German Air Law - A Case History

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Recommended Citation
Fritz G. Lorenz, German Air Law - A Case History, 11 J. Air L. & Com. 111 (1940)
https://scholar.smu.edu/jalc/vol11/iss2/2

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GERMAN AIR LAW — A CASE HISTORY

By FRIEZ G. LORENZ†

CONTENTS

Introduction: German Definitions of Air Law.

Part I: To the Air Traffic Act 1922.
   Chapter I: Period until the World War 1914.
      1. Small number of cases.
      2. Damage to spectator on landing field.
      3. Unreported decisions.
      4. Horses frightened by Zeppelin.
   Chapter II: Period from 1914 to 1922.
      1. Flying over another's land—Noise.
      2. Cattle damaged by wire dropped down.

Part II: German Cases since the Air Traffic Act of 1922.
   Chapter I: History of Legislation—International Conventions.
   Chapter II: Air Traffic.
      A. Aircraft and Airmen.
         1. Air Space.
            a. Use of airspace by flying over another's land.
            b. Use of airspace for advertisement.
         2. Aircraft.
            a. Gliders.
            b. Seaplanes.
            c. Aircraft as object of the law of things.
            d. Aircraft as object of contracts:
               aa. Rent.
               bb. Exhibition.
            e. Admission of aircraft.
         3. Airmen
            a. Pilot's and operator's certificates.
            b. Position of aircraft captain.
            c. Air instruction.

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B. Airports.
1. General development of the law of airports.
2. Decisions as to the establishment of airports, zoning, expropriation.
3. Use of airports:
   a. Use of airport for take-off and landing.
   b. Airport charges.
   c. Airport taxation.

C. Aviation Enterprises—Air Route Traffic (Scheduled Airline)—Aviation Affairs.
1. Requirement of certificates.
2. Definitions of aviation enterprises and air route traffic in German cases.
   a. Aviation enterprises and circular flights as a business.
   b. Aviation enterprises—Scheduled airline—Nature of permits (certificates).
      aa. Freedom of trade and permit.
      bb. Legal nature of permit.
      cc. Restrictions of permit.
      dd. Scheduled airline.
3. Aviation affairs.
   a. Definition.
   b. Prohibition of aviation affairs.
4. Taxation.
   a. Circular flights.
   b. Acrobatic flights.

Chapter III: Liability.
A. Regulations of the Air Traffic Act.
B. Elements of liability under § 19 Air Traffic Act.
1. Damage by air conveyance.
2. Damage by accident.
3. Damage in operating aircraft.
4. Damage as result of accident.
5. Liability of operator—Definition of operator.
   b. Purchase.
   c. Repair.
   d. Rent.
   e. Leaving of airplane to another.
6. Use of aircraft without the right of disposal.
C. Restriction and exclusion of liability towards employees and students.
1. Employees of the operator and compulsory Workmens Accident Insurance.
2. Restriction and exclusion of liability towards employees and student pilots.
a. Waiver of liability and accident insurance as substitution.
b. Admissibility of waiver—Form of declaration.

3. Transfer of rights to damages to the insurer by rule of law. (Workmen's Insurance Code.)
a. Exclusion of liability towards student with substituted accident insurance and public health insurance.
b. Exclusion of liability towards passenger with substituted accident insurance and public accident insurance.

D. Contract of carriage by air and liability to passengers.
1. Restriction or exclusion of liability and Air Traffic Act.
2. Restriction or exclusion of liability and general provisions of law.
3. Form for waiver.
4. Legal significance and effect of transportation conditions:
   AA. Passengers:
      a. Conditions before the Warsaw Convention.
      b. IATA Conditions (after February 13, 1933).
   BB. Representatives of killed passengers.

E. Liability for fault under the conditions of the contract of carriage.

F. Contributory fault of the injured.

G. Liability under laws apart from the Air Traffic Act.

H. Apportionment of liability between several persons.

J. Liability in international carriage.

K. Liability of other persons than operator and pilot.

L. Private insurance.

Chapter IV: Penalties.
A. General provisions.
B. Penalties in the Air Traffic Act.
   1. § 31 nr. 1.
   2. § 31 nr. 2.
   3. Competence for police ordinances.
   4. § 32 nr. 5.
C. Penalties in the Penal Code.

GERMAN ABBREVIATIONS

R.G.Bl.: Reichsgesetzbblatt (German Law Gazette, since 1923 Parts I and II.)

RGSt.: Entscheidungen des Reichsgerichts in Strafsachen (Decisions of the Supreme Court in Penal Cases.)

RGZ.: Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the Supreme Court in Civil Cases.)

RT. Drucks.: Reichstagsdrucksachen. (Publication of the debates of the Reichstag.)
INTRODUCTION:

GERMAN DEFINITIONS OF AIR LAW

The term "Luftrecht" (air law) was employed in German jurisprudence for the first time about forty years ago. It was at that time used in a general sense to refer to the relation of human beings to the air space. In that connection Jurisch, in his treatise "Grundzüge des Luftrechts" (1897), discusses as 'air law' (Luftrecht) the rules about how to utilize the air and how to keep it clean. In another treatise on "Luftrecht" he deals with the legal protection against contamination of air by steam, waste gas, etc. Weck, in his treatise on "Luftrecht" makes the following divisions: (1) The use of the air for breathing. (2) The air as a thing in itself. (3) The use of the column of air above a piece of land in connection with the use of the underlying land. (4) For the transmission of intelligence. (5) For aeronautics or aviation (Luftfahrt). At that time the German writers usually called the law governing this last-mentioned use of the air for aeronautics or aviation "Luftfahrtrecht" oder "Luftschifffahrtsrecht" (law of aerial voyage or navigation). Today the term "Luftrecht" generally signifies "rules regulating traffic in the air".

The German decisions dealing with air law are in part obsolete because of later legislation; nevertheless, even these judicial opinions may be of interest, not only by way of comparison and as illustrations...
of the historical development, but also as a means of understanding the present situation.

PART I: TO THE AIR TRAFFIC ACT 1922.

CHAPTER I. PERIOD UNTIL THE WORLD WAR:

1. Although considerable work has been done in Germany since 1909 on behalf of the technical development of flying, only a few cases concerning air law were reported in the first few years of this period. On the occasion of the 31st Congress of German Jurists (Deutscher Juristentag) at Vienna in 1913, a questionnaire was prepared and sent to all German District Courts (Langerichte) and to the Court of Appeal in Berlin (Kammergericht) inquiring as to the frequency of suits caused by aircraft accidents. Only eight suits were pending at that time, none of which was of general interest. In answer to those who urged a complete codification of air law, therefore, it was stated by other experts that there would be no need for such codification since, in view of the small number of cases, the general rules of German civil law would be sufficient.

2. The leading case for that period is the decision of the Reichsgericht (Supreme Court) of January 11, 1912 which concern the Zeppelin accident near Echterdingen. At that time the question whether an aviator’s liability should be dependent upon negligence or whether there should be liability without fault had been widely discussed. On principle, the German law recognized liability only for fault, but it might be reached through some rules a more comprehensive responsibility. This was founded on the idea that a person who introduces particular risks has to answer for the damages resulting from such risks, even in the absence of negligence or malice. Such a rule of absolute liability is recognized in the German laws for the owner (holder) of animals, for railroads, for the operator (holder) of automobiles, etc. Many authors were of the opinion...

5. At the end of the year 1913, 631 certificates for Pilots of Aeroplanes were issued. The Deutsche Luftfahrerverband (Association of German Aviators) issued 899 certificates for pilots of balloons before January 31, 1913. At that time 35 persons had the certificate for piloting airships.

6. Niemeyer, Gutachten und Verhandlungen des 31. Deutschen Juristentages, Vol. II, p. 50, 96. At that time the Prussian Ministry of Interior issued an ordinance in reference to the air traffic, but its purport was restricted in the main to regulations for exhibitions by balloon ascents etc. The need of the enactment of an air law was recognized by the German Reichstag in 1914. (Session of March, 12.—Protokolle der 254. Sitzung, p. 8034).

7. IV. 86/11—78 RGZ.


8a. Liability Act of June 7, 1871 (Reichs Haftpflichtgesetzes).


9a. Liability Act of June 7, 1871 (Reichs Haftpflichtgesetzes).

10. With different argumentation: cf. Kohler, Luftfahrrechtsrecht p. 14; Meurer, Luftschiffahrtsrecht, p. 16; Klipp in 1908 Juristische Wochenschrift 644; Linckelmann in 1909 Juristische Wochenschrift 8; Krause in 1910 Recht 445; Hilty in XIX Archiv für Öffentliches Recht 91 regarding the question as to whether an aircraft might be considered as an automobile under the Automobile Act. The
that an aviator's liability would have to be based upon an application of these rules.

The Reichsgericht—de lege lata—did not agree with this view and held that the rules regarding the liability for an endangerment were exceptional provisions and therefore were not to be applied to the particular circumstances of aviation. This case is important, therefore, in that it established the principle that aviators were not liable for damage inflicted unless in case of fault. Regarding negligence in aviation the Reichsgericht demands that ordinary care be exercised in preparing for the flight and in undertaking a forced landing. On the other hand it rejected the view that flying in itself amounted to negligence, however it said: the specific risk of flying requires that the aviator take proper, adequate and specific precautions.

3. In a decision of July 1, 1920 the Reichsgericht refers to several unreported decisions in which an aeroplane flying at a low altitude frightened cattle by its loud noise. The Court said that in those cases negligence of the pilot had been proved.

4. The principle “no liability without negligence or malice” was acknowledged by other German courts, however. In 1912 a Zeppelin flew over plaintiff's land at an altitude of about 65 feet (20 meters) to avoid a thunderstorm. A team of plaintiff's horses was frightened by the noise and bolted. The Landgericht Altona/Elbe held that there was no liability without negligence or fault. The decision was affirmed by the Court of Appeal (Oberlandesgericht) Kiel. The Court stated furthermore, that it is a case of emergency if an airship, in order to avoid a thunderstorm, cruises over a piece of land upon which there are horses. Under § 904 of the German Civil Code the owner may claim compensation for damage caused to him in this emergency. The owner of the airship is liable even though he is not piloting the ship.
Chapter II: Period from 1914 to 1922

1. Two decisions of the Reichsgericht are reported regarding damages caused by airplanes interfering with the land of another. Both decisions do not apply to damages inflicted to persons, as the Reichsgericht explains in a later judgment of March 26, 1932.18

a. In case V 97/19 of the Reichsgericht, decision of October 18, 191917 defendant established an aviation field on land adjoining plaintiff's, at which field defendant trained student flyers. Plaintiff sued successfully18 for restitution of the depreciation of his land, the value of which was reduced by the noise of aircraft flying at a low altitude over the land, simultaneously placing the users of said land in apprehension of the possibility of a crash. So far as the plaintiff had sought recovery on the basis of noise arising from the activity on the aviation field itself, the court dismissed the suit for damages.

b. In case VI 24/20, decision of July 1, 192019, a pilot who had passed the pilots' examination, damaged the plaintiff's property by crashing on it in a flight made in order to comply with further conditions for his certificate. The Reichsgericht held the owner of the air school liable.

In case V 97/19 supra, the plaintiff had petitioned in the beginning for an injunction against the manager of the school also. The Reichsgericht dealt with the problem of the responsibility of the manager of an air school for injury caused by the flights of students. In conformity with the general opinion of the German courts, that disturber (interferer) in the meaning of § 1004 of the Civil Code is not only the one who is acting personally, but also the one who causes the infringement by his orders and allows it in an undue manner in so far as there is a causal connection with the manifestation of his intention,20 the Supreme Court determined that the manager of the aviation training school was also the disturber (interferer) under the provisions of § 1004 Civil Code.

A. Both decisions deal with two kinds of titles:

1. § 905 German Civil Code, reading as follows: "The right of the owner of a piece of land extends to the space above the surface and to the earth under the surface. However, the owner cannot prohibit interferences which take place at such height or depths that
of the air space above, or whether he has, as a result of his
ownership of the land, a right to the air space which is similar to
that of the ownership of the land. The Supreme Court held that
the right of the owner extends to the space above. However, there
is no encroachment on and no undue interference with his rights in
the meaning of §§ 1004 and 905 German Civil Code in case an air-

craft should fly through the higher air space. The Court felt that in
the higher air space there is no necessity of affording the protection
of the law.

2. In decision V 97/19 supra, the Reichsgericht affirmed the
interest of the owner to prohibit interference by flying over his land,
because the noise was very loud and the flight was performed at a
low altitude.

3. To find whether an interest worthy of protection may exist,
the Supreme Court examined and considered the general view of
the community as to what interferences of aircraft the owner of
land is forced to submit to. Under certain circumstances the Court
said it might give consideration also to local customs.

4. In case VI 24/20 supra, the Reichsgericht considered that
the owner of land may be interested in preventing flying over his
land even though it is done at a great height. However, in such
cases, the land owner's right to prevention is restricted. The Court
felt that it would be possible to enforce a general stoppage of avi-

ation, and to avoid this result the Court deprived the owner of the
right to prohibit flight at high altitudes. The owner must resign his
right of prohibition so that "aviation, an economical, valuable means
of communication, which is to be developed to an absolute necessity,
may be used in the limits of due liberty and not hampered in a man-
nner disadvantageous for the community."

The Reichsgericht also applied to aviation cases the general rule
that without proof of fault, the aggrieved owner, because he was
forced to resign his right of prohibition, is entitled to damages.
This rule is applied for damages which are incurred in ordinary

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21. From the translation of the German Civil Code by Loewy. The Air
Traffic Act of August 1, 1922 (Luftverkehrsgesetz) established the free use of the
air for aviation. Cf. Chapter II AI.
22. Cf. Trusen, Luftfahrt und Grundstukum with bibliography 3 Archiv
für Luftrecht 153, 281.
23. The same viewpoint was taken in the first draft of the Air Traffic Act
of 1913.
24. A similar point of view is expressed by Judge James C. Michael of the
District Court of Minnesota in the case of Johnson v. Curtis Northwest Airplane
Company, et al. 1928 USAV. D. 42.
25. 47 RGZ. 99; 58 RGZ. 130; 97 RGZ. 221; 98 RGZ. 347; 101 RGZ. 102;
145 RGZ. 107. In reference to the question of whether the rules are to be applied
under the Air Traffic Act Cf. below, Chapter II AI and 158 RGZ. 34.
aircraft operations; the Supreme Court did not pass upon the ques-
tion of whether or not force majeure may be objected to.

B. Both decisions took into consideration whether or not the
plaintiff might be entitled to damages by the law of torts. Regarding
the problem of negligence, the following principles were laid down:

a. The manager of an air school is acting negligently when
he knows of and allows students to fly outside of the boundaries of
the aviation field at a low altitude and with much noise.  

b. Students must be trained within the boundaries of the aviation
field.  

c. An unpractised pilot is negligent if he flies over inhabited
places, and his teacher is negligent in not preventing such flight.  

d. A certified pilot is not negligent in flying over inhabited
places on a training flight, such a flight creating no more risk than
is necessarily inseparable from aviation.  

2. At this point reference may be made to the decision of the
Reichsgericht III 541/23 of June 17, 1924.  

The wire of a kite flown by the German Naval Observatory
was broken. It fell over a high tension line, touched the plaintiff’s
cow and killed it. The Court repeated the principle that the operator
(holder) of the kite was liable regardless of negligence or malice
because the owner had no right to prohibit interference. The said
accident was believed to be a typical risk of operating the kites by
the observatory. The risk was aggravated when defendant con-
tinued to fly kites in the same place, although meanwhile a high
tension line was constructed across the aviation field.

PART II: GERMAN CASES SINCE THE AIR TRAFFIC
ACT OF 1922.

CHAPTER I: HISTORY OF LEGISLATION—INTERNATIONAL
CONVENTIONS

1. The problem in what manner future legislation would be
most suitable for air traffic had been the subject of numerous Ger-
man articles and treatises, and in 1913 the German Government proposed to the Reichstag the draft of an Air Traffic Act. Unfortunately the deliberations of the Reichstag were interrupted by the World War. Immediately after the end of the War, however, an Authority for the Air (Reichsluftamt) was created for the purpose of putting into effect a provisional regulation of aviation. By the Ordinance of December 7, 1918 the issuance of certificates was required for the admission of air conveyance, for the operation of aircraft, for the establishment of airports and for air navigation enterprises. A new draft of an Air Traffic Act was proposed by the German Government in 1920 and the Act was promulgated August 1, 1922. This Air Traffic Act comprehended the principal rules for aviation.

Part I, under the title “Air Traffic”, provided rules regarding the admission of aircraft and pilots, airports, air navigation enterprises and affairs. (Luftfahrtunternehmungen und Luftfahrtveranstaltungen), traffic regulations, expropriation, and some general rules empowering the government to issue statutes covering certain problems and rules for the decisions of the administrative authority. Part II dealt with liability, and Part III with penalties. The act provided that certain problems were to be ruled by ordinance and such an ordinance was expected to be issued in a short time. Unfortunately, the Reichstag was dissolved several times and it was not until July 19, 1930 that the Ordinance for Air Traffic was published. In the meantime, the needed completion for the practical use of the Air Traffic Act was given by decrees of administrative authorities of the Reich and the German States. The purpose of the Air Traffic Act was to put the police regulations for air traffic exclusively under the jurisdiction of the Reich. Following the disposition of the Air Traffic Act it contained particular rules in order to put the Act uniformly into effect.

2. When the National-Socialistic Government came into power, the organization of the air navigation administration was funda-

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33. Ordinances of November 26, 1918 (1918 R. G. Bl. 1337). The Authority later was made a part of the Traffic Ministry of the Reich (Reichsverkehrsministerium).
34. 1918 R. G. Bl. 1407.
35. Subsequently various Acts and Ordinances were promulgated which substantially were issued in fulfilling the political liabilities of the Treaty of Versailles: Acts of January 2, 1920 (1920 R. G. Bl. 14); June 29, 1921 (1921 R. G. Bl. 455); April 30, 1920 (1920 R. G. Bl. 857); May 5, 1922 (1922 R. G. Bl. 775).
36. Amended by Ordinances of February 6, 1924 (1924 R. G. Bl. I 43); February 6, 1924 (1924 R. G. Bl. I 42); December 12, 1924 (1924 R. G. Bl. I 775).
38. State Regulations were provided by Art. 46 of the Air Traffic Ordinance for the purpose of preserving the public security and order in airports and their surroundings. The Ordinance did not make allowance for dispatching aircraft by the customs and postal authorities.
mentally altered. A Reichs Authority for Air Navigation was created for the purpose of supervising the enactment of the Air Traffic Act and of the Air Police. The latter's competence was finally comprehended by a new act in 1939. Furthermore, the new Authority had to protect the safety of flying by providing the Air Weather Service, long distance signals and directional guidance, and television. In the meantime the Authority was charged with air protection against air raids and with the command of the air force.

The Air Traffic Act was amended by the Acts of December 15, 1933, December 19, 1935, and July 29, 1936, and republished under the date of August 21, 1936. It was later amended by the Act of September 27, 1938. The Air Traffic Ordinance was amended and promulgated in a new form under the date of August 21, 1936, and further amended March 31, July 12, and December 15, 1937, and September 30, 1938.

3. The aforesaid Acts and Ordinances are supplemented by various international conventions. Of particular importance among these is the Warsaw Convention of October 12, 1929 which Germany has signed and ratified. In reference to this Convention, Germany promulgated the Act to Put in Effect the First Convention for the

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40. The expression "Air Police" was replaced by "Air Supervision" (Luftaufsicht); the Act entitles the Authority to issue ordinances, decrees, and instructions and to enforce them. Act regarding the competence of the Air Navigation Authority of February 1, 1939 (Luftaufsichtsgesetz) and Ordinance of February 1, 1939 (1939 R. G. Bl. I 131).
42. Ordinance of April 5, 1934 (1934 R. G. Bl. I 801).
47. 1936 R. G. Bl. I 682.
52. 1938 R. G. Bl. I 1327.
54. Such bilateral conventions were concluded with many states and ratified as:
Switzerland Denmark Norway
Netherlands Italy Russia
France Great Britain Belgium
Spain Poland Hungary
Greece Jugoslavia U. S. A.
Portugal Czechoslovakia Union or South Africa
Esthonia

The German Air Law was enacted for Austria by Ordinance April 1, 1938 (1938 R. G. Bl. I 355); for the German parts of Czechoslovakia (Sudeten-deutsches Gebiet) by Ordinance of November 30, 1928 (1938 R. G. Bl. I 1714).
Unification of Private Air Law. On January 12, 1937, the Second Convention of May 29, 1935 (Rome Convention) regarding the Unification of Rules Relating to the Precautionary Attachment of Aircraft came into force together with the Act regarding the Inadmissibility of the Precautionary Attachment of Aircraft. The other Rome Convention “relating to Damages caused by Aircraft to Third Parties on the Surface” was not yet ratified by Germany. On the other hand, the International Sanitary Convention for Aerial Navigation of April 12, 1933 is in force in Germany.

Chapter II: Air Traffic

A. Aircraft and Airmen.

1. Air Space.

a. Use of air space by flying over another’s land.

§ 11 of the Air Traffic Act reads as follows: “The use of the air space by aircraft is free in so far as it is not restricted by this Act and by the Ordinances promulgated to put it into effect.” This rule is called the “Magna Charta” of aviation; it means that flying over another’s land is usually lawful as long as the flyer complies with the rules and regulations for permits and for traffic. The owner is deprived of his veto power also in such cases where he may be interested in a veto according to § 905 German Civil Code. Under such regulation the problem arises of whether the owner of the land over which the aircraft is flown is entitled to compensation in so far as his interests are prejudiced. The Air Traffic Act deals only with liability for accidents (§§ 19 sequ.) and § 28 provides that the Air Traffic Act does not affect other Acts of the Reich according to which the operator (holder) or the person who uses the aircraft is liable to a wider extent, or according to which the pilot or another person is liable. As stated above, the Reichsgericht had held that the owner of land over which an airplane was flown might be entitled to damages according to general rules, and that the principle rule applies that without proof of fault, the owner is entitled to damages if under other regulations he has to resign his right of prohibition. This principle was based on §§ 905 and 1004 German Civil Code.

55. Gesetz zur Durchführung des ersten Abkommens zur Vereinheitlichung des Luftprivatrechts of November 30, 1933 (1933 R. F. Bl. I 1079). See also notification regarding the Warsaw Convention of November 30, 1933 (1933 R. G. Bl. II 1039).

56. Act of March 17, 1935 (1935 R. G. Bl. I 385). See also notification regarding the Warsaw Convention:


GERMAN AIR LAW—A CASE HISTORY

and § 75 Introduction Code of Prussia, and the decisions 100 R. G. Z. 69 and 108 R. G. Z. 310 were founded on it. The Reichsgericht has also applied the rules of § 75, Introduction, Code of Prussia still quite recently, holding that this rule is not abrogated by Art. 153 of the German Constitution. But it restricted the principle to cases where interference in a protected sphere was done by the ordinance of an administrative authority; it was not applied where interference was done by an act of legislation. The problem of whether, under the Air Traffic Act, damages may be established for flying over another's land was discussed by the Reichsgericht in the decision of July 4, 1938. The Supreme Court agreed with the Court of Appeal (Kammergericht) that the said general principle was not to be applied in the face of the positive rule of the Air Traffic Act, and that the general restriction of the rights of the owner of land in § 1 Air Traffic Act in behalf of air traffic, is only compensated by the principle of the strict liability in § 19, l. c. The Court felt that such interpretation was even more appropriate than the conception that the character of real property had changed fundamentally since the earlier decisions were issued, and that § 28 Air Traffic Act meant first and foremost the law of torts.

b. Use of airspace for advertisement:
The Air Traffic Act rules that the use of air space for aviation is free, but it does not deal with the problem of whether the air space may be used for advertising carried on by aircraft. The Amtsgericht Berlin-Tempelhof discussed such a case. In 1930 defendant organized a Constitution festival at the airport in Berlin-Tempelhof in the course of which the ascent of two balloons covered with advertisements was shown. The owner of the airport had transferred to plaintiff an exclusive right to undertake advertisement at the airport and had assigned to him his pretended claim for damages against defendant. The Court held that there was no maxim of law that entitled the owner of land to a fee for the use of the airspace above the premises for advertisement in the air. § 905 German Civil Code

60. November 16, 1937—G. Z. S. 2/36 (VII 200/36)—156 RGZ. 303 (310) (grand division); see also May 15, 1934—VII 27/34—144 RGZ. 325; see also October 29, 1939—V 565/38—12 RGZ. 85.
62. The German writers disagreed. Koffka-Bodenstein-Koffka Luftverkehrsgesetz II, § 28, p. 134; Römer, 1935 Archiv für Luftrecht 171; Staudinger-Koher, German Civil Code (9) § 905, 2 h.; held the owner to be entitled to damages caused by a flyer flying over his land provided that there is a special rule to be applied. Schleicher-Reymann, Recht der Luftfahrt (3) II, 1 § 28, 1 p. 142; Reymann, 1938 Zeitschrift Akademie für Deutsches Recht 784; Opnikofer, 1933 Archiv für Luftrecht 290; Trusen, 1933 Archiv für Luftrecht p. 197; Münster, 1936, Deutsche Juristenzeitung 287 feel that the Air Traffic Act deals definitively with titles for damages. "Introducing a liability without fault which is the strongest in German law, it was the purpose to call into existence a special rule covering all damages resulting from the interference with property or rights by every endangerment that may be typical of aviation." (Reymann.)
63. 6b C 2421/30 April 16, 1931—1931 Archiv für Luftrecht 151.
entitles the owner to demand forbearance and eventually damages. But the Court held that this did not apply because the owner had had no objection to the ascent of the balloons and the Court did not feel that there was any difference whether the balloons were covered with advertisements or not. The case was dismissed. The Court did not deal in an exhaustive manner with the problems arising from the case. For our feeling the basis of the judgment had to be the interpretation of the agreement between defendant and the owner of the airport. By such interpretation it was to be found whether the organizer of the festival was entitled under the agreement to make use of the said balloons. The more important and interesting problem would be whether the owner of the land who is deprived of his right of veto by § 1 of the Air Traffic Act has to permit not only the flying over his land, but also the use of such a flight for advertisement. It seems that there are no other decisions reported dealing with this problem.64

2. Aircraft.

a. Gliders.

§ 1 II of the Air Traffic Act contains the definition of aircraft. The Act of 1922 enumerated aircraft as airships, airplanes, balloons, kites and similar objects designated for movement in the air. Under such regulation the Reichsgericht65 decided that a glider falls within the Air Traffic Act because it is designed for movement in the air. The amendment of the Air Traffic Act, 1936, included gliders expressly.

b. Seaplanes.

Seaplanes are not mentioned by the definition of § 1 of the Air Traffic Act. There is no doubt that seaplanes are also under the regulations of the Air Traffic Act. However, it may be doubtful whether the rules of maritime law are to be applied mutatis mutandis.66 No cases have arisen on this point. However, the Seeamt

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64 In connection with the problem of sky writing cf. Trusen, 1933 Archiv für Luftrecht 208; Alex Mayer, 1931 Juristische Wochenschrift 396; idem, 1931 Archiv für Luftrecht 124. Writers generally think that the use of the air space is free only for air traffic under the Air Traffic Act. Therefore, general rules should be applied as to whether the use of the air space for advertising is to be allowed or not. That means that the owner of land would have the right under § 905 German Civil Code as far as his interests are touched. The Reichsgericht (see 123 RGZ. 181; 1932 Juristische Wochenschrift 46) gave the following principles in a case regarding the use of air space for a conduit: Under §905 s. 2, German Civil Code, the owner of land is not prohibited to utilize his property as well as possible and to turn it to account as far as it is offered to him voluntarily; but he's not allowed to use his right of veto in order to profit from not using his veto against an acting by which he is not disturbed.

65. Decision of November 13, 1928—I 972/28—02 RGSt. 312.

66. See Schleicher-Reymann, Note 12 to § 1 Air Traffic Act; Sebba, 1931 Archiv für Luftrecht 127. On the other hand, Annex D, No. 58 Cina Convention corrected text reads as follows: "Every aircraft maneuvering under its own power on the water shall conform to the Regulations for Preventing Collisions at Sea, and for the purposes of these regulations shall be deemed to be a steam vessel, but . . . ." The German Air Traffic Ordinance 1930 (§77) referred to the provisions of the police for rivers and navigation. § 45 Seewasserstrassenordnung (Codes for Traffic at Sea) of October 31, 1933 enacted such general provisions for
Stettin (an admiralty court) which investigated the accident of a seaplane and reported its findings regarding the probable cause of the accident and the performance of the pilot. On July 7, 1930 the seaplane Dornier Wal D 864 flying from Stettin-Altdamm to Stockholm lost the propeller of the rear motor. The pilot made an emergency landing at sea about 20 nautical miles south of the island of Bornholm. A schooner, which also had a motor, towed the aircraft toward Bornholm. As the weather became worse the seaplane capsized. Some of the passengers and crew were drowned.

Under Section 2 of the See-Unfalluntersuchungsgesetz (See—Disaster Investigation Act) accidents to merchant ships are to be investigated by the Seeamt. The problem was, whether a floating seaplane is to be considered as a ship in the sense of the said provision. The Seeamt explained that “merchant ship” under the Act, means all ships, regardless of construction and purpose, which are not part of the Navy. Hence the Seeamt held that a seaplane, as soon as it lands on water, whether such landing is voluntary or not, was to be considered as a ship unless it is already a wreck upon reaching the water. The said seaplane landing at sea was able to float and be towed, even to propel itself by its own power. The Seeamt felt that a finding of the causes of the accident in so far as it happened while the plane was in the air, is beyond its investigation in the strictest sense of the Act. However, it also covers the loss of the propeller in the air because the deficiency of the rear motor affected the capacity of the plane to be operated as a ship. The German writers generally object to the decision of the Seeamt and there is no doubt that it

the sea water ways, i.e. the lower courses of the rivers navigable for sea-going vessels. Said provisions are now to be applied generally under § 86 II, IIB Air Traffic Ordinance: “Aeroplanes on the water have to avoid the vicinity of other craft when the motor is running. An airplane has to go into the wind without any delay, and any other craft has to give way in case the courses of both are crossing in such a manner that it would mean danger of collision to continue on them. Any other craft has to give right of way to airplanes on the water as long as the motor is not running; as far as possible, they have to sail past in the luff. Otherwise the special provisions for the water on which they are crossing are to be applied for seaplanes.”

Such provisions are to be found in different local ordinances. (Christensen, 1939 Archiv für Luftrecht 5.) The German writers agree that these regulations are not such as to change the character of the aircraft and to make it a vessel. Cf. Wistedtöbetaer, 1931 Archiv für Luftrecht 207.) The London Conference in 1929 regarding assistance etc. at sea also agreed that the international rules regarding salvage at sea are not to be applied to seaplanes. The Convention on Assistance and Salvage of Aircraft or by Aircraft at Sea (CITEJA Document 219—10 JOURNAL OF AIR LAW AND COMMERCE 227 (See Latchford 10 idem 147) did not lay down the principle that seaplanes on the water are vessels.

67. Seeamt Stettin August 13, 1930—1931 Archiv für Luftrecht 54—Translation in extenso by Professor Zollmann 2 JOURNAL OF AIR LAW 688. Schleicher, Luftverkehrsgesetz 1930 p. 195 mentions that in other cases also the Seeamt investigated accidents of aircraft that happened at or over the sea and that the Seeamt had always held such mishaps to be under their jurisdiction.

68. An Italian Court (Tribunale di Firenze) July 3, 1933 in re Società Rimorchiatori Livorno v. Mo Aeronautica: 1933 Rivista di Diritto Aeronautico 325, held an arbitrary act to discriminate whether a seaplane is flying or floating, because under the Italian Code, the plane is always to be regarded as a plane, not only if it is flying.
was not irrefutable regarding the meaning of the See-Unfallunter-
suchungsgesetz. Today, under the new organization of the admin-
istration of air navigation, the Authority for Air Navigation has to
investigate all accidents of aircraft within the supervision of air
traffic.

c. Aircraft as object of the Law of Things:
As there are no special provisions for aircraft in the German
law of things, the general rules of the German Civil Code regarding
things are to be applied. The Code discriminates between the com-
ponent parts of a thing and its accessories. As to the component
parts of a thing there are under special rules the so-called essential
component parts. The law defines essential component parts as those
parts which cannot be separated from one another without destroying
or essentially changing the one or the other, and provides that they
may not be the object of separate rights. This rule has a broad
importance, especially regarding the reservation of ownership. He
who supplies a machine may reserve his ownership until all instal-
ments of the price have been paid. The German Courts held that
under certain conditions a machine which is built into a factory
building or into a movable thing may be an essential component part
of the whole thing, and therefore could not be the object of a sepa-
rate and reserved ownership. Regarding airplanes, the Oberlandes-
gericht in Hamburg decided that the motor of an airplane becomes
an essential component part of the aircraft since it is built into
the body.

d. Aircraft as object of contracts:
The air law, especially the Air Traffic Act, does not provide
special rules regarding the contents of contracts which deal with
aircraft. What rights and what duties will arise from such con-
tracts, therefore, is to be found in applying the general rules of the
German Civil Code. From the viewpoint of air law, it will only be
of interest in so far as the courts based their decision upon the pecu-
liar characteristics of aircraft.

69. Sea Disaster Investigation Act. Cf. Schleicher-Reymann, note 12 § 1;
Koffa-Bodenstein-Koffa, note II, 26, § 1; Sebba, 1931 Archiv für Luftrecht 127.
70. § 93, German Civil Code.
71. Hanseatisches Oberlandesgericht, October 8, 1931—Bf II 299/31—1932
Archiv für Luftrecht 106.
72. The problem of the essential component parts is one of the most contested
in German jurisprudence and the different sentences are not all homogeneous:
the characteristic of being essential component parts was denied for the motor of
an automobile: Oberlandesgericht Braunschweig, January 25, 1934 in 1934 Juri-
strische Wochenschrift p. 1258; for the motor of a dredge: Oberlandesgericht,
Marlenwerder, December 14, 1930 in 1931 Deutsche Richter Zeitung 230; the
production motor of a ship for inland navigation: Oberlandesgericht, Köln, Octo-
ber 14, 1935 in 1936 Juristische Wochenschrift 466. However, the Reichsgericht
found the production motor of a sea-going ship to be an essential component part.
(August 4, 1936—152 RGZ 91).
73. The provisions regarding liability (§§ 19 ss.) establish the liability by
law and independent of any contract.
aa. Rent.

Defendant rented an airplane from the plaintiff for exhibition purposes and passenger flights in the spring of 1925, and promised to pay a fee of 1,50 RM for every kilometer of flight to and from the home port of the plane and to and from the place where the exhibition was to be held. The defendant refused to pay said fee on the ground that the airplane flying to and from the airport where the exhibition took place was used for the transportation of plaintiff’s employees and that there was no chance for him to carry passengers. The contract did not mention whether the lessee should have the right to have carried passengers in the flight to and from the airport. The Court held that since the contract itself was silent, the extent of the lessor’s duty to permit the lessee the undisturbed use of the aircraft had to be found according to the ordinary usage (Verkehrssitte). The Deutsche Luftrat and the Chamber of Industry and Commerce at Berlin delivered opinions on the question of whether it was the ordinary usage in contracts relating to aerial navigation that the charterer of an aircraft for a particular occasion had the right to sell reservations to and from the place of exhibition. The Deutsche Luftrat denied such custom. In its opinion of July 2, 1926 the Chamber of Industry and Commerce stated that there was no custom either in a positive or in a negative sense and that the owner would charge more if he were not to have the right to use the craft on the way to and from the place of the exhibition for transporting employees and materials. Experts felt that a price between 1 RM and 1,80 RM did not indicate the intention of the owner to confer the right of selling reservations to and from the place of exhibition. Hence, the Court held that the defendant had to prove that the charged fee was agreed at such rate as contemplated the right of the charterer to sell reservations for the flight to and from the place of exhibition and regarding the duty of the owner to transport his employees and materials at his own expense. But, as the Court stated, defendant did not even make such allegation, and judgment was given against the defendant. It has to be taken into consideration that the decision deals with a contract made in the spring of 1925. It may be that an ordinary usage has now been developed, but further decisions were not reported.

75. The Chamber of Industry and Commerce thought the lack of any custom was due to the fact that air transportation companies liked to meet the particular wishes of their patrons as much as possible by making express provisions in the individual contracts.
bb. Exhibition.

The legal consequences of the countermand of a stop-over within an air tour were discussed by the Reichsgericht. In July, 1930 the defendant, an aero-club, undertook an airtour over the Rhineland to commemorate the liberation from the Army of Occupation. They planned to fly to several towns inside the occupied territory. Plaintiff, an aeroclub in one of these towns, had made great endeavors toward obtaining such a stop-over for July 5, 1930, and an agreement had been made the significance of which was argued in the law suit. Plaintiff had made extended arrangements when, on July 4th, defendant countermanded the stop-over. The defendant had appointed a committee to take action upon all preparations, and the Court stated that the members of said committee had been assistants to the defendant in charge of preparing the air tour. On July 2, a member of the committee had examined the flying field and had found out that the field was too small for safety to the participating planes under the expected traffic rush. Defendant proposed to restrict the exhibition by stopping only a part of the planes, but, feeling that such restricted exhibition might jeopardize his credit, plaintiff had rejected this proposal. He sued the defendant for compensation of the expenses paid in preparing the stop-over and a part of the profit lost. The Landgericht rejected the claim for profits lost but held that the plaintiff was entitled to compensation of expenses. The Oberlandesgericht rejected the appeals of both parties. Defendant petitioned for a rehearing and the Supreme Court referred again to the Court of Appeal. The Reichsgericht held that a contract had been concluded. It agreed with the Court of Appeal qualifying the contract as being of a special type that had peculiar features of a contract for work. In reference to the decision of the Supreme Court (Reichsgericht in 1931 Juristische Wochenschrift 1934) the Oberaudesgericht explained that each party had to conduct itself in such a way that it acted according to the interests of the other and avoided damage to him. It held that the defendant had been bound to investigate whether the landing field was fitted for the exhibition before or as soon as said field was admitted for a stop-over and that forebearing such investigation he was negligent and liable for such negligence. On the other side defendant alleged he could rely upon the air police who did not oppose the planned stop-over. The Supreme Court held that the

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76. March 24, 1933—VII 345/32—1934 Archiv für Luftrecht 87, annotated by Haupt.

77. The Court analyses the negotiations stating that there is no contract of partnership as defendant expressed his opinion. The arguments deal only with general provisions and have no special interest as problem in air law.
facts were not sufficiently established to base a decision as to whether and at what time defendant was bound to investigate for himself. Haupt, annotating the decision of the Reichsgericht, disagreed because the decision did not make it clear whether defendant was negligent in failing to fulfill his obligation which involved the execution of a stop-over on plaintiff's airfield. Analyzing the problem, Haupt discussed three possibilities: 1. The performance of the contract was impossible in an objective sense. 2. The contract was avoided. 3. Defendant was entitled to rescission because of the failure of basic assumptions. It may be admitted that the decision of the Reichsgericht does not seem to scrutinize the problem exhaustively. If the performance of the contract was impossible ab initio, the problem had to be examined as to whether, at the time of the conclusion of the contract, defendant knew or ought to have known that the performance was impossible, because in that event, under § 307 German Civil Code, the defendant would be bound to make compensation for any damage which plaintiff had sustained by relying upon the validity of the contract, unless he also knew or ought to have known the impossibility. On the other hand, it is a doubtful problem whether beyond § 307 a contracting party may be bound to investigate if the performance is impossible and may be under an obligation for damages omitting such investigations. Since the Reichsgericht mentioned neither the impossibility nor the second problem, and since it stands to reason that the Reichsgericht did not overlook the problem, it may be assumed that the Supreme Court held it obvious that a contract to undertake a stop-over is not impossible to perform because the safety of the traffic is not guaranteed.

Regarding the other viewpoint in Haupt's annotation, the decision of the Supreme Court contains no remarks. Thus it would appear that there is no way to determine from this opinion what legal significance the Reichsgericht gave to the countermand.

e. Admission of aircraft.

The traffic of aircraft within Germany is not permitted unless the craft is admitted and, as far as airships and aeroplanes are concerned, is registered. The requirements are stated by the Act and the Air Traffic Ordinance. The procedure is a mere admin-
istrative one. Decisions of Courts dealing with problems arising therefrom are not reported.

3. Airmen.

a. Pilots' and operators' certificates.

Under §4 Air Traffic Act a certificate of the authority is required in order to operate aircraft or to participate in such operation. According to §18 Air Traffic Act in the wording of August 1, 1922, the legal remedy against decisions of the administrative authorities was given in the way of administrative jurisdiction. Such jurisdiction was exercised by the different countries and, where a country was lacking administrative jurisdiction, an appeal was to be filed under the regulations of the industrial statute (Gewerbeordnung). In the amended wording of the Air Traffic Act of August 21, 1938 the provisions of §18 are cut out. Until a general act regarding legal remedy against orders and decrees of the police of the Reich is enacted, complaints may be filed only with the authority which issued the decree. The final decision in such cases is given by the Minister for Aviation. Nevertheless, there are some earlier decisions of administrative courts that may be of interest because the points of view regarding the reliability and fitness of airmen will be the same. §18 I 2 Air Traffic Ordinance in the wording of July 19, 1930 read as follows: "Facts (viz: that may make a person unfit for piloting and operating aircraft) are especially: habitual drunkenness, placing under guardianship, loss of civic rights, and previous convictions for crime, offence or contravention of traffic rules."

aa. The Prussian Oberverwaltungsgericht (Chief Administration Court) held that the enumeration of facts, from which the inappropriateness follows is not exhaustive but only by way of example; also, numerous slight punishments may indicate that the applicant is unfit. In the feeling of the Court, such numerous punishments may justify the conclusion that applicant is not willing to respect the rights and laws and to accommodate himself to police orders, and it may be feared that such person will disregard the regulations for air traffic and hurt other persons thoughtlessly if not willfully.

82. The classes of airmen who want a license are enumerated by §12 Air Traffic Ordinance.
83. §4 Act of February 1, 1939 (Luftaufsichtsgesetz 1939 R. G. Bl. I, 131) and §13 Ordinance of same date; see also §8 Ordinance of April 18, 1934 (1934 R. G. Bl. I, 310).
84. Substantially corresponding to §19 Air Traffic Ordinance in the wording of August 30, 1936.
86. The same principle is expressed by the decision quoted note 90.
bb. The Bavarian Verwaltungsgericht held that even contraventions of traffic rules that have not been punished may make a person unfit for the certificate and that the decision may be different in as much as contraventions committed by one pilot do not justify withdrawing the license and the same contraventions committed by another one may do so. If a license is issued to an infant, the Court said—extremely correct behaviour has to be requested because the Air Traffic Act provides the issuance of licenses to infants only by way of exception.

c. The Verwaltungsgericht Bremen has considered a flyer as unfit for a license who twice violated the traffic rules. It was also of some importance to the court that the pilot had committed some other irregularities, whenever the court admitted that "incautiousness is only the other side of the venturesome spirit that, in flying, cannot be lacked."

dd. The Prussian Oberverwaltungsgericht held that previous convictions for offenses that did not touch aviation (such as repetition of frauds) may also justify the denial of a license.

b. Position of aircraft captain.

The emergency decrees (Notverordnungen) of June 5, 1931 and October 6, 1931 required a reduction of salaries for employees in the Civil Service and in certain other enterprises. Plaintiff, who had been appointed as an aircraft captain to such an enterprise of public character, contested the amount of the reduction. The Court had to decide to which position in the government's civil service, the position of an aircraft captain was analogous. It held that such captain's professional training could be compared to that of a first naval engineer (Marineoberingenieur) and his occupation to that of a sea captain appointed to the administration of the Reichs waterways. (Seekapitan der Reichswasserstrassenverwaltung.)

c. Air instruction.

Under § 6 Air Traffic Act in the present wording, permission is required for giving instruction to pilots. This rule applies since

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88. Between 17 and 21 years; until the Act of July 29, 1936, it was 19 to 21 years.
89. April 18, 1933—53/33—1934 Archiv für Luftrecht 96.
90. September 21, 1933—III A 1. 32—1934 Archiv für Luftrecht 99. The decision of November 10, 1932—III A 21/32—1933 Archiv für Luftrecht 113 obviously deals with the same applicant. The decision discussed only the formalities of appealing and is obsolete since the jurisdiction of administrative courts was abolished. See note 83.
the second amendment act of July 19, 1936. The former regulations were the following: a permission was required if the instruction was done as a business; otherwise, there was only an obligation to give notice to the Authority of such purpose. The Act does not give a definition of the conception of air instruction (Schulen). In a penal case the Landgericht in Plauen stated that flying in an airplane that has a second control stick built in and thus enables another person to touch the stick is the beginning of instruction for a pilot.

i. General development of the law of airports.

The lack of special rules for a German air law in the beginning of aviation has been of disadvantageous consequence for the development of airports. Since the general rules of the German civil law which were to be applied did not provide for the possibilities and needs of aviation and since, in the beginning, the air law has not been within the Federal competence, the Administrative Authorities of the different German States undertook to rule the airport development by individual decrees and regulations. It is understood that such rules have been of many forms in the different States. The Air Traffic Act of 1922 has taken the first step towards the unification of the law of airports. § 7 of said act prescribed that the establishment of new airports and the continued operation of existing ones depended on a joint permit of the Reichs Government and of

94. § 6 Air Traffic Act wording of August 1, 1922—§ 34 Air Traffic Ordinance wording of July 15, 1930. Since a permission is required today without any difference, at this place, it will be sufficient to know that the requirement "done as a business" in § 6 Air Traffic Act was interpreted by the courts in the same sense as in other German laws. See also below note 187.


96. At that time, in Germany there was scarcely a conception regarding the coming importance of aviation and airports. When the draft for an Air Traffic Act, 1913, was read for the first time in the German Reichstag (March 12, 1914—Protokolle p. 804), a representative of the German Government declared: "We do not know whether after some time a real air navigation enterprise of a larger range will be developed and whether such enterprise will have any importance as a transportation undertaking in comparison to the railways." On the other hand, it was already in 1919 that the Secretary of State for Aviation suggested turning all airports over to the State (reprint in: von Unruh, Flugbehördenrecht, p. 25) but the project was not realized. The first regulation for airports in Europe took place in France. (Ordinances of October 1, 1920 in connection with the Ordinance of July 8, 1920—cf. 1920 B. N. A. iii; 4 (1920 B. N. A. 33).) Here, during the World War, a large number of military flying fields were constructed and they were now utilized for the purposes of civil aviation, since there was no further military need of them. (See also Rapport 6.6.1919; Décret régissant les conditions de passage de la Coordination Générale de l'Aéronautique au Ministère de la Guerre: passage de la Coordination Générale de l'Aéronautique au Ministère de la Guerre: 1923 Repertoire de l'Aéronautique et des Transports Aériens, p. 79, 97.) In 1921, Italy enacted the first decree dealing with airports (November 19, 1921)—Decreto del Ministero della Guerra no. 102 and shortly thereafter other European States followed. In this country the law of airports was left to the States. Generally the various state, territorial and insular governments were authorized by statute to establish airports. As far as the States have been given corresponding powers by constitutional amendment or by statute to local governments ("home-rule" communities), airports may also be established without special statutory grant. (See: Hubbard, McClintock and Williams, Airports p: 117 sq.) In Federal Statutes, the establishment of airports is mentioned first by Section 2 of the Air Commerce Act of 1926. The problem of whether the Federal Government should participate in the construction, improvement, development, operation, or maintenance of a national system of airports is still to be cleared up. (Cf. Section 302 Sq. Civil Aeronautics Act of 1938.)
the Authority of the State in which the airport was situated. The acts under which the permit was to be denied or revoked were pro-
vided by § 7 II. A definition of airports was given in the Air Traffic Ordinance 1930 reading in § 35 I as follows: "Airports are grounds which by their construction and equipment for take-off and landing of aircraft are intended to serve public air traffic (public airports) or special purposes (private airports)." Said definition was dropped in the new wording of the Air Traffic Ordinance of 1936. But the classification remained; airports for public air traffic are now called "traffic airports" and private airports have the denomination "special airports". (§ 26) Under the present laws there are four groups of landing areas:

(1) Traffic airports (§ 26 Air Traffic Ordinance 1936—formerly public airports).
(2) Special airports (§ 26 Air Traffic Ordinance—formerly private airports).
(3) Landing places (§ 35 Air Traffic Ordinance—formerly private landing places). 97
(4) Gliding territories (§ 38 Air Traffic Ordinance—former wording of § 48).

Under the Ordinance of 1930 there was only the obligation to give notice to the Authority for nos. 3 and 4; under the wording of 1936 a permit is required for all places.

Under the Air Traffic Act of 1922 airports were described as the general starting points and destinations of flight; however, without prejudice to emergency, aircraft had the right to land not only on public or private airports, but also—outside of towns—on land that was not fenced and on any expanse of water. 98 This rule was amended by an act of December 19, 1935: Now, in general, aircraft must land at airports. The right to land outside of airports, for general traffic, is only countenanced by necessity as far as security of flight may require or a special permit is granted by the Authority. 99

The airport zone is considered as a part of the airport. 100 The Air Traffic Ordinances provided further regulations for airports. 101 In particular, building zones have been established by the Air Traffic Ordinance of 1930. Such a zone has been extended by the Ordinance

97. § Air Traffic Ordinance 1930—§ § 35 Air Traffic Ordinance of 1936 says: "Landing places are area that serve regularly for take-off and landing of aircraft, without the particular construction and equipment of airports being required."

98. § 12 Air Traffic Act wording of 1922.


100. See § 8 Air Traffic Act—The airport zone is established by the Authority granting an airport permit. It is not the building zone. Its import is to be found in the provision of § 6 of the Air Traffic Act—hence it follows that in the limits of the airport including the airport zone, aircraft may be operated without admission and by unlicensed airmen.

of 1936 under the name "building protection zone" (Bauschutzbereich). The Act of September 27, 1938 repealed the latter rule and, enacting §§ 10a-h in the Air Traffic Act, established extended restrictions for the erection of buildings and constructions first in the surroundings of the airport, and further, outside of such surroundings beyond a certain height. If the permit for constructions is denied or granted under special requirements, the applicant may appeal. Such appeal is to be filed according to the general provisions of Reichs or State law regarding the permit for construction. Decision is to be given by the Administrative Authority with the cooperation of the Ministry for Aviation.

2. Decisions as to the establishment of airports—zoning—expropriation.

a. The municipal corporation Sellin had established a sea aerodrome on the lake of Sellin. Traffic regulations had been enacted by a decree of the police superintendent July 20, 1938. For decades the fishermen in Sellin had had the right to fish in the lake of Sellin. Exercising such right they had put the stakes for weir-fishing in such a way that planes taking off or landing on the water had to cross the row of stakes. Thus the safety of flight was endangered. As an airline to Sellin was to be started, the police superintendent ordered the fishermen to remove the stakes. Upon their refusal to do so, he did it. A fisherman took legal proceedings to the Administrative Court. He argued that the row of stakes did not endanger the air traffic. The lower Court held that the ordinance was against the law and former regulations. The Court pointed out that the stakes did endanger the air traffic but, since the right of fishing had been in force before the airport was established, the fishermen had to be indemnified for said right; in other words: the right of fishing took priority over the right to use the lake that the municipal corporation of Sellin, the owner of the sea aerodrome, had conceded.

102. § 28 Air Traffic Ordinance of 1936. Said provision does not extend to an expropriation without compensation. The rule involved that the owner of an airport was informed regarding the intention of neighbors to erect building, etc. in time; as the laws for building are state laws it depended on the law of the different states whether the permit to build might be denied or the owner had to settle the case with the neighbor or whether he got th right of expropriation.

103. To the removal of constructions existing at the time, when the Act of September 27, 1938 came into effect, the general rules regarding expropriation for the purpose of aviation are to be applied is provided by — § 15 of the Air Traffic Act. As far as a restriction of rights comes into effect under the said act, the Minister for Aviation determines a compensation only in certain cases (§10 g). Such cases are, if an enterprise becomes unprosperous or if the restriction without compensation would be an unfair hardship. The Act mentions as samples: a construction which was otherwise permissible and which was to be erected immediately is the line of a building, or the further utilization for the existent purpose becomes impossible or more difficult. In all cases the courts have no jurisdiction.

The higher Court dismissed the appeal, however, though not agreeing with the reasoning of the lower Court. It held that the police superintendent did not have jurisdiction because the lake of Sellin is part of the Baltic Sea. Otherwise— the court found—the problem could not arise under § 44 of the Prussian Ordinance regarding Fishing, of March 29, 1917/ March 16, 1918 which provides that the stakes are to be removed when the fishing season is terminated. The Court stated that the fishing season had already terminated when the air line started, and hence that at this time the fishermen had to take out the stakes. Therefore, it was held, there was no need for a police ordinance except that the fishermen did not perform their duty and any delay would have been dangerous. In such circumstances, the Court held the extraordinary competence of the police superintendent to be established. From this decision it may be inferred that the principle of § 15 of the Air Traffic Act was not to be applied because the fishermen had no better right than the air line; therefore, they were not entitled to indemnification.

b. The construction of a high-tension electric line near an airport was disputed in the case of the Boeblingen airport. The Boeblingen airport (near Stuttgart) is owned by the Reich and was let on lease to an incorporated company, the Luftverkehr Württemberg Aktiengesellschaft, which ran airlines and maintained an air school at this site. It had partly subleased to other air enterprises. In 1926 an electric power plant, the Grosskraftwerk Württemberg A. G. (called Growag) had obtained the right for expropriation for the construction of a high-tension line. It had acquired the right to erect masts from the owners of land. In 1927 it had filed an application to the police for a special form of permit called a “Polizeiliches Erkenntnis” that was required under the law of the state of Württemberg. Before such permit was issued by the police authority, the Growag had started the construction of the line, since the police had permitted certain preparatory work to be undertaken. In July 1929 the part of the line that is of interest here, had been completed. It went along the airport at a distance of 1350-2400 meters (about 4460-7873 feet) over poles of a height of 35-40 meters (about 115-131 feet). It did not project into the line of flight, i.e. under the German provisions an angle of 1 -- 15

105. The decision does not say in what way the indemnification had to be undertaken. As far as an agreement was not to be reached, there would have been only the expropriation under § 15 Air Traffic Act.
107. In 1928 the airport had been used for 74,832 take-offs and landings.
108. See n. 110 infra.
measured from the end of the landing ground. Subsequently the “Polizeiliche Erkenntnis” was denied. The Administrative Court of Württemberg\textsuperscript{109} dismissed the appeal. Regarding the police permit the court pointed out that the law of the State of Württemberg required a so-called “Polizeiliches Erkenntnis” for the construction and the management of a high tension line, if the line had to go over public ways and waters\textsuperscript{110} but, that the required “Erkenntnis” did not mean that the police authority granted a permit to operate such a line. In this sense—the Court found—a permit was not to be required because the principle of freedom of trade was to be applied, which means that construction and management of high-tension lines is generally allowed without a permit or license, unless a special rule required such a permit. The Court held that the “Erkenntnis” had only the meaning that the police did not object to the construction and that from the denial of the “Erkenntnis,” it was to be concluded that the police declined to tolerate the construction and that the entrepreneur had to remove the construction. The Court held that, for the Growag, this included a restriction of the property and of the right of use. The problem was whether such restriction was to be permitted. As the Court established, in the State of Württemberg, it was customary that in virtue of the police power based upon the general executive power and within the jurisdiction of the public administration and under the Reichs and State laws, the police were entitled to protect necessary order in reference to the needs of the population. The Court discussed the constitutionality of said custom\textsuperscript{111} and pointed out that it affected neither the principle of personal freedom\textsuperscript{112} nor of protection of property\textsuperscript{113} nor the principle of freedom of trade.\textsuperscript{114}

Regarding the problem in itself, the decision depended on whether the high-tension line endangered the air traffic and by that also the life and health of persons participating in flight. Several experts were of the opinion that this was so and the Court followed them in its decision.\textsuperscript{115}

\textsuperscript{109} Württembergischer Verwaltungsgerichtshof Stuttgart, December 23, 1929—1931 Archiv für Luftrecht 248.
\textsuperscript{110} Ordnance of the Minister of the Interior of Württemberg April 21, 1913/July 5, 1926. The reason for such regulation is to be found in the viewpoint that, whenever public ways and waters are free for common use, the use for a high tension line is really exceeding the common use.
\textsuperscript{111} The problem is of general importance but as yet there is no particular interest from the view point of air law.
\textsuperscript{112} Art. 114 German Constitution of 1919.
\textsuperscript{113} Art. 153 II German Constitution of 1919.
\textsuperscript{114} § 1 Gewerbe Ordnung. (Industrial Code.)
\textsuperscript{115} The Court disapproved the opinion of other experts stating that there was no risk for airplanes caused by the construction of the high tension line. The Court adopted the opinion of experts who held that the high tension line was dangerous for flight for the following reasons: The grounds crossed by the line were covered with hills and forests and, since winds from the west and southwest prevailed, weather disadvantageous for flight often set in, particularly fog, clouds and air eddies. Under such atmospheric conditions, the discernibility of the
The Court said that the fact that the high tension line was outside of the line of flight was irrelevant. In the case in question the rules providing an airport zone 1 – 15 \(^{116}\) was not sufficient to guarantee safety for air traffic. Hence, the Court held the denial of the permit had been correct. It disavowed that said denial was not against § 15 Air Traffic Act which, under certain circumstances, provides the possibility of expropriating property or other rights over land.\(^{117}\)

It may be remembered that, at this time, the Air Traffic Ordinance had not yet been enacted; the Court had to consider the matter from the viewpoint of administration. The requirements of Reichs Ministry of Communications regarding airport zoning were not law, but only guiding rules. The Court objected to the idea that, from the viewpoint of the police competence, constructions outside the angle 1 – 15 near an airport were not to be deemed dangerous to flight, because the ministry only required an airport zone 1 – 15. It stated that constructions in the area closely surrounding an airport might also be dangerous to flight though they did not project into the airport zone, and that said constructions might be contrary to the general order which the police had to maintain. The Administrative Court described the problem as one of airport zoning, but in our view, it is one of building zones (building protection zone).\(^{118}\)

Regarding the interpretation of the Air Traffic Act it follows from the decision of the Administrative Court that the expropriation provided by § 15 Air Traffic Act\(^{119}\) does not prevent the administrative authority's prohibiting of a plant, even though such prohibition in its effects amounts to an expropriation. When the said decision had become final the Growag shifted the high tension line. It sued the lessees of the airport for the shifting expenses and for loss of profit during the time the work was going on. The dismissal of the suit was approved by the Supreme Court\(^{120}\) which stated the following principles: A claim for indemnification might be enforced under

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18. At the time in consideration such rule was established for the construction of airports by the Federal Ministry of Communications; today, see § 8 Air Traffic Act, § 27 Air Traffic Ordinance.

18. See note below 121.

18. Said zone was enacted later by § 27 Air Traffic Ordinance (§ 28 new wording) now §§ 10 a-g Air Traffic Act in the wording of the Act of September 27, 1938, as previously mentioned. See also note 103. Besides the latter regulation, the construction of high tension lines is ruled by the Act of December 13, 1935 (Energiewirtschaftsgesetz 1935 R. G. Bl. I 1461); § 4 of said act provides that the Reich Minister of Economy is entitled to object to construction, renewal, enlargement or shifting of power plants and to forbid them for common good.

18. See also decision of Reichsgericht note 120.

18. Decision February 27, 1932, — V. 279/31—1932 Archiv für Luftrecht 251.
§ 15 Air Traffic Act\textsuperscript{121} only if legal proceedings for expropriation are carried on; but, if such expropriation had taken place only the entrepreneur of the airport would have been bound for compensation, the lessees and sublessees not at all.

Under Art. 153 II German Constitution a party would not be entitled to indemnification unless it were deprived of or restricted from a subjective personal right in favor of a third party by the exercise of power of eminent domain that had been applied against a certain individual or a circle of certain individuals.\textsuperscript{122} But, as the Reichsgericht pointed out, since the permit was denied not for the protection of the defendant but for the protection of the community,—in order to preserve life and health of the population and in particular of all those who are involved in air traffic,—the State would be liable for the indemnification.\textsuperscript{124}

The Supreme Court held that also § 1027 German Civil Code was not to be applied. Plaintiff had acquired the right to have poles for the high tension line on the land of other owners by real servitudes. § 1027 German Civil Code provides that the party entitled to the servitude has the rights specified in § 1004 German Civil Code, if its real servitude is interfered with. It follows therefrom that, without proof of negligence or malice, the party which is disturbed in the use of its real servitude (by interferences from a plant serving business or public purposes) may have a claim for damages as far as it is not entitled to oppose the encroachment. But, as the Supreme Court stated, the interference was not caused by the defendant but was due to the intervention of the police. In addition, the Court remarked that flying over the servient tenement does not encroach upon the real servitude and that, besides this, flight over another’s land is free under § 1 Air Traffic Act.

Regarding the attitude of the entrepreneur of the airport the German Supreme Court held that he was entitled to make application to the police in reference to the endangerment caused by the high tension line and that he was under no obligation at all against the Growag to call attention to the requirement of another trace for the high tension line since there was no legal connection between the Growag and the entrepreneur. The Court declared that the entre-

\textsuperscript{121} § 15 Air Traffic Act provides that in case of public requirements for the purposes of air navigation, property and other rights over land may be deprived or restricted for adequate indemnification if an agreement is not to be attained between entrepreneur and owner.

\textsuperscript{122} Such principle is in accordance with numerous decisions of 109 RGZ. 319; 111 RGZ. 130; 129 RGZ. 148.

\textsuperscript{123} The Reichsgericht followed the opinion of the Württembergischen Verwaltungsgerichtshof—see note 109.

\textsuperscript{124} See 80 RGZ. 395; 82 RGZ. 81; the entrepreneur of the airport would have been liable in so far as the permit would have been denied only for its interest.
preneur could depend upon the police and trust that the latter would take appropriate action in time, especially since the plaintiff was able to realize that the planned line brought a risk to air traffic. Hence, the Court refused to apply the provisions of § 826 of the German Civil Code.125

As mentioned above, the Act of September 27, 1938 enacted new regulations regarding a building protection zone. Under the said act the legal situation would be as follows: If, after the act came into force, plaintiff would have constructed the high tension line before a permit was granted, he would be deemed to be a party which has the intention of constructing the line. An indemnification would be stipulated by the Minister of Aviation if he found that the restriction of plaintiff's rights without indemnification would be an unfair hardship. Such indemnification would be paid by the entrepreneur of the airport. The courts would have no jurisdiction. If the line were established when the act came into force, and if a permit for the construction were required by the former regulations, there would be no difference from the former legal situation. If the permit were required only by the new regulation or if the construction were in existence before the permit for the establishment of the airport was issued, the general rules providing expropriation would be applied (§ 10h Air Traffic Act, wording of September 27, 1938). Such general rule will be found first in § 15 Air Traffic Act. The relation of the said rules to Art. 153 II German Constitution providing an indemnification for expropriation has not been the object of decisions as yet.126

3. Use of Airports

a. Use of airport for take-off and landing.

The problem of whether the entrepreneur of a public airport127 might be entitled to prohibit a pilot from entering upon an airport and taking off and landing on it appeared in 1932. The city of Krefeld owned an airport and operated it subject to certain airport regulations

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125. Under § 826 German Civil Code a person who willfully causes damage contra bonos mores is bound to compensation. It may be called into question whether the Supreme Court would give the same reasons regarding § 826 today as far as it said that the entrepreneur was not bound to call upon plaintiff before the construction was started. Since the seizure of governmental power by the National Socialist Regime in 1933, German jurisprudence emphasizes the principle that common welfare precedes the welfare of the individual; it follows from said principle that the individual has to take care of the interests of the community and it might be that under such principle the entrepreneur had to call the plaintiff's attention to the risk of the proposed trace. But, on the other hand, perhaps also today the same decision should be based upon the fact that the plaintiff was able to realize the risk of the proposed trace and that the entrepreneur had done nothing from which the plaintiff could think there was no risk at all.

126. Amendments of the Constitution required a specific majority; Art. 76.

127. Now traffic airport.
which had been approved by the competent ministry.\textsuperscript{128} In consequence of some quarrels between the plaintiff and the superintendent of the airport and a deputy-mayor of the city of Krefeld, the latter had prohibited him from entering upon the airport. Plaintiff desired to use the airport for taking off and landing an airplane whose owner had commissioned him to make test flights. Since he was not admitted to the airport he applied for an injunction against the city of Krefeld to be allowed to use it. The lower Court (Landgericht) in Krefeld held that plaintiff's behavior during the before mentioned quarrels justified the prohibition and dismissed the case. The Court of Appeal\textsuperscript{129} rejected plaintiff's appeal after, in the meantime, the commission for test flights had been withdrawn. The decision of the Court of Appeal was based upon the lack of formal requirements provided by the German Code of Procedure\textsuperscript{130} and therefore, nothing may be concluded from it regarding the problem itself.

Meanwhile, in the month of March, 1932, plaintiff secured another commission for test flights and he was again excluded from the airport. He applied for an injunction. At this time, the lower Court ordered on March 23, 1932\textsuperscript{131} as follows: "On pain of a fine to be stipulated in any case of contravention, defendant is prohibited to prevent the plaintiff from entering upon the airport Krefeld-Bockum for the purpose of flying and to expel him from the airport, if he is prepared to take off, to land or to check an airplane as long as plaintiff has complied with the general requirements for the use of airports and with the particular requirements of the defendant (fees, license, certificate, insurance policy and so on)."

In compliance with this injunction, the plaintiff was admitted to the airport but, during a thunderstorm, the defendant denied permission to the plaintiff to use a hangar. On plaintiff's application for another injunction on April 1, 1932, the lower Court denied the defendant's right to prevent the plaintiff from using the hangars if he had complied with the general and particular provisions for such use. The defendant's objection failed; the lower Court upheld the

\begin{itemize}
  \item \textsuperscript{128} The facts of the case are to be found partly in the decision of the Oberlandesgericht Duiseldorf of Jan. 10, 1933-\textsuperscript{9} U 288/32-1933 Archiv für Luftrecht 99, and partly in an annotation by Dr. von Unruh I. c.
  \item \textsuperscript{129} Oberlandesgericht Duiseldon, April 18, 1932-\textsuperscript{9} W74a/32-Decision not reported; mentioned by von Unruh 1933 Archiv für Luftrecht 102.
  \item \textsuperscript{130} The German Code of Procedure (§§ 936, 940) provides that an injunction for a provisional arrangement of a law case is only to be issued if plaintiff has a sufficient interest as defined by the Code for a provisional arrangement. Such interest had been wanting at the time the commission was canceled since, besides said commission, plaintiff had no particular interest for provisional arrangement.
  \item \textsuperscript{131} Landgericht Krefeld. Quoted from the above-mentioned annotation by von Unruh.
\end{itemize}
decisions; defendant's appeal was dismissed by the Oberlandesgericht as Court of Appeal.\footnote{132}

The decision is of particular interest since it is the first and only case dealing with the entrepreneur of a traffic airport's right to prevent a pilot from using the airport for flying purposes.

The first problem to be decided was a formal one: whether or not the courts have jurisdiction. In discussing this problem, the Court of Appeal stated that the plaintiff had been interested in entering the airport only for the purpose of taking off and landing and sheltering the plane in a hangar insofar as that was absolutely necessary for flight. The Court pointed out that, under § 91 Air Traffic Ordinance 1930,\footnote{133} the police had jurisdiction over air traffic on the landing grounds.\footnote{134} Hence, insofar as the police would have inhibited him from the use of the airport, the courts would have no jurisdiction. However—as the court stated—the police had not interfered, but that had been done by the owner and operator of the airport, the City of Krefeld. If at all, the Court pointed out, the city had no other motive to vindicate the prohibition of the airport's use than in relying on its ownership. The problem to be decided by the Court was, whether the right of ownership entitled the owner of a traffic airport to prevent a person from entering it. The Court stated that such problem was one of the civil law and under its jurisdiction. The Court found that the City of Krefeld operated a public airport (§ 7 Air Traffic Act; § 35 Air Traffic Ordinance) and that it had dedicated said airport to the common use.\footnote{135} The Court held that the dedication to common use meant that every pilot was entitled to take-off and land under the provisions approved by the authority, and that—if plaintiff were willing to comply with the provisions and regulations—the defendant could prevent him from entering the airport only under special circumstances. For the Court, such special circumstances would be such as involve special inconveniences. Examining the different disputes and especially the actions of the plaintiff, the Court denied that defendant could reasonably deduce from those facts that the plaintiff would give special inconvenience.\footnote{136} Finally, the Court

\footnote{132. Oberlandesgericht Düsseldorf, January 10, 1933 (1933 Archiv für Luftrecht 99).}
\footnote{133. § 34 Air Traffic Ordinance 1936 says that the Air Board (Luftamt) has to rule the airport. Regarding the start see § 94 Air Traffic Ordinance 1936 which requires the permission of the Airport Authority (Flughafenleitung) or Air Police Station (Luftaufsichtswache).}
\footnote{134. § 91 Air Traffic Act gives no provisions regarding other parts of the airport.}
\footnote{135. "Zum Gemeingebrauch gewidmet."}
\footnote{136. Defendant reproached the plaintiff with the following grievances: a. Defendant maintained that plaintiff, as manager of a company residing in the airport building had committed fraud to his prejudice. The Court said that there was no connection between the case in question and the
held defendant had acted contra bonos mores\textsuperscript{137} if, due to previous disputes in connection with other contracts, he rendered it impossible to plaintiff, who depended upon the use of the said airport, to carry on his profession.

The problem in question is not solved by a special regulation of the Air Traffic Act and Ordinances, but the decision is based upon general principles. It may, however, be open to some doubt whether the reported decision discusses the case exhaustively enough to be a precedent for similar cases.

The Oberläudesgericht dealt with the case solely from the standpoint of the civil law. The same Court said in the above-mentioned decision of April 19, 1932\textsuperscript{138}, “The problem of the use of an airport by agents of an airplane operator is not a problem of a subjective public right\textsuperscript{139} but of the private law, especially of the law of ownership. The right to expel persons who are undesired is only based upon the private right of ownership. The Court has jurisdiction.” If the point of view of the Court of Appeal has been correct, there is no doubt that the Court had jurisdiction. Actually, the Court of Appeal discussed only the right of the defendant. From § 903 German Civil Code\textsuperscript{140} it follows that the owner is entitled to prohibit the use of his property, but, as the Court said, by dedicating the airport to public traffic (and, it may be added, by opening it to such traffic) the defendant had restricted his rights resulting from ownership, so that, on principle, he was bound to admit every flyer. But the restriction of the rights of ownership is not a complete one, as the Court said; it is confined to uses that give no inconvenience. If the use of the airport causes special inconveniences, the defendant might use his rights as owner. It may be directed whether the decision was founded on this principle alone, for if the plaintiff asserted the right of entering on the airport, the first problem was what right existed and whether it was well-founded. From here the problem of whether the court had jurisdiction had to start, and in reference to the rights of the

\textsuperscript{137} Alleged fraud.
\textsuperscript{b} After several disputes regarding the rented rooms in the airport building, plaintiff had entered the real estate of defendant unlawfully. Here, also, the Court did not find a reasonable connection with the case before it, and added that plaintiff’s defense that he believed he was entitled to enter, had not been refutable.
\textsuperscript{c} A threat and an insult against defendant’s employees that had no importance in the feeling of the Court, pointing out that also the demeanor of these employees had not been perfectly correct.
\textsuperscript{138} § 826 German Civil Code.
\textsuperscript{139} Quoted from von Unruh l. c.
\textsuperscript{139} Subjektives öffentliches Recht.
\textsuperscript{140} § 903 German Civil Code reads as follows: “The owner of a thing may, in so far as the law or the rights of third parties admit, deal with the thing as he pleases and exclude others from any interference with it.” (Chung Hui Wang.)
plaintiff the legal position of the defendant had to be examined. To find out what rights plaintiff might have, the position of the entrepreneur of a traffic airport and of its patrons was to be examined. Originally, as mentioned above, the Air Traffic Act required only a permit for the establishment or continued operation of an airport. The provision that an airport was not to be opened before it was rated, and the regulations for its use had been approved, was introduced by § 42 of the Air Traffic Ordinance of July 19, 1930. The German writers concluded from said provisions that it was not a concession in the sense of a privilege but only a police permit, and that such permit covered a dedication for the common use of air traffic. From such dedication a subjective public right to use the airport extends to patrons. Also, if the suit was based upon such subjective public right, the case fell within the Court's jurisdiction. It is a well established rule in the decisions of the Reichsgericht that the courts have jurisdiction in suits concerning the defendant's right to interfere with the plaintiff's subjective public right to enter on a way dedicated for public use.

The further problem,—what rights did remain to the owner,—was left open by the Court which said that, if at all, only special circumstances would give a right to the owner and explaining that such circumstances had not been evident.

Recently German writers dealing with the problem more as a whole, and taking into consideration as well the establishment as the permit to operate the airport, held it to be a real concession and regarded the airport as an institution under public law. From this point of view the owner has no right to forbid a patron to enter the airport, and also, the opinion of the Court of Appeal in Düsseldorf that the owner may be entitled to an injunction under special circumstances might be called into question as far as the Court derived such right from the private ownership. From the viewpoint of public law the only way would be that the police proceed against patrons which act contrary to police regulations. Coercion of the police is to be employed only by the Airport Authority. For

142. "Verleihung".
143. "Polizeierlaubnis" that is similar to a certificate.
144. 123 R.G.Z. 131 and often.
146. Echte Konzession.
147. von Unruh, 1933 Archiv für Luftrecht 106, expresses the opinion that the owner may be entitled by his private right of ownership to prevent patrons from a use against the regulations by a claim for damages or other means, but on no condition by the negatoria.
the Air Traffic Ordinance of 1930 this may be deduced from § 91 reading as follows: "It is the task of the police to regulate the traffic on the landing ground of a public airport in order to protect public safety and order." Under the Air Traffic Ordinance of 1936 there is no difference. From § 34 Air Traffic Ordinance 1936 and § 10 Appendix to §§ 26-34 Air Traffic Ordinance (Regulations for establishment and management of airports) the conclusion may be drawn that the law distinguishes between the entrepreneur and the Airport Authority. The Airport Authority's director is a civil servant of the German Reich. In support of the above-mentioned decision of the Court of Appeal in Düsseldorf Professor von Unruh found still other arguments which may be quoted. Professor von Unruh agrees with the Court of Appeal that defendant was not entitled to prevent the plaintiff from using the airport. But he gives another reasoning: The airport regulations, approved by the authority provide the use of the traffic airport for take-offs and landings, and these regulations are, in a way, special rules which the entrepreneur is bound to observe. If the entrepreneur prevents a pilot, who has complied with the provisions and regulations, from using the airport, he infringes the airport regulations. Such infringement means that he operates the airport contrary to the conditions imposed by the Authority, and he is thus culpable under § 32, no. 5 Air Traffic Act. Said provision is intended to protect others in the meaning of § 823 II German Civil Code and therefore, a person damaged by such infringement is entitled to forbearance. Such claim in tort are under the jurisdiction of the Courts.

b. Airport charges.

The fees that an airport may charge for its use are established by the airport regulations approved by the Authority. In the few cases which were reported, the German Courts have adjudicated the airport fees on the ground that a contract under private law has been concluded by which the flyer was entitled to use the airport for a monetary consideration. In two decisions the courts said: "The person who uses an airport accepts impliedly the offer of the entrepreneur to permit the use of the airport in return for payment of the fee established by the tariff." Moreover, the judgment of the Court in Breslau emphasizes that the tariff had been posted at the

148. The right to use an airport is developed as a public right in several European countries as Italy, France, Poland, Portugal, etc.; whereas in the U. S. A. it is ruled only by regulations of private enterprises.
150. von Unruh refers to the private bill in England.
airport, and further that the Association of Airport Entrepreneurs had approved it. But the Court did not explain what legal conclusions were to be drawn from those facts. It seems the Court wished to express that defendant could neither object to the reasonableness of the amount nor urge that he had not known the tariff, since he had had the opportunity to take notice of it. However, the problem of whether, and in what way, a contract had been concluded would not arise if the right to use an airport were considered a public right. If the airport is to be used under public law, the construction of a contract under private law would be, at least, superfluous. The German writers disagree.\footnote{Writers who find that the use of an airport is based upon the private law consistently have to assume the conclusion of a contract.}{152} Schleicher-Reymann,\footnote{Recht der Luftfahrt, p. 87, § 7, 2—p. 126, § 31, 1.}{153} though feeling that the airport is a public institution says that the fees are owed under private law and are to be enforced as a private claim. Von Unruh\footnote{Luftverkehrsrecht, p. 56, § 7, V, 1b.}{154} and Koffka-Bodenstein-Koffka\footnote{Luftverkehrsrecht, p. 50, § 7, V, lb.}{155} point out that the entrepreneur is entitled to the fees under public law. Such title under public law means that the obligation to pay the fees becomes existent immediately upon using the airport, quite apart from any contract.\footnote{In Germany the fees fixed by the tariff generally are raised only from flyers who use the airport occasionally. Flyers who use an airport regularly generally make agreements with the entrepreneur, often an usufructuary lease, (for instance, Deutsche Luft Hansa). By such agreements a lump sum is usually fixed or the flyer gets the use at a reduced price, or, sometimes, the tariff fees are stipulated. The German doctrine agrees that a private fee may be stipulated instead of a fee owed under public law (von Unruh, i. c. and 69). Schenk, Flughaf en p. 44 thinks that such agreement is also based upon public law.}{156} From this point of view, the reasons of the two judgments would not be correct. In addition, the problem seems to be more a theoretical one. Certainly, the Court would be able to declare that the tariff is contra bonos mores if it found that the entrepreneur had been unfair in fixing the fees, and was misusing his monopoly. Since each tariff was approved by the Authority,\footnote{§ 42 II Air Traffic Ordinance.}{157} this seems a mere theoretical possibility. There is little probability that a German Court would hold a tariff approved by the Authority to be contra bonos mores. Also, if the fees for the use of an airport are based upon public law, the courts will have jurisdiction. It is a well established rule by the Supreme Court\footnote{§ 43 II Air Traffic Ordinance.}{158} that the courts may have jurisdiction regarding subjective rights based upon public law insofar as there is no special rule denying such jurisdiction. In Germany\footnote{The regulation of such countries which have adopted the principle of state airports, provide that the fees are generally collected under the rules for the collection of taxes due to the State. (e. g. Italy Art. 20, 32 Ordinance of March 2, 1933).}{159} such special regulation is not established concerning airport fees. The further requirement would be that it is an action

\footnotesize{\begin{itemize}
\item \footnote{Luftfahrtrecht, p. 61; idem 1934 Archiv für Luftrecht 106.}{150}
\item \footnote{Luftverkehrsrecht, p. 50, § 7, V, 1b.}{155}
\item \footnote{In Germany the fees fixed by the tariff generally are raised only from flyers who use the airport occasionally. Flyers who use an airport regularly generally make agreements with the entrepreneur, often an usufructuary lease, (for instance, Deutsche Luft Hansa). By such agreements a lump sum is usually fixed or the flyer gets the use at a reduced price, or, sometimes, the tariff fees are stipulated. The German doctrine agrees that a private fee may be stipulated instead of a fee owed under public law (von Unruh, i. c. and 69). Schenk, Flughafen p. 44 thinks that such agreement is also based upon public law.}{156}
\item \footnote{§ 42 II Air Traffic Ordinance.}{157}
\item \footnote{The regulation of such countries which have adopted the principle of state airports, provide that the fees are generally collected under the rules for the collection of taxes due to the State. (e. g. Italy Art. 20, 32 Ordinance of March 2, 1933).}{159}
\end{itemize}}
in civil matters; the Supreme Court stated that also a claim based upon public laws may be an action in civil matters if the right or the legal position of a person is the object of the dispute.

c. Airport taxation.

The Air Traffic Act has no rules regarding the taxation of airports and such general rules are also lacking in the finance bills. Therefore, regarding the different rates and taxes, general principles as to airports are not to be found in German decisions. The legal position of the airports may be different under the different finance bills and, the position must be examined in reference to the different regulations. An exhaustive account of airport taxation, in reference to the numerous acts and regulations and to the numerous changes of legislation is not possible within the limits of this paper. Therefore, without any claim to completeness, reference is made only to some decisions which are perhaps characteristic for the point of view that Tax Courts had in respect to the development. Concerning the imposition of different taxes, it is of importance to investigate whether an airport is a business undertaking or whether it serves public utility. As Professor von Unruh observed, the public airport enterprises generally are operated by partnerships with limited liability or corporations. Members are mostly the Reich, city communities and other public associations. There are airport enterprise statutes which provide that aerial transportation companies and airplane factories are excluded from membership. Mostly, statutes established that the enterprise serves for public utility; other statutes provided that net profits are to be placed in a reserve fund up to a certain amount and that the surplus is to be used to serve public purposes by promoting airport development or public air traffic.

Regarding the corporation profits tax the Reichsfinanzhof expressed the view that the aim of a corporation to promote the air traffic was sufficient to regard it as a public utility. The turnover tax is not to be levied provided that the enterprise is of public utility and, in addition, that the turnover serves for public utility...
immediately and, further, the fees are less than those charged on an average by similar trading associations. In a case of the Bremen airport the Reichsfinanzhof\textsuperscript{170} denied the exemption from the turnover tax because the tariff of the airport was fixed by the association of airport enterprises, and was exercised by all members of said association whose enterprises were partly not for public utility. The Court was satisfied with this finding and abstained from an analysis of the charges fixed by the tariff. Two years later the same Court\textsuperscript{171} approved a decision of the lower Court that the turnover tax was not to be levied. The lower Court found that the airport company had placed its grounds and plants at the disposal of all flyers and aeronauts without discrimination. It concluded from this that considerably higher fees ought to be charged if it was for the purpose of making a profit but the fees fixed by the tariff were lower than the standard charges. Regarding the lower charges the Reichsfinanzhof pointed out that the fact alone that an enterprise requires subsidies does not show that the charges are below the standard. However, under particular circumstances, as the Court held, it might be concluded from such prices that the enterprise was non-profit making, particularly since it made well-planned sacrifices for public utility without any prospect of future profit. The Reichsfinanzhof in other decisions also admitted that airports serve public utility.\textsuperscript{172} The problem of land taxes\textsuperscript{173} was later adjusted by the Act of December 1, 1930\textsuperscript{174} which provided that the part of the airport grounds that is not covered with buildings is free of land tax.

The question of whether landing grounds are “public places” for the real estate purchase tax\textsuperscript{175} was denied by the Reichsfinanzhof in a decision of February 14, 1928.

c. Aviation Enterprises—Air Route Traffic (Scheduled Airlines)—Aviation Affairs.

1. Requirements of certificates (permits).

§ 11 par. 1 and 2 of the Air Traffic Act reads as follows:

\textsuperscript{170} Decision of August 22, 1930—A 346/30—1933 Archiv für Luftrecht 110.
\textsuperscript{171} Decision of September 18, 1932—A 909/31—1933 Archiv für Luftrecht 111.
\textsuperscript{172} Decisions December 20, 1929-1930 Reichsteuerblatt 140 ; October 16, 1930-1931 Reichsteuerblatt 858. Both deal with the Act of Aug. 30, 1924, April 13, 1930 (Aufbringungsgesetz). Former decisions said partly the contrary. In Switzerland the public utility of the airport at Basle was denied for the stamp tax V Archiv für Schweiz. Abgabenrecht 207, VI Id 115.
\textsuperscript{173} See decision of Prussian Supreme Administrative Court of January 5, 1932—1932 Archiv für Luftrecht 322—regarding the Prussian municipality tax (Kommunalaabgabengesetzes of 1893).
\textsuperscript{174} Emergency Ordinance of Dec. 1, 1930 (Notverordnung) 1930 R.G.B. I 547, Part III Chapter 11 § 3 No. 5.
\textsuperscript{175} Grunderwerbssteuergesetz—Decision II A 51/28, 1928 Stuer und Wirtschaft Nr. 285.
(1) "For enterprises which, as a business\textsuperscript{176} carry persons or property by aircraft (aviation enterprises)\textsuperscript{177} and for public affairs for competition or display in which aircraft take part (aviation affairs)\textsuperscript{179} a certificate is needed."

(2) "The certificate shall be denied if there is no necessity or if there are known facts that the public safety or order might be endangered; if such facts arise later the certificate shall be revoked. The certificate may be denied if the entrepreneur uses aircraft not registered as his own in the aircraft register,\textsuperscript{179} it may be revoked if aircraft are not operated for more than a year."\textsuperscript{180} The report on the draft of the Air Traffic Act pointed out that aviation enterprises must be subjected to the need of a certificate (permit) lest they prevent a suitable development of air traffic by desultory competition. It was by the exigency of rating that the Reich got the legal background for its traffic policy. The development of the air traffic brought on a considerable unification of aviation. At this time in Germany only the Deutsche Lufthansa and the Deutsche Zeppelinreederei may come into the question as professional air traffic. Both are private corporations but under the authoritative influence of the Reich,\textsuperscript{181} Usually the certificate has been connected with certain conditions and burdens. Until the Air Traffic Ordinance was enacted, the development of such provisions rested solely with the discretion of the authorities of the different States. Regarding the certificate for aviation enterprises it became an established rule to make a reservation for the permission of scheduled air route traffic. Such rule of the administrative authority passed into law enacting §\textsuperscript{54} Air Traffic Ordinance (wording 1930) which, in addition to the general certificate, provides special permits for each line of flight in scheduled air route traffic. The lawfulness of requiring such special permit has been deduced from §\textsuperscript{11} Air Traffic Act which prescribes that in issuing the certificate the Authority has to examine the need of the enterprise. §\textsuperscript{54} Air Traffic Ordinance (wording 1930) referred explicitly to §\textsuperscript{11} Air Traffic Act. Under the amended Air Traffic Ordinance\textsuperscript{182} the grant of a special permit for scheduled air route traffic lies in the absolute discretion of the Authority.\textsuperscript{183} Court decisions dealing with aviation enterprises, air route traffic and

\textsuperscript{176} "Gewerblich". The former wording was "gewerbsmässig". The two words have the same meaning.
\textsuperscript{177} Luftfahrtunternehmen.
\textsuperscript{178} Luftfahrveraustaltungen.
\textsuperscript{179} Luftfahrzeugrolle.
\textsuperscript{180} The permit is partly a license, partly a certificate in the sense of the Civil Aeronautics Act of 1938.
\textsuperscript{181} Gemischtwirtschaftliche Betriebe.
\textsuperscript{182} § 42, wording of 1936.
\textsuperscript{183} Regarding aviation enterprises, the provisions have not changed: also under § 41 Air Traffic Ordinance (wording 1936) a certificate has to be issued if there are no general doubts and if there is a need.
aviation affairs are only reported in criminal cases since, under § 32 nr. 5 Air Traffic Act, a person who operates an aviation enterprise or aviation affair without certificate or contrary to the conditions incurs a penalty. In the cases that have been reported, the Courts have dealt with the definition of the terms "aviation enterprise," "air route traffic" and "aviation affair," and the meaning and effect of a granted permit.

2. Definitions of aviation enterprises and air route traffic in German cases.

a. Aviation enterprises and circular flights as business.

aa. The Landgericht Plauen\(^{184}\) had to decide the criminal case of a pilot who, without the certificate required by § 11 Air Traffic Act for aviation enterprises, undertook circular flights.\(^{185}\) The Court explained that an enterprise "refers to a business undertaking, an activity which is prolonged and done for the purpose of gain, and is not for the purpose of promoting art or science," and that "it is not necessary that the business be very extensive or according to a fixed schedule."\(^{186}\) The Court found that "defendant for months undertook each week a certain number of daily circular flights with passengers." The Court decided the undertaking of circular flights, in which passengers start and land at the same place, was an aviation enterprise, but gave no reasons for such interpretation. Defendant particularly raised the point that since he was charging only a fee covering the actual cost of the flight without profit the flights were gratuitous (aus Gefälligkeit), but the Court said that defendant's actions were to be brought under the designation of a business. The Court stated that the very purpose of the defendant was business, and did not believe that the compensations collected in each case were merely taken to cover the expenses, since a witness stated that the compensation was to cover the costs of material, depreciation and value of time consumed. From the fact that the compensation was nearly as high as the amount charged by the Deutsche Lufthansa for similar flights, and from defendant's statement that he acted merely in order to minimize the expenses resulting from the entire operation of his plane in all of its forms, the Court deduced that the compensation was not limited to the cost, and that time and material were not given without compensation. For what purposes defendant used the money, whether for his own support,

\(^{184}\) Straffakammer (Criminal section) of the Landgericht Plauen, June 8, 1927—2 Br 46/27 nr. 2—2 Zeitschrift für das gesamte Luftrecht 52. Transl: JOURNAL OF AIR LAW 457 by Professor Zollmann.

\(^{185}\) The same decision deals with the definition of training pilots: The question as to whether an administrative order is under the provisions of § 31 Air Traffic Act is also decided by this judgment. See below.

\(^{186}\) Quoted from Professor Zollmann's translation.
or for other expenses, the Court declared to be of no importance.

Regarding the training of pilots, the Court denied that defendant was training student flyers as a business. It held that the fact that only one student had been trained was sufficient to show that defendant had not acted for the purpose of gain.

bb. The problem of defining the term "aviation enterprises" for business and whether circular flights for advertising might come under such definition, arose in the case of the German cigarette factory "Haus Bergmann." Said factory which sells a cigarette called "Gildehof" let an airplane be flown in circular flights for advertising. The airplane had on the lower sides of the wings the inscription "Gildehof." Tickets for circular flights were put in every twentieth box of Gildehof cigarettes. An authorized agent of the company was charged with operating an aviation enterprise without permit. The lower Court dismissed the case finding that defendant did not act for business. The public prosecutor appealed and the Landgericht held that defendant had undertaken an aviation affair. On defendant's appeal, the court of last resort, the Bayrische Oberste Landesgericht, reversed the case and the public prosecutor withdrew his appeal; hence the verdict of acquittal became final.

The Court held that besides the provision of § 57 Air Traffic Ordinance 1930 flights for advertising are only under the general rule of § 11 Air Traffic Act. That means that it depends on the character of such flights whether a permit is wanted or not.

Regarding circular flights the Bayrische Oberste Landesgericht said that it was understood that such flights come under aviation enterprises. § 11 Air Traffic Act provides a certificate only in the case that the transportation of persons or things is done as a business and the Court interpreted this proviso as follows: "The acting for business that is required for an aviation enterprise assumes

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187. The Court stated four flights with the same student on a second control stick.
189. Amtsgericht Neu Ulm, October 14, 1931—315/31—decision not reported but only mentioned by Professor Oppikofer in an annotation of the decision, 1932 Archiv für Luftrecht 328. From this annotation the facts are quoted that are not to be found in the decision of the Oberste Landesgericht.
191. The Court disapproved the opinion of the lower Court that defendant operated a public affair for competition: see below. Further, the Court held that the facts were not cleared up for the statement that defendant was aware of lacking a permit. In so far, the case has no importance for the air law.
191a. § 75 Air Traffic Ordinance 1936.
192. The above-mentioned decision of Landgericht Plauen had the same point of view. The Bayrische Oberste Landesgericht refused, without further reason, to follow the opposite opinion of Conrad in Stenglein, Strafrechtliche Nebengesetze, 5th edition, Vol. I, p. 629. Conrad points out that transportation by an aviation enterprise requires that the point of the start differ from the point of the landing. His opinion seems to be isolated.
the intention for the purpose of gain by means of carrying persons or things by an activity that is undertaken continuously otherwise with the intent to repeat it. However, the intention for the purpose of indirect gain by a gratuitous performance may also be sufficient, provided such performance has been executed within a business activity for the purpose of promoting the business, as, increasing sales. (Landmann-Rohmer, Gewerbe Ordnung, 8th edition, I, 1, p. 66; 37 RGSt. 369; 46 RGSt. 327; 27 Entscheidungen des Bayrischen Obersten Landesgerichts in Strafsachen 174; 30 dto 88.) For the case in question it must be taken into consideration that the firm ‘Haus Bergmann Zigarettenfabrik A. G. in Dresden’ as it is stated by the Court of Appeal, manifestly intended to secure publicity for the sale of its products by executing circular passenger flights that were meant to increase the business and to secure profit through it. It is immaterial that the firm did not aim for immediate profit by carrying passengers on its advertising flights and that it did not intend to carry passengers as a ‘permanent’ institution. The contrary opinion of the Court of Appeal is incorrect. On the other hand, it is without significance for the definition of ‘acting for business’, whether the firm really acquired the profit that it endeavored to obtain.”

The opinion of the Bayrische Oberste Landesgericht was criticized by Professor Oppikofer. He pointed out that the formulation of the decision might be mistaken. In his opinion it does not follow from § 11 Air Traffic Act that every transportation would need a certificate as long as it is done for business with the mediate or immediate purpose of gain. He thinks that for the definition of “aviation enterprise” it is necessary that the purpose (which may be the main one or a subsidiary one) is for transportation as a business. As he said, the purpose of the requirement of a certificate should be of decisive importance. As it follows from the above-quoted report on the draft of the Air Traffic Act, the permits have been required for the protection of aviation to insure that its development is not hindered by desultory competition. Furthermore, it was the purpose to protect public safety and order, as is shown by § 11, II Air Traffic Act. Professor Oppikofer, taking into consideration the said purposes, defined “aviation enterprises” as those that as an organization premeditated for a length of time offer aviation transportation to the public as a business for profit.  

193. Annotating the decision, 1932 Archiv für Luftrecht 328.
cc. The Amtsgericht Hamburg\textsuperscript{105} denied the application of § 11 Air Traffic Act to a flight for advertising. The Court stated that in the case before it, no persons were transported, and that there was likewise no transportation of property, for the machinery that was taken up was not transported but merely used during the flight for the purpose of advertising.


The different legal problems arising out of the definition of the above mentioned terms were discussed completely by the Kammergericht in Berlin in a criminal case.\textsuperscript{106} The firm Nordbayrische Verkehrflug G. m. b. H., whose manager was defendant, had maintained regular flights between Berlin and Leipzig/Mockau from April 23 to July 21, 1928. Except on July 12, it carried a load of newspapers fresh from the printer and accompanied by a messenger of the publisher. Sometimes two or more passengers were also transported. On January 15, 1927 the Reichsverkehrsministerium\textsuperscript{107} had issued a temporary certificate to transport persons and property with the power to revoke at any time and on condition that a further permission was needed to start and operate scheduled airlines. A further permit had been issued on April 13, 1928 for certain airlines but with reference to the airline Berlin-Leipzig/Mockau the permit was denied, because the ministry did not find any need for such airline. This denial was maintained over the contention of the firm that negotiations for daily transportation of load had already been entered into with the publishers. In his final decree of May 8, 1928, the minister said that he did not object to flights from Leipzig to Berlin on demand, but that flights would be classed as scheduled if they were conducted daily approximately at the same time and that this covered the question of the transportation of papers between these points. Defendant was charged with a violation of §§ 11, 32 nr. 5 Air Traffic Act because he had maintained, without permission, a scheduled operation of air service by which persons and property (i.e. newspapers) were carried every day punctually at 5 P. M. from Berlin to Leipzig, and had continued the flights in violation of the conditions of the temporary certificate insofar as no need had been shown and no permission had been obtained.

The Kammergericht reversed the imposed fine and acquitted the

\textsuperscript{105} Decision of November 21, 1930—XII Z 3696/30—1931 Archiv für Luftrecht 77; transl. by Professor Zollman, 2 Journal of Air Law 591.

\textsuperscript{106} Decision of June 30, 1930—4 S. 46/30—1931 Archiv für Luftrecht 64; translated by Professor Zollman 2 JOURNAL OF AIR LAW 581 in extenso.

\textsuperscript{107} Ministry of the Reich for Traffic.
defendant. From the opinion the following principles may be deduced:

aa. Regarding the principle of freedom of trade, as laid down by § 1 Industrial Code (Gewerbe Ordnung) in reference to the requirement of a certificate (permit) for aviation enterprises, the Court pointed out that transportation of persons and property as a business by aircraft is regulated by the Air Traffic Act as a special statute and that, thus, the provisions of the Gewerbe Ordnung apply only to the extent that the subject has not been treated exhaustively by the Air Traffic Act and other statutes and ordinances covering this field, such as that for Construction of Air Conveyance of July 13, 1926 and the still later Air Traffic Ordinance. As the Court stated, there is an exhaustive regulation as compared with the Gewerbeordnung for certificates required for aviation enterprises, and, in so far, the provisions of the Gewerbe Ordnung do not apply.

bb. The certificate provided by § 11 Air Traffic Act is,—as the Kammergericht said in its opinion,—a franchise and not a permission issued in the exercise of police power. The difference is that the certificate issued under the police power states that there are no objections to the plans of the applicant, while a franchise as a disposition of the administrative authority creates for and confers on the grantee a subjective personal right to establish and to operate a certain enterprise. From its nature as a franchise the Kammergericht inferred that in addition to the restrictions which may be imposed by the police, the certificate required by § 11 Air Traffic Act may be subjected also to other material limitations. Therefore, the requirement of a special permission for scheduled flying was not unlawful.

The opinion of the Kammergericht is not undisputed. Niemeyer, Schleicher-Reymann and Basarke regarded the certificate as bestowed under the police power. Niemeyer deduced
from it that the reservation of revocation at any time was not legal. Another point of view was taken by von Unruh that the certificate required under § 11 Air Traffic Act is a form for the admission to air traffic whose legal nature is different according to different conditions; to him the certificate for an aviation enterprise is an exercise of police power, the certificate for operation of an airline is a franchise.

c. The Kammergericht held it proper for a certificate to be issued subject to material restrictions. As to the content of such restriction, the Court said that once the permission to carry persons and property by aircraft has been granted under the proviso that only scheduled flying needs special permission, such special permission must be limited to scheduled flying, but that the conditions of the special permission dealing with operating an airline might not be inconsistent with the general permission for operating an aviation enterprise. Besides this, the Court pointed out that such provisions should be clear and beyond all doubt in wording and meaning if they are supposed to be enforced by the penal clause of § 32, nr. 5 Air Traffic Act.

d. Proceeding from the developed principles the Kammergericht had to inquire into whether the defendant had established and operated a scheduled airline. Since the first permission of 1927 contained no other restriction than that regarding the requirement of a special permit for a scheduled airline, defendant was only guilty if the transportation of newspapers from Berlin to Leipzig was done on a scheduled airline. On the other hand, if there was not a scheduled airline, the Ministry, as the Court pointed out, did not have the right to prohibit the transportation through its decree of May 8, 1928 which declared that flights on demand would become a scheduled airline if they were conducted daily approximately at the same time, and that this covered also the transportation of the papers. For, with respect to the opinion of the Kammergericht regarding the only admissible object for the special permission, such special permission was only to be required in so far as a scheduled airline had been operated. If it was not a scheduled airline, the decree of May 8th was unlawful in so far as it prohibited the transportation of newspapers from Berlin to Leipzig. Then it was the question of whether said decree of May 8th contained a par-

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206. The Kammergericht for the case at bar had no reason to discuss this question.
207. Lufthafenrecht, p. 70, n. 106; agreeing Kofka-Bodenstein-Kofka, Luftverkehrerecht, p. 81. It is to be noticed that in both cases the certificate is based upon § 11 Air Traffic Act.
208. Today § 41 Air Traffic Ordinance in connection with § 12 of the mandates for aviation enterprises and § 119 Air Traffic Ordinance provide that such restrictions might be imposed.
tial revocation of the general permission that defendant’s firm had obtained in 1927. It may be doubtful whether such revocation would have been permissible and the Kammergericht gives no decision; following a well established rule in German jurisprudence it held that, even though such a revocation might be permitted, it must be by a clear and express declaration. The Court found that the decree mentioned did not contain such a clear declaration.

The Kammergericht’s discussion of the meaning of the words “scheduled airline” is merely of historical interest since the Air Traffic Ordinance gave a legal definition: ‘air line traffic’ means a “regular and public air transportation of persons or property on designated stretches.” The Court found an equal definition from the general sense of the words compared with similar expressions used in other statutes based upon corresponding considerations regarding traffic policy.

Examining the facts found in the trial with reference to the developed definition, the Court stated that the transportation of the newspapers daily at the same time did not constitute a “scheduled airline”. Because the aircraft served exclusively the needs of one newspaper publisher, the Court held that the operation had not had a public use, that is, a use which is open to everyone and upon which everyone can rely. Against this, the regularity and punctuality of the flights were of no weight in the reasoning of the Court since this was dependent of the goods to be transported. Newspapers must arrive daily at about the same time, and after their arrival at the airport they must be forwarded at once in order to be distributed at their destination on the same day. If the expression “flights on demand” is to be used as the Court held, the wanted flights could not become a scheduled airline traffic, unless it was at the service of the public and conducted with such regularity and frequency that the public could rely on it. The Court said in its opinion that the decree of May 8 erred in alleging that a flight performed daily at approximately the same time becomes a

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209. See note 206.
210. Planmässige Luftlinie.
211. § 42 Air Traffic Ordinance (wording of 1930) further mentioned that transportation was performed for pay. The amendment does not affect the matter itself. As § 42, II Air Traffic Ordinance (wording of 1936) shows, also in its new wording the Act provides that transportation will be paid; the permission covers not only the schedule and air transport stipulations, but also the rates for air transportation.
212. Fluglinienverkehr.
213. The Court took into account the Act in regard to Automobile lines of August 26, 1925, and the Ordinance of October 20, 1928 (R. G. Bl. 1, 380). The viewpoints for a definition of an automobile line are here: transport, designated routes, certain amount of regularity, serving public needs and for pay. See the opinion in detail with quotations of books and cases.
214. “Bedarfsverkehr”, that means occasional flights as needed.
215. The Kammergericht opposed the expression because it doubted that it is conducive to clear the legal situation, particularly since the traffic on scheduled air lines (Fluglinienverkehr) includes flights on demand. (Bedarfsverkehr).
scheduled airline. The Court pointed out that, whenever the planes, in accordance with a contract, carried newspaper freight accompanied by a messenger daily (except July 12, 1928), no public transportation was operated, since this transportation was limited to the newspaper publisher and not open to everybody. A scheduled airline traffic could also be created by carrying passengers. The Court considered the fact that on some days other persons were transported, but it did not find that the general public had a regular opportunity for transport from Berlin to Leipzig/Mockau. Under the contract with the publisher the newspapers had to be transported regularly and — as the Court stated — it depended on its variable volume whether other passengers could be carried besides the messenger. From this the Court deduces that by the transportation of passengers a scheduled airline has not been created because the essential element of regularity was lacking. The fact that the timetables made reference to the route was held as of no consequence since the annotation was made "flight on demand." The Court concluded with the statement that "even though it may be true that timetables are evidence that the route is operated as a public scheduled airline, this conclusion is rebutted by the note 'flight on demand.' Only the actual operation of the line on a particular route is 'decisive' for the problem of whether a scheduled airline exists or not."216

3. Aviation Affairs
   a. Definition:

   For the arrangement of the so-called aviation affairs,217 a certificate is required under § 11 Air Traffic Act if they are got up for the purpose of contest218 or exhibit.219

   aa. In the decisions of the Schöffengericht Liegnitz220 and of the Strafkammer of the Landgericht Liegnitz221 the question to be decided was whether an affair during which the ascent and chasing of two balloons by motorvehicles was arranged in such a way that the balloons’ landing places were the destination of the motorcars

216. It may be added that the Kammergericht did not consider whether the transport of the newspapers accompanied by a messenger violated the provisions of Postal Law because a criminal prosecution under said regulation presupposed action by the Postal Authority as a necessary condition and such action was not taken.

217. "Luftfahrtveranstaltungen": a public performance in which air conveyances participate.

218. "Im Dienste des Wettbewerbes."

219. "Im Dienste der Schaulust."


and motorcycles, was to be certificated under § 11 Air Traffic Act. Both decisions held that defendants were not guilty, the lower Court because it did not find that for said performance a certificate was needed, the higher Court because it did not find that defendants were the promoters. The Schöffengericht Liegnitz expressed some doubt as to whether the flight of two balloons was under the rules of the Air Traffic Act, since the Act's purpose was to regulate air traffic and, in the feeling of the Court, such regulation did not appear needed for the actual flight of two balloons. As § 11 Air Traffic Act shows, it cannot be disputed that every flight of balloons, is under the provisions of the Air Traffic Act and that the Court's idea was erroneous. In fact, the Schöffengericht did not find the decision on the mentioned misconstruction. However, from the opinion of the Schöffengericht it is not quite clear whether the Court held that it was a public performance in which air conveyance participated. In its opinion the Court declared—and in so far the higher Court agreed—that the words "for contest" meant a competition between aircraft or between air conveyances and vehicles on land, and that no competition was arranged here either between the balloons or its pilots; they did not act as competitors.

With regard to the question of whether an exhibition was arranged by the balloon ascent and chasing, the Schöffengericht stated that whenever a crowd was attracted to inspect the performance there was no exhibition as provided by § 11 Air Traffic Act, since the promoters had no intention of giving one. Regarding the balloon chasing the Landgericht agreed, but not regarding the ascent, finding that the purpose of the ascent was to gain public interest and new members for the Association for the Promotion of Aerial Navigation whose branch in Liegnitz had been founded just before. From such purpose the Court concluded that an exhibition was given by creating on the part of the public the desire to see the performance and by satisfying such desire. Since the Landgericht held that only the ascent of the balloons was an "aviation affair for exhibition," it acquitted the members of the automobile club who had arranged the chasing and explained that the leading members of the Association were the responsible organizers.

bb. In reference to the definition of the words "for contest" in the above mentioned decision of the Amtsgericht Hamburg, it was said that flying an airplane for advertising is not affected by § 11 Air Traffic Act because this rule provides for competition of

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222. The public Prosecutor had appealed.  
aircraft. A definition of "contest" in its proper sense is not to be found in German decisions.

cc. The above reviewed judgment of the Bayrische Oberste Landesgericht [224] examines the term "aviation affairs for exhibition" in relation to flying for advertising. The Court in its opinion said:

"Aviation affairs for exhibition are such that present to the public something worth inspecting. They wish to create the desire of the public to see the performance and they are arranged for show and, according to practical experience, are planned and qualified for amusement and entertainment. Such definition does not coincide with flights for advertising—also with such passenger flights—insofar as the advertising is only done by inscriptions and special public displays—as, for instance, acrobatic flying or parachute jumps,—are not connected with the flight." [225]

b. Prohibition of aviation affair.

From the denial of a certificate required under § 11 Air Traffic Act there is no appeal when the Minister for Aviation has issued the decision. If the decision is given by the air board [226] complaints may be made to the Minister. [227] The prohibition of acrobatic flights by the police authority has been discussed by the Landgericht Erfurt. [228] Plaintiff was prepared for an aerial circus. The proper permission as required under § 11 Air Traffic Act and issued by the authority contained the proviso that plaintiff had to take out an insurance policy against liability covering all damages from the affair up to the amount of the highest sum provided by the law. The insurance policy of the plaintiff read in part as follows:

"Insurance protection will be given only if the aviation affair and the flying field are duly permitted by the authority and recognized by the German Air Council [229]. Liability claims from parachute jumps or other acrobatic exercises are excluded. Acrobatic flying and stunts are excluded."

The day before the affair was scheduled to take place the superintendent of the air police station stopped the performance since plaintiff had not secured the required insurance protection.

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225. See also 1933 Archiv für Luftrecht 203: Cour d'Appel Grenoble July 22, 1933: circular flights of the same pilot are not public display arranged for show. (Evolution constituent un spectacle public) in the sense of Article 23 French Air Traffic Act.

226. Luftamt.

227. § 6 Ordinance April 18, 1934 (R.G.Bl. I 310) dealing with the organization of the aviation administration by the Reich. Formerly § 18 Air Traffic Act provided a complaint to be filed with the administrative jurisdiction. § 18 has been amended by the Act of December 15, 1933, and August 21, 1936.


229. Deutscher Luftrat.
The plaintiff sued the State for damages resting upon the contention that the superintendent had committed a breach of official duty by imposing the prohibition at a time when plaintiff still had the opportunity to take out insurance. The case was dismissed. The Court pointed out that the liability under Art. 131 German Constitution is given if a civil servant infringes an official duty. But in the Court's finding there was no such infringement. The Court established that plaintiff had no chance to take out insurance from the moment when the affair had been prohibited (Saturday afternoon) until the time scheduled for the performance, (Sunday) since between Saturday afternoon and Sunday morning, the offices of the insurance company, with which plaintiff was in connection, were closed. The policy which was introduced by plaintiff did not comply with the proviso of the permission since the recognition of the air council was lacking, and acrobatic flying etc. was excluded. The Court seemed to have no doubt that the permission connected with a condition was valid. Insurance is compulsory under § 29 Air Traffic Act and the Authority is bound to fix the amount of the insurance. As § 29 Air Traffic Act provided, the insurance was to be proved before the certificate was issued. This means that the Authority had to fix the amount of the required insurance, applicant had to take out the insurance, and to prove it to the Authority and, only then, the certificate was to be issued. The rule was amended by the Act of July 29, 1936, and now there is no proviso regarding the time at which the insurance protection is to be proved. In fact, at the time of the case at bar, the proceedings of the Authority did not correspond with the literal wording of the law. However, such proceeding was admitted since by such simplification of the routine the position of applicants was made easier. In reference to the decision, there will be no doubt that the "aviation affair" was not duly permitted and the prohibition of the air police superintendent was justified.

4. Taxation.

a. Regarding circular flights the Saxon Oberverwaltungsgericht held that there was no exemption from entertainment taxes. The Court did not overlook the fact that the purpose of such flights was to make clear to the public that flying was neither dangerous nor injurious to health and to propagandize long distance flight, but, as it stated, this did not alter the character of circular flights as entertainment.

b. The arrangement of acrobatic flights and parachute jumps has been held subject to the entertainments tax by the Prussian Oberverwaltungsgericht.\textsuperscript{232} The Court held that the exemption which was provided for gymnastic exercises did not apply since the performance was made for business. The Court pointed out that a subsidiary purpose to promote the interest in aviation did not supersede its character as entertainment.\textsuperscript{233}

\textsuperscript{232} Decision of June 27, 1933—II C 214/32—1934 Archiv für Luftrecht 177.

\textsuperscript{233} Some decrees of the Minister (cf. 1928 Preussisches Ministerial Blatt für Innere Verwaltung 271) recommended to the counties they might exempt aviation affairs under certain conditions. But such recommendation is not an exemption.