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THE DEVELOPMENT OF AVIATION AND AERONAUTICAL LAW IN CHINA

BY WO-CHIANG LIN*

For thousands of years China has been using, as means of communication, instrumentalities propelled by man-power, animal-power and wind-power. She has remained in that stage longer than the Western countries, for steam locomotives as used for overland transportations began only about the last quarter of the past century. A century ago, before the railroad began to be operated and, later, the construction of highways for automobiles in Europe and America, the systems of communications in China then, compared favorably with those in the Western world.

Long before the Christian Era, the various parts of the Chinese Empire were linked, for administrative purposes, by a system of posts or mandarin roads, on which government dispatches were rushed from the Capital to the provinces and vice versa by the Imperial mounted couriers. The system has been officially known as the Imperial Courier Service. The mounted couriers on these highways, were said to have been able to cover seventy miles or more per day, according to urgency of the message, by relays of horses at the posts or stations along the roads.¹ The importance with which the Government regarded this service may be seen from the facts that up to the end of the last century some two million dollars were annually spent for its maintenance, and statutory laws were provided for the punishment of those officials who failed to keep the service in working order. Although this rapid means of communication was in existence early, it was accessible only to the Court and the mandarins. For the common people, there were no better means of communication than the pioneers who colonized America had, in the days of the "covered wagons." Another age-long system of communication in China is that of the Grand Canals and similar artificial waterways, constructed and maintained at great cost. Although both these systems have become archaic today,

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1. An interesting account of this service is found in Appendix F to the Post Office Report (China) for the year 1904. See also Ch. VIII of the China Year Book, 1928.

they serve to show that where necessity demanded the Chinese would supply themselves with some system of transportation.

Enterprising as the Chinese were in earlier days in devising methods of communications, the last century has seen them reluctant in adopting such systems as perfected by Western science. This attitude of conservatism, as may be seen described here, naturally leads us to question the prospect of the development of air-transportations in China to any great extent. What has been, indicates little prospect; but, what it is, seems to be full of promises.

Here are one or two instances of Chinese opposition to introducing Western methods of transportation into China. The first railway built in China was the Woosung Railway near Shanghai, by enterprise of foreign concerns. This was opened in 1876. The Chinese Government did not like to have a railway built anywhere in China, so this historical railway was bought over from the foreign concerns, torn up, and shipped to the island of Formosa, which was once a Chinese criminal colony.

Four years later, however, a railway was built in north China. From then on railway construction was encouraged by the Government, which accepted the cooperation of foreign capital and technical personnel. We find the same thing repeated in the introduction of commercial aviation in recent years. There is, however, an essential difference between the two. Formerly this joint undertaking, by the Chinese Government and foreign concerns in the operation of railways, had usually taken the form of "concessions" sought by foreign capitalists, backed up by their respective governments. As such they were so tangled in international politics that this period from 1895 to 1900 has sometimes been described as a period in which foreign Powers "battled for concessions."² The result was that the Chinese people then regarded every extension of railway an economic-political invasion on the part of the Powers. This, together with the failure of the former Imperial government to formulate a constructive plan, largely explains the little progress made in railway communication. China, with an area larger than the United States, has today no more than

2. The scrambling for concessions and establishment of spheres of influence by the Powers during this period were such, that they formed the major causes of the Boxer Uprising in 1900. Just before this event, and to bring the international struggle to an end, Secretary Hay, in behalf of the United States, asked the Powers to agree to an "Open Door" policy in China. A purely economical investment by foreign capital has always been regarded as of mutual interest. Dr. Sun Yat Sen in his book: *The International Development of China*, eagerly invites cooperation of foreign capital for the development of Chinese communications and resources.

eight thousand miles of railways. This lack of rapid transportation has much to do with the economic and social sluggishness of China, and the provincialism of her people. Today no one feels more acutely this handicap than the people themselves. In view of the fact that it costs more to build and equip new railways, and that it takes a longer time to construct the lines, it is not at all improbable that aviation will be the forerunner of the railway.

The development of aviation in China, like that in most countries, has been predominantly military in its inceptual stage. During the Revolution in 1911 the South planned to attack Peiping (formerly Peking) by air. For this purpose two Etrich monoplanes were purchased from Austria, which arrived in China at the close of the war in 1912. These planes under the charge of a returned student from England, were removed to Nanyuan, near Peiping. The military authorities at the northern capital were so enthusiastic about it that they raised a sum of \$300,000 for purchase of twelve Caudron biplanes and equipment of workshops, and the establishment of an army aviation school.

In 1919 the Chinese Government created a Commercial Aeronautical Department side by side with the Military Aeronautical Department. In the same year the Government signed contracts with the Handley Page Company for the purchase of six large passenger planes, and with the Vickers Company for forty Vickers-Vimy commercial planes, forty Vimy training machines, and sixty-five Avro planes. A number of British, American and French instructors and mechanics were engaged. In 1920 an aviation school was established at Nanyuan for training commercial pilots, and plans were drawn up for the development of a commercial air service along all of China's principal trade routes. For a time all went well, and it seemed that China was going to take a leading place in aviation among the Asiatic countries.³ Unfortunately, this attempt, as similar attempts two years later, to introduce commercial aviation into China proved futile owing to the repeated seizures of all available aeroplanes by the Chinese military authorities during successive civil wars. In the civil war of 1920 the two departments were amalgamated for military purposes, and the planes were used for observation and bombing. With the defeat of the

3. Japan began creating an Aviation Section under the War Office in August 1920, one year later than China. This section was transferred to the Ministry of Communications in 1923, while in the case of China separate departments, civil and military, were established as early as 1919. But since 1923 Japan has been making tremendous progress. For the Japanese aviation data, see: *Japan Year Book* (1930), p. 147 et seq.

Anfu Government at Peiping, these planes were carried off by the victors to Mukden and Paotingfu. This marked the decline of aviation in China, to be revived by the National Government of China only until 1929. The first daily mail between Shanghai and Nanking was inaugurated July 8, 1929.⁴

Thus, because of the unfortunate circumstances above, commercial aviation in China has been retarded in its progress for a whole decade. But the recent zeal for the promotion of aviation in China, shows that she is trying to make up for the time lost. It also shows that the unprecedented air-mindedness of the American public following the trans-Atlantic flight of Col. Lindbergh in 1927, has found reverberation in China. In 1928, a young Chinese aviator, Captain H. C. Chang (now General Chang) fitted out a Ryan monoplane for a round China flight. The plane, which was called by its flyer the "Spirit of Canton," started from Canton to Mukden, in Manchuria. This flight aroused great public interest as the plane stopped at Hankow, Nanking, Shanghai, Tientsin and Peiping, on its way to the North. Considering the lack of intermediate landing fields, accurate topographical maps, and adequate meteorological services, this flight must be regarded as a feat.

After this flight, aeronautical associations were formed in Canton, Kaifeng and Nanking. All have as their object the promotion of passenger and mail services. In July, 1928, an Aviation Conference was held in Nanking, when these three organizations amalgamated under the name of "The Chinese Aeronautical Association." At present there are about three hundred planes in China. Among these seven are "homemade." There are three aeroplane factories, located in Shanghai, Canton and Foochow.

At present there are two branches of aviation in China, each under a separate department. The Bureau of Military Aviation, as a matter of course, is under the Ministry of War. The Bureau of Commercial Aviation is now under the Ministry of Communications, although a year ago it was under the Ministry of Railways. At this moment there is not a single Chinese private company operating any air-transportation line, or taking contract from the Chinese Government for air mail.⁵ Judging from the railway policy of the Chinese Government in the past, it is doubtful that permission

4. The earlier data of aviation in China may be found in *China Year Book* (1930); more recent data are often reported in the *Far Eastern Review* (Shanghai), especially the vols. for 1929 and 1930.

5. An account of the contracts given to the American and German concerns to operate passenger and mail services, is given in the pages following.

would readily be given to private companies to operate the main lines. This may sound startling in the countries where public utilities are mostly undertaken by private enterprises. So far as railway construction is concerned the Chinese Government had adopted the policy of permitting private enterprises to confine themselves only to the building of branch lines, and reserving the "trunk" line to be constructed and operated by the Government.⁶ The Ministry of Communications which has charge of commercial aviation, has not limited itself to the supervision, the regulation of, and providing facilities for, aviation. It is actually operating passenger and mail transportation, with cooperation of foreign aviation firms. In this respect it does not differ very much from the railway administration under the Ministry of Railways, which operates all the railways excepting a few branch lines.

Recently there has been some discussion among the members of the Government at Nanking to the effect that China should have an Air Ministry for the centralization of air administration. This presumably will be somewhat similar to the British Air Ministry in scope of powers.⁷ But it is not believed that such a plan would be carried out under the present conditions. The lack of centralization of air administration in China is quite noticeable and regretted by any one who has paid any attention to the promotion of aviation. There are several centers of aviation in China over which the National Government has either only some nominal control or no control at all. Of the more important of these, located in the various provinces, are those in Mukden, Taiyuan in the North, and Yunnan and Canton, in the South. In all these places the provincial authorities possess both army and commercial planes, and operate airports and aviation schools. The largest provincial air centers are probably the one at Mukden, and another at Canton. The number of planes and activities in Mukden have been sufficiently numerous and great that the provincial authorities there have of late established an aviation department of their own. It is said that Mukden is going to have a factory for the making of aeroplanes and aeroplane engines. As to the aviation center in Canton, the situation is complicated by putting both army and commercial aviation under one administration.

Canton has one of the finest airports in South China. The airport is located on a delta about three miles away from the city.

6. This policy was announced by an Imperial Edict of May 1911.

7. *J. M. Spaight*: *Beginning of Organized Air Power*, p. 180; also, *G. D. Nokes*: *The Law of Aviation*, p. 13 et seq.

The airport covers about twenty-seven acres and has facilities for land and seaplanes. There are modern steel hangars with concrete floors with complete machine shops and repair facilities for repair and storage of over 30 planes. There is a school connected with the airport for the training of both army and commercial pilots. It is reported that negotiations are under way, at this time for the lighting of the airport, with an American firm which specializes in the lighting of airports for night flying. When completed this will be the only airport in China equipped for landing day and night. The bureau has recently placed orders for several large and small commercial planes to be used on the mail-passenger airlines. These projected airlines are: Canton-Wuchow, Canton-Swatow-Amoy, Canton-Yunnanfu and Canton-Hongkong.⁸ The Aviation Bureau in Canton which has control of army planes, the airport, the aviation school, and soon to include commercial aviation, was originally a branch of the Army and is still under the Ministry of War.

From the above description, it will be seen that the situation is by no means favorable for centralization of air administration by the National Government. Yet, until this is achieved, it is difficult to build up an efficient system of air transportation. The difficulty of China in the development of aviation is not a legal one. It is not a question whether the National Government could have complete control over aviation throughout the country. There is no doubt that in China the Central Government is constitutionally competent to have absolute control over both army and civil aviation. The difficulty lies in realism; it is a matter of politics. The difficulty is, however, not insurmountable. The sooner this difficulty is overcome the better for the future of aviation.

Despite these handicaps, the National Government has given serious attention to the development of commercial aviation in the last two years. Its first effort was to create an independent bureau for commercial aviation. This department was organized and put under the control of the Railway Ministry in 1929. The Ministry forthwith signed a contract with an American aviation corporation, for mail and passenger service. The contract was signed on April 20, 1929, between the Minister of Railways and the Aviation Exploration, Inc. It calls for a joint contribution to the capital for the enterprise by both parties and the supply of American technical personnel, by the American firm. And the first air mail between Shanghai and Nanking was inaugurated on July 8, 1929, with a

8. See an article on: Aviation in South China, in the *Far Eastern Review*, vol. XXVI, p. 639 et seq.

Stinson-Detroit six-passenger plane. However, a question of administrative jurisdiction soon arose among the members of the Cabinet. The Minister of Communications claimed that commercial aviation rightly belonged to his ministry, since he has jurisdiction over Post, Telegraph, Radio and Navigation. Finally, the issue was settled by the State Council, which decided that the Department of Commercial Aviation should be transferred to the Ministry of Communications. Since then that department has been functioning as a branch of this ministry.

The transference of administration made it necessary for the American company to sign a new contract with the Ministry of Communications, although the contract is essentially the same as the one done previously. In view of the fact that this is the first contract for the development of commercial aviation in China that was ever given to a foreign concern, and that the undertaking marks a departure from the railway "concessions" of previous days, the full text of the contract (with omission of a few minor points) is reproduced here:

Art. I. The two parties agree to organize jointly a limited company in accordance with Chinese law, to be known as the China Aviation Corporation, for the operation of air mail and passenger services in China.

Art. II. Capital of the Corporation: (1) The total authorized capital shall be ten million dollars in Chinese currency, to be divided into ten thousand shares of \$1,000, each. The Ministry shall have the right to subscribe for 5,500 shares and the American Company 4,500 shares.

Art. III. Administration and Supervision. (1) The power of the administration of the Corporation shall be vested in a board of five directors, of whom three are to be nominated by the Ministry, and two by the American Company. All matters relating to the issue or contracting of loans or in any other way incurring liabilities, the purchase of real estate or aeroplanes of a value of over \$20,000, the negotiating, signing or cancellation of agreements with the Postal Administration, the National Government or any organs thereof must be decided upon by eight-tenths of the holders of the shares already issued. (2) The board shall have one chairman and two vice-chairmen; the former and one of the latter to be nominated by the Ministry and the other vice-chairman to be nominated by the American Company. (3) Under the board of Directors, there shall be three departments; namely, (a) business, (b) finance, and (c) operation. Directors of the business and finance departments and the Assistant Director of the operation department are to be nominated by the Ministry. The Assistant Directors of the two former departments and the Director of the last-mentioned department are to be nominated by the American Company. (4) The Corporation shall be under the supervision of two supervisors, one each to be nominated by the two parties.

Art. IV. Finance Affairs. (1) The capital and other assets of the Corporation, shall be deposited in a Chinese bank to be mutually agreed upon. . . .

Art. V. Aviation Routes. The Corporation is to operate the following three air mail and passenger services:

- (1) Shanghai-Chengtú—via Nanking, Kiukiang, Hankow, Ichang, Wanh sien and Chungking.
 - (2) Nanking-Peiping—via Hsuchow, Tsinan and Tientsin.
 - (3) Shanghai-Canton—via Ningpo, Wenchow, Amoy and Swatow.
- (2) Operation of the first line shall be started first and should the result prove satisfactory, operation of the second and the third lines shall be immediately started. In case the Corporation is not able to start the second or the third line following the lapse of three years after the coming into force of the contract, it shall lose the privilege to operate the lines unless such failure is due to *force majeure*. (3) According to an agreement signed with the Chinese Postal Administration, the Corporation is to have the exclusive privileges of carrying mail matter by air along the routes specified in this contract. (4) All matters relating to the charges for air mail matter and the acceptance and disposal of mail matter shall be in accordance with the agreement signed with the Chinese Postal Administration.

Art. VI. Operation. (1) After the coming into effect of the contract, the American Company agrees to place its technical experience at the disposal of the Corporation so as to facilitate the development of the enterprises. (2) The American Company agrees to give every opportunity to Chinese aviators to receive special training by American aviators. (3) Chinese-made aeroplanes shall as far as practicable be purchased.

Art. VII. Airports and intermediate aviation fields. (1) As far as practicable, the Ministry shall allow the Corporation the use of airports or aviation fields on the routes specified. The Corporation shall, however, pay a rental for their use.

Art. VIII. Wireless Equipment. (1) To ensure the safety of aviators and passengers, the Ministry agrees to grant to the Corporation the privilege to install and use equipment for the transmission and receiving of wireless messages.

Art. IX. Life and Ratification of the Contract. (1) This contract shall take effect after ratification by the National Government. (2) It shall continue in force for a period of ten years. In case neither party indicates, one year before the expiration of the term, its desire to terminate the contract, it shall remain in force for another five years. (3) Upon the expiration of the term of the contract, the Ministry reserves the right to purchase the property of the Corporation at a reasonable price. (4) Should any disagreement arise under the contract, the question shall be referred to arbitration. Two arbitrators shall be chosen by each party. (5) The following contracts shall be declared null and void: (a) Contract signed between the former Aviation National Corporation and the American Company on April 17, 1929 for the operation of air services. . . .

The above contract was signed on July 8, 1930 by the Curtiss American Company and the Chinese Ministry of Communications,

and subsequently ratified by the State Council of the National Government.⁹ The contract shows that this new enterprise has been undertaken on very fair basis to all concerned. With exception of one or two incidents the mail and passenger services have been functioning smoothly, and the operation of the second line, that is, the Nanking-Peiping line, will soon be started.

Finding the mail and passenger air services operating successfully in the last two years, the Chinese Government has recently opened an international air line connecting China with Europe. For this purpose a contract was signed in August 1930 between the Chinese Ministry of Communications and the Lufthansa Company, a German concern known as the Euro-Asia Aviation Corporation. The Sino-German air contract is, in principle, substantially the same as the Sino-American air contract appearing above. The essentials of this contract may be summarized as follows:

The Corporation shall have a capital of \$3,000,000 in 3,000 shares in which the Chinese Government holds two-thirds and the German Company one-third. There shall be six directors representing the Chinese on the board and three representing the Germans. The lines to be operated by the Corporation are:

- (1) Shanghai-Berlin line, via Nanking, Tientsin, Peiping, Manchuli and Siberia.
- (2) Shanghai-Berlin line, via Nanking, Tientsin, Peiping, Outer Mongolia and Siberia.
- (3) Shanghai-Berlin line, via Nanking, Sinkiang, Kansu and Siberia.

Although this contract has been signed for more than half a year and the planes have been purchased, the Euro-Asia line has not started to operate. The difficulty seems to lie in the fact that the Soviet Government on learning about the prospective operation of these air lines, which invariably had to fly over Russian territory, had stated that it would refuse passage of the Sino-German aircraft.¹⁰ A glance at the map will show that the lines extending to northeastern Europe can not be operated without passing over part of the Russian territory. Since the Sino-Russian crisis of 1929, the diplomatic relations between China and Russia have not been resumed, and this adds to the difficulty of reaching an understanding with the Russian Government for an "innocent passage" of these mail-passenger planes. Since Germany is on friendly terms

9. The text of this contract was made public by the official Kuo Min news agency on August 1, 1930.

10. *Vossische Zeitung* (Sept. 11, 1930). This issue has a statement of the Russian attitude toward the installation of these air-lines.

with the Soviet Government, it is hoped that Russian permission may be assured eventually. It is said that Russia is planning an expansion program for her commercial aviation. This five-years program (1929-1934) is expected to cover a net of air-lines of 42,500 kilometres at the end of the period; and it will connect Moscow with China, Japan, Turkey and Aghanistan.¹¹ It is clear that unless Russia permits the commercial aircraft of other nations to pass over her territory, other nations would have justifiable cause to refuse her innocent passage of her aircraft. In a discussion on the problems of the development of international air navigation law, M. Albert Roper refers to the isolation policy of the Soviet Government which bears directly on the point I have just raised. Commenting on the attitude of the Soviet Government in respect to the CINA, M. Roper says:

"It would be more venturesome to prejudge the air policy that the Soviet Government will adopt in the future, but the impetus it has desired to give to aviation, the important credits it has consecrated to the intensifying of its national propaganda in favor of air navigation, the necessity in which it will find itself when it resumes normal relations with the outside world of developing air traffic, more necessary than anywhere else in that immense territory unprovided with other means of communication, lead us to believe that it will not always shut itself up in its present isolation."¹²

The apparent lack of centralization of air administration, the obstruction of the Soviet Government in regard to the extending of the Chinese air-line to Europe, these are not the only problems which confront China in her endeavor to develop commercial aviation. From the general survey of the development of aviation in China, it will be found that more conscious and definite development really began about a decade ago. In the course of this period she has secured more planes every year, established airports, aviation schools, aeroplane factories, and lately installed both mail and passenger services, on a commercial basis. But, so far, she has no air navigation law. The absence of air navigation law will become more conspicuous with the increase of aviation activities. In a recent article published in the "China Weekly Review," in which the writer urged early legislation for the regulation of air navigation, it was said:

". . . with the civil or commercial aviation put on a permanent basis, with every prospect of a phenomenal growth, there is an absolute necessity for the National Government to make provisions for the regulation of this

11. Soviet Union Year Book (1929), p. 227.

12. The JOURNAL OF AIR LAW, vol. I, p. 412.

new enterprise. In introducing commercial aviation into China, the Government has also introduced some problems in connection with the new industry, and which could be solved only through appropriate legislation. These are, to mention a few, the questions, of rights and liabilities; of risk and loss of life or property; of the legal relations between the public and the Government; of the scope of power and function of governmental departments relative to the administrative matters arising out of the undertaking; of the position of the contracting corporations; and lastly, but not the least important, the possible violation of China's sovereign rights by foreign Powers, when their military or civil aircraft fly over Chinese territory or territorial waters without authorization. . ."

So far as is known to the writer there has been no case which involves aviation before the Chinese Court. But it will be recalled that aviation in China until the middle part of 1929, has been a branch of the Army. The army airports are usually located far away from the civilian community. The army aviation has very little contact with the people. And when actual damage is done by the army air force to the civilians, the latter are usually reluctant in seeking redress, even where redress is procurable. But with the daily increase of commercial aviation the situation is different. However, there is an aviation case involving international law which happened in China a few years ago and which would have provided a *casus belli*, had the two Powers involved been better matched in armed force, and which fully emphasized the need of air legislation by China.

It will be recalled that in 1927 during the civil war in China, the British Government sent an armed expedition over to China, for the protection of British interests there. This army was stationed in the International Settlement in Shanghai. With the International Settlement as its base of operation, the air force attached to the expedition made daily flights over the Chinese territory, and often above over the barracks where the Chinese soldiers were quartered. The Chinese Government, through its diplomatic representative, repeatedly protested against this violation of Chinese sovereign right. But the protests proved unavailable.¹³ One day something happened. A British army plane developed motor trouble while flying above Chinese territory and in the vicinity of a Chinese army station. The plane made a forced landing in this neighborhood, and the Chinese military authorities took steps to detain the plane by removing the wings and kept them as an effective protest against the intrusion. This took place in the middle part of August,

13. The Chinese protests were lodged on April 10 and 27, June 13 and Aug. 11.

1927. The British authority in Shanghai immediately addressed two notes to the Chinese authorities. Addressing to the Chinese authorities on August 16, Sir Sidney Barton, the British Consul-General says:

"With reference to the action of the Chinese military authorities in detaining portions of the British airplane which made a forced landing at the Kiangwan Race Course, . . . unless I receive from you before 11 o'clock a. m. an assurance that no further obstacle will be placed in the way of removal of the airplane portions by persons sent for that purpose, such steps as the British authorities may deem appropriate in the matter will be taken."¹⁴

As the Chinese authorities did not comply with the demand intimated in the British note, the British army took "steps" by cutting the Chinese railway line connecting the Shanghai-Nanking and Shanghai-Hangchow lines, on the 17th of August. Through the mediation of a third Power, however, the matter was settled and the railway line was restored on the following day.

Had China promulgated some kind of air law, providing that foreign aircraft, especially army aircraft, could only be permitted to fly over Chinese territory under certain circumstances and that, on violation of these rules, the aircraft will be warned, shot at or detained, the Chinese Government would have a more definite claim; although, in the absence of such legislation, China could always invoke the rules of International Law. Had China been a contracting party to the CINA, the situation would probably be different,¹⁵ since this Convention recognized the exclusive sovereignty of every Power over the airspace above its territory, and admits the entrance of foreign army aircraft only on condition of authorization. These principles are stated in the two articles, to wit:

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

"Art. 32. No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization . . ."¹⁶

But the fact that China has not ratified the CINA should not prevent her from legislating against the violation of her sovereign rights recognized under the principles of International Law. In this connection it is interesting to quote from one of the British jurists,

14. This aircraft incident is narrated in the: *China Weekly Review*, (Aug. 20, 1927).

15. China signed the CINA of Oct. 13, 1919, but has not ratified it.

16. The CINA as amended on June 15, 1929 and issued copy of July 1930, by the International Commission for Air Navigation.

which as a group generally uphold the air-sovereignty theory. Discouraging on the support of International Law in this respect, Sir Richards states:

" . . . There is no usage with regard to the extent of sovereignty over air vessels; . . . but in my judgment the matter is covered, . . . by a principle of International Law which is fundamental in the determination of the extent of State sovereignty and must apply as much to the air space above State territory as to the territory itself."

"This principle is that Sovereign States are entitled to all those rights which are necessary for the preservation and protection for their territories; . . ."17

This principle is fully reflected in the British Air Navigation Act of 1920,¹⁸ which declares that:

" . . . the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto."

Authorized by this Act of 1920 to regulate air navigation the British Consolidated Order provides:

" . . . An aircraft which finds itself over a prohibited area must give a signal of distress and land outside the area at the nearest aerodrome. If warned by signals of the prohibited area, the signals of distress must be given and the craft landed in accordance with this practice. The penalty for failure to comply with these directions is the opening of fire on the defaulting craft. The photographing of a prohibited area or any part of it is forbidden."¹⁹

In view of the principle of air-sovereignty announced by the CINA, the prevailing opinion of the British jurists supporting the fundamental rules of International Law, and the existing law of Great Britain which asserts absolute sovereign rights in this respect, it is amazing that the British authorities then in China should have

17. *Sir H. E. Richards: Sovereignty Over the Air*, p. 5-6. Among the other British jurists who stand for absolute air-sovereignty theory are H. D. Hazeltine and Spaight. Hazeltine in propounding his argument for air-sovereignty observes: "It is extremely significant for the purposes of the present argument to observe most carefully that states have all along viewed themselves as having the right of sovereignty in the air-space. It is not therefore, to-day necessary to establish a new sovereignty, but it is necessary to recognize that states do possess an already established sovereignty."—*The Law of the Air*, p. 46. For Spaight's view see his: *Air Craft in War*, p. 61. See also, *J. W. Garner, Recent Developments in International Law*, Ch. IV. for a discussion of the "air-is free" and "air-sovereignty" theories.

18. 10 & 11 Geo. V., Ch. 80.

19. S. R. O. 1923, No. 1508, *para.* II.

but scanty regard for Chinese air-sovereignty as exemplified in the aircraft incident of 1927 described above.

It remains only to be said that Turkey, which like China is not a contracting Power to the CINA, but is acting on the principles sanctioned by International Law, has recently legislated against violation of her sovereign rights by foreign aircraft. A few articles from the Turkish air navigation law may be cited here:

"(b) Foreign aircraft desiring to fly over Turkish territory along the said air routes (there is a map indicating available air routes and the prohibited areas) are required to obtain, in respect of each journey, the prior authorization of the Government of the Republic and to conform to the conditions which it lays down."

And in respect to flight over prohibited areas the law provides:

"(4) Aeroplanes which enter prohibited areas and do not obey the summons to land or those whose entry into such areas is not due to unfavourable weather conditions, expose themselves to artillery or machine-gun fire or chase by pursuit aeroplanes with mission to bring them down."²⁰

Quite apart from the international aspect which requires air legislation, the Chinese law, although derived partly from custom, is nevertheless codified to a large extent.²¹ Both the customs and the codes cannot be expected to be pressed into service for settling of problems raised by air navigation and the industry connected thereto. Chinese customary law cannot be compared with the Anglo-American common law, which has often been found sufficient to cover aviation. In China each province has its peculiar customs, which are judicially noticed by the courts and applied in the settlement of litigation. The customary law, tinged with local peculiarities, as prevails in China is not fit to be applied to aviation problems, even though in some cases it may be found applicable.²² For one of the essentials of air navigation law is *uniformity*, which Chinese customs are found lacking.

20. Bulletin of Information, No. 433 (dated 27th. Nov. 1930) as issued by the International Commission for Air Navigation.

21. Law began to be codified some twenty centuries ago. Since the Code of the Han Dynasty almost each successive dynasty has compiled its own code, modelled very largely after that of its predecessor, but is known by the name of the dynasty, e. g., the code compiled by the T'ang emperors is called the T'ang Code. The code of the last dynasty, preceding the Republic, is called the Ta-Ch'ing Lu-Li, portions of which is still in force today.

22. I have used the phrase "customary law," with reference to the Chinese customs, to mean only the customs which have the force of law, and not in the sense usually understood by Occidental jurisprudence (for instance, as defined by *Salmond*: Jurisprudence, p. 54).

The inadequacy of both the dynastic statutory law and customs to meet the demand of modern progress was felt as early as the beginning of the century, and new codes were drafted—some of which were promulgated during the first decade of the century—by the former imperial government. On succeeding the imperial government, the Republic decreed that both the old law and the imperial new codes should remain in force unless they have been abrogated or modified by the Republic. Since then, the Chinese Supreme Court has in most cases borrowed its general principles from the old law and the Drafted Civil Code (of 1911). The nearest approach to applicability to aviation of the law in this code is one found in Art. 991 which may be translated as this:

“The ownership of land, within the meaning of the law, extends above and below the land. When the interference by others does not amount to an encroachment upon the exercise of the rights of ownership by the landowner, such action may not be expelled.”

This law as cited here, was made when those who drafted it had probably not contemplated the situation that might arise out of aviation. But it is quite applicable. The law recognizes the right of flight of the aviator over private property. It is unnecessary to observe that the principle laid down here bears a family resemblance to the Continental civil codes in this respect. The instance given here is one among a very few rules that have been so happily framed, that they may be applied to aviation. As for the statutory laws made by the Republic of China, there is little that could be of service for the purpose in view.

Naturally one may ask that as it is, what the Court is going to do when cases involving aviation are brought before it? As a matter of fact, there have been cases in which aviation was not involved, and statutory law had provided no solution. But the Chinese Supreme Court has displayed a good deal of ingenuity in dealing with them. There is an introductory ruling recorded in the official collection of Summaries of the Decisions of the Supreme Court,²³ which reads as follows:

“Civil cases are decided first according to express provisions of law; in the absence of express provisions, then according to custom; and in the absence of customs, then according to legal principles.”

Both the statutory law and customs as mentioned in this declaratory statement have been discussed above, and which I have

23. The Chinese Court Decision, by *F. T. Cheng* (Peiping, 1923), and *Recueil des Sommaires de la Jurisprudence de la Cour Supreme*—by *Prof. Escarra* (Shanghai, 1925).

stated are conspicuously inadequate for the purpose of aviation. The one which is more flexible and of greater applicability is the third alternative which the Court may have resort to in such contingency, namely, that in the absence of both the statutory law and customs, "then according to legal principles." By "legal principles" the Court has always understood the general rules as established by the modern jurisprudence. In other words, we may presume that, when an aviation case is brought before the Court, if there were no other alternative but the third one, the Court may apply the principles laid down in the American "Air Commerce Act" of 1926, or the British "Air Navigation Act," of 1920, or any other law for the regulation of air navigation. It is true that a way is opened here by which the Court may extricate itself from the difficulty, which the absence of Chinese air legislation may force it to do. But it must be observed that with so many sets of air law (even the Court should have all these laws for reference) the finding of the door, so to speak, may sometimes amount to a process of groping. There is another point of great importance which must also be taken into consideration, and that is, under the circumstances stated here, there is always an *uncertainty* of the law which the Court might apply to the parties affected by the decisions.²⁴ These short-comings may be avoided when China has her own air navigation law.

Since from the problems enumerated and the difficulties noted above, it is realized that air legislation is absolutely necessary for China under the present circumstances, we may surmise as to the nature of air law she is likely to have and how this law may be brought into existence. The last point need not be discussed as it is a matter of legislative procedure. As to the nature of this law, it may at least be asked whether the law will be embodied in its entirety in an air-code, after the fashion of the Italian "Air Navigation Regulations" of 1925, or is it going to follow the British or the American air legislation of 1920 and 1926, respectively; by the laying down of a few general principles by the Legislature and leaving the provision of detailed rules and regulations to some administrative bodies? It may be submitted here that the method last-

24. It may be noted here that on the interpretation and application of laws, the National Government practically adopts fully the above ruling of the Supreme Court in recent: Civil Code of the Republic of China, promulgated on May 23, 1929. Thus Art. I of this code says: "In civil matters if there is no provision of law applicable to a case, the case shall be decided according to custom. If there is no such custom, the case shall be decided in accordance with the general principles of law."—as translated by Dr. Ching-Lin Hsia.

mentioned is to be preferred. The American and the British air laws have the advantage of being very much more flexible.²⁵ The administrative bodies being given the powers to make administrative rulings, as authorized by the acts, rules and regulations can be amended as often as circumstances demand. The difficulty of relying entirely upon the legislature for the provision of laws and regulations governing air navigation, may be seen from the fact that it took Congress almost four years before the "Air Commerce Act" was passed.²⁶ In the case of China there is already a bureau of commercial aviation under the Ministry of Communications. The powers of making rules and regulations then, may be given to the Ministry of Communications, when the Chinese legislature has passed a general law governing air navigation. By formulating sound air navigation law, China will not only be in a position better able to cope with her domestic problems arising out of the development of aviation; but, she will enjoy and participate the more fully in the international life as promoted by international air navigation.

25. The British "Air Navigation Act" of 1920, conferred the powers to make rules and regulations on the executive branch of the government—the King by Order in Council—Sections 1-4, of this Act. Whereas the regulatory powers are vested in the Secretary of Commerce by the American Congress—Sec. 3, the "Air Commerce Act" of 1926.

26. See *Frederick P. Lee*: Legislative History of the Air Commerce Act of 1926.