificate of competency, and every vessel has to conform to certain requirements for safety at sea. For air transport, the analogy of marine transport is controlling. This is effected by granting a license, after due inspection.

Safety requires four kinds of precautions:

(a) First, the *type* of construction must be a safe one; the Government Bureau prescribes the types of construction, as to size of wings, kind of engine, instruments of navigation, etc.

(b) Next, each particular aircraft, when completed, must be inspected, to determine whether it fulfills a prescribed type of construction.

(c) Thirdly, the pilot must be a competent experienced person; hence he must pass an examination and receive a license, as in the case of other occupations requiring special skill.

(d) And finally, the aircraft, when it engages in regular travel, must follow particular routes, so as to avoid collisions and arrive safely at the desired destination. Hence the Government lays down traffic rules. It also builds signal stations at various points on the land below, so that the pilot can observe the regular and safe route. Even in crossing the Rocky Mountains from Chicago to California, the railway traveler can perceive at night these electric beacons on the high peaks, placed there to guide the air pilots at night.

(2) The second problem, for Government regulation, is the economic one, i. e., that of competition. Should the Government allow any person whomsoever to conduct a regular line of aircraft for commercial transport? In other words, should competition be

unlimited? The Government does not any longer allow unlimited competition in building railways on land. On the other hand, in marine transportation new lines can always be freely started. Which analogy should control for airlines?

Hitherto in the United States free competition has been allowed. But the new bill, now pending in Congress, would adopt the opposite policy, viz., it would prevent wasteful competition, and therefore would require a certificate of convenience and necessity before licensing a new line.

(3) In public law, the third great problem is this: In Government regulation, what is the scope of state power and what is the scope of federal power, respectively?

The answer is obvious:

(a) The state power extends to intrastate traffic, and to that only. But in order to secure harmony of operation with the federal government, the state laws already enacted, forty-five in all, provide that the airmen and the aircraft must have a federal license. This secures harmony of operation, and saves the states enormous expense in maintaining licensing and inspection bureaus. But uniformity between the several state laws is also desirable. So a uniform aeronautical regulatory act has just been approved by the National Conference of Commissioners on Uniform State Laws, and will now be pushed along for adoption. This uniform law is modeled on the Illinois Act, the first and the best of its kind, enacted in 1931.

(b) The federal power extends to interstate traffic.

Here the great problem is: What department of the federal government shall exercise this control? The present condition of the federal law is satisfactory to no one, because the control is divided between three or more departments. The Department of Commerce controls the licensing of airmen and aircraft and airlines, and supervises the navigation facilities of the air routes. The Post Office Department lets the contracts for carrying mail. The Interstate Commerce Commission has final control over mail rates. The Labor Relations Board supervises pilots' hours and wages. This subdivision of control works great hardship on the airlines. Reform is urgently needed. The Federal Aviation Commission of 1934 prepared a model bill placing the control in a single body, the proposed Air Commerce Commission. Or, instead of that, the control could be concentrated in an Air Commerce division of the Interstate Commerce Commission. But the new bill lies dormant in Congress. What is urgently needed is that

the Congress should wake up and do something to relieve the airlines from the present handicaps of divided control.

(B) *Private Law.* There remain the problems of private law, that is of the rights of individuals. Naturally, these problems are analogous to those which arise for travel on land. The principal ones are three: (1) What is the carrier's responsibility to the passenger for his safe carriage? (2) What is the carrier's responsibility to the owner of goods carried, for their safe carriage and delivery? (3) What is the responsibility of the aircraft owner for damage done to persons or property on the land below the air-space?

(1) and (2). As to the carrier's responsibility to the passenger, this is of course regulated partly by contract. And the same is true of the carrier's responsibility for goods carried. The carrier in his contract usually seeks to minimize his liability. But the law cannot allow him to evade it entirely. He must at least be responsible for damage due to an unsafe condition of the ship. But whether he shall be responsible for negligent management by the pilot has been much disputed; also whether he shall be responsible beyond a limited amount of money. Similar dispute had already long ago taken place in respect to the responsibility of railway carriers and marine carriers. Each state has already adopted some compromise rule for railway and for marine carriers. And there will be soon a similar settlement of the rule for air carriers. Probably the best solution will be to require the carrier to place accident insurance upon both passengers and goods, while charging a small extra premium to cover the cost of insurance. This will give the carrier the benefit of limited liability, yet force it to carry adequate insurance.

(3) As to the aircraft owner's liability for damage done to persons or property on land beneath, by dropping things or by the fall of the craft, there have been two rival theories. One is the theory of absolute liability regardless of fault. The other is the theory of liability only in case of fault, that is, fault in the construction or in the management of the craft. At present, neither rule has been finally adopted, except in a few tentative decisions.

Whatever rules be adopted on these various points, it is highly desirable that there be uniformity between the different laws of the several United States and other countries.

For domestic interstate traffic, this subject is now being worked upon by a Committee of the National Conference on Uniform State Laws. This Uniform Act will be one of the most difficult to frame,

and a year or two will probably elapse before a consensus is reached

But, furthermore, now that transpacific and transatlantic passages are in sight, uniformity with the laws of other countries is very desirable.

In this field some progress has already been made. An international conference of government delegates was held at Warsaw, Poland, in 1929. At that conference a convention establishing a uniform air carrier law for all nations was adopted. This convention has been ratified by the United States and a few other countries. However, the international committee (C. I. T. E. J. A.) continues to study the subject, so as to secure ultimately the agreement of all nations, and an annual meeting of the committee will take place in Switzerland during the coming September.