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Modern Developments in Aviation Law, National and International.

By John H. Wigmore

Introduction. Keiogijuku, founded by the great Fukuzawa Yukichi, has always symbolized progressive ideas. I hope that my lecture will be in harmony with the spirit of its founder.

Mankind has always felt the urge of progress, especially in power over Nature. In language, for example, mankind was not satisfied with spoken words, so he invented writing for communication at a distance. Not satisfied, then he invented the wire telegraph, then the wire telephone, then the radio-telegraph and the radio-telephone and the telephotograph.

So also in travelling. Not satisfied with the ox-cart, he developed horse-power. Then he invented the steam-railway and steamship, then the electric railway. But still, not satisfied with travel on land, he has now invented the mechanism for travel in air, the air-ship.

But as each new invention brings a new form of social activity, so then must be new laws, because every form of social activity requires regulation by law. Hence, for travel in air, there must now be a new law of the air.

Subject. When I came here forty years ago, it was because the great Fukuzawa wished to open the minds of Keiogijuku students to the new subject of Anglo-American law, in the new department of Daigaku. So now, after 40 years, I shall again fulfil the purpose of the great Fukuzawa by telling you some of

the most recent progress in that field of law, I mean, specially Aviation.

In traveling here this time I crossed the Pacific Ocean by water-ship. But if I were to live long enough to come here again after another 40 years, I should undoubtedly travel here across the ocean by air-ship. By that period, travel over long ocean distances will be usually made by air-ship. At present, however, this mode of travel is entirely novel. Hence the law of such travel is new. It is just beginning to be developed. But by the time these students are mature men, they will be using that law in the Courts. Hence it is important for them now to begin to study the legal problems that arise from air traffic.

What are those problems?

Classification of Problems. Those problems fall into two general classes, first, problems of international law, and next, problems of national (or domestic) law. International law deals with the rights and duties of nations towards each other. National law deals with two general fields; public law,—that is, the control of the individual by the State; and private law,—that is, the rights and duties of individuals to each other. I shall mention the problems in the above order.

I. International Law. 1. In International Law, the first principal question for aviation is this: Must one nation allow the air-ship of another nation to come freely into the air-space over the first nation's territory? Already for marine and land travel, this question was answered plainly in the negative. Each nation is owner of 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 own the air-space above its territory as it owns 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 60 jurists, who at their meetings attempt to formulate the principle of international law. But when the Great War came, in 1914-1918, it was perceived that national defence would be endangered, if the airspace over each country could be freely entered by airships from another nation. Hence, the opinion of jurists was changed. It is now unanimously agreed that each nation has the same sovereignty over the airspace above that it has over the territory below. This is now the international law agreed upon by every nation.

2. But now a second problem arises. Commercial activities in the air would be obstructed unless the nations permitted free commercial 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 fulfil necessary conditions of safety. Therefore, international conferences have been held, to agree upon uniform conditions of safety for foreign civil aircraft to be admitted freely.

Such a conference was last held at Paris, France in 1919, at which time by international convention a committee was organized, to adopt uniform rules. The United States was a party to that convention. I do not remember whether Japan is a party to it. The Committee thus organized is known by its French name, Comité International de Navigation Aérienne, but usually it is named by the initials C I N A.

The principal condition adopted by that Convention is that the civil airship 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. In other words, both ship and pilot must be licensed by the country of origin. 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 convention. Hence, civil airships of other countries do not obtain the benefit of this convention; they must in each case obtain permission to enter.

3. However, a third principal question arises, viz. How shall we know to what country an airship belongs? That is, how is the nationality of an airship determined?

To answer this question, the analogy of marine ships has been adopted. Nationality is determined by 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.

4. But there remains one further limitation. The permission to a foreign civil airship to come into a country extends only to its arrival in the country and its travel in the air space for private purposes. It cannot engage in 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 ship is not entitled to engage in coastwise commerce in Japan, nor a Japanese ship in coastwise commerce in the United States. The same will be true of foreign airships. Each country will limit the internal commerce to ships of its own nationality. Such are the main problems of International Law that arise in regard to aviation.

The other field of such problems is National Law. But these problems fall into two groups, problems of Public Law and problems of Private Law.

II. National Law.

1. **Public Law.** The problems of public law involve the answers to the question: How far should the State regulate and control air traffic?

(1) The first problem is that of safety. Airships are as safe as marine ships if they are properly constructed and properly managed. In every country, the State regulates the construction and management of marine ships; therefore it would naturally do the same for airships. This is effected by granting a license, after due inspection. Safety of airships requires safety to passengers and goods, and safety to persons and property on land beneath the ship. Safety requires four kinds of precautions:

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

(b) Next, each particular airship, when completed, must be inspected, to determine whether it fulfils the 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, such as physicians, engineers, marine officers, etc.

(d) And finally, the airship 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 Bureau of Commerce 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 high Rocky Mountains from Chicago to California, the railway travelers can perceive at night these electric beacons on the high peaks, placed there to guide the air pilots at night.

(2) But there remains one more question of public law, viz: Should the Government allow any person whatever to conduct a regular line of airships for commercial transport? In other words,

should competition be unlimited? The Government does not allow unlimited competition in building railways on land; why should it not adopt the same policy for air commerce?

Hitherto in the United States free competition has been allowed. But the new law, now under discussion, would adopt the opposite policy, viz. it would forbid wasteful competition.

2. **Private Law:** There remain the problems of private law, that is of the rights and liberties between individuals, involved in a nation: These I will mention briefly.

Naturally, these problems correspond 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 airship 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 nation 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.

(3) As to the airship owner's liability for damage done to persons or property on land beneath, by dropping things from the ship or by the fall of the ship, 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 ship. Probably, when the law is finally settled, the theory of liability for fault only will prevail. But at present, in the United States, no rule has been finally adopted.

3. International Private Law. However, one important problem remains. Suppose that on one of the foregoing kinds of liability, the law of one nation differs from that of another nation, which national law shall apply in case of passengers or goods carried from one country into the other? For example, to an airship traveling from Mexico to the United States, or from England to France, or from the United States to Japan? It would be very confusing, when the injury is done to a passenger or goods in England, during transit to France, if the rule of law should be different according to whether the suit were brought in England or in France.

For this reason it is important that the different nations should attempt to agree upon uniform rules of liability so that the law in all countries should be the same.

For this purpose an international conference of government delegates was held at Warsaw, Poland, in 1929. At that conference a committee was appointed to prepare a convention establishing a uniform law in all nations. This convention has not yet been adopted by either the United States or Japan, but only by some European Nations. However, the committee continues to study the subject, so as to secure ultimately the agreement of all nations. It is important to remember the name of this committee, which in French is called Comité International Technique d'Expertise Juridique Aérienne, meaning, International Technical and Legal Aviation Committee. The initials of the French name are C I T E-

J A, and it is usually known by these initials. The other committee, first mentioned by me, which deals with public law, is called C I N A; this second one, dealing with private law, is called C I T E J A. They must be carefully distinguished.

So, to conclude, let us hope that by the time the law students of today in Japan are practising their profession in the Courts, both Japan and the United States will have become parties to the world-conventions formulated by the C I N A and the C I T E J A.