

DEVELOPMENTS IN AERIAL LAW

For three centuries the art of aerial navigation received slight consideration from other than a few scientists who devoted their experiments to the study of gases and the application of the results of those experiments to practical devices, and a few military commanders who had used balloons for observation purposes during engagements. Although the military advantages of the use of aircraft were demonstrated as early as 1794 at the battle of Fleurus, it was not until the escape of balloons from beleaguered Paris during the Franco-Prussian War had drawn from Bismarck a threat to execute as spies all aeronauts, that the interest in the development of the art of aviation became general. This incident focused legal minds upon aerial navigation and from that time, we may safely assert, dates the growth of aerial law.

Thus it came about that the attention of the most eminent international jurists was drawn to the question of the use of the air in warfare. In this the lawyers were but a step behind the military technicians who seem to have realized the potentialities in this field at its inception and to have devoted an amazing amount of study toward its perfection.

The Brussels Conference on International Law, which considered the question at the session of 1874, disapproved of Bismarck's view.¹ This was also the official conclusion reached by The Hague Peace Conference in 1899. These international congresses concerned themselves principally with the regulation of warfare by air. This was naturally so, since the outstanding developments in the art of aerial navigation had been made by the military branches of the governments. The Hague Conference determined that aeronauts should not be held to be spies since espionage connotes disguise and covert acts whereas any information obtained by the use of aircraft must necessarily be acquired openly. At the Session held in 1899, a proposal

¹ Wilhelm, *De la situation juridique des aéronauts en droit international*, JOURNAL DU DROIT INTERNATIONAL PRIVÉ 440 (1891).

“to forbid the throwing of projectiles or explosives from balloons or by other new methods of similar nature,”²

was agreed to by the signatory nations because of the undeveloped state of aviation. The treaty so entered expired in 1907 and its main prohibition was not renewed by the leading powers, so rapid had been the development in the art and so manifest the possibilities of its use in time of war.³

At the Neuchâtel meeting of the Institute of International Law in 1900, M. Paul Fauchille, who had probably devoted more study to the problems of aeronautical law than any other jurist, proposed the subject “*Le régime juridique des aérostats*” as a part of the order of the day for the next meeting.⁴ At the following session in 1902 he presented a detailed study of the subject, supplemented by an exhaustive draft of proposed legislation. This draft contained thirty-two paragraphs, was based on the theory of freedom of the airspace and included detailed provisions for the regulation of aerial navigation.⁵ No action was taken upon the suggested legislation. Its fault lay in insufficient devotion to cardinal principles and basic theory and in too strict attention to details before the art of aviation had undergone sufficient technical development to warrant such regulation.

The efforts of M. Fauchille served the excellent purpose, however, of arousing argument on the general subject. Comparatively slight consideration had been given to the legal questions which flight would involve before there arose the highly important problem of sovereignty of the airspace. Jurists disagreed on this fundamental question and two theories, supported by equally eminent students of international law, were quickly advanced in the disputation thus engendered. The advocates of the theory more popular at its inception, basing their arguments on the analogy of the high seas, contended that the

² REPORTS TO THE HAGUE CONFERENCES (1899 to 1907), Edited by James Brown Scott, p. 169.

³ Kuhn, *The Beginnings of an Aerial Law*, 4 AM. J. INT. L. 109 (1910).

⁴ ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 262 (1900).

⁵ *Ibid.*, pp. 25-86 (1902). See also FAUCHILLE, *LE DOMAIN AÉRIEN ET LE RÉGIME JURIDIQUE DES AÉROSTATS* (1901), the first volume on the law of aeronautics.

airspace was free, that no sovereignty existed over the aerial domain; the opposing theorists maintained that a state was sovereign not only over the land and waters within its boundaries, including the territorial waters adjacent thereto, but also over the superjacent airspace.⁶ Between these extremes of absolute freedom and absolute sovereignty there ranged an illustrious group of jurists who advanced intermediary views based upon the one or the other theory.⁷ Thus while Meili, Fauchille, Oppenheim and others maintained that the air was free, that no sovereignty existed therein, yet they recognized the necessity of protection for the subjacent state and granted either a territorial zone variously defined wherein to exercise the rights of conservation or simply recognized the authority of the underlying state to enforce those rights when necessary; and while von Bar, Westlake and Meurer, among a list too long to enumerate, favored absolute sovereignty at least within a certain territorial zone, yet they recognized the need of unimpeded navigation and asserted this sovereignty subject to the right of free passage to aviators when such flight would not be prejudicial to the subjacent state.

In a carefully considered brochure published in 1910, Dr. J. F. Lycklama exposed the fallacies of the freedom theory and clarified the various suggestions of sovereignty to some arbitrary height by showing that the real aim of the advocates of the latter was freedom of navigation insofar as such freedom could be secured—as was, indeed, the real desire of those who maintained that no sovereignty existed.⁸ Dr. Lycklama argued that the only

⁶ The positions of the various jurists are set forth briefly and clearly in LYCKLAMA, *AIR SOVEREIGNTY* (1910), where there is also an extensive bibliography of the subject as to that date. The view of Nys, while in favor of freedom, seems to be an expression of exasperation at the already too great number of laws (*ANNUAIRE* 108, 1902), whereas Wheaton seems to consider the atmosphere rather than the air space (*ELEMENTS OF INTERNATIONAL LAW*, p. 292 (Ed. 1904)), as do some others writing at the same time. The opinions of supporters of the theory of sovereignty are more studied and carefully prepared, however, *e. g.*, Baldwin, *Law of the Airship*, 4 *AM. J. INT. L.* 95 (1910).

⁷ These intermediary views are also outlined in LYCKLAMA, *op. cit.*; and see also FAUCHILLE, note 5 *supra* and note 10 *infra*; Westlake, *ANNUAIRE* 299 (1906); von Bar, *ibid.*, 304; GRÜNWARD, *DAS LUFTSCHIFFIN VOLKERRECHTLICHER UND STRAFRECHTLICHER BEZIEHUNG* (1908).

⁸ LYCKLAMA A NIJEHOLT, *AIR SOVEREIGNTY* (1910).

logical and practical solution of the question was the existence of complete and absolute sovereignty of the subjacent state in the superincumbent aerial domain, and reached the conclusion:

"In principle the air-space belongs to the sovereign state territory, so the state has full sovereignty to an unlimited height, which sovereignty can only be abolished or restricted by treaty."⁹

In response to an invitation issued by the French Government while the controversy was at its height, the First International Conference upon Aerial Navigation convened in Paris May 18, 1910. Proposals for discussion which included such highly important, in light of the rapidly developing art of aviation, subjects as the determination of the nationality of aircraft, the licensing of operators and the right of public and private aircraft to cross frontiers, were not settled there, largely because of the opposed views of the delegates on the question of sovereignty, though the majority of the conference favored freedom of circulation subject to protective rights in the subjacent state.¹⁰ This impasse caused adjournment to be had in November *sine die*.

From May 31st to June 2d of the same year an unofficial congress, the First International Juridical Conference for the Regulation of Aerial Locomotion, was held at Verona. Resolutions were passed which related to establishing the nationality of aircraft, inclining to the view that the nationality should follow that of the owner; subjecting an aircraft to liability for damage caused by it in landing; and defining the jurisdiction, subject to local police regulations, over aircraft in flight to be in the state of nationality.¹¹ While the actual achievement of these congresses was nugatory, they are important as being the first to have been held for the serious discussion of the regulation of

⁹ *Ibid.*, p. 46.

¹⁰ See Fauchille's proposed "Art. 7—*La circulation aérienne est libre. Néanmoins les Etats sous-jacents gardent les droits nécessaires à leur conservation, c'est-à-dire, à leur propre sécurité et à celles des personnes et des biens de leurs habitants.*" ANNUAIRE 105 (1911), presented to the Paris Conference upon Aerial Navigation, 1910. Wilson, *Aerial Jurisdiction*, 5 AM. POL. SCI. REV. 171 (1910).

¹¹ Wilson, *op. cit. supra*, note 10; Baldwin, *Address*, 35 A. B. A. REP. 898 (1910).

aviation, and their influence in extending the consideration of the problems before them was internationally felt.

Soon afterward, in 1911, both the British¹² and the French¹³ Governments passed Aerial Navigation Acts regulating aerial navigation within those States. In the United States, a proposed draft of legislation presented by Simeon E. Baldwin to the American Bar Association was rejected, the subject being considered not to be of sufficiently widespread interest at that time.¹⁴ That year Connecticut, of which state he was then Governor, became the pioneer in this field of legislation by enacting the first aerial code effective within the United States.¹⁵ Two years later Massachusetts enacted similar legislation.¹⁶ These enactments dealt chiefly with the registration of aircraft and the licensing of operators and operation, avoiding the question then uppermost in the minds of international lawyers and at that time being heatedly discussed; but the Russian Aerial Navigation Act of July 5, 1912,¹⁷ seems to have taken a definite stand on the troublesome problem of sovereignty, assuming, if not complete sovereignty in the subjacent state, at least complete control of the air as far as was deemed necessary for the protection of national interests, by the creation of zones not open to flight. In December of the same year Austria followed the example thus set, and Germany, France and Great Britain rapidly fell into line.^{17a} Moreover, in 1913 Germany and France entered a treaty prescribing the regulations for international flights of civil, military and public aircraft between those two nations.¹⁸ Thus legislators of the various states, not concerned with the difficult legal problems confronting the jurists, met the practical problems involved by an assumption of their right to legislate in respect to

¹² Aerial Navigation Act (1911), 1 & 2 Geo. V, c. 4.

¹³ 40 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 537 (1913).

¹⁴ 36 A. B. A. REP. 380 (1911).

¹⁵ Act of 1911, Conn. Gen. Stat. (1918), § 3107.

¹⁶ Act of 1913, Mass. Gen. Laws (1921), c. 90.

¹⁷ WOODHOUSE, TEXTBOOK OF AERIAL LAWS, 136.

^{17a} *Ibid.*

¹⁸ 40 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 1385 (1913). A translation of this Convention appears in WOODHOUSE, TEXTBOOK OF AERIAL LAWS, 11.

flight and by this assumption testified to their belief in the sovereignty of a state over the superincumbent air-space.

Meanwhile the controversy among students of international law had continued unabated. In the United States where interest did not fully awaken until 1910, the opinions of the foremost students of aerial law favored the sovereignty theory. Their conclusions are perhaps best stated by Wilson:

"It would seem that physical safety, military necessity, the enforcement of police, revenue and sanitary regulations, justify the claim that a state has jurisdiction in aerial space above its territory. This position also seems to underlie established domestic law and regulations, the decisions of national courts, the conclusions of national conferences, and the provisions of international conventions."¹⁹

The theory of freedom of the airspace was not without its adherents, however, although their desire seems to have been, as Lycklama earlier remarked of other proponents of this theory, to assure an unimpeded navigation rather than to create an absolute freedom of the airspace.²⁰ In Italy Catellani maintained aerial freedom subject to certain protective rights in the ground state;²¹ and the Madrid Session of the Institute of International Law, in 1911 accepted the theory of free circulation²² as did the Comité juridique international de l'Aviation at its Paris Session, 1911.²³ The International Law Association, standing alone among the learned expert bodies, went on record at its meeting in Madrid in 1913 as approving state sovereignty.²⁴

¹⁹ Wilson, *op. cit. supra*, note 10 at p. 179. See also Baldwin, *The Law of the Airship*, 4 AM. J. INT. L. 95 (1910); Kuhn, *op. cit. supra*, note 3; Myers, *The Sovereignty of the Air*, 24 GREEN BAG 229 (1912), and *The Practical Solution of the Problem of Sovereignty in Aerial Law*, 26 GREEN BAG 57 (1914).

²⁰ Lee, *Sovereignty of the Air*, 7 AM. J. INT. L. 470 (1913). For a review of the theory of freedom, see Myers, *Freedom of the Air*, 24 GREEN BAG 430 (1912).

²¹ CATELLANI, IL DIRITTO AEREO, 1911.

²² ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 346 (1911). See note 10, *supra*.

²³ 38 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 1404 (1911).

²⁴ Report of the 28th Conference of the International Law Association, 533 (1913).

Thus unsolved stood the question of sovereignty of the air. Legislation and treaty had assumed sovereignty in order to carry out their projects; eminent legal minds faltered over the freedom essential for the development of international aerial communication and the sovereignty essential to the safety and protection of the underlying state. In this undecided position, wavering now toward one view, now toward the other, the problem stood at the declaration of war in 1914. Almost instantly the question was answered. Germany stated as a *casus belli* that French aviators had penetrated her aerial domain and violated the neutrality of Belgium.²⁵ Aerial frontiers were closed with a bang and neutral states proclaimed the integrity of their aerial as well as their land and water frontiers. With conclusive decisiveness the war in the air forced the nations to accept unqualifiedly the theory of absolute sovereignty and to adhere to this policy throughout the struggle.²⁶

Less than two years later the Pan-American Aeronautic Federation at a meeting held in March, 1916, at Santiago, Chile, approved absolute sovereignty for the Western Hemisphere by its recommendations that airspace be declared state property and that states have sovereign rights over the spaces above their respective territories.²⁷

The tremendous development in aeronautics brought about by the war had enforced this view upon all nations. That it was the only theory compatible with the independence and inviolability of a sovereign state was so manifest that, when the Peace Conference appointed as a subcommittee the Commission on International Air Navigation, that body set forth as the opening provision of its Convention:²⁸

²⁵ FRENCH YELLOW BOOK, Nos. 147, 148.

²⁶ Instances when the principle was asserted are collected in SPAIGHT, AIRCRAFT IN PEACE AND THE LAW, pp. 203-215.

²⁷ WOODHOUSE, TEXTBOOK OF AERIAL LAWS, 12.

²⁸ For a copy of the Convention as originally drafted, October 13, 1919, see SPAIGHT, AIRCRAFT IN PEACE AND THE LAW, 137; Lee, *The International Flying Convention and Freedom of the Air*, 33 HARV. L. REV. 23 (1919); as revised May 1, 1920, WOODHOUSE, TEXTBOOK OF AERIAL LAWS, 51; 17 AM. J. INT. L. SUPP. 195 (1923). The Annexes which contain the technical rules drawn by the Commission are set forth in SPAIGHT, *op. cit.*, p. 149 *et seq.*, and WOODHOUSE, *op. cit.*, p. 21 *et seq.*

"Article 1. The High contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory.

"For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto."²⁹

In order that international aerial communication should not be unduly impeded by the exercise of sovereignty, it was provided, however:

"Article 2. Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed."³⁰

The Convention, therefore, recognized the absolute sovereignty of the subjacent state in the airspace but for practical reasons made aerial navigation free to the craft of the signatory nations, following, it is pointed out by Kuhn,³¹ "the principle championed by Westlake at the 1906 Session of the Institute."³² This right of innocent passage has been likened to "the right of one state freely to navigate an international river flowing from or through its own territory into a foreign state."³³ The recognition of this right of passage is but the first of the many examples of the practicable and sensible rules and regulations provided by the Convention.

As the first international Convention adopted by the leading nations, the Convention of 1919 is signal in its achievement. It lays down the general principles of jurisdiction, recognizing prohibited areas and providing that regulations as to foreign aircraft

²⁹ Convention Relating to International Air Navigation, Art. 1 (1919).

³⁰ *Ibid.*, Art. 2.

³¹ Kuhn, *International Aerial Navigation and the Peace Conference*, 14 AM. J. INT. L. 369 (1920).

³² Note 7, *supra*.

³³ Kuhn, *op. cit. supra*, note 3 at p. 114; *idem, op. cit. supra*, note 31.

shall be without discrimination. The nationality of aircraft shall be that of the state of registration which shall be that state to whose nationals the craft wholly belongs, or if owned by a corporation, that state of which the president of the company and two-thirds of the directors are nationals. Aircraft shall display their nationality and registration marks. Registration of and certification of the airworthiness of the aircraft and certification of the competency of the pilot are required, which certifications shall be recognized as valid by all contracting states. International routes shall be designated and a foreign craft may cross a state thereon without landing, but landings when made shall occur at designated aerodromes. Nationals may be favored in intrastate commerce. Foreign aircraft *en voyage* are not subject to seizure for patent infringements if a deposit of security is made. Rules regarding landing, departure and prohibited transport are provided. As originally drafted the Convention provided that, while in flight, the law of the state of nationality of the craft should govern the legal relations between persons on board, though the state flown over was given jurisdiction of a breach of its police or military laws and of crimes and misdemeanors committed against one of its nationals when followed by a landing within that state; upon revision this article was deleted and no similar clause provided. Definition is made of military, public, and civil aircraft and provision for international flight of state aircraft is made. The International Commission for Air Navigation is created and placed under the direction of the League of Nations, provision made for its membership and power given it to collect and disseminate information, to modify the annexes and to settle disputes arising from the construction of the regulations. Provision is made for modification of the Convention and for the determination of disputes arising thereunder before the Permanent Court of International Justice. Exhaustive provisions are set forth in the eight annexes to the Convention regarding the marking of aircraft, the certification of airworthiness, log books, rules as to lights, signals and flight, which are strikingly similar to maritime rules, the qualifications of pilots, aeronautic maps and ground markings, the

collection and dissemination of meteorological information and customs.³⁴

"The Magna Carta of the air," which was to become effective upon the exchange of ratifications by the signatory states, was signed by all the Allied and Associated Powers, including the United States, though with reservations, and was ratified by the European non-neutral states. The United States Senate failed to ratify, however, and it was by the courtesy of Canada that international flights were made between the two nations. Article 5 provided that

"No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State."

Because of this article, Norway, Sweden, Denmark, Holland and Switzerland declined to adhere to the Convention since it would prohibit them from admitting into their airspace ex-enemy aircraft, ex-enemy states not being permitted to adhere to the Convention before January 1, 1923,³⁵ and since they had not been granted the right of flight over the ex-enemy states as the belligerents had been by the treaties of peace, their aircraft might be shut out in retaliation. As a consequence a Protocol to the Convention, under date of May 1, 1920, permitted "derogations" from Article 5 by states that accepted the Convention in other respects.³⁶ By this Protocol special and temporary authorization might be given to such states for the flight of aircraft of specified non-contracting states over their territory.

Great Britain ratified the Convention by the Air Navigation Act, 1920.³⁷ This bill repealed all former legislation from the

³⁴ For a discussion of the Convention, see Lee, *op. cit. supra*, note 28; Kuhn, *op. cit. supra*, note 31; Richards, Hazeltine and Nyeholt, Report of the 29th Conference of the International Law Association (1920), p. 377 *et seq.*; Lacey, *The Law of the Air*, 7 GROTIUS SOC. PAPERS 73 (1921).

³⁵ Convention, Art. 44 (1919); as revised, Art. 42.

³⁶ *Protocol to Convention*, 17 AM. J. INT. L. SUPP. 212 (1923). The Convention is now effective in 15 independent nations. F. P. Lee, *The Air Commerce Act of 1926*, 12 A. B. A. JOUR. 371 (1926).

³⁷ (1920) 10 & 11 Geo. V c. 80.

original Aerial Navigation Act of 1911³⁸ empowering the Secretary of State to prohibit flight over prescribed areas during the ceremonies attending the coronation of King George, through the Aerial Navigation Act of 1913³⁹ extending those areas and empowering him to issue orders, the Air Force (Constitution) Act, 1917,⁴⁰ which did not concern civil aviation, and the Aerial Navigation Act, 1919,⁴¹ regulating aerial navigation and extending the powers of the Air Council to civil aviation. The Air Navigation Act of 1920 empowered the carrying out of the Convention, 1919, by such Orders in Council to extend to all British possessions except the self-governing dominions and India as might be necessary, applicable to all aircraft within airspace subject to British jurisdiction, for certification, registration and regulation of aircraft, aerodromes, landing fields and airways and for licensing aeronauts. It extended the scope of the Air Council "to include all matters connected with air navigation" and provided that admiralty jurisdiction should be applicable to aerial navigation where feasible. It altered the law of trespass and prevented actions lying for trespass unless damage were done. This Act and regulations promulgated thereunder are in force in Great Britain at the present time.

On June 6, 1919, the Canadian Air Board Act⁴² became effective. It created an Air Board of wide powers and provided for the regulation of aerial navigation in a manner similar to that of the Air Navigation Act, 1920, of Great Britain. New Zealand had adopted a code for aerial navigation in 1918 and India in 1911.⁴³

In the United States, once the question of sovereignty had been settled, legal minds became involved in the controversy of federal versus state control. It was generally conceded that the development of aviation needed uniformity of laws, but the Constitution presented a stumbling block that could not be ignored.

³⁸ (1911) 1 & 2 Geo. V c. 4.

³⁹ (1913) 2 & 3 Geo. V c. 22.

⁴⁰ (1917) 7 & 8 Geo. V c. 51.

⁴¹ (1919) 9 Geo. V c. 3.

⁴² (1919) 9 & 10 Geo. V c. 11.

⁴³ 6 CORN. L. Q. 284 (1921).

The Conference of State and Local Bar Associations of America met in 1919 and passed a resolution declaring it to be the sense of the Conference that the jurisprudence of aeronautics and aerography would properly lie within the admiralty jurisdiction of the United States.⁴⁴ This view was strongly advocated by William Velpeau Rooker in his scholarly reports submitted to the committee, of which he was chairman, appointed by this Conference.⁴⁵ A bill introduced to Congress in 1920 was based on this view.⁴⁶

When a committee report brought the subject before the American Bar Association at its annual meeting in 1921, a veritable storm of debate broke forth.⁴⁷ There came forward proponents of the view that the admiralty clause of the Constitution would include aeronautics; there were advocates of the commerce clause; some lawyers favored the treaty-making powers; and some advanced the war powers. The ancient and time-honored doctrine of *cuius est solum ejus est usque ad coelum* worried many into believing that only a constitutional amendment would enable the Federal Government to act; and others looked to the exercise of the power of eminent domain to secure airways that Icarus might fly. The report of the Committee on the Law of Aviation adopted at that session of the American Bar Association, recommended a constitutional amendment as the means of securing uniformity in aerial law.⁴⁸

The following year the Committee on the Law of Aeronautics recommended

“That until Congress has enacted legislation fostering and regulating aeronautics and until the Supreme Court has determined the extent of federal control over aeronautics

⁴⁴ Rooker, Letter to the Committee on Jurisprudence of Aeronautics and Aerography, Jan. 5, 1920.

⁴⁵ *Ibid.*, and his Letter, July 1, 1920.

⁴⁶ H. R. 14601.

⁴⁷ 46 A. B. A. REP. 77 *et seq.* (1921).

⁴⁸ For an exhaustive study of the then-existing status of aerial law, see *Report of the Special Committee on the Law of Aviation*, 46 A. B. A. REP. 498 *et seq.* (1921). For a presentation of the various views, see 46 A. B. A. REP. 77 *et seq.* (1921); Zollman, *Governmental Control of Aircraft*, 53 AM. L. REV. 897 (1919); Rooker, Letters, note 45, *supra*; Bogert, *Problems in Aviation Law*, 6 CORN. L. Q. 271 (1921); MacCracken, *Air Law*, 57 AM. L. REV. 97 (1923).

no further consideration be given to the question of a constitutional amendment to vest exclusive jurisdiction over aeronautics in the federal government,"

and urged the coöperation of the members of the Association in securing state and federal legislation favorable to the development of aeronautics.⁴⁹ Since that time the efforts of the Association have been directed toward accomplishing this purpose by cooperating with the Commissioners on Uniform State Laws, the Department of Commerce and other bodies seeking to establish uniformity of aerial legislation.

Meanwhile, the Commissioners on Uniform State Laws were actively engaged under the able direction of Dean George G. Bogert of the Cornell University School of Law in preparing a draft of legislation to be presented to the legislatures of the several states in an effort to replace their scattered and haphazard enactments by an adequate and uniform aerial law. The draft of the Uniform State Law for Aeronautics was adopted by the Commissioners in August, 1922,⁵⁰ and thereafter introduced in various state legislatures. This act declares sovereignty in the airspace to rest in the State except where granted to the United States, and ownership therein vested in the subjacent surface owners. Flight is declared lawful when it does not interfere with the use, enjoyment or safety of property or persons beneath. The act provides for the absolute liability of the owner of aircraft for damage caused thereby and creates a lien on the craft to the extent of the injury. It provides for collision and places the aircraft and its occupants within the jurisdiction of the state over which it may be flying at the time of the commission of any crime or tort or the entering of any contract. Dangerous flying and hunting from aircraft are made misdemeanors.

During the years while Federal legislation was under consideration eighteen States and Hawaii followed the example set

⁴⁹ *Report of the Committee on the Law of Aeronautics*, 47 A. B. A. REP. 413 (1922). The view that the federal and state governments should act in conjunction had been advanced by Dean Bogert in 1921. Bogert, *op. cit. supra*, note 48.

⁵⁰ Handbook of Commissioners on Uniform State Laws 24 (1922).

by Connecticut in 1911 and enacted aerial navigation laws. Of these, ten accepted the Uniform Aeronautics Act,⁵¹ and it was under discussion in several more. Regulatory laws covering such subjects as registration and inspection of aircraft, licensing of operators, and air traffic rules were passed by nine others,⁵² while miscellaneous enactments had been approved in other states.⁵³

The efforts of the American Bar Association, manufacturers of aircraft, operators of aerial lines and others interested in the development of aeronautics culminated in the enactment by the Sixty-ninth Congress of the Air Commerce Act of 1926.⁵⁴ Registration is provided for on conditions similar to those outlined in the International Air Navigation Convention, and is mandatory for aircraft engaged in commercial flight if any of the transportation is interstate or international and for aircraft undertaking interstate flight in the furtherance of or to operate in the conduct of a business. Inspection or examination of aircraft and operators is compulsory for registered craft, and provision is made for the inspection of airports, airways and equipments. Domestic commercial flight is confined to domestic aircraft and provision is made for reciprocal privileges in foreign commercial flight. Air traffic rules are made applicable

⁵¹ Del., Laws 1923 c. 199; Idaho, Laws 1925 c. 92; Mich., Laws 1923, No. 224; Nev., Laws 1923 c. 66; N. Dak. Comp. Stat. Ann. (Supp. 1925), § 2971 c. 1; S. Dak., Laws 1925 c. 6; Tenn. Ann. Code (Supp. 1926), § 1616a12; Utah, Laws 1923 c. 24; Vt., Laws 1923, No. 155; Haw. Rev. Laws 1925 c. 214.

⁵² Calif., Laws 1921 c. 783; Conn., Laws 1925 c. 249; Kan. Rev. Stat. (1923) c. 3-106; Me., Laws 1923 c. 220, amended by Laws 1925 c. 185; Mass., Gen. Laws (1921) c. 90, amended by Mass. Gen. Laws (1922) c. 534; Minn., Laws 1921 c. 433, and Laws 1925 c. 406; N. J. Comp. Stat. (1 Cum. Supp. 1911-24), §§ 15-6; Ore., Laws 1921 c. 45, amended by Laws 1923 c. 186; Wis. Stat. (1925) c. 35.

⁵³ N. Y., Laws 1921 c. 408, § 70(9) amended by N. Y., Laws 1923 c. 814 (permitting incorporation of casualty insurance companies to write aerial risks); N. Y., Laws 1926 c. 673 (exempting from taxation municipally owned public flying fields situated outside the municipal limits); Act of 1923, P. L. 295, Pa. Stat. (Supp. 1924), § 460a and Act of 1923, P. L. 296, Pa. Stat. (Supp. 1924), § 460b (empowering counties and cities of the second class to acquire land by lease, purchase or condemnation for the construction of flying fields), and Act of 1925, P. L. 614 (empowering cities of the first class to acquire land for the same purpose).

⁵⁴ Public No. 254, 69th Cong., approved May 20, 1926. For a review of previous attempts to pass a federal enactment, see F. P. Lee, *The Air Commerce Act of 1926*, 12 A. B. A. Jour. 371 (1926).

to all aircraft and include navigation, protection and identification of aircraft. The act provides that customs, immigration and public health laws shall be made applicable to air commerce. Enforcement of the act has been provided by penalties imposed in a manner similar to the administrative means used in the enforcement of customs and navigation laws. Penalties are to be collected by proceedings which shall conform to, but shall not be admiralty proceedings. Air navigation facilities and equipment are provided for and placed under the supervision of the Department of Commerce.

The long awaited enactment has, by its distinctions, based congressional authority to act upon the commerce clause of the Constitution. It has avoided regulating local flight except where such flight affects interstate or foreign commerce, and the air traffic rules, although they are applicable to all aircraft, will probably be upheld on the grounds of congressional authority to act wherever it is necessary to protect interstate or foreign commerce from unjust burdens and discrimination. It does not answer the question raised by the maxim "He who owns the soil owns to the heavens above," but it asserts a freedom of navigation superior to the landowner's rights in the superjacent airspace. Wisely, the administrative work has been delegated to the Secretary of Commerce whose regulations, while enjoying the force of congressional enactments, possess the flexibility necessary to assure rules which will further the advancement and conform to the needs of a rapidly developing industry. The expansion of aviation under the new law has been immediate and promises even more remarkable growth in the not distant future. Its enthusiasts look upon the recent legislation as opening for the art of flying, a new and golden era.

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