LIABILITY FOR ACCIDENTS IN AERIAL NAVIGATION.

IT cannot be long before the American courts will be called upon to decide whether, under the principles of the common law, aeronauts, who cause damage by a descent to the earth, are liable at all events, or only when chargeable with negligence or want of skill.

Is there a right to navigate the air, corresponding to the right to navigate the sea?

Navigable waters are no man's property. Nor, for practical purposes, can it be fairly claimed that property in the soil carries title to the entire and illimitable air space above it. It does, no doubt, carry a title to occupy a part of that air-space with buildings attached to the earth. But the limitations of social conditions, if not of mechanical forces, restrict the height of any structure of such a nature. Nothing seems ever likely to be built that shall exceed in height two or three times that of the Eiffel tower, at Paris. But this does not answer the main question. A right to navigate the air is to be measured not simply by the extent of the right of the proprietors over whose land a flight is made, but by the extent of the right of any person who may be injured in consequence of such a flight. If we were to grant that a fall of an air-ship upon a land-owner would give him, as such, no special cause of action, would he not have one as an individual human being; and would not every individual human being, who or whose property might be struck by the falling ship, have a remedy for any resulting damage?

If I fire off a rocket at night, during a Fourth of July celebration, and the rocket stick in coming down strikes my neighbor in the eye and blinds him, can I defend against his claim for damages on the ground that I fired it high in the air, in the usual manner in which rockets are discharged, and with no intention of injuring anybody? I have engaged in a dangerous business. The rocket stick would naturally come down somewhere. The chances were that it would harmlessly strike the ground; but who was to risk the chances that it would not, he or I?[1]

An aeronaut, for his own advantage or amusement, flies over a town, and accidentally falls, causing injury to life or property as he reaches the earth. He is engaged in a dangerous pursuit: dangerous to himself and others. If unprotected by any authority of positive law, he ought to be held responsible for whatever misadven-

[1] See Vosburgh v. Moak, 1 Cush. 453; Scanlon v. Wedger, 156 Mass. 462; 31 N. E.

tures, of a kind not unusual in such a pursuit, may befall him. In other words, it would seem that the aeronaut must absolutely assume, on principles of general jurisprudence, the risk of any such accident causing loss to others.

The only three rules of law, according to the Romans, were: "*Honeste vivere; Alterum non laedere; Jus suum cuique tribuere;*"[2] and the common law re-states the second thus: *Sic utere tuo ut alienum non laedas.*

The fundamental thought here is that one must not injure another. If he injure him, though unintentionally, he must answer for it. The mandate is not that he shall use due care not to do a certain thing. It is that he shall not do this thing.

No doubt this is a doctrine not to be pushed to its logical extreme. If a man, while doing a lawful act in a lawful way, injures another, or is the cause of an injury to another, it may be a case of *damnum absque injuria.* If I fire a pistol in self-defense, and the shot hits a third party, I shall not be liable to him, unless he can show carelessness or folly on my part.[3] But here I am doing what I have a right to do, as against all the world. I am doing something to be naturally expected in the course of human affairs. Up to the twentieth century at least, the sudden descent of an air-ship from the skies was not a thing to be naturally expected. Such a vehicle of transportation, used in such an element, appears in a very different light from an ordinary vehicle of commerce by land or water. It is a dangerous object, of a kind not fully subject to human control. If somebody must suffer from a collision with it, it should not be any unfortunate individual whom it chances to strike, but rather the person who put the cause of injury in motion.

So far as balloons are concerned, this has been always assumed as law.[4] The heavier-than-air machines of the present day are still more dangerous to public safety. It may not be unlawful to use them; but he who ventures on their use must be held responsible for its natural consequences, and can hardly shelter himself, because the immediate cause of injuries done may have been an unexpected gust of wind.

In countries where a code has replaced the customary law, we generally find that an injury done without fault imposes no liability,[5] though, as in the Aquilian law, the least fault is sufficient.

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[2] Inst. I, de Justitia et Jure I.

[3] Morris v. Platt, 32 Conn. 75.

[4] Guille v. Swan, 19 Johns. 381.

[5] See Code Napoleon, Art. 1383; Italian Civil Code, Arts. 1151, 1152; Civil Code of Japan, Art. 709; German Civil Code, Art. 823.

This subject was discussed with some fulness, at a *"Congresso Giuridico Internazionale per Regolamento della Locomozione Aera,"* held at Verona, Italy, in May and June, 1910.

In a preliminary study submitted by Dr. Gustavo Sarfatti the rule of unconditional liability was vigorously supported. Some of his contentions may be thus stated:

If the voyage were made from an aerodrome, under the charge of a committee of organization, they should be personally responsible; if the vehicle and its conductor were supplied from a garage, for hire, the owner of the garage should be responsible. The one governing rule should be that aeronauts fly at their own risk, or "Responsibility without Fault." If two air-ships should collide, the damages should be divided, either equally or unequally, according to the circumstances and the relative degrees of fault, if any.

For these purposes, the public should be protected by a guaranty fund.

Spectators at an aviation meet should forfeit their right to compensation for injury, who so transgress the rules of the meet as to put themselves in a position of special danger.

The Congress of Verona did not adopt Dr. Sarfatti's views. Its conclusions on this point may be thus summarized:

In view of the actual state of the art of aviation, indemnity is due in case subjective responsibility (direct or indirect) is created by the common law, and also for damages received from the exercises of any special right given by law (such as the right to land). It is deemed necessary that a minimum of guaranty for the due conduct of an air-ship voyage be required; but it should not exceed that limit, so as not to impede the development of aerial science.

Subjective is here used as distinguished from *objective,* as presupposing some fault on the part of the aeronaut, and not holding him liable for every consequence of his engaging in the voyage.

But are these conclusions of the Verona Congress sound, under the principles of the common law?

An air-ship which descends on a house and tears off the roof does the owner an injury. Of what consequence is it that the aeronaut did not mean to strike it, but was endeavoring to light in a field beyond? He must answer for what he did. He undertook to launch into the air, for his own purposes or pleasure, something which the force of gravity would certainly constantly be dragging downward. It did drag this thing down upon this roof. The thing was, while in the air, inherently and continually a menace to the security of everything beneath it. It was a thing of danger to all men and to the property of all men.

If I have a fancy to keep a tiger caged in my parlor, as a household pet, I am responsible if he gets into the street, although it was some casual visitor who left the cage door open. I kept him at my own risk. If I store up water in a reservoir to irrigate my farm, and the dam bursts, I may be liable to those whose houses are swept away by the escaping flood, although the dam was well and carefully planned and built. I put it up at my own risk.[6]

The analogy between driving an air-ship through the air and driving a vessel through the water, or a wagon over the land is, in the nature of things, an imperfect one.

The force of gravity holds the vessel to the water, the wagon to the earth. Their normal position is one of safety. But this same force, as suggested above, is continually pulling the air-ship to a fall, and making its normal condition one of danger to all upon or below it.

A franchise to navigate the air might probably, in the absence of any constitutional inhibition, be given to me by the state, which would be a protection, except in case of negligence or wilful fault.[7] But this would be because the law had been thus altered in my favor. Every franchise gives a special privilege which otherwise would not be enjoyed. It is defensible as a means of promoting the public good. To secure that, individual interests must often suffer some impairment.

But might not, under our political system, a franchise for aviation set up, as a justification for an unintended injury, be put aside by the courts, on the ground that, if given that effect, whether it came from the state or from Congress, it would deprive the injured party of his life, liberty, or property, without due process of law? That phrase in our Constitution is an elastic one, and there are few wrongs which it has not in principle been construed to reach.[8]

So too, as respects any state franchise, the provision of the Fourteenth Amendment to the Constitution of the United States is to be reckoned with, which guarantees to all within the jurisdiction of a state the equal protection of the laws. Can an aeronaut be legally protected from the damage which he may do, when other people in other lines of action are not?

On the one hand, it is true that aviation is an art of great promise, and capable of producing great good to the public. It is, under favorable circumstances, the quickest mode of locomotion yet invented. If a railroad train can be run as fast, it is only when all the

[6] Rylands v. Fletcher, L. R. 3 H. L. 330.
[7] Canadian Pacific Ry. Co. v. Roy, [1902] A. C. 220.
[8] The Courts as Conservators of Social Justice, 9 Colum. L. Rev. 507.

conditions of safety, as respects track, grade-crossings, switches, and signals, are fulfilled. But an aeroplane sails without being tied down to a track, and can start in any direction, at a moment's notice.

On the other hand, the aviator is continually risking a fall, from the stoppage of his machinery, or the violence of the wind, and such a fall may bring fatal injury to anyone who is struck in consequence of it.

Absolute liability for all such consequences, on the whole, seems the fairest rule, in the present state of the art.[9] It should be perfected at the risk of those professing it, and not of the general public.

It may be that the courts will adopt a *via media* by requiring of the aeronaut a degree of care similar to that demanded of a common carrier of passengers. He would then be held for negligence if he did not use the utmost vigilance; exercising all the care and forethought, to prevent injury to anyone, that could reasonably be exercised, consistently with the nature of the mode of conveyance and the practical operation of his vehicle.

If these conclusions are sound, no franchise should be granted for aviation which would carry exemption from liability to those injured by its exercise.

Undoubtedly, some form of written, public authorization should be given and required. No one can safely be allowed to navigate an air-ship who has not been found, by some one legally empowered to decide, to be a competent navigator for such a craft. But this paper should be in the nature of a license, rather than of a grant of special privilege. For voyages within a state, state officials should be the examiners as to the proper qualifications. For voyages between states, or to or from foreign parts, there should be United States examiners.

Nor should such a license be unconditional.

Aviators should not be permitted, except perhaps in special cases, to fly over thickly settled towns. In some parts of Germany, regulations to this effect have already been made.

An International Congress to settle Rules for Air-Ship Voyages, was held in Paris in June, 1910, at which nineteen powers were represented. At this it was resolved that aeronauts approaching a frontier ought to travel on prescribed routes, and descend, after crossing it, at designated points, for custom-house inspection; and that aviation over fortifications was inadmissible.

[9] The Law of the Air-Ship. 4 Am. Journal of International Law, 95.

Nor should a license be granted, unless some form of security be given that the aeronaut will answer for all damages directly resulting from his practice of his art. This might take the form of a bond with surety, so drawn as to operate for the benefit of whom it may concern; or of an insurance policy, payable in the same way. Any such paper should be filed in a public office, and approved by some public authority, as sufficient to serve the object in view.

The art of aviation has now been sufficiently developed to warrant and to call for such legislation as will fix the substantial rights, both of the aeronaut and of those who may suffer damages in consequence of his acts or omissions. It would be easier now to secure a uniform law in all the states than it might be later. The subject is one that might well be taken up by the Conference of Commissioners on Uniform State Legislation.

An Act of Congress in respect to inter-state and foreign voyages by air-ship would seem desirable, if such voyages are to be regarded as commerce. That they should be would seem to follow from the same reasons that justified applying that term, as used in the Constitution, to the telegraph and the telephone. Indeed the question might be regarded as one attended with less difficulty, since voyages by air-ships, that is balloons, from one country to another had been made, and become the subject of universal public interest, in 1784 and 1785, several years before the Constitution of the United States was framed.

A draft of a bill for such an Act was referred by the American Bar Association at its annual meeting last September to its Committee on Jurisprudence and Law Reform for inquiry and report.

This reads as follows:

AN ACT TO REGULATE COMMERCE BY AIR-SHIPS.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that

The term *air-ship* in this Act includes every kind of vehicle or structure intended for use as a means of transporting passengers or goods, or both, in the air.

The term *aeronaut* in this Act includes every one who, being in or upon any such vehicle or structure, or anything thereto attached, undertakes to direct its ascent, or course, or descent in the air.

The verb *to fly* and the word *voyage,* as used in this Act, include every kind of locomotion by an air-ship.

Sec. 2. No air-ship shall be flown from any point within the jurisdiction of the United States to a foreign country, or from any point within any State of the United States to any other State of the

United States, or from any point in any Territory of the United States to any other Territory of the United States, or any State of the United States, or any foreign country, except under the conditions prescribed in the following sections.

Sec. 3. It must carry and be in charge of an aeronaut, whose competency, as such, is certified under the authority of the United States.

Sec. 4. It must either carry a flag of the United States not less than six feet by ten in size, and display the same while over the territory of any foreign country, or it must have a copy of the flag, of not less size, painted on some part of the air-ship, so as to be visible to those who may be beneath it.

Sec. 5. It must have a number, in characters not less than three feet in height, painted on some part of the air-ship, so as to be visible to those who may be beneath it.

Sec. 6. It must be registered by this number in the office of the Collector of Internal Revenue for the district including the residence of the owner or charterer, or if such owner or charterer do not reside in any such district, then in the office of such collector for the district in which the voyage is to be begun by the ascent of the air-ship; and a certificate of the registry issued by said collector.

Sec. 7. The owner of the air-ship, or if he has let it to another for such voyage, either the owner or such charterer, shall, before the voyage is commenced, file in the office of such Collector a bond to answer for all damages that may result to any person or persons, as an incident of any voyage that said air-ship may make or attempt to make, either from the descent of the air-ship, or from the fall of the air-ship, or any part thereof, or anything that was on board of it, or from the trailing of anything in the nature of a guide-rope. Such bond must be a joint and several bond, signed by such owner or charterer and a sufficient surety, and shall be for such an amount, not less than $1000, as the Collector of Internal Revenue for the District wherein the air-ship is registered may order, and such Collector must also endorse the bond with his approval of the sufficiency of the surety. Such bond shall be payable to the United States of America; but any person claiming damages thereunder may bring suit upon it in any court having competent jurisdiction, whether a court of the United States or of any State or Territory of the United States, or of any foreign country, within the territorial jurisdiction of which court he claims that such damages were caused; or, at the option of such plaintiff, in any such court within the territorial jurisdiction of which he can make due service of process on the bondsmen or either of them. If such suit be terminated by a judgment for the

defendant, he shall recover the costs of suit from the party bringing such suit.

Sec. 8. The air-ship must carry, throughout any trip, a copy of such bond and of its certificate of registry, and of the certificate of the competency of the aeronaut, which copies shall be authenticated under the hand and seal of the Collector of Internal Revenue, in whose office the original of each must be filed.

Sec. 9. The aeronaut for the voyage, as an incident of which any damage may be claimed, shall allow any party claiming to be so damaged to make and keep copies of any or all of the papers mentioned in Section 8.

Sec. 10. The certificate mentioned in Section 3 may be granted by the District Attorney of the United States for any Judicial District, after such examination and tests as he may think fit to impose, to be conducted by himself or such persons as he may appoint or approve. It shall be signed by the clerk of the District Court of the United States in which he is Attorney, and authenticated under the seal of the court.

The expense of such examination, tests, and certificate, shall be paid by the applicant for such certificate, in advance, and if a certificate be refused, the fee for the certificate shall be refunded to him.

Sec. 11. Said bond may be limited to be in force for only one year from the date of filing, or for any other term exceeding one year. If not so limited, it shall be in force during the life of the air-ship therein mentioned.

Sec. 12. No minor shall receive a certificate of competency.

Sec. 13. Fees under this Act shall be collectible as follows.

To the District Attorney.

For the examination and tests provided for by Section 10, such sum as he may demand in any instance, not exceeding $25; for granting a certificate of competency, $5.

To the Clerk of the District Court.

For the issue of a certificate of competency under seal, $2.

To the Collector of Internal Revenue.

For filing each certificate of competency or bond, $1; for making, recording and certifying to each registry, $2; for authenticating a copy of either certificate or of the bond, $2; for approving or disapproving every bond offered for his approval, $5.

Sec. 14. Any violation of any provision of this Act by the owner or charterer of any air-ship, or by any aeronaut, shall be a misdemeanor, and punishable by a fine not exceeding $1000 or by imprisonment for not exceeding thirty days, or by both, at the discretion of the court.

An Act of this character would place interstate and foreign voyages by air-ships under considerable restrictions. But is not the safety of the public more important than freedom of experimentation in any new art of locomotion? Air-ship voyages are largely new commercial enterprises, undertaken to make money, under the patronage of those who by means of them hope also to make money for themselves out of profits of newspaper sales or gate receipts. A government which permits aeronauts to make flights in or to its territory comes by that very permission under a certain responsibility. It ought not extend such a permission into a franchise rendering legal what was not legal before, nor grant it at all except on terms giving some assurance that those who profit by it shall not profit at others' cost.

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