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AIRCRAFT MORTGAGE

A Study in Comparative Aviation Law of the Western Hemisphere

S. A. BAYITCH*

- I. *Prenda, Hipoteca and Mortgage*: (i) Civil law, (ii) Common law.
- II. *Sources of Law*: (i) Latin America, (ii) Common law countries (Canada and the United States).
- III. *The Agreement*: (i) Parties, (ii) Chattel, (iii) Debt, (iv) Form, (v) Possession, (vi) Registration.
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It is indeed fascinating to study reactions produced within a legal system faced with the task of regulating new phenomena. Where such reactions come as products of continuous growth, legal systems are able to supply the appropriate solutions through reliance on established patterns. Novel situations are absorbed by insertion within the web of existing law. Passing beyond the limit of that absorptive capacity are those instances where new problems arise so unexpectedly that no period of adjustment is available to cushion the impact. Legal systems presented with the difficult task of regulating new technical, social or economic devices will strive to preserve continuity. They will adjust rather than innovate, greater or lesser success depending on their flexibility. Only strong pressures can produce new legal ideas. Though such solutions be driven from well trod paths, they will still be crossed by long shadows from the distant past.

Such developments are exemplified by the law of aviation. Within one generation aviation went from a mere fancy to an effective, economical and accepted means of transportation. It flourished and took on solidity in an economy where credit financing is a basic characteristic. The more aviation relies on credit as an element of its economic growth, the more ingenious will be the devices invented and adopted. Thus it becomes

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possible to use as security any of the assets, corporeal and incorporeal, owned or controlled by the industry. Their methods range from the classical personal suretyship and real pledge, to the delicately balanced arrangements of conditional sales, equipment trusts, trust receipts, assignment of accounts receivable and, of course, various mortgage types of security.

Aircraft financing required no invention of new devices but only adjustment of already existing methods. Generally, they did not have to parallel the technical and economic progress of aviation because governmental auspices and public financing, in most countries, removed any need for recourse to private financing. It is, therefore, readily understandable that the only country forced into a position of real need for private financing was the United States. Here highly advanced credit techniques combined with detailed contractual banking arrangements accounted for most of the progress, statutory enactments having made only a modest contribution. In the other countries questions of aircraft financing arose not out of any pressing need, but rather from an academic interest in the novel field and an inherent tendency toward the creation of complete codes speculatively resolving all possible future problems. Their dogmatic overtones and the lack, in many jurisdictions, of a countervailing pragmatism are evidence of slight connection with reality.

In this country both the manufacturing and the transportation branches of the aviation industry have shown a continuous interest in the security aspect of aircraft financing. One case of really heavy capital investment in the industry came immediately after 1945, by which time the fundamental techniques of aircraft financing had already achieved stability.¹ Recent technical changes in aircraft engines have again triggered new and greater demands for capital. Pressing from this center new type aircraft will carry the need for properly secured financing into foreign countries. This added international dimension of the financing problem brings with it the acute need for internationally effective regulations and safeguards.

I. PRENDA, HIPOTECA AND MORTGAGE

The three main types of security in aircraft, the *prenda* (pledge), *hipoteca*, and chattel mortgage must first be identified. Historically, these institutions developed differently in both legal systems² in force in the Western Hemisphere, retaining characteristics inherent in the civil law on the one side and the common law on the other.

1. BANKERS TRUST COMPANY (J.O.), AIRLINE FINANCE (1945); BROWN & ASHBY, *Airline Financing*, 14 J. AIR L. & COMM. 460 (1947); BEEKEN, FINANCIAL STUDY OF THE DOMESTIC AIRLINE INDUSTRY AND AMERICAN AIRLINES (1954). See also Sharp, *Some Considerations on the Financing of the Air Transport Industry in the Jet Era*, 39 ROBERT MORRIS ASSOCIATES BULL. 25 (1956).

2. Wigmore, *The Pledge-Idea, A Study in Comparative Legal Ideas*, 10 HARV. L. REV. 321 (1896); Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1 (1890).

CIVIL LAW. A startling fact is manifested by the law in force in Latin America in regard to security interests in aircraft, namely that it still follows the principles of the early Roman law.³ As it is well known, Roman law developed three types of security in chattels: the early *fiducia cum creditore*,⁴ and later the *pignus* (pledge), and the *hypotheca*. *Pignus* was construed as based on a contract real (*re contrahitur*),⁵ meaning that the contract can be perfected only by the transfer of the chattel into the creditor's possession. On the other hand, the *hypotheca* was constituted as a simple lien on real and personal property, the security remaining with the debtor.⁶ *Fiducia*, on the contrary, brought into play the title which was transferred for security. At a later stage *fiducia* was replaced by the less stringent nondispossessory *pignus* and *hypotheca*. In the Corpus Juris Civilis⁷ *pignus* and *hypoteca* appear merged into one legal institution.

Faced with this variety of possible solutions, medieval Romanists disregarded the title shattering *fiducia* and gave preference to the dualism of dispossessory *pignus* for chattels and the nondispossessory *hypotheca* for real property. The French Civil Code adopted this solution.⁸ Directly therefrom, or, in some cases, indirectly from the Spanish Civil Code,⁹ the dual system of dispossessory *prenda* on the one hand and the *hipoteca* on the other, were adopted in the early¹⁰ and retained in the more recent Latin American civil codes.¹¹ Under this system the debtor lost the use

3. BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW, A COMPARATIVE SURVEY 314 (1952).

4. GAIVS 4, 182.

5. INSTITUTES 3.14.4

6. Propie pignus dicimus quod ad creditorem transit, hypothecam cum non transit nec possessio ad creditorem, DIGEST 13.7.9.2 (Ulpian).

7. Inter pignus autem et hypothecam tantum nominis sonus differt, DIGEST 20.1.5.1.

8. CODE CIVIL art. 2076 (Fr. 53rd Dalloz 1954).

9. CODIGO CIVIL art. 1863 (1889). Since then Spanish law has developed considerably. In pursuance of art. 14 of the *Ley de bases de la navegacion aerea* (1949), HERRERA Y ESTEBAN, LEGISLACION AERONAUTICA ESPANOLA (1951), adopting the principle that "aircraft are susceptible to *hipoteca*," in conformity with international conventions as well as with Spanish legislation regarding *hipoteca*, the validity depending on inscription in the mercantile register, the *Ley sobre hipoteca mobiliaria y prenda sin desplazamiento* (Dec. 16, 1954, BOLETIN OFICIAL DEL ESTADO, Dec. 18, 1954, text also in PECES-BARRA DEL BRIO, LEGISLACION ESPANOLA: LEYES MERCANTILES, app. 143, 1955) declared aircraft amenable to *hipoteca* (art. 12). ALVAREZ ROMERO, LA AERONAVE Y SU SITUACION REGISTRAL (1957); LOUSTAU, LA AERONAVE Y SU REGIMEN JURIDICO (1958).

10. E.g., CODIGO CIVIL arts. 1415, 1420 (Bolivia 1830); CODIGO CIVIL arts. 2384, 2386 (Chile 1855); CODIGO CIVIL art. 3734 (Nicaragua 1867).

11. E.g., CODIGO CIVIL art. 768 (Brazil 1916); CODIGO CIVIL arts. 2403, 2405 (Ecuador 1950); CODIGO CIVIL arts. 1837, 1891 (Venezuela 1942). For purposes of illustration, typical statutory definitions of both *prenda* and *hipoteca* follow. *Prenda* (pledge) is defined in the Mexican CIVIL CODE art. 2856 (1932), as an "interest in rem in a chattel susceptible of alienation, constituted to secure the performance of an obligation as well as preference in its payment," perfected when the chattel is "delivered to the creditor in fact or constructively" (art. 1857). On the other hand, *hipoteca* is defined as an interest of the same nature, but in land. However, the Mexican code adopted a more flexible definition stating that *hipoteca* is a "security in rem constituted in assets not delivered to the creditor, giving him the right to be paid with the proceeds of such assets according to his rank established by law, in case of default on the obligation

of the chattel whenever he pledged it as security. On the contrary, where the debt was secured by land, the use and profits remained, generally, with the debtor. When modern agriculture and industry, both well supplied with efficient machinery and other equipment, started to produce goods in unheard of quantities, the attitude of the law toward the chattels instrumental to such production underwent a fundamental change. In a number of Latin American republics nondispossessory security interests in agricultural and industrial equipment were introduced,¹² registration replacing the transfer of possession.¹³

With these innovations on their statute books, Latin American countries entered the air age. Their initial legislative handling of aviation was restricted, in the main, to administrative matters. Starting in the late 1930's aviation codes were enacted dealing exhaustively with all other aspects of aviation, including property rights and security interests in aircraft. Determined efforts were still needed to blaze new trails through the heavy undergrowth of sacred traditions. This clash between legal traditions and technical progress brought about a veritable array of statutory solutions.

Jurisprudentially the most conservative, but a precise and effective approach was adopted in Peru. There the traditional dualism of *prenda* and *hipoteca* remained untouched. The solution was by a simple reclassification of the aircraft from a movable to an immovable.¹⁴ By so doing, the statute subjected the aircraft, including security interests in it, to the law of real property and thus made the aircraft amenable to a nondispossessory type of security. It may be added that this real property cast, so unexpected in the law of aviation, is also to be found in other jurisdictions. Honduras¹⁵ and Nicaragua,¹⁶ for example, both prescribe that judicial sales of aircraft

so secured" (art. 2893), and may be constituted in "assets especially designated" by law as amenable.

A valuable discussion of the civil notion of *pignus*, Slovenko, *Of Pledge*, 33 TUL. L. REV. 59 (1958); on *hipoteca*, CANO LLOPIS, *LA HIPOTECA EN EL DERECHO COMPARADO* (1951).

12. Folsom, *Chattel Mortgages and Substitutes Therefor in Latin America*, 3 AM. J. COMP. L. 477 (1954); FERNANDEZ, *PRENDA CON REGISTRO* (1948) with comparative statutory materials at 443.

13. Because of limited credit facilities, the *prenda con registro* (recorded pledge) sufficed for a comparatively long period. Only recently the title to the chattels became an additional security device, by the adoption, in some Latin American countries, of the conditional sale and of quasi-trust (*fideicomiso*), for example in Mexico, Batiza, *The Evolution of the Fideicomiso (Trust) Concept under Mexican Law*, 11 MIAMI L. Q. 478 (1957). These types of security, however, remain outside of the scope of the present study.

14. CODIGO CIVIL art. 812 (Peru 1936) providing: "Inmovables are 1. land, mines and public water courses . . . , 4. ships and aircraft." — The question of the movable or immovable nature of aircraft is still being discussed as a dogmatic proposition, Delascio, *Estatuto Juridico de la Aeronave*, (10) REVISTA JURIDICA DE LA FACULTAD DE DERECHO (Caracas) 65, 70 (1957).

15. Ley de aeronautica civil art. 198 (Honduras 1957), assuming, upon comparison with the Nicaraguan act (art. 191), that "inmueble" at the end of the article is a typographical error.

16. CODIGO DE AVIACION CIVIL art. 191 (Nicaragua 1956).

encumbered with *hipoteca* shall be governed by the law applicable to forced sales of land. The classical idea of the *hipoteca* also lingers on in Mexico¹⁷ where in addition to the pledge-type of *prenda*, *hipoteca* is available as security for certain classes of assets, e.g., aircraft.

Outside of those jurisdictions where the law of immovables was, for reasons of its very availability, incorporated into the law of aviation, other methods for tackling the problem arose. One of them is exemplified by countries where aircraft are classified as movables of a special type, *sui generis*. Such provisions as those enacted, for example, in Venezuela,¹⁸ only dramatize the break with the tradition involved in the adoption, by aviation codes, of the nondispossessory security. The same explanation is to be kept in mind when reading the language used in the aviation acts of Honduras¹⁹ and Nicaragua that "notwithstanding that they are movables, civil aircraft may be encumbered with *hipoteca* . . ."²⁰ In a considerable number of jurisdictions dogmatic scruples have been overcome simply by a straight statutory provision, modeled after French law, declaring aircraft amenable to *hipoteca*.²¹ This is the case, for example, in Bolivia,²² Brazil²³ and Uruguay.²⁴

In most of the Latin American republics these developments have resulted in a general acceptance of a nondispossessory security interest in aircraft and related equipment. Generally it is called *hipoteca*, a term otherwise reserved for security interests in land. Presently the term has acquired two connotations: one, the original, meaning a security interest in land governed by a specific part of the civil code and now extended, by statute, to encompass aircraft. The other is a recently introduced meaning designating in a rather inaccurate sense any nondispossessory kind of *prenda* (pledge). Thus, in some jurisdictions the term *hipoteca* is used in its classical sense, for example, in Mexico²⁵ and in Peru.²⁶ In other countries the meaning of the term is not well defined. In some jurisdictions the term *hipoteca* will probably mean only a nondispossessory *prenda*, particularly where aviation acts expressly retain only one or another im-

17. Ley de vias generales de comunicacion art. 362 (Mexico 1940).

18. Ley de aviacion civil art. 62 (Venezuela 1955).

19. Ley de aeronautica civil art. 208 (Honduras 1957).

20. CODIGO DE AVIACION CIVIL art. 201 (Nicaragua 1956).

21. CODE CIVIL art. 2076 (Fr. 53d ed. Dalloz 1954). Loi sur l'immatriculation des bateaux de riviere et l'hypothèque fluviale (July 5, 1917) providing that "les bateaux de navigation interieure . . . sont susceptibles d'hypothèque. . ." was incorporated in art. 14 of the Loi relative a la navigation aérienne (May 31, 1924) and is now art. 12 of the CODE DE L'AVIATION CIVILE ET COMMERCIALE (Nov. 30, 1955). Nevertheless, some of the Latin American enactments expressly declare aircraft to be movables, e.g., Argentina, CODIGO AERONAUTICO DE LA NACION ARGENTINA art. 48 (1954); Bolivia, Resolucion Suprema art. 31 (1939); Uruguay, CODIGO DE LEGISLACION AERONAUTICA art. 96 (1942).

22. Reglamento general art. 84 (Bolivia 1939), see note 50 *infra*.

23. CODIGO BRASILEIRO DO AR art. 137 (Brazil 1938), see note 51 *infra*.

24.Codigo de legislacion aeronautica art. 105 (Uruguay 1942), see note 63 *infra*.

25. Ley de vias generales de comunicacion art. 362 (Mexico 1940), see note 57 *infra*.

26. See note 14 *supra*.

movable characteristic of the *hipoteca* for security interests in aircraft. This appears to be the case, for example, in Honduras and Nicaragua.²⁷ In other countries this question might cause even greater difficulties. On the contrary, where the term *prenda* is retained with a qualification added indicating its nondispossessory nature, like, for example, *prenda sin desplazamiento* or *sin disposicion*, there is no doubt that the *prenda* will be, generally, of the type established for security interests in chattels.

Nevertheless, in some Latin American countries, as already indicated, the dualism of *prenda* and *hipoteca* in the strict sense of the terms still persists. The real effect of this dualism cannot be stated in general terms since in some countries such symbiosis in the area of aviation law is intended while in others it is best explained by assuming inaccuracies in drafting. Mexico is an example of the former. There *hipoteca* is available in regard to aircraft and aviation enterprises,²⁸ and *prenda* in regard to engines, propellers, spare parts, and other equipment,²⁹ the effect being that both groups of chattels and security interests constituted in them will be governed by different provisions contained in the Civil Code.³⁰ However, the basic difference is not to be found in the element of possession. Even though *prenda* must be perfected, in principle, by the transfer of possession of the chattel to the creditor, such transfer may be "real or juridical," the latter term to be understood as constructive transfer.³¹ The aviation act of El Salvador follows this model by adopting the same dualism coupled with a reference to the Civil Code providing that the chattel, in case of *prenda*, must be "transferred to the creditor in accordance with the applicable legal requirements."³² In this regard, however, the civil codes of Mexico and El Salvador differ on the crucial point. While the Mexican code makes the nondispossessory *prenda* available in certain situations, including chattels like aircraft and equipment, the code of El Salvador perseveres in the traditional attitude that *prenda* can be perfected solely by the actual transfer of the chattel into the creditor's possession.³³ This means that, unless there is a change in the Salvadorean Civil Code, the *prenda* affecting assets other than the aircraft and the aviation enterprises as a whole, as, for example, all assets available to *prenda* under the Mexican act, still is of the dispossessory nature.

Another example of deficient draftsmanship seems to be presented by the aviation acts of Honduras and Nicaragua.³⁴ These acts provide, in a

27. See notes 15 and 16 *supra*.

28. Ley de vias generales de comunicacion art. 362 (Mexico 1940), see note 57 *infra*.

29. Ley de vias generales de comunicacion art. 363 (Mexico 1940).

30. *Hipoteca* is regulated in art. 2893 to 2943, the *prenda* in art. 2856 to 2892 of the Civil Code.

31. Art. 363, para. 2, as implemented by art. 2859 of the Civil Code (translation in note 111 *infra*).

32. Ley de aeronautica civil art. 242 (El Salvador 1955), see note 54 *infra*.

33. Art. 2134, 2136, according to the version in CONSTITUCION Y CODIGOS DE LA REPUBLICA DE EL SALVADOR (1947).

34. Ley de aeronautica civil art. 201 (Honduras 1957), and Código de Aviacion Civil art. 201 (Nicaragua 1956).

general way, that aircraft are "amenable to the *hipoteca*." This provision is followed by another that "aircraft, engines, propellers, and other spare parts for the same may be the object of a *prenda sin desplazamiento*." If this latter provision is construed as explanatory, it would seem that only one type of security is created, that of a nondispossessory *prenda*. This may be objected to by pointing out that the contract of *prenda* is especially regulated in article 215, and both *prenda* and *hipoteca* are dealt with in article 216. The *exposicion de motivos* accompanying the act speaks of only the *hipoteca*. The situation is far from clear.

COMMON LAW. Entering the era of air transportation common law countries were not confronted with difficulties that plagued civil law jurisdictions in overcoming the rigidity imposed by having, with a few exceptions, only dispossessory security interest in chattels available. While there is in the common law an institution analogous to *pignus*, namely pledge, originally requiring the transfer of the security to the creditor, it was the mortgage transferring not possession but the title to land to the creditor as security that opened the way to the use of nondispossessory security interests in personal property as well. Taking advantage of the comparative ease with which the common law manipulates the transfer of title,³⁵ chattel mortgage offered a type of security comparable to the Roman *manipatio cum fiducia*.

In the common law a chattel mortgage³⁶ is considered an agreement vesting in the creditor the title to the chattel, defeasable by performance on the part of the debtor, of the obligation for which title to the chattel is conveyed as security. Short of performance the title to the chattel is redeemable only in equity or under a statute. On the other hand, a pledge transfers only a limited interest of a lien type, measured by the secured claim, but it is strengthened by the transfer of the control over the chattel to the debtor. In common law countries both methods of security coexist and may be freely chosen by parties. However, it may be stated that, at

35. The civil law doctrine of *titulus* and *modus* necessary for the transfer of interests in things, including chattels, formulated in Roman law (Nunquam nuda traditio transfert dominium, sed ita, si venditio aut aliqua iusta causa praecesserit, propter quam traditio sequeretur, DIGEST 41.31 pr.; traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur, CODEX, 2.3.20), applied to *pignus* (pledge) considers the agreement to pledge as *titulus* and the transfer of the chattel as *modus*. This doctrine still prevails in Latin American civil codes, not only in regard to *prenda* but also in regard to transfer of property in chattels, e.g., Argentina, Brazil and Chile; an example of the statutory language may be taken from the Salvadorean Civil Code (1912) requiring a *titulo translativo de dominio* (art. 656) coupled with transfer (*tradicion*) as *un modo de adquirir dominio* (art. 651). Like in regard to pledge this traditional approach is fading away and a mere consent suffices for the transfer of ownership in chattels, assuming *traditio ficta*, e.g. in Bolivia, Peru and Venezuela, a rule modelled after French law.

36. I JONES, LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES (1933); EAGER, LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES (1941).

the present time, arrangements of the lien type prevail over the title transfer characteristics stressed by the orthodox notion of mortgages.³⁷

It follows that terminological difficulties are unavoidable in a simultaneous discussion of both the civil and common law. In civil law jurisdictions *prenda* means a dispossessory security interest in chattels except where changed to a nondispossessory interest by statute. *Hipoteca*, on the other hand, means a nondispossessory security interest, primarily applicable to real property, in the nature of a lien, extended by some statutes to personalty as well. This leaves the title shifting common law chattel mortgage in a special category. Nevertheless, the general term mortgage will be used where the specific type of security is not at stake.

II. SOURCES OF LAW

Security interests in aircraft are, like other substantive aspects of the law of aviation, regulated by rules emanating from a variety of sources. In civil law countries the carefully construed hierarchy of sources assigns aviation acts a precise place in relation to other sources of law. In the common law jurisdictions parties' contractual agreements are controlled by substantive legal rules to a lesser extent. In addition, where these provisions are operative, they are subject to change by the parties' agreements, except in rare cases. They are of equal dignity, subject only to general standards set up by the common law and the elementary control by the time factor.

LATIN AMERICA. To identify the controlling statutory rules in a civil law country, the special enactment, in this case the aviation act, must be taken as the starting point. As special legislation its provisions affecting security arrangements will prevail over any provisions contained in the general codes, civil as well as commercial. In some jurisdictions such a reference is explicit, in others implicit. In jurisdictions where aviation and activities connected with it are classified as commercial in nature, security arrangements are, consequently, subject to the commercial code as the first subsidiary source. This twofold structure becomes threefold where the civil code is expressly or by implication established as the ultimate statutory authority.

An express reference to "civil legislation" is, for example, contained in the aviation act of Brazil.³⁸ Listing the civil code first and the commercial second, the aviation act of El Salvador admits both codes as subsidiary sources.³⁹ The inverse sequence is adopted in the aviation acts of Honduras and Nicaragua which provide that contracts involving aircraft shall be governed by the "applicable provisions of the Commercial Code and, in

37. Gilmore & Axelrod, *Chattel Security*, 57 YALE L.J. 517, 530 (1948). The UNIFORM COMMERCIAL CODE (1957) applies provisions regulating security interests regardless of "whether title to collateral is in the secured party or in the debtor" (Sec. 9-202).

38. CODIGO BRASILEIRO DO AR art. 146 (Brazil 1938).

39. Ley de aeronautica civil art. 241 (El Salvador 1955).

case it contains none, by the other applicable general laws."⁴⁰ This provision appears to be reconcilable with another provision in the same acts that the contract of *hipoteca* in aircraft will be "governed in matters not provided for in this Act, by the applicable provisions of the Commercial Code and, if there be none, of the Civil Code."⁴¹

A completely different subsidiary source is established in the Argentine aviation code. There matters of *hipotecas* in aircraft are governed, insofar as the code has no provisions, by rules applicable to ship mortgages.⁴²

Surveying specific sources of aviation law in force in Latin American republics, two groups of jurisdictions may be distinguished. One would contain countries where there is no special aviation legislation at all, as is the case in Haiti and Paraguay. There matters of aviation including questions of security in aircraft are subject to rules of the general law. The other group would consist of countries with special aviation acts but containing no provisions relating to security in aircraft. There the situation is identical with that in countries with no special aviation legislation, except where nondispossessory security interest in chattels was introduced by enactments creating the nondispossessory industrial *prenda*. There the question arises whether or not such a nondispossessory security interest in chattels may be construed so as to include aviation enterprises and, in consequence, is available in regard to aircraft. It would seem that Chile,⁴³

40. Ley de aeronautica art. 208 (Honduras 1957); CODIGO DE AVIACION CIVIL art. 201 (Nicaragua 1956).

41. Ley de aeronautica civil art. 201 (Honduras 1957), see note 56 *infra*; CODIGO DE AVIACION CIVIL art. 211 (Nicaragua 1956), see note 60 *infra*. The civil code appears as a subsidiary source also in those countries where the security interest in aircraft is constituted under a non-aviation type of statute, as, for example in Ecuador according to art. 3 of the Ley sobre contrato de prenda agricola e industrial, 1936 (see note 46, *infra*).

42. The Argentine COMMERCIAL CODE art. 55 (1889) deals with ship mortgages in art. 1351 to 1376; insofar as there are no applicable provisions, the COMMERCIAL CODE art. 1667 refers to the CIVIL CODE regarding *hipoteca*, i.e. security in realty. The same result is reached under the aviation acts of Honduras (art. 208) and Nicaragua (art. 201). Taking the latter as an example, it appears that the Nicaraguan COMMERCIAL CODE (1914) has provisions on ship mortgages (arts. 1024 to 1035); in case these provisions should not suffice, the same Code (art. 1025) refers to the CIVIL CODE (1929).

43. Chilean aviation law is regulated by the Decreto con fuerza de ley sobre navegacion aerea of May 15, 1931, as modified by the Decreto-ley No. 325 of July 29, 1932. It contains provisions concerning nationality and ownership of aircraft (art. 7) and their change (art. 10), but no provisions concerning encumbrances. The CIVIL CODE (1855) adheres to the strict form of *prenda* (art. 2384 and 2386). Nondispossessory *prenda* is available only under special legislation, e.g., commercial (art. 813 of the COMMERCIAL CODE), agrarian (Ley 4.097, 1926), banking (Ley 4.287, 1928) and industrial (Ley 5.687, 1935). The question then arises whether or not a nondispossessory *prenda* may be constituted on aircraft under one of the special acts. The closest seems to come the *prenda industrial* in the sense that industrial enterprises may pledge, among others, "means of transportation, like . . . ships . . . and generally all kinds of movables that, being used in the industry, are an integral or collateral parts of it" (art. 24). The Corte de Apelaciones (Talca) has held in 1931 that the term *explotaciones industriales* means productive industries (SOMARRIVA UNDURRAGA, TRATADO DE LAS CAUCIONES 219, 1943) and that *prenda industrial* is not available to enterprises engaged in air transportation. The opposite view is taken by HAMILTON, MANUAL DE DERECHO AEREO 395 (1950). It may be added that the official draft for a new aviation act (1947) provides for *hipotecas* in aircraft (art. 224).

Cuba,⁴⁴ the Dominican Republic,⁴⁵ Ecuador⁴⁶ and Panama⁴⁷ fall into this group.

The majority of Latin American republics not only adopted special aviation legislation but also enacted provisions regulating security interests in aircraft of the *prenda* or *hipoteca* type or both. Before entering into an analytical comparative discussion,⁴⁸ the controlling enactments will be briefly listed.

44. In Cuba aviation law is regulated by the Reglamento de navegacion aerea civil of April 21, 1928, as amended (text in LOPEZ DE GOICORCHEA & PARES VALDEZ, LEGISLACION DEL TRANSPORTE TERRESTRE, MARITIMO, AEREO 137, 1954), but contains no provisions concerning nondispossessory securities. Ley 5 of December 20, 1950 amended the CIVIL CODE in regard to *prenda* (art. 1863 through 1872). The original dispossessory type of *prenda* (art. 1863, para. 1) was modified by the introduction, in para. 2, of the *prenda sin desposesion* as security for the balance of the purchase price for the same chattel or for bank credits in general. Such *prenda* will be inscribed in the Mercantile Register, or in the Agricultural and Industrial Section of the general Property Register, provided the debtor is "an industrial entrepreneur and the chattels may be classified as belonging to the business (*fondo de comercio*) or to the unity of agricultural or industrial production. . . ." Different from the situation in Chile, here the emphasis on the productive nature of the business involved seems more explicit, and may prevent the use of this nondispossessory type of *prenda* on aircraft in spite of the fact that "means of transportation" are listed as one of the chattels amenable to it (art. 1870, para. 2). There are no known decisions or practice. SANCHEZ JEREZ, LA PRENDA SIN DESPLAZAMIENTO EN NUESTRA LEGISLACION (1957, unpubl. thesis, Univ. of Villanueva).

45. Aviation law of the Dominican Republic is regulated in the Ley sobre navegacion aerea civil (No. 1915, January 19, 1949, Cac. Of. No. 6894), with no provision on security interests. The Ley de prestamos con prenda sin desapoderamiento (Nov. 4, 1948, Cac. Of. No. 6857) would seem applicable to aviation since it covers, among others, industrialists, including those of corporate nature, making it possible for them to use as security "means of transportation, vessels, machinery . . . and other movables . . . they use in their work, industries, enterprises . . ." (art. 1).

46. The law of aviation in Ecuador is regulated by the Reglamento de aviacion civil of July 8, 1954 (text in MINISTERIO DE OBRAS PUBLICAS, DIRECCION GENERAL DE AVIACION CIVIL, LEYES BASICAS Y REGLAMENTO DE AERONAUTICA CIVIL, (1954). However, these regulations did not change the dispossessory nature of *prenda* under the Ecuadorean CIVIL (art. 2403) and COMMERCIAL CODE (art. 535). In practice security in aircraft is constituted under the Ley sobre contrato de prenda agricola e industrial (No. 625 of August 14, 1936, Reg. Of. No. 267) using the nondispossessory industrial *prenda* available (art. 1) for "*elementos de trabajo de cualquier clase*" (art. 5,d). The *prenda* is registered with the Registrador de Propiedad of the respective Canton (art. 7) and communicated to the Superintendente de Bancos (art. 13) who, in turn, informs all banking institutions.

47. In Panama aviation law is regulated by the Decreto No. 89 relativo a la navegacion aerea (1929) as amended. The nondispossessory security in chattels is presently regulated by the Ley No. 21 of February 15, 1952 (Cac. Of. No. 11.724), as amended by Decreto-Ley No. 16 of Sept. 22, 1954 (Cac. Of. No. 12.490), amending art. 1567 of the CIVIL CODE so as to permit nondispossessory *hipoteca* in chattels, provided they may be specifically determined or identified and sufficiently described (art. 1), and additional provisions contained therein are followed. In practice, the 1954 decree is used to constitute security interests in aircraft.

On the 1952 law Eder, *Panama: Chattel Mortgage and Conditional Sales Laws*, 2 AM. J. COMP. L. 71 (1953).

48. Studies in the field of comparative aviation law are only few, particularly those discussing mortgages. Alsina, *Hipoteca Aeronautica*, 4 REVISTA DEL INSTITUTO DE DERECHO AERONAUTICO 1, 1957 (also reprint), and HOFSTETTER, L'HYPOTHEQUE AERIENNE, ETUDE DE DROIT COMPARE ET DE DROIT INTERNATIONAL (1950). On comparative aviation law generally, CAY DE MONTELLA, PRINCIPIOS DE DERECHO AERONAUTICO (1950); Grant, *Trends in Latin American Air Transport Legislation*, 20 N.Y.U.L.Q.Rev. 312, 321 (1945); Gardner, *Comparative Air Law*, 20 J. AIR L. & COMM. 34, 48 (1953), and Pepin, *Development of the International Legislation on Aviation since the Chicago Convention*, 24 J. AIR L. & COMM. 1 (1957).

Argentina adopted in 1954 the *Código aeronáutico de la Nación Argentina*. Chapter VIII of title four of the *Código* contains provisions regarding *hipoteca* and privileges in articles 51 through 55.⁴⁹

Bolivia enacted aviation law as the *Resolución Suprema* (1939) regulating "air traffic within the national territory." Articles 31 and 34 contain short provisions regarding *hipoteca*.⁵⁰

Brazil codified its aviation law early in 1938 in its *Código Brasileiro do ar*. Articles 137 through 146 deal with *hipoteca* in aircraft.⁵¹

Colombia enacted its aviation law even earlier, as Law No. 89 of May 26, 1938, regarding civil aviation. Only a short provision contained in Art. 11 deals with the question of encumbrances of aircraft.⁵²

Costa Rica enacted its aviation law in the *Ley general de aviación civil* (1949). Articles 109 through 116 regulate the *garantía prendaria sobre aeronaves*, implemented by the elaborate provisions of the *Ley de prenda* with the *Reglamento*.⁵³

El Salvador enacted its aviation law as the *Ley de aeronáutica civil* (1955). Chapter five of the act is dedicated to *hipoteca* (articles 241 through 252).⁵⁴

49. Ley No. 14.307 of July 15, 1954. Text in *CODIGO AERONAUTICO DE LA NACION ARGENTINA* (1954). RODRIGUEZ JURADO, *EL CODIGO AERONAUTICO RIOPLATENSE*, in *ESTUDIOS JURIDICOS EN MEMORIA DE EDUARDO J. COUTURE* 623 (1957), also Alsina, *supra* note 48, at 142; Videla Escalada, *Breve Analisis del Código Aeronáutico*, 33 *REVISTA DEL COLEGIO DE ABOGADOS DE BUENOS AIRES* 23, 52 (1955); Lena Paz, *Exposición y Comentario del Nuevo Código Argentino de Aeronáutica*, 10 (44) *REVISTA DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES* 605 (1955) [hereinafter cited as Lena Paz]; Rodriguez Jurado, *Las Aeronaves en el Código Aeronáutico*, *LA LEY*, Sept. 15, 1956.

Registration of aircraft with encumbrances constituted abroad is governed by the Decreto-ley No. 12.037 of Oct. 11, 1957 (Bol. Of. 23, 1957), see *infra* VIII.

50. Decreto Supremo, Oct. 24, 1930, patrimonio y reglamentación del servicio aéreo en el territorio nacional; Resolución Suprema, Jan. 3, 1939, reglamento general sobre el tráfico aéreo en el territorio nacional. Text in MONROY CARDENAS, *COMPENDIO DE DISPOSICIONES ADUANERAS* (1955).

51. Decreto-Ley No. 483. June 8, 1938; text in *DIRECTORIA DA AERONAUTICA CIVIL, COLETANEA DE LEGISLACION AERONAUTICA* (1955). MILHOMENS, *DIREITO AERONAUTICO* (1956); 4 MARTINS FERREIRA, *INSTITUCOES DE DIREITO COMERCIAL* 390 (1955); BASTOS BELCHIOR, *HIPOTECA AEREA NO DIREITO BRASILEIRO*, 1 *REVISTA BRASILEIRA DE DIREITO AERONAUTICO* 51 (1951); SAMPAIO DE LACERDA, *CURSO DE DIREITO COMERCIAL MARITIMO E AERONAUTICO* . . . (1954); Dalmo Fairbanks Belfort, *Sugestoes para a Reforma do Código do Ar* . . . , 43 *REVISTA DA FACULDADE DE DIREITO DE SAO PAULO* 172 (1948).

52. Ley No. 89 (May 26, 1938); text in LLEVANO BARAGA & SANCHEZ BERNAL, *COMPILACION AEREA NACIONAL* (1949); BEETAR DOW, *ENSAYOS SOBRE DERECHO AERONAUTICO* (1951); Durán Trujillo, *El Código Aeronáutico Colombiano*, 22 (158-161) *REVISTA DE LA ACADEMIA COLOMBIANA DE JURISPRUDENCIA* 416 (1948).

53. Ley general de aviación civil, Decreto-ley No. 762 (Oct. 18, 1949); text in I QUESADA PICADO & AGUILAR AGUERO, *LEYES Y REGLAMENTOS USUALES* 275 (1953). Ley de prenda, No. 5 (Oct. 5, 1941) and Reglamento de la ley de prenda, Decreto No. 52 (Dec. 23, 1941), both in BEECHE, *CODIGO CIVIL DE COSTA RICA* 389, 407 (1949).

54. Ley de aeronáutica civil, Decreto No. 2011 (Dec. 22, 1955). Text in MINISTERIO DE DEFENSA, *LEY DE AERONAUTICA CIVIL Y REGLAMENTO DE AVIACION CIVIL Y AGRICOLA* (1956).

Guatemala adopted its *Ley de aviacion civil* in 1948, dealing with the *hipoteca* in aircraft and other equipment in article 14, implemented by articles 15 and 114.⁵⁵

Honduras has, at the present moment, the most recent aviation code, the *Ley de aeronautica civil* (1957). Provisions regarding *hipoteca* are to be found in articles 197 to 218 under the title contracts respecting aircraft and prescription.⁵⁶

Mexico's aviation law is contained in the *Ley de vias generales de comunicacion* (1940).⁵⁷ Book four deals with aviation, and its articles 362 through 373 with *hipoteca* and *prenda*. Additional provisions are enacted in numerous administrative regulations,⁵⁸ among them the important *Reglamento del registro aeronautico Mexicano* (1951).⁵⁹

Nicaragua enacted its present *Codigo de aviacion civil* in 1956.⁶⁰ It is almost identical with the Honduran enactment since both follow the same model, namely a draft for an aviation code adopted by the Third Conference of General Directors of Civil Aviation of Central America (1954).⁶¹ Provisions regarding *hipoteca* and *prenda* in aircraft are contained in articles 190 to 211.

Peru still lists as its basic aviation law the *Decreto Supremo* of 1953, dealing primarily with administrative matters. As already indicated, the question of *hipotecas* in aircraft is regulated by the Civil Code. The *Reglamento general de los registros publicos* (1940) as well as the *Reglamento de las inscripciones* (1936) contain additional important provisions.⁶²

55. *Ley de aviacion civil*, Decreto No. 553 (Oct. 28, 1948); text in 55 DIARIO DE CENTRO AMERICA, no. 9 (April 7, 1949), also in 4 (8/9) REVISTA DE LA FACULTAD DE CIENCIAS JURIDICAS Y SOCIALES DE GUATEMALA 49 (1950). The CIVIL CODE (1933) already contains a provision (art. 1133, para. 3) that interests in aircraft shall be inscribed in special parts of the General Register (art. 1076).

56. *Ley de aeronautica civil*, Decreto No. 146 (Sept. 3, 1957) as amended by Decreto No. 174 (Oct. 18, 1957); text in REPUBLICA DE HONDURAS, LEY DE AERONAUTICA CIVIL (1957).

57. *Ley de vias generales de comunicacion*, Feb. 19, 1940, as amended Dec. 30, 1949. FRANZOS RIGALT, DIRECTIVAS MEXICANAS DEL DERECHO DE LA AVIACION (1958); Bucio Cipres, *La Hipoteca sobre Aeronaves Civiles*, 19 (73) ANALES DE JURISPRUDENCIA 297 (1952); VILLAGOMEZ ITA, CONDICION JURIDICA DE LA AERONAVE (1951).

58. A list in FRANZOS RIGALT, op. cit. note 57 at 68, 69. The law as well as regulations are available in English translations published by Traducciones (Mexico).

59. Decreto, Sept. 10, 1951; text in DIARIO OFICIAL, Oct. 25, 1951.

60. CODIGO DE AVIACION CIVIL, Decreto No. 176 (May 18, 1956), 60 LA GACETA, DIARIO OFICIAL No. 266.

61. ACTA FINAL DE LA CUARTA CONFERENCIA DE DIRECTORES DE AERONAUTICA CIVIL DE CENTRO-AMERICA Y PANAMA (1954).

62. See note 14 *supra*. Reglamento general de los registros publicos (July 18, 1940) and Reglamento de las inscripciones (Dec. 17, 1936); text in ACAVEDO Y CRIADO, LEYES Y REGLAMENTOS DE LOS REGISTROS PUBLICOS Y DEL NOTARIADO 219, 242, 265 (1950).

In regard to registration of the *hipoteca*, see Corte Suprema, Acuerdo Aprobatorio, Dec. 11, 1953, summarized in Alsina, op. cit. *supra* note 48, at 119.

Villegas, *Consideraciones sobre Derecho Aeronautico Peruano*, 22 (158-161) REVISTA DE LA ACADEMIA COLOMBIANA DE JURISPRUDENCIA 416 (1948).

Uruguay enacted its *Código de legislación aeronáutica* in 1942, regulating the *hipoteca* in articles 105 through 109.⁶³ Additional regulations have been issued implementing the code, the most important being the *Reglamentación de los artículos 12, 21, 23, etc.* (1944).⁶⁴

Venezuela adopted the *Ley de aviación civil* in 1955, containing provisions on *hipoteca* in articles 62 through 64.⁶⁵

CANADA AND UNITED STATES. In both common law jurisdictions security interests in chattels, including aircraft, are within the legislative domain of the provinces or the several states respectively.

In Canada, matters of aviation fall into the legislative powers of the Dominion.⁶⁶ Reluctance, based on constitutional considerations,⁶⁷ kept the Dominion from enacting a uniform substantive law of aviation or even from establishing a system of registration of security interests in aircraft. The Aeronautics Act⁶⁸ regulates administrative matters and contains no provisions related to substantive aspects of the law of aviation including mortgages. The same goes for the supplemental Air Regulations Act.⁶⁹ Consequently, questions concerning security interests in aircraft, including their registration, remain governed by the common law or supplemental statutory enactments in force in different provinces.⁷⁰

In the United States modern means of transportation have been an important area of federal legislation, providing, among others, for a

63. CODIGO DE LEGISLACION AERONAUTICA, Decreto-ley No. 10.288 (Dec. 3, 1942); text in REGISTRO NACIONAL DE LEYES, DECRETOS, etc. 1484 (1942). BAUZA ARAUJO, PRINCIPIOS DE DERECHO AEREO (1955); id., *Caracteres Generales del Derecho and Regimen Jurídico de la Aeronavegación Comercial en el Uruguay*, in ESTUDIOS JURIDICOS EN MEMORIA DE JUAN JOSE AMEZAGA 59 (1958).

64. Decreto No. 3348 (June 9, 1944); text in MINISTERIO DE DEFENSA NACIONAL, REGLAMENTACION DEL CODIGO DE LEGISLACION AERONAUTICA (1946). MAZZERA ALVAREZ, APUNTES DE DERECHO AERONAUTICO (1951).

65. Ley de aviación civil (April 1, 1955); translation in 13 J. AIR L. & COM. 260 (1946). CHIOSSONE LARES, PRINCIPIOS GENERALES DE DERECHO AERONAUTICO VENEZOLANO (1954); BAUZA ARAUJO, PRINCIPIOS DE DERECHO AEREO (1955) with a list of Uruguayan sources of aviation law (73-77).

66. British North America Act arts. 91, 132 (1867).

67. In spite of the holding in *Re Aerial Navigation A.G. Can. v. A.G. Ont.* [1932] 1 D.L.R. 58.

68. CAN. REV. STAT. ch. 2 (1952). Richardson, *The Canadian Law of Civil Aviation*, 9 J. AIR L. 201 (1938), and *Canadian Law of Civil Aviation, 1937 - 1947*, 13 J. AIR L. & COMM. 195 (1946).

69. Nov. 23, 1954, 1 STATUTORY ORDERS & REGULATIONS 1 (consol. 1955).

70. Alberta: ALB. REV. STAT. ch. 23 (1955); Brit. Columbia: B.C. REV. STAT. ch. 28 (1948); Manitoba: MAN. REV. STAT. ch. 17 (1954); New Brunswick: N.B. REV. STAT. ch. 18 (1952); Nova Scotia: NOV. SCOT. REV. STAT. ch. 22 (1954); Ontario: ONT. REV. STAT. ch. 36 (1950); Prince Edward Islands: PR. EDW. ISL. REV. STAT. ch. 18 (1951); and Saskatchewan: SASK. REV. STAT. ch. 357 (1953). Due to the prevailing civil law, Quebec offers only the strict pledge (art. 1979 of the Civil Code), with exceptions, not applicable here, in regard to agricultural pledges and vessels. Cf. *Cambell Auto Fin. Co. v. Bonin* [1945] S.C.R. 175; also BAUDOIN, *LE DROIT CIVIL DE LA PROVINCE DE QUEBEC* 897 (1953).

For a discussion of differences between pledge and mortgage, *Re Shapiro*, [1949] 3 L.D.R. 253. FORMS in 3 MACWOOD, CANADIAN CONVEYANCING AND COMMERCIAL FORMS 13 (1955).

nationwide recording of vital data involved in security transactions. Starting with the Ship Mortgage Act of 1920 subsequent acts fell into a general pattern. A nationwide recording system of interests in aircraft was enacted in 1938,⁷¹ extended in 1948 to include spare parts, followed by a similar act in 1952 regulating railroad equipment liens, and completed in 1958 by the enactment extending analogous safeguards to highway trucks.⁷²

The Federal Aviation Act of 1958⁷³ provides for a central recording of security interests in aircraft including those of the chattel mortgage type.⁷⁴ However, the controlling substantive law remains state law, common as well as statutory. As a consequence, law governing substantive aspects of aircraft mortgages in aircraft of United States registry is still far from uniform, in spite of the attempt to unify the law of aviation through the Uniform Aeronautics Act which, unfortunately, disregarded the question of security interests in aircraft. The only central control factor remains the one provided by the Federal Aviation Act. However, its effect in matters of interests in aircraft depends on whether or not federal registration will be recognized by state law.⁷⁵ In some states this is achieved by express enactments giving the registration under the federal act the same effect as local registration under state law. This is the case in Florida⁷⁶ and is exemplified by

71. Hester, *The Civil Aeronautics Act of 1938*, 9 J. AIR L. 451 (1938); for background of the 1948 amendment, Hines, *Legal Difficulties in Secured Airline Equipment Financing*, 15 J. AIR L. & COMM. 11 (1948); also Nunnely, *Federal Aviation Legislation*, 14 J. AIR L. & COMM. 445 (1947). For a survey SHARP, A CHRONICAL AND LEGISLATIVE HISTORY OF FEDERAL ACTIVITIES 1910 - 1947 (1949).

72. 72 Stat. 812 (1958). For further details Comment, 67 YALE L.J. 1023 (1958).

73. Federal Aviation Act, 72 Stat. 731 (1958), authorizes the Administrator to "establish and maintain a system for the recording" § 503(a). Regulations issued by the Administrator are to be found in the C.F.R.

74. Michelson, *Aircraft Liens and Procedure*, 44 ILL. B. J. 863 (1956); Adkins & Billyou, *Developments in Aircraft Equipment Financing*, 13 BUS. LAW. 199 (1958).

75. Binzer, *Civil Aviation, the Relative Scope of Jurisdiction of the State and Federal Government*, 33 KY. L.J. 276 (1945); Plaine, *State Aviation Legislation*, 14 J. AIR L. & COMM. 333 (1947); Rhyne, *Federal, State and Local Jurisdiction over Civil Aviation*, 11 LAW & CONTEMP. PROB. 459 (1948); Comment, *Mobile Equipment Financing: Federal Perfection of Carrier Liens*, 67 YALE L.J. 1023, 1033, 1065 (1958); also Thomas, *Federal Regulation of Air Transportation*, 3 SW. L.J. 1 (1949).

76. FLA. STAT. § 329.01 (1957).

77. Act to Amend the Lien Law . . . , N.Y. Laws of 1958, ch. 424, providing that the recording of a chattel under the Civil Aeronautics Act "shall have the same effect as filing or refiling under this article; and no filing or refiling under this article shall be required, whether or not the mortgaged property is kept or used wholly within this State" (sec. 238a).

Some unification may be expected from the UNIFORM COMMERCIAL CODE (1957) which deals also with chattel mortgages in sec. 9 - 102 (2). However, the Code does not apply to security interests "subject to any statute of the United States, such as Ship Mortgage Act of 1920, to the extent that such statute governs the right of the parties to and third parties affected by transactions in particular types of property", sec. 9 - 104 (a). According to the Comment (602) "the present provisions of the Civil Aeronautics Act . . . call for registration of title to and liens upon aircraft . . . and such registration is recognized as equivalent under sec. 9 - 302 [of the Code]; but to the extent that the Civil Aeronautics Act does not regulate the right of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article, pending passage of federal legislation."

a recent New York enactment.⁷⁷ In other states recognition is given or is to be expected in consequence of a persuasive trend shown in case law.⁷⁸

The impact of treaties on the municipal law of countries under discussion, particularly the modifications caused by the ratification of the Convention on the International Recognition of Rights in Aircraft (Geneva, 1948)⁷⁹ will be discussed later.⁸⁰

III. THE AGREEMENT

In absence of specific provisions in aviation acts, the agreement creating a security interest in aircraft is governed by the rules of general law, civil as well as commercial, as the case may be, or by the common law rules of contracts. As already mentioned, in some of the Latin American jurisdictions an express reference to the general law is contained in the aviation acts, for example, El Salvador⁸¹ and Mexico.⁸² In Costa Rica *prenda aeronautica* is governed by "provisions applicable to *prenda* generally,"⁸³ that is by the general civil legislation,⁸⁴ except, of course, where the aviation act contains specific provisions. It will also be recalled that in some countries the commercial code takes precedence over the civil code in regard to the contract of *hipoteca*, as in Honduras and Nicaragua.⁸⁵

PARTIES. The pledgor or mortgagor is, as a rule, the owner of the aircraft to be used as security. In some jurisdictions his interest in the aircraft has to be shown in the process of registration of the interest by a certificate of ownership or registration.⁸⁶

CHATTEL. In order to take effect a security interest must affect a specific chattel.⁸⁷ This principle of specialty, emphasized particularly in civil law

78. *Re Veterans' Air Express Co.*, 76 F. Supp. 684 (D.C.N.J., 1948) holding it to be "clear that the Congress has prescribed the only way . . . in which liens upon aircraft may be recorded . . .", followed in *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E. 2d 610 (1949). Congress has preempted the field, *United States v. United Aircraft Corp.*, 80 F. Supp. 52 (D.C. Conn., 1948). Cf. *Marshall v. Anderson*, 169 Kan. 534, 220 P. 2d 187 (1950) and *Dawson v. General Discount Corp.*, 82 Ga. App. 29, 60 S.E. 2d 653 (1950). *Contra Aviation Credit Corp. v. Gardner*, 174 Misc. 798, 22 N.Y.S. 37 (1940) holding that the federal act does not apply to aircraft engaged in intrastate flights.

79. 4 (2) U.S.T. & O.I.A. 1831 (1953); T.I.A.S. No. 2847 [hereinafter cited as Geneva Convention].

80. To be discussed under VIII *infra*.

81. Ley de aeronautica civil art. 241 (El Salvador 1955).

82. Ley de vias generales de comunicacion art. 364 (Mexico 1940).

83. Ley general de aviacion civil art. 109 (Costa Rica 1944).

84. See note 53 *supra*.

85. Ley de aeronautica civil art. 208 (Honduras 1957); CODIGO DE AVIACION CIVIL art. 201 (Nicaragua 1956).

86. CODIGO DE LEGISLACION AERONAUTICA art. 105 (Uruguay 1942); 14 C.F.R. § 503.3(a) (6) declares a chattel mortgage (instrument) to be "eligible for recording if: (i) it is signed by the mortgagor, and (ii) is executed in the name of the registered owner, or the mortgagor applies for registration as provided in Part 501 of this chapter, except . . ."

87. A full discussion follows under IV *infra*. It may be pointed out that a 'fleet mortgage' presents no special features. It is explained as a mortgage on a number of aircraft belonging to the same mortgagor and given as security so that every plane is

countries, as distinguished from general liens imposed by law, applies also to securities in aircraft. The Mexican act may be used as an example.⁸⁸ It provides that the agreement has to contain "a description of the aircraft as well as of the equipment encumbered, its international identification and data concerning immatriculation, the name of the manufacturer and the serial number; in case there be none, then data sufficient to identify beyond any doubt the aircraft as well as the other items contained in the *hipoteca* or *prenda*."⁸⁹ This provision is adopted without change by the aviation acts of El Salvador⁹⁰ and Guatemala.⁹¹ Data sufficient for identification are required under the acts of Honduras and Nicaragua.⁹²

In this country a conveyance creating an interest in aircraft or in chattels connected with it must comply with the controlling state law. In order to qualify for registration under the Federal Aviation Act the conveyance must "describe the aircraft by make, manufacturer's serial number and Civil Aeronautics registration number, or any other detail sufficient to enable identification";⁹³ where an engine is encumbered, it must be "specifically identified by make, model and manufacturer's serial number."⁹⁴ Spare parts, including engines encumbered as spare parts, must be identified in the conveyance not only by the name of the authorized air carrier by whom or on whose behalf such spare parts are kept; the conveyance must also "describe generally the types . . . of the spare parts covered thereby"⁹⁵ as well as "specifically describe their location or locations."⁹⁶

DEBT. In regard to the debt to be secured, two questions arise: the first as to whether any kind of debt may be secured by aircraft, and the other as to what extent the debt so secured has to be disclosed in the instrument.

In general, it may be stated that aircraft may be used as security regardless of the origin or nature of the debt; consequently, these obligations

liable for the whole amount (Hines, loc. cit. note 71, at 20). The exceptional attention given to this arrangement abroad (e.g. Elwell, *Origen y Naturaleza de la Hipoteca sobre Flota*, I REVISTA DEL INSTITUTO DE DERECHO AERONAUTICO 37, 1952) is difficult to understand, particularly since, in a few cases, writers do not distinguish between floating charge, corporate mortgage and mortgage of aircraft.

It may be added that the GENEVA CONVENTION (art. VII, para. 5) takes into account a situation involving a mortgage of several craft for one debt. Under the Federal Aviation Act there is no possibility to record a fleet mortgage unless individual aircraft are properly identified.

88. The Mexican CIVIL CODE art. 2919 (1932) provides that a *hipoteca* "is never tacit, nor general . . ."; it may be voluntary, arising out of an agreement (art. 2920), or imposed (art. 2931) by force of law in enumerated situations (art. 2935).

89. Ley de vias generales de comunicacion art. 364 (Mexico 1940).

90. Ley de aeronautica civil art. 244 (El Salvador 1955).

91. Ley de aviacion civil art. 14 (Guatemala 1948).

92. Ley de aeronautica civil art. 216 (Honduras 1957); CODIGO DE AVIACION CIVIL art. 209 (Nicaragua 1956).

93. 14 C.F.R. § 503.3 (a) (2).

94. 14 C.F.R. § 504.3 (a) (1).

95. 14 C.F.R. § 505.3 (a) (1).

96. 14 C.F.R. § 505.3 (a) (2).

may or may not be connected with aviation or with the specific aircraft or equipment to be encumbered.⁹⁷ Only exceptionally are restrictions established, mainly in statutes designated for industrial development and thus potentially applicable to the aircraft industry in general and to aircraft in particular. Only certain types of debts, such as the unpaid balance of the purchase price of the chattel used as security or credits extended by banks generally, qualify under Cuban law for the nondispossessory *prenda*.⁹⁸ In Chile, provided the act concerning *prenda industrial* is taken to be applicable to the aviation industry,⁹⁹ the debts to be secured are limited to those incurred in the course of the particular business.

The other matter is that concerning the minimum information on the debt to be shown in the conveyance. This requirement appears justified in view of the fact that the instrument will be registered and, as a consequence, in a number of jurisdictions will have substantive effects between parties to the agreement as well as in relation to third parties. In this respect some aviation acts simply refer to the provisions of the general law, e.g., El Salvador¹⁰⁰ and Mexico.¹⁰¹ The Brazilian code¹⁰² requires that the amount of the debt or its estimate be stated in the instrument, and also the rate of interest. Guatemala demands the amount of the capital, the rate of interest, the time and place of payment, and "other conditions and stipulations agreed upon."¹⁰³ In accordance with the strict immovable mold of the aircraft *hipoteca* Peru insists that a sum certain appears in the instrument.¹⁰⁴

FORM. Some kind of form for the security agreement may be a requirement already provided for in the general law. A simple instrument in writing is required for *prenda* by the Mexican Civil Code;¹⁰⁵ an *hipoteca* involving an amount under five thousand pesos must be in writing attested by two witnesses while a *hipoteca* for an amount exceeding this sum must be executed in the form of a public document. Similar provisions are to be found in most Latin American civil codes.¹⁰⁶ In the area of aviation

97. This position is also taken by the Geneva Convention requiring (art. I, 1, d) that interests in aircraft be "contractually created as security for payment of an indebtedness"; for a discussion see VIII *infra*.

98. See note 44 *supra*.

99. See note 43 *supra*.

100. Ley de aeronautica civil art. 244 (El Salvador 1955).

101. Ley de vias generales de comunicacion art. 364 (Mexico 1940). Art. 31 (III) of the regulation regarding the register (see *supra*, note 58) requires a statement as to the time when the debt becomes due and the rates of interest including the time when it starts to accrue.

102. CODIGO BRASILEIRO DO AR art. 142 (Brazil 1938).

103. Ley de aviacion civil art. 14 (Guatemala 1948).

104. CODIGO CIVIL art. 1013, para. 2 (Peru 1936). — A detailed disclosure of the debt to be secured was originally required under art. 14 of the Panamenian statute of 1952; the subsequent amendment of 1954 limited these requirement so as to include the amount, interest, provisions regarding payment and "any other lawful agreement adopted by the parties" (art. 7,b; see note 47, *supra*).

105. CODIGO CIVIL (*fed. district*) art. 2860 (Mexico 1932).

106. E.g., Nicaragua, CIVIL CODE, art. 3734 (1929); Venezuela, CIVIL CODE, art. 1840 (1942).

law, a formal instrument constituting an interest in aircraft became a necessity with the adoption of registration as a substitute for the transfer of possession.

In Latin American countries a public document, usually a notarial act or its equivalent, is required for the instrument establishing an interest in aircraft or connected equipment.¹⁰⁷ In this country, using Florida as an example, the chattel mortgage, unless the chattel "be delivered to the mortgagee and continue to remain truly and bona fide in his possession,"¹⁰⁸ must be recorded; to be recordable the execution of the instrument must be acknowledged or approved "in a manner provided for mortgages of real property."¹⁰⁹ To be eligible for recordation under the Federal Aviation Act the conveyance must be "acknowledged by the signer or signers before a notary public or other officer authorized by the law of the United States, or of a State, territory or possession thereof, or the District of Columbia, to take acknowledgments of deeds."¹¹⁰

POSSESSION. Transfer of possession as a condition for perfecting the *prenda* is in most Latin American countries replaced, in the field of aviation law, by the requirement of a public document properly registered. Where the dualism of *prenda* and *hipoteca* persists, as in Mexico, in case of *prenda* some kind of transfer of possession is still required, be it only constructive.¹¹¹

REGISTRATION. In all the countries under discussion registration in the most general sense of the term including inscription as well as recording, is required to perfect the security. The effects of such registration vary considerably from country to country. In a general way it may be stated that two main types have developed in this Hemisphere. One type is represented by countries where the registration has only the function of giving notice to third persons without affecting the instrument's intrinsic validity either as to parties or third persons. The other type is found in jurisdictions where the registration may have substantive effects in two ways: as between the immediate parties to it, and in relation to third persons or both. The former type is representative of common law countries while the latter is descriptive of Latin American law.

107. Argentina (art. 51); Brazil (art. 137, para. (2); Colombia (art. 11); Costa Rica (art. 111); El Salvador (art. 246); Guatemala (art. 14); Honduras (art. 215); Mexico (art. 364); Nicaragua (art. 207); Peru, CIVIL CODE art. 1012 (1936); Uruguay (art. 105 para. 2).

108. FLA. STAT. § 698.01 (1957).

109. FLA. STAT. § 698.02 (1957).

110. Federal Aviation Act § 503 (c), 72 Stat. 731 (1958).

111. According to art. 2859 of the Mexican CIVIL CODE a *prenda* is "considered to be transferred to the creditor when he and the debtor agree that the chattel shall remain under the control of a third person, or when it remains in the debtor's possession in pursuance of such an agreement with the creditor or the law allows it. In the last two cases *prenda* must be inscribed in the Public Register in order to take effect in relation to third persons."

Under the various recording statutes in force in common law jurisdictions recording is given only a limited effect.¹¹² In the main it puts persons on notice of the existence of the instrument recorded, an effect achieved also by factual knowledge alone. As between parties to the agreement, recording has no substantive effect according to the recording statutes of the several States. In regard to recording under the Federal Aviation Act, there can be no doubt that the recording of a conveyance involving ownership "shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue."¹¹³ Such reservation in favor of the otherwise applicable state law is not, however, expressed with regard to the recording of lesser interests in aircraft, among others, of the mortgage type.¹¹⁴ On the contrary, the statute uses rather strong language that:

No conveyance or instrument the recording of which is provided by section 503 (a) shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given . . . or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator

It appears difficult to read the term 'valid' to mean 'good and effectual,'¹¹⁵ in accordance with the language usually found in state recording statutes, particularly since the provision is apparently copied indiscriminately from another federal statute¹¹⁶ regulating matters under complete federal legislative control. An additional difficulty is created by the lack here of a reservation like the one applicable to recording of conveyances affecting ownership expressly denying such recordation any substantive effect. If interpreted literally, the statute would establish an unbalanced and unwarranted distinction between recordings involving ownership interests on the one hand, and those dealing with security interests on the other. The former would have a mere notice giving effect while the latter, though involving a lesser interest, would be endowed with a constitutive effect "against all persons without further or other registration."¹¹⁷ In the final consequence the statute would wipe out state law in an area where its application was never questioned. And there is no indication that such a result was ever intended.

112. E.g., FLA. STAT. § 698.01 (1957); cf. *Benedik v. Ratner*, 268 U.S. 353, 362 (1924).

113. Federal Aviation Act § 501 (f), 72 Stat. 731 (1958).

114. Federal Aviation Act 503 (c), 72 Stat. 731 (1958).

115. E.g., FLA. STAT. § 698.01 (1957).

116. 41 Stat. 1000, 46 U.S.C. A. § 921 (a) (1952) providing that "No . . . mortgage . . . which includes a vessel of the United States . . . shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor . . . and any person having actual notice thereof, until such . . . mortgage is recorded in the office of the collector of customs"

117. Federal Aviation Act § 503 (d), 72 Stat. 731 (1958).

In Latin America registration (*inscripción*) is given a substantive effect. Based on the doctrine of *fé publica*, let us say, of full faith and credit accorded to public registers of any kind,¹¹⁸ inscription in such registers¹¹⁹ may be made a condition for the creation of the encumbrance as between the parties or in relation to third parties or both. Registration is required for the between-the-parties effect in Argentina.¹²⁰ In relation to third persons registration is made a substantive requirement in El Salvador¹²¹ and Venezuela,¹²² to name only a few. In Mexico the instruments are effective in relation to third persons from the time of registration. Nonregistered instruments are effective only between parties; nevertheless, third persons may "take advantage [of nonregistered instruments] insofar as they are favorable."¹²³ The acts of Honduras and Nicaragua¹²⁴ seem to give the

118. For background see Villalón Igartua, *The Public Registry of Property in Mexico*, 11 MIAAMI L.Q. 457 (1957); and Carral y de Teresa, *The Public Authority of the Acts of Notaries and Registrars in Mexican Law*, 11 MIAAMI L.Q. 448 (1957). Both articles also appear in MEXICO, A SYMPOSIUM ON LAW AND GOVERNMENT 32, 40 (1958). COUTURE, EL CONCEPTO DE FE PUBLICA, INTRODUCCION AL ESTUDIO DEL DERECHO NOTARIAL (1954).

119. Inscriptions of security interests in aircraft are executed as prescribed by the aviation acts in force in different countries. The registers not only vary by names but are administered by various authorities, some civilian, some military; inscriptions are made, in some countries, in the general aviation register, in others in a special part of it, or in the general register of property or pledges, or in both.

Here follows a list of the national registers, citations referring to aviation acts. *Argentina*: Registro Nacional de Aeronaves (art. 27, 38, para. 3, and 51 a); *Bolivia*: Registro General de Matriculas de Aeronaves (art. 22, 34); *Brazil*: Registro Aeronautico Brasileiro (established by Decreto No. 20.914, Jan. 6, 1932, as amended, Decreto-ley No. 2961, Jan. 20, 1941, art. 137 of the aviation code); *Colombia*: Registro Aeronautico Nacional (art. 10); *Costa Rica*: Registro General de Prendas in San Jose (art. 111, see also note 53 *supra*); *El Salvador*: Registro Nacional de Aeronaves (art. 42, 43, b and 243); *Guatemala*: Registro de Aeronautica Nacional, libro de transferencias y gravámenes (art. 15 (c) 1); *Honduras*: Registro de Propiedad Aeronautica (art. 197); *Mexico*: Registro Aeronautico Mexicano (art. 371), Reglamento del Registro Aeronautico Mexicano, Oct. 5, 1951 (see note 59 *supra*), also Registro Publico de Propiedad (art. 372, para. 2); *Nicaragua*: Registro de Propiedad Aeronautica (art. 190); *Peru*: Registro Publico (art. 1036 of the CIVIL CODE, see note 62 *supra*); *Uruguay*: Registro Nacional de Aeronaves (art. 105, also Reglamento, Decreto No. 3348, June 9, 1944, art. 8, b and 9, see note 64 *supra*; also Decreto, June 31, 1946); *Venezuela*: Registro Aereo (art. 62).

In this country, instruments to be recorded under state law are filed with the proper courts. Recordation under the Federal Aviation Act is within the jurisdiction of the Federal Aviation Agency in Washington, D. C.

According to art. II (1) of the GENEVA CONVENTION which article also applies [art. XI (2) (b)] to domestic aircraft, "all recordings relating to a given aircraft must appear in the same record." The effect of this provision on the dual system of registration, state and federal, is not clear, particularly since the additional provision of the CONVENTION (art. XVII), containing an inter-provincial reference, applies only to "separate registers of aircraft for purposes of nationality."

120. CODIGO AERONAUTICO DE LA NACION art. 49 (Argentina 1954).

121. Ley de aeronautica civil art. 241 (El Salvador 1955).

122. Ley de aviacion civil art. 62 (Venezuela 1955).

123. Ley de vias generales de comunicacion art. 372, para. 1 (Mexico 1940).

In some jurisdictions the consequences of omitted inscription are determined by the civil code. This is, for example, the case in El Salvador where, according to art. 235 of the aviation act, the "lack of inscription . . . in regard to interests in rem constituted in them produces the effects established in the civil code in regard to things and interests to be inscribed in the Register of Land and Mortgages," these consequences being (art. 680 of the Civil Code) that interests established without inscription will not affect third parties.

124. Ley de aeronautica civil art. 215 (Honduras 1957); CODIGO DE AVIACION CIVIL art. 208 (Nicaragua 1956).

inscribed *prenda* absolute efficacy by providing that as long as *prenda* is inscribed in the register, it will remain unaffected "by any transfer or interest created in the object given as security." For both the effect between parties as well as in relation to third persons registration is necessary under the Argentine code; it provides that no legal transaction recordable under the code "will be perfected between parties or will become operative in relation to third persons unless followed by the inscription in the National Aircraft Register."¹²⁵ It may be assumed that the same scope is intended in the Brazilian code.¹²⁶

The aviation acts of some Latin American jurisdictions establish the requirement of registration of interests in aircraft but leave the procedure as well as effectiveness to be determined by other enactments. In Costa Rica such provisions have to be found in the *Ley de prenda* as well as in the *Reglamento* to it.¹²⁷ In addition to provisions regarding the real property *hipoteca* contained in the Peruvian Civil Code, provisions of the *Reglamento general de los registros publicos* (1940) and the *Reglamento de las inscripciones* (1936) must be consulted.¹²⁸

Ordinarily the requirement of registration is met by the recording of the document or by the inscription or annotation of the interest in the proper register, as the case may be. In some jurisdictions the security interest must also be annotated on the certificate of immatriculation issued for the aircraft. This is, for example, the case in Brazil where "any juridical act or fact which may change the juridical position of an aircraft, will be inscribed in the Brazilian Aeronautic Register and annotated on the certificate of immatriculation."¹²⁹ The possibility of such a quasi-Torrens system is foreseen in the Federal Aviation Act but not in operation.¹³⁰

IV. THE SECURITY

In addition to the case in which an aircraft is utilized as security, there is a variety of related situations which must be discussed. The aircraft may be put up as security as a finished product or under construction. It may belong to joint owners and aliquot shares considered for security. Different problems will arise from encumbering parts of the plane, like the engine. Moreover, spare parts may pertain to an aircraft or appear as independent assets. Finally the whole aviation enterprise may be used as security, including aircraft and other equipment.

125. CODIGO AERONAUTICO DE LA NACION art. 49 (Argentina 1954); Lena Paz 653, 659.

126. CODIGO BRASILEIRO DO AR art. 27 (Brazil 1938).

127. See note 53 *supra*.

128. See note 62 *supra*.

129. CODIGO BRASILEIRO DO AR art. 27 (Brazil 1938). An identical provision is contained in the aviation code of Uruguay (art. 24).

130. Federal Aviation Act § 503 (g), 72 Stat. 731 (1958).

AIRCRAFT. Whenever an aircraft is encumbered with a security lien, the aircraft must be properly identified or identifiable. Changes in the basic characteristics of the aircraft, such as changes in the type of engines, load capacity or cargo facilities, even though they do not vary the identity of the aircraft, may be of such an interest to the secured creditor that they are subject to specific rules. El Salvador,¹³¹ Honduras and Nicaragua,¹³² for example, expressly prohibit changes on the aircraft without consent of the creditors having a security interest in it.

Modeled after the French law¹³³ the Argentine code¹³⁴ allows *hipoteca* on an aircraft under construction, a provision hardly practical at a time when aircraft are mass produced on assembly lines and, at this stage, more convenient financing methods are available.

The question whether or not aliquot shares in aircraft may be used for security is answered differently in various countries. In Argentina, for example, it is permissible.¹³⁵ Costa Rica¹³⁶ and El Salvador¹³⁷ take the opposite position. The Brazilian code¹³⁸ permits hypothecation only with the consent of all joint owners. In countries where there are no express provisions to be found in the aviation acts, the question will be controlled by the general law.

Whether or not the component parts of an operational aircraft may be encumbered, depends on provisions contained in aviation acts; otherwise

131. Ley general de aviacion civil art. 250 (El Salvador 1955). The Ley de aeronautica civil art. 115 of Costa Rica prohibits changes in the characteristics of the engines.

132. Ley de aeronautica civil art. 212 (Honduras 1957); CODIGO DE AVIACION CIVIL art. 205 (Nicaragua 1956).

133. Loi sur l'immatriculation des bateaux art. 13 (cited note 21 *supra*), incorporated in the Loi relative a la navigation aerienne art. 14 (1924).

The provision survived in the ITALIAN CODICE DELLA NAVIGAZIONE (art. 1028, 1942), MANCA, THE ITALIAN CODE OF NAVIGATION, TRANSLATION AND COMMENTARY (1958); the compliance with the provision is facilitated by the fact that aircraft under construction must be registered (art. 848, 849). There are no similar provisions in the Argentine aviation code.

The applicable Spanish statute (see note 9 *supra*) refined the provision by providing that "an aircraft under construction may be encumbered with an *hipoteca* when one third of the presumed amount has been invested" (art. 38); the temporary inscription in the mercantile register will be changed into a permanent once the construction is completed.

134. CODIGO AERONAUTICO DE LA NACION art. 51, para 1 (Argentina (1954); Lena Paz at 660.

135. CODIGO AERONAUTICO DE LA NACION art. 51, para. 1 (Argentina 1954), interpreting the statutory "en todo o en parte" to include aliquot shares as well, Lena Paz at 660.

136. Ley general de aviacion civil art. 110 (Costa Rica 1949), providing that *prenda* may only be constituted "sobre la entera propiedad de las aeronaves", with the additional provision that there can be no "prenda parcial respecto a derechos que no sean el de la nuda propiedad", this apparently to be understood as complete ownership and not in the special sense of mere "nuda propiedad."

137. Ley de aeronautica civil art. 251 (El Salvador 1955), specifying in this regard "quota or parte de derecho sobre una aeronave," in spite of the fact that coownership is possible (art. 236). The same position is adopted in art. 229 of the Chilean draft (1947), see note 43 *supra*. For Argentina, see Lena Paz at 660, relying on art. 1364 of the CIVIL CODE.

138. CODIGO BRASILEIRO DO AR art. 144 (Brazil 1938).

on rules supplied by the general law. In a negative sense it may be stated that in a number of Latin American republics aviation acts provide for *prenda* or *hipoteca* of an aircraft as a whole, for example, Bolivia,¹³⁹ Brazil,¹⁴⁰ Colombia,¹⁴¹ Costa Rica¹⁴² and Uruguay.¹⁴³ Being special acts, provisions contained therein will be interpreted as limitative in character making component parts unavailable as security. The most valuable part of the craft, the engine, may be pledged as security under Mexican law.¹⁴⁴ In the United States the validity of such arrangements depends on the applicable state law. With regard to the recording of such security interest under the Federal Aviation Act,¹⁴⁵ a mortgage of any "specifically identified aircraft engine" may be recorded regardless of its being part of an operative aircraft. This conclusion appears to be justified in view of other provisions in the same act dealing with the recording of mortgages affecting engines classified as spare parts.¹⁴⁶ Other component parts of an operational aircraft such as propellers, radio or radar, may be encumbered provided the controlling state law permits. However, such mortgage cannot be recorded under the Federal Aviation Act since it allows the recording only of mortgages in "any aircraft engines, propellers, or appliances maintained . . . for installation or use in aircraft . . .,"¹⁴⁷ *i.e.* provided they may be classified as spare parts.

SPARE PARTS. With regard to all appurtenances belonging to aircraft two questions can arise. The first is the classification of those parts considered appurtenances of an operational aircraft and as such included in the same encumbrance. The other deals with those chattels classified as spare parts and thus available for security as independent assets.

The answer to the first question depends on the controlling aviation statute; in the absence of an applicable provision, one or another of the subsidiary sources will come into play, in addition to the intent of the parties. In jurisdictions where the orthodox notion of *hipoteca* governs, as in Peru¹⁴⁸ and partly in Mexico,¹⁴⁹ the question is determined by the rules of the civil code defining appurtenances to immovables.

139. Resolucion Suprema art. 34 (Bolivia 1939).

140. CODIGO BRASILEIRO DO AR art. 137 (Brazil 1938).

141. See note 52, *supra*, art. 11 (Colombia 1938).

142. Ley general de aviacion civil art. 110 (Costa Rica 1949).

143. CODIGO DE LEGISLACION AERONAUTICA art. 105 (Uruguay 1942).

144. Ley de vias generales de comunicacion art. 363, para. 1 (Mexico 1940); registration under art. 371(1) (d) of the act and art. 11 (1) (b), 14 and 31 (VIII) of the Reglamento, cited in note 59 *supra*.

145. Federal Aviation Act, § 503 (a) (2), 72 Stat. 731 (1958); 14 C.F.R. 504.3 (a) (1).

146. Federal Aviation Act, § 503 (a) (3), 72 Stat. 731 (1958); 14 C.F.R. § 505.3(a)(1), (2).

147. Federal Aviation Act § 503(a) (3), 72 Stat. 731 (1958); 14 C.F.R. § 505.3(a) (1) and (2).

148. See note 14 *supra*.

149. See note 30 *supra*. Relying on art. 1354 of the Argentine CIVIL CODE, Lena Paz suggests that a *hipoteca* on an aircraft includes all accessories except where there is an agreement to the contrary (661).

The question concerning spare parts as an independent asset presents greater difficulties.¹⁵⁰ It is a characteristic that these are more varied and numerous, and stored in different places, mostly along the lines operated by the debtor. When need arises, they are taken from the stock and built into operational aircraft and, as a consequence, lose their identity. Thus inventories of spare parts are constantly depleted even though replaced as routine operations dictate. In this matter the most elaborate provisions are in force in the United States. Under the Federal Aviation Act¹⁵¹ mortgage interests in "any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certified under Section 604 (b) of this Act, for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such air carrier" will be admitted to registration. The identification necessary to satisfy the doctrine of specialty is supplied by three devices: the identification of the debtor, the air carrier involved; by a general description of the types of such spare parts, without necessity for a statement of serial numbers or quantities; and finally, by the designation of the place where such spare parts are located.¹⁵²

There are only a few jurisdictions in Latin America where specific statutory provisions regarding spare parts are enacted. In Mexico, in addition to engines, propellers, radios, instruments and other equipment listed as available to *prenda*, the statute lists other spare parts as well.¹⁵³ Virtually the same language appears in the aviation act of El Salvador.¹⁵⁴ Aviation acts in force in Guatemala,¹⁵⁵ Honduras, and Nicaragua¹⁵⁶ omit radios from the list but retain the balance of these items, though with a crucial change. All three acts mention as the object of *hipoteca* (Guatemala) or *prenda sin desplazamiento* (Honduras and Nicaragua) first the aircraft itself, and then engines, propellers, spare parts (Guatemala) or generally other equipment, adding the doubtful qualification "as well as *their* engines . . ." (Guatemala), or "engines . . . for the *same* aircraft" (Honduras and Nicaragua). Interpreted strictly this would mean that only parts or equipment in the nature of spare parts belonging to a specified aircraft, i.e. as their appurtenances, may be subject to an *hipoteca* or *prenda*. Of course, there is always the alternative to assume poor drafting and thus avoid such restrictive interpretation.

150. The Geneva Convention does not apply to spare parts as independent assets for security, but only to spare parts belonging to an aircraft encumbered with an interest to be recognized under the Convention (art. X, para. 1). See discussion under VIII *infra*.

151. Federal Aviation Act, § 503 (a) (3), 72 Stat. 731 (1958); 14 C.F.R. 505.3 (a) (1).

152. 14 C.F.R. § 505.3 (a) (2).

153. Ley de vias generales de comunicacion art. 363, para. 1 (Mexico 1940). It may be added that the Argentine code provides for a special register for engines, propellers, spare parts and accessories (art. 37).

154. Ley de aeronautica civil art. 242 (El Salvador 1955).

155. Ley de aviacion civil art. 14, para. 1 (Guatemala 1948).

156. Ley de aeronautica civil art. 214 (Honduras 1957); CODIGO DE AVIACION CIVIL art. 207 (Nicaragua 1956).

ENTERPRISE. A more complex question arises when the complete aviation enterprise is used as security, since the enterprise includes not only immovables but also movables, both corporeal and incorporeal, among the former aircraft and related equipment. Without attempting to open the vast problems surrounding the enterprise as an object of legal transactions in civil law,¹⁵⁷ particularly in Latin America,¹⁵⁸ the present discussion will be limited to the immediate effects of such security operations on aircraft.

As an illustration the Mexican enactment may be discussed. Under this act the "complete unit of an enterprise engaged in air transportation" may be encumbered with *hipoteca*, so as to include "respective concessions and permits" and, provided parties did not expressly exclude, also "flying equipment, installations, engines, propellers, radios, other instruments . . . , fuels, lubricants as well as other movables and immovables intended to be used in the exploitation and considered as an entity."¹⁵⁹ There seems to be some uncertainty on the question whether or not such *hipoteca* must be registered. The act itself has no express provision in this respect since it omits the *empresa* from the list of items whose hypothecation must be registered.¹⁶⁰ Two additional provisions should be noted in this connection. One is to the effect that an *hipoteca* on an enterprise may not be constituted to last longer than nine tenths of the duration of the permit where such permit is limited;¹⁶¹ the other provides that the creditors holding a *hipoteca* may not "oppose modifications or alterations during the duration of the *hipoteca*, to the buildings, lands, terrains and . . . the materiel of the enterprise."¹⁶²

A further example is the aviation law of El Salvador which permits the *hipoteca* of the "complete unit of an aviation enterprise."¹⁶³ The added

157. Bayitch, *Transfer of Business, a Study in Comparative Law*, 6 AM. J. COMP. L. 285 (1957).

158. Hypothecation of a railway enterprise was possible earlier, e.g., in Cuba (MILITARY ORDINANCE, No. 3407, Feb. 7, 1902, ch. IX and XI); in Brazil (CIVIL CODE, art. 854), in Nicaragua (CIVIL CODE art. 3899 (8) and Law of May 25, 1916) and in Mexico (Ley sobre ferrocarriles, April 22, 1926, art. 37).

159. Ley de vias generales de comunicacion art. 362 (II) (Mexico 1940); prior authorization by the Secretary of Communications is required (art. 362, para. 2).

160. Ley de vias generales de comunicacion art. 371 (Mexico 1940). Additional registration of specific component parts may be necessary under art. 372, para. 2; see note 118 *supra*.

The Reglamento (see note 59 *supra*) deals only with items enumerated in art. 371, and has no provisions pertaining to *hipoteca* of an *empresa*.

161. Ley de vias generales de comunicacion art. 92 (1940).

162. Ley de vias generales de comunicacion art. 95 (1940).

163. Ley de aeronautica civil art. 241 (El Salvador 1955). The principle of unity of the *empresa* is emphasized in art. 647 of the COMMERCIAL CODE prohibiting the "disintegration in consequence of the pressure by individual claims", except in favor of holders of *hipoteca* (Codigo de Comercio art. 647).

The aviation acts of Honduras (art. 157) and that of Nicaragua (art. 152) contain a definition of an aviation enterprise, namely "any physical or juridical person engaged, on the basis of a licence . . . in the performance of air transport services . . ." Added is a definition of air carrier (art. 158 and 153 respectively).

reference to the applicable provisions of the civil and commercial codes is, at least with regard to *empresa*, illusory, since both of these codes, in contra-distinction to the Honduran, contain no pertinent provisions. However, it is a similar reference contained in the Honduran¹⁶⁴ aviation act, this time to the Commercial Code¹⁶⁵ which has adopted the French idea of *nantissement de fonds de commerce*,¹⁶⁶ that a nondispossessory pledge of the business was introduced and expanded through the vehicle of *hipoteca* to include aviation enterprises as well. According to Honduran commercial law,¹⁶⁷ a *hipoteca* constituted on an enterprise will encumber "all elements of the same without need for a detailed description." The following component parts of the enterprise are presumed to be included: the establishment, its goodwill and reputation, the trade name including commercial signs, leases, movables and machinery, employment contracts, merchandise, and account receivable and other assets. To exclude the aforementioned, the parties must so stipulate; to include the following items, namely patents, trade secrets, exclusive dealerships and licenses, they must do likewise. It seems that the *hipoteca*, whatever its scope, must be registered in the Public Commercial Register. This registration will not suffice as to the immovable property of the enterprise though. It remains subject to the law of real property and *hipoteca* in this respect must be registered in accordance with rules for that type of property.¹⁶⁸ This is true notwithstanding the general provisions of the Commercial Code which declare enterprises owned by individuals as well as corporations to be movables.¹⁶⁹

In common law jurisdictions there are no specific statutory provisions in force regulating mortgages on aviation enterprises. Though limited to corporate enterprises, two institutions, one in Canada and the other in the United States, come close enough to statutory schemes described above so as to warrant comparison.

Where an aviation enterprise is operated as a company under the Canadian Act respecting Dominion Companies,¹⁷⁰ a floating charge may

164. Ley de aeronautica civil art. 216 (Honduras 1957) contains the clause "sin perjuicio de lo dispuesto por elCodigo de Comercio en la hipoteca de empresa", which does not appear in the version of the act as in force in Nicaragua (art. 209).

165. CODIGO DE COMERCIO art. 1315 (Honduras 1952).

166. Loi relative a la vente et au nantissement des fonds de commerce, March 17, 1909. COHEN, TRAITÉ THÉORIQUE ET PRATIQUE DES FONDS DE COMMERCE (1948); recently KUNZLER, DAS NANTISSEMENT DU FONDS DE COMMERCE, EINE RECHTSVERGLEICHENDE STUDIE (1958).

167. CODIGO DE COMERCIO art. 648 (Honduras 1952).

168. CODIGO DE COMERCIO art. 646, para. 2 (Honduras 1952).

169. CODIGO DE COMERCIO art. 646, para. 1 (Honduras 1952).

170. CAN. REV. STAT. ch. 53 § 66 (1952). The charge must be recorded in the Company's Register of Mortgages (§ 70).

A comparable type of security is available under the Argentine Ley No. 12,962, sobre prenda con registro, March 27, 1947, permitting a *prenda flotante* on merchandise and raw materials of commercial or industrial enterprises (art. 16).

On floating charge, BUCKLEY, ON THE COMPANIES ACT 204 (1949); GOWER, THE PRINCIPLES OF MODERN COMPANY LAW 409 (1954), discussing the English Companies Act of 1948 (11 & 12 Geo. 6, ch. 38), § 95.

be constituted "on the undertaking or property of the company," undertaking being defined as the "whole of the works and business of whatsoever kind that the company is authorized to undertake or carry on."¹⁷¹ A comparison between a floating charge and a mortgage throws into sharp relief the differences between the lien and the title type of security. This was well expressed in a recent opinion¹⁷² stating that the floating charge constitutes only an "equitable lien permitting the company to deal freely with the property in the usual course of business until the security holder shall intervene to enforce his claim whereupon the lien or charge becomes fixed or crystallized and the company . . . has no further authority to deal with the property, nor can general creditors take it."

In the United States the operation effecting the enterprise as security took the form of the corporate mortgage.¹⁷³ Such a mortgage is largely, if not almost exclusively, nonstatutory. It results from private agreement whereby all or part of the assets, present or future, corporeal or incorporeal, of a corporation are mortgaged, in compliance with the controlling state law.¹⁷⁴ It is to be noted, however, that this type of security is, as such, not recordable under the Federal Aviation Act, but only those parts of the agreement dealing with specific chattels which would, standing alone, qualify for recording. Nevertheless, it is interesting to find the corporate mortgage mentioned in the act when it relieves persons "having . . . a security title to any aircraft under a corporate mortgage. . . ." ¹⁷⁵ from liability imposed, under the applicable local law, upon the owner of the aircraft.¹⁷⁶

SUBSTITUTIONS. The final aspect of the security transaction to be discussed involves those situations where a sum of money takes the place of the chattel. Here again a sharp difference exists between the civil and common law jurisdictions. The aviation acts of the former provide that such substitutions take place by operation of law, whereas in the latter the substitution normally is by operation of a private agreement. Such substitution occurs in the following cases: proceeds of insurance contracts, indemnities for expropriation and the loss-value stemming from damage to the aircraft.

171. Companies Act, 11 & 12 Geo. 6, ch. 38 § 148(a) (1948).

172. *Pennsylvania Co. for Ins. v. United Ry. of Havana*, 26 F. Supp. 379, 387 (1939). *Adkins & Billyou, A Proposed New Form of Security for the Senior Debt of Our Airlines and Railroads: Floating Charges*, 12 BUS. LAW. 378 (1957).

173. 7 FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* 177 (1957 supp.); also 1 DEWING, *THE FINANCIAL POLICY OF CORPORATIONS* 195 (1953); LYON, *CORPORATIONS AND THEIR FINANCING* 244 (1938).

174. FLA. STAT. § 608.13 (1957); *Smith v. Massachusetts Mutual Life Ins. Co.*, 116 Fla. 390, 156 So. 498 (1934). For a more elaborate statute see New York Lien Law § 231, as amended 1942 and 1947, and the New York Stock Corporation Law § 16, as amended 1950.

For a parallel institution in Quebec, § 22 to 28 of the Special Corporate Powers Act, QUE. REV. STAT. ch. 280 (1941).

175. Federal Aviation Act § 504, 72 Stat. 731 (1957).

176. See note 226 *infra*.

The Argentine code exemplifies the first mentioned instance of the substitution process. The code expressly provides that "the *hipoteca* also includes any proceeds of the insurance policy arising from loss of or damage to the aircraft."¹⁷⁷ Similar provisions are contained in the aviation acts of Brazil,¹⁷⁸ Costa Rica,¹⁷⁹ El Salvador,¹⁸⁰ Honduras,¹⁸¹ Nicaragua¹⁸² and Uruguay.¹⁸³ In this country the closest parallel to be found is the rule granting to the mortgagee an equitable lien on insurance proceeds where the mortgagor promised to insure the chattel but defaulted on his promise to make the loss payable to the mortgagee.¹⁸⁴

Indemnity for expropriation is listed as another case of substitution in a number of Latin American aviation acts, like that in force in Brazil,¹⁸⁵ Costa Rica,¹⁸⁶ El Salvador,¹⁸⁷ Honduras,¹⁸⁸ Nicaragua,¹⁸⁹ and Uruguay.¹⁹⁰ The security liens also attach to the amounts due for damages inflicted to the aircraft, under the aviation acts of Argentina,¹⁹¹ Brazil,¹⁹² Costa Rica,¹⁹³ and Uruguay.¹⁹⁴

V. RANK AND PRIVILEGES

Accurate assessment of the effectiveness of a security lien is impossible without consideration of two factors: the rank it occupies in relation to other securities of the same type, and the statutory privileged claims granting priority over all or some of the security interests constituted by agreement. Due to the original requirement of transferring possession of the security to the creditor, the principle of a single security lien still obtains in many jurisdictions and is even carried over into the nondispossessory pledge. In that situation questions of rank do not arise, only questions of privileges. The *hipoteca*-type of security, on the contrary, permits the constitution

177. CODIGO AERONAUTICO DE LA NACION art. 52 (Argentina 1954).

178. CODIGO BRASILEIRO DO AR art. 139 (Brazil 1938).

179. Ley general de aviacion civil art. 113 (Costa Rica 1949).

180. Ley de aeronautica civil art. 241 (El Salvador 1955).

181. Ley de aeronautica civil art. 210 (Honduras 1957).

182. CODIGO DE AVIACION CIVIL art. 203 (Nicaragua 1956).

183. CODIGO DE LEGISLACION AERONAUTICA art. 108 (Uruguay 1942).

184. 5 APPLEMAN, INSURANCE LAW AND PRACTICE WITH FORMS 524 (1941); 8 COUGH, CYCLOPEDIA OF INSURANCE LAW 6450 (1932). Cf. *Sumlin v. Colonial Fire Underwriters*, 158 Fla. 95, 27 So.2d 730 (1946). The lack of analogous provisions in common law is evidenced by the provision in the Uniform Commercial Code (1957) that security interests continue notwithstanding sale, exchange "or other disposition thereof by the debtor" which excludes acts beyond the debtor's control.

185. CODIGO BRASILEIRO DO AR art. 139 (Brazil 1938).

186. Ley general de aviacion civil art. 113 (Costa Rica 1949).

187. Ley de aeronautica civil art. 248 (El Salvador 1955).

188. Ley de aeronautica civil art. 210 (Honduras 1957); art. 2115 of the Civil Code gives holders of *hipoteca* a right to demand a "new *hipoteca*, or payment of the debt from the proceeds (*valor*) of the expropriated thing."

189. CODIGO DE AVIACION CIVIL art. 203 (Nicaragua 1956). Art. 3788 of the Civil Code contains an identical provision as translated in the previous note.

190. CODIGO DE LEGISLACION AERONAUTICA art. 108 (Uruguay 1942).

191. CODIGO AERONAUTICO DE LA NACION art. 52 (Argentina 1954).

192. CODIGO BRASILEIRO DO AR art. 139 (Brazil 1938).

193. Ley general de aviacion civil art. 113, para. 2 (Costa Rica 1949).

194. Codigo de Legislacion Aeronautica art. 108 (Uruguay 1940).

of a number of liens against the same chattel.¹⁹⁵ Where this type prevails, both the questions of rank and privileges become important.¹⁹⁶

RANK. In general, the rank of security liens constituted by contract is determined by the time of their creation, in accordance with the time honored adage *prior tempore, potior jure*. Such time may be when the agreement was reached, or when reduced to writing and executed, when the chattel was handed over, or when the instrument was filed for registration or registered. The opposite rule of rank according to inverse time sequence, is part of the maritime law and applies in aviation law only when expressly incorporated, as in the Geneva Convention.¹⁹⁷

PRIVILEGES. The main danger for the contractually created security interests, in both types of jurisdictions, is the existence of a large number of classes of claims statutorily privileged to take priority over the former. Even though there may be incidental variations as to the specific types of privileges among the several jurisdictions, it would seem their potential burden has reached the point where the very effectiveness of the contractual security is threatened. The reaction to this crippling condition found expression in the move to limit, at least in the area of aviation law, the number of these privileges. France took two courageous steps forward and one backward.¹⁹⁸ This halfway position now appears to prevail. It might be summarized that in civil law jurisdictions aircraft are no longer subject to the numerous priorities, including general liens, imposed by the civil codes, but only to priorities as are expressly enumerated in aviation acts.¹⁹⁹

195. CODIGO BRASILEIRO DO AR art. 143 (Brazil 1938). In Peru, the right to constitute subsequent *hipotecas* cannot be bargained away (art. 1023 of the CIVIL CODE). However, the civil code of Panama (art. 1567, as amended, see note 47 *supra*) permits only one encumbrance. The same rule prevails in Ecuador, art. 21 of the Ley sobre contrato de prenda agricola e industrial, 1936 (see note 46 *supra*).

196. For general information CORDEIRO ALVAREZ, TRATADO DE LOS PRIVILEGIOS, DERECHO CIVIL Y COMERCIAL ARGENTINO, DERECHO COMPARADO (1941); MOLINARIO, LOS PRIVILEGIOS EN EL DERECHO ARGENTINO (1941).

197. GENEVA CONVENTION art. IV (2).

198. Excluding general liens by providing that vessels "ne peuvent être hypothéqués que par la convention des parties" (art. 11 of the 1917 law, see note 21 *supra*). However, this provision did not expressly exclude privileges established in the CIVIL CODE (arts. 2101 and 2102), and, in consequence, still permitted hidden encumbrances. This deficiency was clarified by the amendment of July 19, 1934, expressly listing privileges on vessels and, by incorporation in the aviation act, on aircraft as well (see note 21 *supra*). These privileges are: costs for conservation (see note 200 *infra*), wages of the captain and the crew, contributions due for social security, amount for salvage and assistance, and claims for damages arising out of accidents in navigation. It is apparent that this list served as model to a considerable number of Latin American countries. It may be added the inter sese the rank is determined by the statutory sequence, claims in the same group being of equal rank except claims for salvage and assistance where the maritime rule of inverse rank applies [art. 10 (a)]. JUGLART, TRAITE ELEMENTAIRE DE DROIT AERIEN 130 (1952); LEMOINE, TRAITE DE DROIT AERIEN 183 (1947).

The Spanish statute (see note 9 *supra*) goes farther by providing that only claims for salvage and expenses "absolutely necessary for the conservation of the aircraft" will be privileged provided they are annotated in the commercial register within three months since these operations have been terminated (art. 41).

199. Priorities in force in this country have been well presented in a recent study by Scott, *Liens in Aircraft: Priorities*, 25 J. AIR L. & COMM. 193 (1958).

In regard to privileges two questions must be dealt with. The first is the basic delineation of the classes of claims that are privileged. The second is that of rank *inter sese* as well as against the nonprivileged claims attached to the same security. The delineation places the privileged claims in the following groups:

(1) Judicial expenses. A substantial number of countries, for example, Brazil,²⁰⁰ Costa Rica,²⁰¹ Honduras,²⁰² Nicaragua²⁰³ and Uruguay,²⁰⁴ recognize the priority of a lien for expenses of a judicial character occasioned by action by secured creditors in connection with the security. Some countries qualify this general rule, Argentina²⁰⁵ limiting it to those costs beneficial to the mortgagee, while Venezuela²⁰⁶ extends it to include costs incurred in the interest of creditors generally. The El Salvador act reads as limiting the privilege to expenses destined for the conservation of the aircraft.²⁰⁷

(2) Tax claims in a broad sense constitute the next class of privileged claims. Tax claims in general are preferred in El Salvador,²⁰⁸ Mexico,²⁰⁹ and Uruguay.²¹⁰ In Venezuela²¹¹ such claims are limited to current and previous year taxes. Costa Rica adds the qualification that the taxes be "owed by the aircraft."²¹² It may be pointed out that under Florida law aircraft are exempt from taxation,²¹³ but not free from liens for the non-payment of the registration tax.²¹⁴ Tax liens perfected under the Internal Revenue Code attach to aircraft just as to any other asset of the delinquent taxpayer.²¹⁵

200. CODIGO BRASILEIRO DO AR art. 140(a) (Brazil 1938), including costs for conservation of the plane prior to judicial sale; cf. art. 1569 (2) of the CIVIL CODE and art. 10 of the French law of 1917 as amended in 1934 (see note 198 *supra*), referring to "les frais de conservation depuis la saisie."

201. Ley general de aviacion civil art. 113(a) (Costa Rica 1949).

202. Ley de aeronautica civil art. 209(a) (Honduras 1956).

203. CODIGO DE AVIACION CIVIL art. 202 (a) (Nicaragua 1956).

204. CODIGO DE LEGISLACION AERONAUTICA art. 109(1) (Uruguay 1942).

205. CODIGO AERONAUTICO DE LA NACION art. 53(3) (Argentina 1954).

206. Ley de aviacion civil art. 63 (2) (Venezuela 1955).

207. Ley de aeronautica civil art. 247(a) (El Salvador 1955); the provision is apparently modelled after art. 140 (1) of the Brazilian act, omitting however, the connecting "ou" and thus limiting expenses to those arising out of a receivership prior to judicial sale. The distinction as established in the Brazilian code is adopted in the Honduran and Nicaraguan aviation acts.

208. Ley de aeronautica civil art. 247c) (El Salvador 1955).

209. Ley de vias generales de comunicacion art. 365 (Mexico 1940).

210. Codigo de legislacion aeronautica art. 109 (2) (Uruguay 1942).

211. Ley de aviacion civil art. 63 (1) (Venezuela 1955).

212. Ley general de aviacion civil art. 113 (a) (Costa Rica 1949).

213. FLA. CONST. art. IX: FLA. STAT. §§ 330.06 (1), 330.11 (4) (1957).

214. FLA. STAT. §330.16 (1957).

215. Kennedy, *The Relative Priority of the Federal Government: the Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905 (1945); Prather, *Federal Liens as They Affect Mortgage Lending*, 13 BUS. LAW. 118 (1948); Wentworth & Brandt, *Federal Revenue Liens*, 39 CHI. BAR REC. 453 (1957); Scott, l.c. at 197. Reiling, *Priority of Federal Tax Liens*, 36 TAXES 978, 982 (1958); Spencer, *Federal Tax Liens*, 38 B.U.L.REV. 181 (1958). Cf. *United States v. Jane B. Corp.*, 167 F.Supp. 352 (1958).

Fiscal claims of an operational character, such as landing fees, are another preferred group under the law of Argentina,²¹⁶ Brazil,²¹⁷ and Uruguay.²¹⁸ Honduras²¹⁹ and Nicaragua²²⁰ both restrict the privilege to those fees accrued during the last 60 days.

Claims for fines are privileged under the aviation act of Uruguay.²²¹ A similar privileged lien exists under Florida law,²²² and for civil penalties under the Federal Aviation Act.²²³

(3) Claims for damages arising out of the operation of aircraft constitute the next class of privileged liens. In Venezuela,²²⁴ for example, the privilege operates with regard to "recovery for damages imposed by this law," namely of civil aviation. Claims for damages generally are privileged in Costa Rica.²²⁵ In the United States a lien attaches to an aircraft for damages under the Uniform Aeronautics Act.²²⁶

(4) Claims for salvage and assistance²²⁷ are preferred in the prevailing number of Latin American republics, e.g., Argentina,²²⁸ Brazil,²²⁹ Costa

216. CODIGO AERONAUTICO DE LA NACION art. 53(2) (Argentina 1954).

217. CODIGO BRASILEIRO DO AR art. 140(3) (Brazil 1938).

218. CODIGO DE LEGISLACION AERONAUTICA art. 109(3) (Uruguay 1942).

219. Ley de aeronautica civil art. 209(c) (Honduras 1957).

220. CODIGO DE AVIACION CIVIL art. 202(c) (Nicaragua 1956).

221. CODIGO DE LEGISLACION AERONAUTICA art. 109(2) (Uruguay 1940), "for fines arising out of violations."

222. FLA. STAT. § 330.16 (1957).

223. Federal Aviation Act § 901(b), 72 Stat. 731 (1958); Scott, l.c. note 199 at 197.

224. Ley de aviacion civil art. 63 (3) (Venezuela 1955).

225. Ley general de aviacion civil art. 113(a) (Costa Rica 1949).

226. Uniform Aeronautics Act (withdrawn 1943) provides in art. 5 that "The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it". 11 UNIFORM LAWS ANN. (1938). Schnader, *Uniform Aviation Liability Act*, 9 J. AIR L. 664 (1938).

227. Seaplane and vessel in salvage situations, *Reinhart v. Newport Flying Service Corp.*, 332 N.Y. 115, 133 N.E. 371 (1921); *Lambos Seaplane Base v. The Batory*, 215 F.2d 228 (1954). Knauth, *Aviation and Salvage: the Application of Salvage Principles to Aircraft*, 36 COLUM. L. REV. 234 (1936), and *Salvage as between Vessels and Aircraft*, 8 J. AIR L. 159 (1937); Norris, *Maritime Salvage for Fallen Aircraft*, 43 CAL. L. REV. 309 (1955); also Note, 52 MICH.L.REV. 1229 (1954); NORRIS, *THE LAW OF SALVAGE* 56 (1958).

In relation to Mexico, the Treaty providing for Assistance to and Salvage of Vessels in Territorial Waters (June 13, 1935, 49 Stat. 3359) applies also to aircraft (art. III, 2).

The Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea (Brussels, Sept. 29, 1938) has not been ratified by the United States. Knauth, *The Aviation Salvage at Sea Convention of 1938*, 10 AIR L. REV. 146 (1939).

228. CODIGO AERONAUTICO DE LA NACION art. 53(3) (Argentina 1954), salvage only; note also art. 125 to 133 of the aviation act.

229. CODIGO BRASILEIRO DO AR art. 140 (b) (Brazil 1938); note also art. 118 to 126 of the same act as well as art. 1566 (2) of the CIVIL CODE.

Rica,²³⁰ El Salvador,²³¹ Honduras,²³² Mexico,²³³ Nicaragua,²³⁴ Uruguay²³⁵ and Venezuela.²³⁶

(5) Claims arising out of assistance furnished, permitting continuation of flight are also privileged. These may be divided into two classes: first, claims arising from assistance to any flight of the aircraft involved, as in Argentina,²³⁷ Brazil,²³⁸ Costa Rica,²³⁹ and El Salvador;²⁴⁰ or, second, for the last flight only, as in Honduras,²⁴¹ Nicaragua,²⁴² Uruguay,²⁴³ and Venezuela.²⁴⁴ In the United States a privileged lien on an aircraft exists only for the value of labor on and materials furnished to the aircraft.²⁴⁵ Under most of the controlling state laws, fueling would not create such a lien. On the contrary, it would suffice under many of the Latin American aviation laws, especially under the even broader Venezuelan provision expressly protecting *aprovisionamiento*.²⁴⁶

(6) Wage claims due the flight personnel are privileged under most of the Latin American acts. They are given the same treatment as seamen's wages under the general maritime law. Such claims may be unlimited in the sense that all wages due for the service on a particular aircraft attach to it; this appears to be the case in Costa Rica²⁴⁷ and El Salvador.²⁴⁸ Notwithstanding the fact that wage claims are omitted from the list of privileged claims in the Mexican act,²⁴⁹ they, as part of all earned wages, should

230. Ley general de aviacion civil art. 113(b) (Costa Rica 1949) for assistance and salvage.

231. Ley de aeronautica civil art. 247 (a) (El Salvador 1955).

232. Ley de aeronautica civil art. 209 (a) (Honduras 1957), limited to assistance and salvage occurring during the respective hypothecation.

233. Ley de vias generales de comunicacion art. 365 (Mexico 1940); note also art. 358 to 359 of the same act.

234. CODIGO DE AVIACION CIVIL art. 202(b) (Nicaragua 1956) with the qualification indicated in note 232 *supra*.

235.Codigo de legislacion aeronautica art. 109 (4) (Uruguay 1942); note also art. 166 to 170.

236. Ley de aviacion civil art. 63 (4) (Venezuela 1955).

237. CODIGO AERONAUTICO DE LA NACION art. 53 (4) (Argentina 1954).

238. CODIGO BRASILEIRO DO AR art. 140 (d) (Brazil 1938), limited to "expenses incurred by the commander of the aircraft within his legal authority, indispensable for the continuation of the flight."

239. Ley general de aviacion civil art. 113(d) (Costa Rica 1949), with a limitation as in note 238 *supra*.

240. Art. 247 (d), with the same limitation as in note 238 *supra*.

241. Art. 209 (d), with the limitation as in note 238 *supra* added.

242. Art. 202 (d), with the limitation as in note 241 *supra*.

243. CODIGO DE LEGISLACION AERONAUTICA art. 109 (5) (Uruguay 1942).

244. Ley de aviacion civil art. 63(4) (Venezuela 1955).

245. In Florida this type of lien has constitutional foundation (FLA. CONST. art. XVI § 22) and affects work on personal property (FLA. STAT. § 85.07) or repairs (FLA. STAT. § 85.12); on priority (FLA. STAT. § 85.24); on enforcement, FLA. STAT. ch. 86 (1957); on recording FLA. STAT. § 85.06 (1947). Silverstein, *Florida Mechanic Liens Law* . . . , 7 MIAMI L.Q. 477 (1953); Comment, *Security Interests* . . . , 7 MIAMI L.Q. 535, 539 (1953). Note, *Priority between Aircraft Artisans and Chattel Mortgagees and Conditional Vendors of Aircraft*, 2 OKLA. L. REV. 378 (1949); also Scott, l.c. 198. For Canadian law, MACAULAY & BRUCE, *HANDBOOK ON MECHANIC'S LIENS* (1951).

246. Ley de aviacion civil art. 63 (4) (Venezuela 1955).

247. Ley general de aviacion civil art. 113 (e) (Costa Rica 1949).

248. Ley de aeronautica civil art. 247 (e) (El Salvador 1955).

249. Ley de vias generales de comunicacion art. 365, para. 1 (Mexico 1940).

have the privileged status under the constitution²⁵⁰ as implemented by the Civil Code.²⁵¹ The same observation applies to Honduras; there wage claims are not included among the privileges listed in the aviation act,²⁵² but are recognized as privileged in the constitution of 1957.²⁵³ The other group of jurisdictions grants privileges to claims for wages only for the last flight completed before the claim is made. This limitation is in force in Argentina,²⁵⁴ Honduras,²⁵⁵ Nicaragua,²⁵⁶ and Uruguay.²⁵⁷ Venezuela²⁵⁸ extends the privilege to include wages accruing during the 15 days following the time of arrival of the airplane at the airport.

It is not disputed that such privileges do not exist under the controlling state law in the United States.²⁵⁹

(7) There is also a number of other liens privileged under the applicable local laws, e.g., the lien for storage under Florida law.²⁶⁰

The order in which the classes of privileged claims have been set forth above approximates the general preference given each *inter sese*. It is obvious that all take priority over non-privileged claims including contractual *hipotecas* and *prendas*, even over those having a temporarily superior rank.²⁶¹

250. CONST. OF MEXICO art. 133 (XXIII) (1917). On the problem in general CABANELLAS & PEREZ BOTIJA, DERECHO CONSTITUCIONAL LABORAL . . . (1958).

251. CODIGO CIVIL (*fed. district*) art. 2989 (Mexico 1932).

252. Ley de aeronautica civil art. 209 (Honduras 1957).

253. CONST. art. 112(4) (Honduras 1957).

254. CODIGO AERONAUTICO DE LA NACION art. 53(5) (Argentina 1954), Lena Paz 664.

255. Ley de aeronautica civil art. 209(e) (Honduras 1957).

256. CODIGO DE AVIACION CIVIL art. 202(c) (Nicaragua 1956).

257. CODIGO DE LEGISLACION AERONAUTICA art. 109 (6) (Uruguay 1942).

258. Ley de aviacion civil art. 63(5) (Venezuela 1955).

259. Except repairmen under state statutes. Scott, l.c. note 199 at 198. Brazil (art. 140) omits wages as well as mechanic liens in spite of such provisions in the CIVIL CODE (art. 1569 and 1566).

260. FLA. STAT. § 678.28 (1957); Scott, l.c. at 199.

The position of the unpaid seller's lien, similar to the right to retain possession so termed under the Uniform Sales Act, sec. 54-56 (cf. art. 1613 of the French Civil Code) remains uncertain. ZAPPIRIOU, THE TRANSFER OF CHATELS IN PRIVATE INTERNATIONAL LAW, A COMPARATIVE STUDY 128 (1956). According to art. 66 of the Argentine aviation code such claim only is ground for seizure of the aircraft, see *infra* VI, particularly note 267.

261. In case of insolvency or bankruptcy, the respective provisions of the civil (Dorantes-Tamayo, *La Procédure du 'concurso civil' en droit Mexicain*, 10 REVUE INTERNATIONALE DE DROIT COMPARE 753, 1958), or commercial codes, or of bankruptcy acts will control. In regard to the United States it is noteworthy that the 1957 amendment to the Bankruptcy Act § 116 (5) excluded the lien-type mortgage from the list of security interests privileged in bankruptcy, e.g., leases and conditional sales. This discrimination was strongly criticised. Adkins & Billyou, *Developments in Commercial Aircraft Financing*, 13 BUS. LAW. 199, 210 (1958).

There are time limitations on the privileged status of claims. According to the Brazilian aviation code (art. 141), claims listed in art. 140 retain their privileged status only for six months since they accrued (*depois sua constituicao*), subject to provisions regarding insolvency and bankruptcy. It appears doubtful whether an inscription will result in retaining their privileged status or will turn them into ordinary inscribed interests. For the solution adopted in Spain under the 1954 statute, see note 198 *supra*.

This question was dealt with in the Geneva Convention, art. IV (see VIII *infra*).

This survey of privileges demonstrates not only the large number of priorities recognized under the aviation laws in force in different jurisdictions but dramatizes their potentially frustrating effect on contractually established security interests, particularly on the international level. It was inevitable that the Geneva Convention should attempt to eliminate as many of the locally established priorities as possible. Later discussion will show how far the Convention succeeded in securing the adoption of such a policy and, at the same time, how many countries appear to be willing to go along.

RETENTION. At this point it is appropriate to discuss a remedy familiar to civil law jurisdictions, retention. In connection with some privileged liens, this remedy is known in common law jurisdictions as well.²⁶² To quote the definition given by the Argentine Civil Code,²⁶³ retention is the "right of the holder (*tenedor*) of a thing belonging to somebody else, to retain possession of the thing until payment due him on account of the same thing is made."²⁶⁴

It is safe to assume that in view of the legislative intent to free aircraft from most of the general privileges, retention will be authorized only in situations where particular aviation acts so provide. An example of this kind is given by the Mexican act²⁶⁵ providing that two out of three privileges listed, namely claims for salvage and claims for conservation, give the right to exercise retention until the amount due for such action is paid or security otherwise arranged. In Canada as well as in the United States the right to retain a chattel because of a privileged lien, mostly for work on it, with or without furnishing materials, depends on the controlling local law.²⁶⁶

VII. ENFORCEMENT

The fundamental idea behind in rem security arrangements is to give the creditor a contractually established priority to have his claim satisfied

262. *E.g.*, FLA. STAT. § 86.02 (1957).

263. CODIGO CIVIL art. 3939 (Argentina 1869).

264. So defined retention appears as a mere detention by the creditor, not in consequence of a security agreement but for the practical reason of work on the chattel, or because of expenses for or damages caused by it; the claim for refund being directed against the person entitled to possession; the connection between such claim and the chattel retained. The creditor might not have a lien on the chattel in the sense of a right to be paid out of the proceeds. ACUNA ANZORENA, *EL DERECHO DE RETENCION EN EL CODIGO CIVIL ARGENTINO* (1929); also CORDEIRO, *op. cit. supra* note 196, at 520, and MOLINARIO, *op. cit. note 196* at 266. On the interrelation between retention and privileges CORDEIRO, *op. cit. supra* note 196, at 525, and MOLINARIO, *op. cit. supra* note 196, at 273.

265. *Ley de vias generales de comunicacion* art. 365, para. 2 (Mexico 1940), within the limits established by art. 96 of the same act. Consequently, art. 2644 of the CIVIL CODE giving the "maker of any movable work (*obre mueble*) the right to withhold it until paid . . .", does not apply.

266. See note 245 *supra*.

out of the specific asset,²⁶⁷ ahead of all other so-called general creditors. This aim may be achieved in different ways. The most primitive which allowed the creditor to keep the security upon the debtor's default (*lex commissoria*) has long since been abolished. Methods of enforcing security interests in chattels developed along similar lines in both the civil and common law jurisdictions once the title transferred under a chattel mortgage became redeemable.

Notwithstanding differences in detail, it may be stated as a rule that prior adjudication is necessary determining the debt as well as the specific security. In most jurisdictions, civil as well as common law, general satisfaction of secured claims is achieved in summary proceedings of one kind or another.²⁶⁸ In addition, there is, in some jurisdictions, a possibility of an even more summary method, that is where a *titulus executionis*, judicial

267. In case several securities are constituted, the creditor has the right to demand satisfaction from any one at his discretion, CIVIL CODES of Argentina (art. 3147), Honduras (art. 2104), and Nicaragua (art. 3777, 3792).

In common law jurisdictions the equitable doctrine of marshalling assets may be brought into play compelling a creditor having a lien on two or more assets, to satisfy his claim out of an asset to which another secured creditor cannot resort, *Lanoy v. Duchess of Athol*, 2 Atk. 444 (1742); 2 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 230 (1918).

A number of Latin American aviation acts, e.g., Brazil (art. 138), Costa Rica (art. 114), El Salvador (art. 249), Honduras (art. 211), Nicaragua (art. 204) and Uruguay (art. 107) prohibit encumbered aircraft to be removed abroad without the consent of the creditor, or the creditor and the competent administrative office (e.g. in El Salvador the Departamento de Aviacion). It is not clear what the civil consequences of such a violation are; in some of these statutes violations are subject to penalties.

268. E.g., Chile, arts. 42-46 of the Ley de prenda industrial (see note 43 *supra*); Costa Rica, Ley de prenda, art. 61 providing that "*La acción será sumarisima*" (see note 53 *supra*); Mexico, art. 468 to 488 of the CODE OF CIVIL PROC. for the Federal District (1932), or the corresponding state codes.

In Florida a summary proceedings is available (FLA. STAT. § 86.05), or in equity (FLA. STAT. § 86.03), or a sale without judicial proceedings may be authorized [FLA. STAT. § 86.08 (2), 1957].

There are only a few aviation acts establishing special provisions regarding the enforcement of security interests in aircraft. Argentina may be used as an example. According to art. 64 of the act an aircraft may be attached (*embargo*) which fact is to be recorded (art. 65) in the National Register (art. 38, para. 2, see note 119 *supra*), giving the creditor preference against all others except those with priority (*mejor derecho*). However, the attached aircraft will be grounded only in enumerated situations (art. 66), namely where the attachment is in pursuance of a judgment, where it is for a credit extended for the continuation of the flight, this even if the aircraft is ready for departure [the claim itself is privileged under art. 53 (4), see note 237 *supra*], and for the claim of the vendor based on the purchase agreement, otherwise a non-privileged claim (see note 260 *supra*), *Lena Paz* at 664.

The Bolivian act (see note 50 *supra*) provides in general that attachment and judicial sale of aircraft will be governed by the laws in force (art. 35). In case the owner of the aircraft has no residence in Bolivia or the aircraft is of foreign registry, then "any creditor may demand attachment as well as the appointment of a *depositario* by the court where the aircraft has landed." Attachment may be averted by the owner or pilot posting of a bond in the amount of the claim (art. 37).

Similar provisions dealing with *arrest* are contained in the Brazilian aviation code, 62-65, MILHOMENS, *op. cit.* note 51, at 69.

Special enforcement procedures are available under the nonaviation type of acts available to constitute security interests in aircraft, e.g. in Ecuador (Ley sobre contrato de prenda etc., 1936, art. 22, note 46 *supra*) and Panama (Decreto-ley of 1954, art. 62-65, MILHOMENS, *op. cit.* note 51, at 69).

or notarial,²⁶⁹ constituted in advance, establishes the debt, the specific chattel charged with it, and the right of the creditor to enforce his claim dispensing with the need of a previous adjudication. Armed with any of these *tituli executionis*, the executing creditor will press for judicial sale, except where private sale is permitted.

In civil law countries enforcement proceedings are regulated in that part of the codes of civil procedure dealing with enforcement of judgments and other executive claims. In common law countries judge-made law prevails as modified by scattered statutory enactments. In aviation acts provisions concerning the enforcement of security interests in aircraft are extremely rare. One isolated provision, already mentioned in another connection, is contained in the aviation acts of Honduras²⁷⁰ and Nicaragua,²⁷¹ to the effect that judicial sales of aircraft encumbered with *hipoteca* shall be conducted in accordance with provisions applicable to judicial sales of land while in "other cases such sale will be executed according to rules respecting chattels."

Considerable changes in municipal law concerning the enforcement of security interests in aircraft have been occasioned by the Geneva Convention.²⁷²

VII. TERMINATION

A security interest in chattels may terminate for either of the two reasons which, in combination, were necessary for bringing it into being. The first relates to the debt secured. The security arrangement being collateral, the debt is coextensive as well. Extinction of the debt extinguishes the security arrangement. The other factor deals with the security aspect itself. The debt may continue beyond the life of the security, for one reason or another.

Only a few aviation acts regulate this aspect of the problem so that, as previously stated, reliance must be placed on the provisions of the civil code. With this understood, a few examples taken from aviation acts may be cited. The aviation act of Brazil²⁷³ has the most comprehensive provision listing as grounds for termination of the *hipoteca* loss of the aircraft, surrender of the security by the creditor, termination of the principal debt and, finally, judicial decision.²⁷⁴ Additional grounds for

269. Martinez Segovia, *La Ejecutoriedad y el Documento Notarial*, 10 REVISTA INTERNACIONAL DEL NOTARIADO 39 (1958).

270. Ley de aeronautica civil art. 198 (Honduras 1956).

271. CODIGO DE AVIACION CIVIL art. 191 (Nicaragua 1956).

272. To be discussed under VIII, *infra*.

273. CODIGO BRASILEIRO DO AR art. 145 (Brazil 1938).

274. Judicial decisions may be based on grounds for termination as listed in art. 145, or may rely on another reason, for example, on third parties claim of ownership to the encumbered aircraft, comparable to *terceria* in Latin American statutes, like art. 62 of the Costa Rican Ley de prenda, art. 751 of the Code of Civil Proc. of Peru, or FLA. STAT. § 55.39 (1957).

termination may be found in the "civil legislation."²⁷⁵ The aviation acts of El Salvador,²⁷⁶ Honduras²⁷⁷ and Nicaragua²⁷⁸ make specific mention of only two grounds: the loss of the aircraft and the judicial sale, in both cases adding a saving clause in favor of the possible substitution.²⁷⁹ Costa Rica²⁸⁰ has a general reference to provisions applicable to *prenda aeronautica*, emphasizing especially judicial sale and loss or total destruction of the aircraft, in addition to those listed in the *Ley de prenda*.²⁸¹

Where it applies, the distinction between *hipoteca* and *prenda* may be important since different grounds for termination are established for each type of security in the controlling provisions of the civil code. Particularly in jurisdictions where the registration of security is required to be in accordance with principles governing security interests in land will the cancellation of such inscription be an important additional factor.²⁸²

Aviation acts of two jurisdictions contain interesting time limitations. Argentina provides that an *hipoteca* will terminate three years from the date of registration unless renewed.²⁸³ A nondispossessory *prenda* under Cuban law²⁸⁴ terminates thirty days after the due date of the debt it secures, unless renewed or proper proceedings commenced. The common law jurisdictions have limitations on the notice effect of recording. In Florida, for example, the recording must be renewed after seven years to continue its effectiveness.²⁸⁵ The Federal Aviation Act has no time limitations on the notice effect of recording; consequently a total search must be made in every case.

[To be concluded in a later issue]

275. CODIGO BRASILEIRO DO AR art. 146 (Brazil 1938).

276. Ley de aeronautica civil art. 252 (El Salvador 1955).

277. Ley de aeronautica civil art. 213 (Honduras 1957).

278. CODIGO DE AVIACION CIVIL art. 206 (Nicaragua 1956).

279. See Substitutions, pt. IV of text *supra*.

280. Ley general de aviacion civil art. 113 (Costa Rica 1949); however, the exact interrelation between this article and art. 63 of the Ley de prenda, referred to expressly, is difficult to assess, particularly since the former provision uses in regard to privileged claims the elusive term of "*incluyendo*". The provision is in this respect, reminiscent of art. 10 of the French law of 1917, as modified in 1934, discussed in note 198 *supra*.

281. Ley general de aviacion civil art. 66 (1949).

282. E.g., art. 471 of the CIVIL CODE of Costa Rica providing that "inscriptions on the property of a *hipoteca* do not expire in relation to third persons unless the inscriptions are cancelled or the transfer of the ownership or of the inscribed interest to another person is effectuated."

283. CODIGO AERONAUTICO DE LA NACION art. 54 (1954).

284. Art. 1871, para. 2 of the CIVIL CODE, see note 44 *supra*.

285. FLA. STAT. § 698.08, extension under §698.09 (1957).