German Air Law - A Case History

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†ED. NOTE—The author studied law at the Universities of Lausanne (Switzerland), Heidelberg and Breslau (Germany), receiving the degree of Doctor Juris, magna cum laude, from Breslau in 1912. From 1919 to 1924 Dr. Lorenz served in the Prussian Ministry of Justice, and for the next fourteen years as Judge of the District Court and Court of Appeals in Berlin, part of the time as Presiding Judge of the District Court. During the period from 1922 on Dr. Lorenz conducted seminars for young lawyers, wrote and published several legal treatises, including a Handbook on German Civil Procedure, and for many years he has been a contributor to Professor Schlegelberger's (Berlin) Encyclopaedia of Comparative Law and Professor Galganos' (Rome) Yearbook of Comparative Law. Air law has been included in these studies. The JOURNAL OF AIR LAW AND COMMERCE is honored to have such an able contributor to a field and on a subject in which the English language documents are so limited.
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GERMAN ABBREVIATIONS
R.G.Bl. : Reichsgesetzblatt (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.)
CHAPTER III: LIABILITY

A. Regulations of the Air Traffic Act.

The draft of an Air Traffic Act proposed in 1914 provided rules of liability for the operator (holder) of aircraft similar to those of the Automobile Act, since it was the current opinion that the general principle of no liability without fault, then applicable to aviation cases, did not afford sufficient protection for the public. Under the regulations of the draft the operator (holder) was liable for damages caused by operation of aircraft. The liability was excluded if the accident was caused neither by negligence of the holder and/or its employees nor by a defect of material or failure of machinery. The liability of the operator and pilot of aircraft has been extended by the Air Traffic Act that regardless of fault and acts of God, as provided by § 19:

(1) “If in the operation of aircraft a person by accident either is killed, or his body or health injured, or damage caused to a thing, the holder of the aircraft is obligated to compensate for such injury or damage.”

(2) “If another uses the aircraft without the knowledge and consent of the holder of the conveyance the other is obligated to compensate for the injury or damage in place of the holder. The holder in that case is also liable if the use of the aircraft was made possible through his fault.”

The following §§ 20-26 establish regulations in respect to taking into consideration contributory negligence (§ 20), the extent of the damages to be compensated (§§ 21, 22, 24), the maximum of responsibility (§ 23), prescription, and exclusion of claims (§§ 25, 26). There are no other rules in reference to liability for damages caused by air traffic than the above mentioned, but said rules do not preclude an even greater liability that may be based upon other provisions of German Codes and Acts. Such liability, however, is always based upon malice or negligence regardless of whether the case rests upon the law of torts or of contracts. As mentioned above the German Courts had developed the principle that the owner, who has to resign his right to prohibit interference with his property, is entitled to damages without proof of malice
or negligence. Before the Air Traffic Act came into effect the Reichsgericht had held that this rule applied also to air traffic, insofar as the owner had no power to prohibit flights over his land.\textsuperscript{237} When the Air Traffic Act came into force the legal position changed. The Reichsgericht\textsuperscript{238} explained:

"The principle, as developed by the decision of the Reichsgericht 100 R.G.Z. 69, cannot be applied to the affirmative provisions of the Air Traffic Act. The compensation for the general restriction of the land owner provided by § 1 Air Traffic Act\textsuperscript{239} is only to be found in the severe liability prescribed by § 19. (See also 156 R.G.Z. 305).\textsuperscript{240} This is all the more valid as, after said decision had been given, a fundamental and complete change took place regarding the conception of the nature of real property.\textsuperscript{241} Hence, if § 28 Air Traffic Act says that the rules and prescriptions of the Reich, under which the operator (holder)\textsuperscript{242} or the person using the aircraft is bound to a greater extent for damages caused in operating an air conveyance, are not affected, said rule refers principally to the law of torts."

B. Elements of liability under § 19 Air Traffic Act.

The liability for the result provided by § 19 Air Traffic Act as distinguished from the Automobile Act is due not only to third persons but also to all persons carried by the aircraft no matter if for pay or gratuitously, for employees, students and so on.\textsuperscript{243}

The provisions under which the liability established by § 19 Air Traffic Act takes place are as follows:

1. Damage must be caused by \textit{air conveyance}. The Air Traffic defines air conveyances under § 1, par. II in connection with § 1 Air Traffic Ordinance.\textsuperscript{244} There is no question that many doubts may arise as to what extent said definition is suitable; however, no decisions of the courts are reported.

2. The liability is confined to \textit{accidents}. The definition of the

\textit{Recht der Luftfahrt}, p. 112 It may be expected that at this time the rules of the German Air Traffic Act regarding liability will be amended since from then the liability will be different against third persons and all others such as airmen, passengers and employees.

239. See note 61.
240. See note 60.
241. The Reichsgericht is here referring to the doctrine of national-socialism which may be condensed in the sentence: common welfare precedes the welfare of the individual.
242. See notes 258 sq.
243. Generally liability is restricted by special provisions; see § 23 Air Traffic Act. Regarding employees' restrictions under the Workmen's Compensation Act. See note 278 sq.
244. Kites and models with more than 5 kg. (about 11 lb.) are under the Act. For gliders see note 65.
word "accident" gave many difficulties. Even though the liability for damages is due to the fact of an accident under different regulations, a definition is only to be found in the Reichs Beamten Gesetz.\textsuperscript{245} Said Act defines an accident met by a civil servant on duty as, "a sudden, local and at the moment determinable event that occurs in exercising or in consequence of the service and is based upon external influence, causing bodily harm." The jurisdiction referring to other acts mentioning the word "accident" gave the following definition: "An accident is an event that is determinable at the moment, that is in connection with operating a factory, an automobile, a railway and so on, and, that causes harm to the affected person by a sudden influence."\textsuperscript{246} In reference to the Air Traffic Act the Amtsgericht Emden\textsuperscript{247} gave the following definition: "An accident is a sudden occurrence which gives damaging characteristics to an event otherwise harmless and happening while the plane is being operated."

In one of the latest decisions the Reichsgericht\textsuperscript{248} said: "The Court of Appeal (Kammergericht) proceeds from the correct point of view that an accident is the sudden influence of external facts upon persons or things which results in damage."

In this decision the owner of a fox farm claimed damages, urging that the aircraft of defendant were flying over his farm in scheduled flights at low altitudes and with tremendous noise and that the female foxes, frightened and excited by the view and the noise, aborted their young prematurely or destroyed them. The Reichsgericht continued: "Although the point of suddenness has predominant reference to the coming into effect of the damages, the decision of the Kammergericht does not cast doubts about this point. The Kammergericht established from its findings that the female foxes suddenly suffered a psychic fright that lead to the abortion and destruction of the young. The immediate damage is the fright and this fright resulted suddenly. There is no doubt that also such a psychic influence may be considered an accident. It may be that the female foxes did not abort and destroy the young suddenly, but the damages resulted from the fright and therefore, the Kammergericht was correct in taking them as a consequence of the accident. Also a deterioration of the female foxes is a

\textsuperscript{245} Act regarding Civil Servants of January 26, 1937 (1937 R.G.Bl.1, I 99).
\textsuperscript{246} See 21 R.G.Z. 27; 44 R.G.Z. 258; in the opinion of various writers it was held that an accident was plainly a bodily injury or death happening in the operation of a factory etc. See Eger, Reichshaftpflichtgesetz § 1 Note 10; (Liability Act); Müller, Kraftfahrzeuggesetz § 7 I note B II; (Automobile Act); Fachinger, Die Änderungen des Bürgerlichen Rechts durch das Luftverkehrs- gesetz, p. 33.
\textsuperscript{247} Decision of March 10, 1926—4 C 1823/25—1927/28. Zeitsehrift für das gesamte Luftrecht 59—Transl. (1930) 1 JOURNAL OF AIR LAW 219 by Professor Zollmann.
\textsuperscript{248} Decision of July 7, 1938—458 R.G.Z. 34.
damage resulting from an accident. The damage is not one that came into effect in the course of time, but it is a continued damage resulting from fright." Defendant rested upon the argument that there was no accident because the airplanes had been operated in a normal flight without any incident. But the Court rejected this interpretation.249 "The Landgericht giving the first judgment250 in the case had held that a psychic disorder could not be considered as an accident, because there was no immediate and direct influence upon the female foxes.

3. The Act provides that the accident resulted in operating aircraft.251 Such regulation corresponds to the provisions of the Liability Act252 and the Automobile Act.253 The beginning and the end of the operation of aircraft are not defined by the Act itself. The Rome Convention of 1933 relating to Damages Caused by Aircraft to Third Persons used the term "in flight". The draft provided the words "in maneuvers or in flight". Since there were many objections as to the vagueness of "in maneuvers", by a compromise the words were struck and "in flight" was defined by a fiction in Art. 2 III as follows: "The aircraft is considered as in flight from the beginning of the operations of departure until the end of the operation of arrival." The wording is not supposed to restrict the liability for all risks in operating aircraft as it was expressed in the final protocol of the Rome conference. In respect to the proviso for operating aircraft in § 19 Air Traffic Act the Amtsgericht Emden254 held that an aircraft is operated until it is stopped and passengers have had the possibility of leaving it. In the case at bar a passenger of an aircraft was injured by striking upon an object in the cabin when the plane was landing. The Court abstained from a discussion whether an occurrence happening after the landing would be an accident under the proviso of § 19 Air Traffic Act since, in this case, the injured passenger had not had the opportunity of leaving the plane.

4. Whether damages result from an accident occurring in
operating aircraft is a question of causation. In the above-mentioned decision regarding the fox farm the Reichsgericht summarized the present position of jurisdiction as follows: "The Reichsgericht has held that an adequate causal connection exists if an act or a forbearance was capable of effecting the result, which came to pass. But, there is no causal connection, if the act or the forbearance was fitted to reach the effect only under circumstances, that were especially peculiar, wholly unlikely and to be left out of consideration under the regular and natural course of events. (See 133 R.G.Z. 126; 135 R.G.Z. 149; 141 R.G.Z. 169). In reference to psychic influence, courts have denied adequate causal connection, if damages took place resulting from an uncommon disposition of the injured, although the occurrence was innocuous if judged by objective standards. (Reichsgericht in 1908 Juristische Wochen- schrift p. 41, nr. 16.)" In applying said principles to damages in connection with aircraft the Reichsgericht said that from the viewpoint of an objective observer, in the light of the development of aviation within the last years, the sight and noise of aircraft flying straight at a high altitude must be regarded as innocuous for a normally disposed human being as well as for a beast of normal disposition. The Court stated that "if there was any other (viz. abnormal) reaction upon the silver foxes it must be traced back to the fact that such species are imported from climates without air traffic and, due to the particular conditions of its rearing, it is extremely sensitive to the sight and noise of aircraft."

Proceeding from this statement the problem of the adequate causality was to be decided in the opinion of the Reichsgericht as follows: "If the foxes were damaged because they were extremely sensitive, due to air traffic innocuous from an objective point of view, the causal relation between the operation of aircraft and the resulting damages plays no part in the legal decision, since it is outside of the regulation that the law provides. In the case before the Court an adequate causality could be traced only if the fright of the foxes resulted from the flight of aircraft at a low altitude with tremendous noise impressing the dis-

255. In German civil law the theory of adequate causality is generally acknowledged. It says that a causality in the legal sense exists only in reference to such facts by which the effect may be expected as probable, regarding a reasonable perception under the natural course of events. cf. the similar theory in Salmond-Stajlyrass Law of Torts 137; Hadley v. Baxendale (1845) 9 Ex. 341.

256. 165 R.G.Z. 34.

257. The problem of fox farms and aviation is of great importance. In Germany about 1500 fox farms are supposed to exist (in Norway, about 17000). From the decision of the Reichsgericht it follows that a claim for damages may be based only upon § 19 Air Traffic Act and that plaintiff would have to rest upon the argument that the flight was executed at a low altitude and with tremendous noise and that other beasts also would have been frightened. But for the usual flight the owner of the farm will not be entitled to damages. As Schleicher in 1938 Verkehrsrechtliche Entscheidungen und Abhandlungen 262 explained, there is no probability under the rules of Ministry of Aviation that such farm land may be declared a prohibited area, because such a prohibition would interfere
position of the foxes in a way which was suitable to result in an injurious psychic influence upon beasts that are not particularly sensitive."

5. The absolute liability stated by § 19 Air Traffic Act is imposed on the holder (operator) of aircraft. Thus the German Air Traffic Act provides the same rule as the Rome Convention of 1933 relating to Liability for Terrestrial Damages. The German system left to the Courts the definition of the "holder". In the deliberations at Rome many doubts arose as to this definition, and the French delegation suggested that the problem be left to each jurisdiction. But, considering that under different systems the owner is liable and further that neither under the American nor the English system the holder's liability was established, it was decided to give a definition of the person who elsewhere is generally called the holder, which reads as follows: "Any person who has the right of disposal of and uses the aircraft on his own account shall be termed "operator" of the aircraft."

The definition to be found in the Rome Convention coincides almost completely with the result reached in German jurisprudence. Here, the holder (Halter) was deemed liable under the Automobile Act and since the Act itself did not define the meaning of holder, it was left to the Courts to give an exact definition, which later was generally applied to the holder of aircraft. Pursuant to the proviso established under the Automobile Act, the holder (Halter) of an automobile and equally of aircraft is termed any person who has control of it, that means anyone who uses it on his own account and has such full disposal over it as said control requires.

with the needs of aviation. However, the Minister for Aviation recommended by several decrees that pilots avoid heading for fox farms flying over farms at low altitude. See decrees indicating the positions of the farms, e. g. 36/21.3. 1936 Nachrichten für Luftfahrer 367; 39/19.5. 1939 Nachrichten für Luftfahrer 447. The same problem arose in the case of Nebraska Silver Fox Corp. v. Boeing Transp. Inc. 1932 USAVR. 164 and in Norway see 1937 Archiv für Luftrecht 334.

258. Halter des Flugzeugs.
260. "Any person who has the right of disposal of and uses the aircraft on his own account shall be termed "operator" of the aircraft."
261. § 7 Automobile Act. The word "Halter" occurs for the first time in the German Civil Code § 833 stating the liability of the keeper of animals.
262. The Amtsgericht Hamburg (decision of November 21, 1930—DJI. Z. 3696/30—1931 Archiv für Luftrecht 77; translated by Professor Zollmann (1931) 2 JOURNAL OF AIR LAW 591) brought up the question whether the maritime law may furnish an analogy for explanation of the holder (Halter) and referred to the equipper (Ausruester) in § 510 German Code of Commerce. The equipper (Ausruester) is a person who uses a ship which he does not own for the purpose of gain by navigation either by maneuvering it himself or by putting it under the control of a master. However, the Amtsgericht Hamburg finally following the definition found for the Automobile Act did not draw conclusions from its suggestion and the Courts did not enter into the idea.
this point of view the holder of an aircraft may be called an operator in the sense of the Rome Convention of 1933. In some cases that have dealt with airplanes the following principles have been expressed by the courts:

a. If an airplane is placed at a person's disposal for temporary use (chartered for an acrobatic flight and the necessary test flights) such person cannot become operator in the sense of holder because it was not the intent to establish a connection for a certain length of time.²⁸³

b. The purchases of an airplane becomes the operator by delivery of the plane even if the contract provided for reservation of ownership and ownership was not yet conveyed.²⁹⁶

c. The status as operator will not be affected if the operator delivers the plane to a plant for repairs.²⁹⁷ The Kammergericht held that such principle was to be established because the operator as owner could dispose of the plane at any time, and might request its return from the mechanic.

d. In the case of the Amtsgericht Hamburg²⁹⁸ the Court found that an airplane had been hired for advertisement and that the bailee paid rent directly proportionate to the length of the flights and that he, even in adverse weather conditions, had “to give directions when the flight was to begin, when it was to end, and where it was to take place.” The Court denied that the bailee was the operator because it was not used on his own account, and because the “decision about the beginning and ending of a flight does not include any considerable right to direct. “The decisive thing is,” as the Court continued,

enzyme to industrial accident insurance) Nov. 20, 1931—1 a 8788/30—1932 Archiv für Luftrecht 250.


²⁶⁷. Oberlandesgericht Hamm note 264. The same principle had been established by the Reichsgesetz 87 R.G.Z. 139 for the purchase of an automobile.

²⁶⁸. Kammergericht note 264. The decision dealt with the following facts: The operator and owner had sent his airplane to an airplane plant for repairing. The plant, after the repair was finished, ordered one of its employees, the son of plaintiff, to make a test flight, on the occasion of which plaintiff's son crashed. The Court held the owner liable as operator. The decision is in conformity with the principles stated for the capacity as operator when an automobile is to be repaired. Cf. 79 R.G.Z. 314; 91 R.G.Z. 272; 91 R.G.Z. 303; 127 R.G.Z. 174; 150 R.G.Z. 134. Following the quoted judgments the manager of a repair work shop who drives an automobile for the purpose of repairing or testing it, does not become the operator liable for damages under § 7 Automobile Act. However the Reichsgesetz explained in its decision 150 R.G.Z. 138 that a different judgment might take place if the repairer is allowed a certain independent disposal and if he substantially shares the expenses. But as a rule, such exception will not fit repairing plants since the cost of test flights generally will on the account of the customer. Oppikofer in his annotation of the decision of the Kammergericht 1937 Archiv für Luftrecht 326 disagreed with the developed principles. He explained that there is a substantial difference between an aircraft and an automobile and that the courts should pay regard to it in establishing as a rule that the manager of a repair plant becomes operator for test flights. He felt that such interpretation would correspond to ordinary usage and common interests as far as to the particular position of air law. It seems that, up to now, the German courts have not defined their attitude regarding Professor Oppikofer's opinion.

²⁸³. Note 262.
that "the technical conduct of the flight is entirely independent of the will and directions of the renter." On the other hand the Landgericht in Halle\textsuperscript{269} held the renter of a balloon to be the operator because he had the disposal of the balloon and was prepared to pay the cost of an ascent. In that case defendant had rented the balloon for an "aviation affair" in the course of which an automobile club was supposed to arrange a balloon chase. The automobile club was willing to make a contribution to defendant's costs. Since the defendant was afraid to begin the ascent under bad weather conditions the automobile club increased its contribution considerably in order to induce the defendant to make the ascent. The question arose whether the automobile club might have become the operator. The Court held that such contribution did not affect the defendant's position as operator, since the automobile club by contributing a certain sum to the expenses of the ascent, did not take over the complete cost and that defendant retained full disposal as to the management of the ascent, the piloting, and the control.

e. In another case, decided by the Oberlandesgericht Hamm,\textsuperscript{270} the owner of an airplane had allowed his airplane to be taken by an instructor for pilots who put his own name on the plane and assumed the expenses. The Court held the instructor to be the operator.\textsuperscript{271}

6. Use of aircraft without the right of disposal.

§ 19 II Air Traffic Act provides that a person who uses aircraft without the operator's knowledge or consent is liable for damages in place of the operator. Besides, the operator continues to be liable if the use of the aircraft was made possible by his negligence.\textsuperscript{272} It seems that such unlawful use, which is rather common in automobile cases, has no great importance for air traffic. In connection with the identical provision of § 2 III Automobile Act, the Reichsgericht\textsuperscript{273} declared that the use of an automobile with the knowledge and consent of the operator becomes unlawful if the user deviates considerably from the prescribed route, unless under

\textsuperscript{269} Landgericht Halle, September 30, 1931—6 L. 208/31—1932 Archiv für Luftrecht 185.
\textsuperscript{270} Note 264.
\textsuperscript{271} In this case the Court denied that the owner was liable under § 831 German Civil Code providing that "a person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of his work." In the same direction the Amtsgericht Hamburg (Note 262) held that the pilot was not in the service of the hirer of the plane.
\textsuperscript{272} The Rome Convention of 1933 says in Art. 5: "Any person who, without having the right to dispose of the aircraft, makes use of it without the consent of the operator shall be liable for the damage caused, and the operator who has not taken the proper measures to avoid the unlawful use of his aircraft shall be jointly liable with him, each of them being bound on the conditions and within the limits of the present Convention."
\textsuperscript{273} 119 R.G.Z. 347.
urgent circumstances. The same principle will apply to the use of an airplane, but it seems that such decisions are not yet reported.\textsuperscript{274} The problem of whether an airplane is used without the consent of the operator if the agent of the operator was not acting within the scope of delegated authority, is a difficult one. In a case decided by the Landgericht Stuttgart\textsuperscript{275} the facts were as follows: Defendant, a corporation in Berlin, maintained a branch at Böblingen near Stuttgart\textsuperscript{276} for the purpose of giving instructions in flying for private pilots. It had appointed an independent manager with commercial power of agency who had control over defendant's airplanes stationed at the airport at Böblingen. The Court held that under such circumstances the defendant exercised its position as operator of the aircraft in Böblingen by its agent and branch manager; hence the decision whether an airplane might have been used without the knowledge and the consent of the operator depended on the knowledge and the consent of the branch manager. In the case at bar defendant rested upon the contention that the branch manager acted against his instructions in putting an airplane at the disposal of the charterer for acrobatic flights. The Court, in its opinion, said that it might affect the relations between the head office and the branch manager if the latter overstepped the instructions but that it would not have any influence upon the fact that an airplane piloted by an employee of defendant was used with the consent of defendant. Also the position of the charterer who chartered the plane by a contract with the branch manager, which involves the latter's knowledge and consent, is not affected or changed if the manager overstepped instructions, as the Court pointed out. It follows consequently that also the use of the charterer did not become unlawful. The Landgericht Stuttgart stated in its decision that it was not contrary to the intention of the head office to rent an airplane for acrobatic flights, but that it was opposed only to such renting in so far as the airplane's insurance did not cover the intended acrobatic flight. It would appear that the question, whether the use of an airplane may be unlawful if an agent of the operator in consenting to its use oversteps its authority, is not yet solved. From the statement of the reported decision it is not known whether the pilot or charterer had knowledge of the agent's lack of authority or not. Koffka-Bodenstein-Koffka\textsuperscript{277} say that the consent of the branch manager is sufficient if it is given within the scope of the ordinary business of the branch.

\textsuperscript{274} Use of airplane without consent of the owner is to be punished under the Ordinance against Unlawful Use of Motor Conveyance and Bicycles of October 20, 1932—1932 R.G.Bd. I 496.
\textsuperscript{275} Decision of May 6, 1931—5 O 6709/30—1932 Archiv für Luftrecht 100.
\textsuperscript{276} About 400 miles from Berlin.
\textsuperscript{277} \textit{Luftverkehrsrecht}, p. 95, § 19 III 2b.
On the other hand, as they point out, the use is unlawful if the branch manager in consenting to the use oversteps his authority, which may be wider than the internal relationship to the head office. The unlawful use is made by himself and the position of the charterer depends on his knowledge of the misuse of authority by the branch manager. If he knew that the branch manager had no authority to consent to the use, he was using the airplane unlawfully. In this case both made an unlawful use of the plane without the knowledge and consent of the operator. Further decisions are not reported and it may be remarked that the problem has not yet been thoroughly discussed. The question may arise as to the position of the third person if the branch manager acted within the limits of a written power of agency without taking care of an internal restriction and the third party knew or ought to have known the facts.

C. Restriction and exclusion of liability towards employees and students.

1. Employees of the operator and compulsory Workmen’s Accident Insurance.

Workmen’s accident insurance (Gewerbeunfallversicherung) is compulsory for the plants of aircraft manufacturers, air traffic enterprises, air schools, and other enterprises that are operators of aircraft. As § 898 Reichsversicherungsordnung provides, the employer is liable for damages caused by accidents to employed workmen and employees only if a criminal court has stated that the employer has caused the accident maliciously. As far as such statement is made he is bound to pay the difference between the amount of the damage and the compensation that is to be paid under workmen’s accident insurance. An accident is covered by workmen’s accident insurance if the damaged person was employed under a labor con-

278. § 537 Workmen’s Insurance Code (Reichsversicherungsordnung). The problem of liability for damages is not affected by the question to what cooperative association (Berufsgenossenschaft) they may belong; that is only a problem of organization: see decision of the Reichsversicherungsamt Dec. 15, 1924 (1925 Entscheidungen und Mitteilungen des Reichsversicherungsamts, p. 242, nr. 5.) The question of whether about 1200 volunteers assisting in the landing of Graf Zeppelin in a German city were to be insured under the workmen’s accident insurance provisions had been submitted to the Reichsversicherungsamt. In an opinion (XXXI Entscheidungen und Mitteilungen des Reichsversicherungsamts 193) the Court pointed out that they were not to be insured because an aviation affair happening but once was not to be considered as an exhibition in the meaning of § 537 4d Reichsversicherungsordnung. At that time persons occupied in landing work were not protected by the workmen’s accident insurance except if they were employed in the airship enterprise or were insured under the Reichsversicherungsordnung by other reasons. The Act of Dec. 18, 1933—1933 R.G.B. 1 I 1077 and the Air Protection Act of June 26, 1935 (Luftschutzgesetz)—1935 R.G.B. 1 I 827—amended the Reichsversicherungsordnung. § 537 no. 5a provides now that the workmen in enterprises under the jurisdiction of the Minister of Aviation are insured. Professional training and similar technical instruction that corresponds to enterprises liable for workmen’s insurance have to insure their students under the new regulation § 537 no. 13 Reichsversicherungsordnung.
tract or if he was in a similar relationship with his employer and was injured in an accident while engaged in duties. The Reichsversicherungsamt had to decide whether the members of a sport club which was an operator of aircraft are in a relationship similar to a labor contract if they take active part in operating aircraft by rendering assistance to take-offs voluntarily and temporarily. The Reichsversicherungsamt held that such assistance is given for comradeship and sportsmanship and does not establish labor relations. The Court added in its opinion that it would not come to another decision if the owner of the airplane, who put the plane at the club's disposal, would also be deemed an operator. A member of the club does not enter into a temporary labor relation to him by giving assistance as a clubfellow and sportsman.

A similar position was taken by the Oberversicherungsamt Dortmund. A student pilot was injured at an airport turning the propeller by hand for a sport flyer who had rented an airplane. The Oberversicherungsamt held that the student was not under the compulsory workmen's accident insurance in an employee relation to the sport flyer and in consequence thereof, that he was not entitled to compensation under the Workmen's Insurance Code.

On the other hand, the Reichsversicherungsamt found a soldier to be under the compulsory workmen's insurance who was injured in an accident while assisting the landing crew, for a small allowance, in the landing maneuvers of a Parseval airship. The Court held that the accident occurred in the airship enterprise and that the soldier was there in an employee's or an employee-like relation.

The compulsory workmen's accident insurance generally covers only accidents occurring within the boundaries of Germany.


282. The case is of general interest since the cooperative association had awarded an accident insurance compensation of 50 R.M. (about $21) monthly and the student had appealed. The awarding of compensation involved the decision that the damage was caused by an accident covered by the Workmen's Accident Insurance. By such statement a claim for damages against the operator of the airplane was excluded (§ 898 Reichsversicherungsordnung) since there was no way that a penal court would have stated that the operator caused the accident with malice. Doubts may be expressed whether the decision did not contain a reformatio in peius that would be unlawful. The principle that no party may be put in a more unfavorable position by its own appeal is generally recognized and applies also to the workmen's accident insurance procedure. The Court did not discuss the problem. Tauber, in an article published in 1932 Archiv für Luftrecht 94, explained that there was no reformatio in peius by repealing the compensation decree since the purpose of said regulation was to protect the party, and all the circumstances were to be taken into account to decide whether the party was now in a less favorable position.

an aviation accident happens in a foreign country the question might come up as to whether such accident would be covered. Decisions are not reported, but the Reichsversicherungsamt gave its official opinion.\textsuperscript{284} It pointed out that the cooperative association would have to reimburse the amount paid for the insured because of an accident in a foreign country if it were reasonable and if the amount would have to be spent by the association itself. That opinion is based upon the theory of radiation (Ausstrahlungstheorie) that has been developed in the jurisdiction of the Reichsversicherungsamt. Under said theory, regardless of the general territorial system,\textsuperscript{285} transitory work outside the German boundaries is considered as a radiation of the enterprise in Germany, that is an accessory to the insured enterprise. It may be remarked that the Reichsversicherungsamt applied this idea only to employees employed in Germany and only to transitory radiation with the exception of employees in railway stations on the borders. As Dersch\textsuperscript{286} stated, it may be possible to deem the foreign part of an airline in immediate connection with the German part as a radiation of the latter, but he expresses considerable doubt as to whether a foreign part without such connection could be comprehended by the compulsory insurance under the radiation theory.

2. Restriction and exclusion of liability toward employees and student pilots.

The German law system is based upon the principle of “freedom of contract”. The law leaves it to the parties to make their contracts and agreements under provisos they will find suitable unless compulsory regulations are opposed. Regarding a waiver of the operator’s liability, the Air Traffic Act contains no special rules against an agreed restriction.\textsuperscript{287} The “motives” for the draft said explicitly that the Act did not affect the operator’s right to restrict his liability by agreement within the admissible boundaries, and the courts have generally\textsuperscript{288} adopted this opinion.

Whether a general principle of civil law is opposed to a restriction of liability depends on the wording and meaning of the respective clauses. There are no cases reported dealing with a clause that was held plainly void.

\textsuperscript{284} Opinion of September 2, 1929—1929 Entscheidungen und Mitteilungen des Reichsversicherungsamts 365—Cf. Dersch in 1937 Archiv für Luftrecht 311.
\textsuperscript{285} Workman’s accident insurance is compulsory only for the enterprise working in Germany.
\textsuperscript{286} Note 284.
\textsuperscript{287} See below the discussion in reference to passengers noting that unless special rules following from the relation between employer and employee are opposed, the principles may also be applied here.
\textsuperscript{288} There is only a decision of the Amtsgericht Emden of March 10, 1926—1927/28 Zeitschrift für das gesamte Luftrecht 55, transl. by Professor Zollmann (1930) I JOURNAL OF AIR LAW 219—from which it may follow that the Court was of the opinion that the liability provided by the Air Traffic Act should be compulsory. The case referred to the exclusion of liability by a passenger for a circuit flight. Beside the fact that the decision was reversed on appeal
a. In a decision of the Reichsgericht of March 26, 1926\textsuperscript{289} a
master flyer had waived all damages for himself and his heirs in a
labor contract made on May 13, 1919, i.e. before the Air Traffic
Act came into effect. The employer had bound himself to take out
accident insurance for 10,000 Mark in behalf of the employee, and
in consideration thereof, the latter had waived all damages beyond
the insurance amount. On December 6, 1922, after the Air Traffic
Act came into effect, the flyer perished in an airplane crash. The
heirs sued the employer and operator of the airplane urging that
defendant was under obligation either to take out insurance at a
stable sum or to adapt the insured sum to the inflation.\textsuperscript{290} The
Oberlandesgericht, in its opinion, interpreted the obligation of the
employer to take out insurance in behalf of the employee for acci-
dents in flying and eventual death as follows: Under the provision
the employer had undertaken a responsibility to provide for the
needs of the employee's heirs. The Court pointed out that under the
Air Traffic Act, which indeed came into effect after the date of the
contract, the operator of aircraft was bound for damages resulting
from an accident in the course of operating the aircraft without
negligence, and further that already in 1919, when the contract was
made, in the court's practice a person damaged by aircraft was held
entitled to compensation without proof of negligence or malice. The
Reichsgericht disagreed. The Supreme Court stated that the courts
in their decisions had permitted compensation without proof of neg-
ligence or malice only for damages inflicted on property.\textsuperscript{291} Hence,
in the Court's opinion, the waiver by the victim could include at that
time only damages resulting from an accident which occurred by the
operator's negligence, and, since the enterprise was under compulsory
workmen's accident insurance, the importance of the waiver was less
because the employer and operator was only liable under the rule of
§ 898 Reichsversicherungsordnung.\textsuperscript{292} The Reichsgericht reversed
for a new trial because the Court of Appeal had not thoroughly
examined the question whether the employer had negligently omitted
to take out sufficient insurance. In respect to the question as to
whether the waiver of the claim to damages might be valid, the

\textsuperscript{289} III 178/25—1927/28 Zeitschrift für das gesamte Luftrecht 218.
\textsuperscript{290} At the time of the contract 10,000 Mark were worth $1330, at the time
of the crash they were worth $2.30.
\textsuperscript{291} See notes 17 and 18.
\textsuperscript{292} See text after note 278.
Reichsgericht discussed only the time when the contract was made. The problem, if a waiver of the liability which was introduced by § 19 Air Traffic Act, was admitted by the law, was not dealt with explicitly. It is obvious that the Reichsgericht did not have any doubt as to this. In the contrary case the Reichsgericht would have had to examine the question of whether a waiver that was held valid in law for the time before the Air Traffic Act came into effect, had been affected by the coming into force of said Act293 or not. From the decision of the Reichsgericht it may be concluded regarding the waiving of liability against employees that the Supreme Court has no objections in as much as the employee is covered by insurance.

b. aa. The Landgericht Stuttgart294 discussed the admissibility of a waiver by a mechanic. The facts were as follows: A pilot proposed to climb from a flying plane “A” to a flying plane “B” and the mechanic had to let down a ladder at a given moment from plane “A”. He was delegated by an airplane factory that was in a friendly relation to the operator of plane “B”. Both planes crashed, with the loss of life of all flyers, and the widow of the mechanic sued the operator of plane “B” for damages. From the facts found by the Landgericht it is not quite clear whether the deceased participated as an employee or not, but he clearly was not a passenger. The Court discussed whether the late husband of plaintiff had waived the operator’s liability and had no doubt that such waiver would be lawful and might be done silently; however, in its opinion no reasons were given. Since an express declaration of intention was lacking, the Court looked into the question of whether a waiver was to be drawn from the circumstances. The Court held that an implied agreement waiving the right to damages might be deduced if there were striking proof that the deceased obtained the promise of an exceptionally high allowance and had insisted on his cooperation. On the other hand, the Court explained that the fact that he participated in deference to his employer could be urged against the conclusion of an undeclared intention to waive damages. As the Landgericht said, even if the deceased cooperated voluntarily a waiver could be assumed only in case other sustaining facts were evident in favor of such conclusion. In this respect voluntary assistance and a certain insistence to be called in to participate was not sufficient for the Court to state a waiver and even under the most favorable circumstances the arrangement for an exceptionally high compensation could perhaps mean a waiver against the operator of

293. The validity of a passenger’s waiver of the right to damages from § 19 Air Traffic Act is discussed thoroughly by the Reichsgericht in the decision of May 19, 1927—117 R.G.Z. 102 see note 310 and text after note 313.

294. Decision of May 6, 1931—6 O 6709/30—1932 Archiv für Luftrecht 100.
the plane “A”. Those principles are in conformity with the development of German jurisprudence generally regarding the problem of a silent waiver of liability.295

bb. An agreement between an air school for gliding flight and a student, under which the air school would be liable for damages only to the extent of a liability insurance, that it had taken out, was held valid by the Landgericht Frankfurt am Main.296 Appeal was rejected by the Oberlandesgericht Frankfurt am Main.297

Defendant, the Air School, in its petition set up that a restriction of liability had been agreed upon. The Court of Appeal examining the facts held that the Air School and the student had arrived at an agreement restricting the liability although the student had not signed a form used generally by the defendant for the declaration of each student. In this form it was said that defendant should be liable for accidents only as to the amount of an accident insurance that he had taken covering 1000 Reichsmark for each student, and that the student waived all claims for damages against the school in so far as it was not covered by the insurance. The Court found that the student had received a note from the defendant in which it was stated that accident insurance had been taken out for the student who might insure himself for a higher sum. In addition, as the Court stated, it was clearly announced by posters in the schoolrooms and on the bulletin board, (on the latter also by a copy of the form sheet), that defendant requested the students to agree to the restriction of liability. Since the student had not objected to this requirement, the Court of Appeal, in its opinion, established that a waiver in the wording of the above mentioned form was stipulated.

The result as to which an agreement was concluded seems to be correct, although the reasoning does not support the statement that the parties had agreed upon a waiving proviso in the wording of the form sheet. The Court stated that the form was posted on the bulletin board, but it seems that the fact that such posters existed and that the students did not object would not be sufficient to form an agreement. As has been established in numerous decisions, it would be necessary to state either that the other party knew of the poster or that it knew or ought to have known of the issuance of general terms for contracts by the opposing party with such terms.298

295. See note 330.
297. Decision of January 26, 1933—3 U 75/32—1933 Archiv für Luftrecht 94. The Court in its opinion said that the restriction of liability between the operator of aircraft and passenger by agreement is lawful and quoted the decision of the Reichsgericht 117 R.G.Z. 102 (See note 310). It seems that the Court did not hold that there would be any difference between liability towards passengers and student pilots.
298. In so far the decision has no special importance in respect to aero-
Transfer of rights to damages to the insurer by rule of law.
(Workmen's Insurance Code).

a. A more interesting problem which the latter decisions dealt with refers to the relation between the operator's liability as amended by the above mentioned agreement and the rules of the Workmen's Insurance Code (Reichsversicherungsordnung). The student was—for reasons without connection to his pilot's training—insured by a local public sick fund that was under the regulations of the Reichsversicherungsordnung. § 1542 of said Act reads as follows: "Insofar as persons insured under this Act or their dependants are entitled to damages caused by illness, accident, disablement or decease of the bread-winner, under regulations of other Acts, the right to damages is transferred to the insurer inasmuch as he is bound to compensate the person entitled to damages under this Act." The local sick fund had granted the statutory protection to the student who was injured in a glider crash. It relied on said rule and sued the Air School for the amount of 1000 Reichsmark, i. e. the sum to which the liability was restricted. The problem for the Court was whether in respect to the agreement restricting the liability the insured person was entitled to damages under regulations of other acts in the meaning of § 1542 Workmen's Insurance Code. The question as to the interpretation of § 1542 is not only confined to the cases on aviation accidents, and the German Courts in their decisions in other liability cases often had to deal with it. The Landgericht interpreted the agreement between defendant and student as follows: "Even if the defendant in order to protect itself and to comply with the requirement of § 29 Air Traffic Act to secure compensation of claims under § 19, took out a liability insurance of 1000 RM for each student and even if the defendant restricted its liability to this amount by agreements with the students, the title for damages that a student injured by accident acquired, was based upon the law. The intention of the defendant as well as of the student was to re-
strict the liability stated in § 19 Air Traffic Act but not to exclude the legal liability by substituting a liability based upon an agreement. An exclusion of the legal liability might be in question if an injured student would have a direct claim against the insurance company. Under such point of view the Landgericht held that the claim of the student was transferred to the public sick fund. The Court of Appeal in its opinion found the opposite interpretation. The Court said: "It is not important whether the students did obtain a direct claim against the insurance company. From the purpose of the insurance and the wording of the declaration to be signed pursuant to which the students waived every claim for damages against the defendant and with respect to the circumstances, the agreement is to be interpreted as follows: The aim of the defendant was to be released from any risk and any liability and to waive the legal title based upon § 19 Air Traffic Act at all events entirely. Defendant, its representative, agents and servants wished obviously to devote themselves entirely to the fostering of aviation. The management business and the fighting out of law suits was to be limited as far as possible lest defendant be hampered in accomplishing its purposes. Defendant was well aware of the risks of gliders and the risk to be entangled in law suits for damages. Obviously, that risk was to be excluded. In case of accident, defendant intended to refer students to the insurance and to be free of any claim. The payment of insurance premiums was only reasonable if there was no way of claiming it twice (viz. for premiums and for damages under § 19).

It might be admitted that the wording of the form was not well drawn up and considered in itself was doubtful. But from the expression 'a waiver of any liability' with regard to the purpose of the proviso and to the understanding that the students were to be expected to show for the want of such settlement, it follows conclusively that the legal liability was definitely excluded and not only the injured person to damages gave rise to other claims for compensation for

the courts in their opinions instanced here especially the compensation for civil servants and workmen under the compulsory workmen's insurance. On the other hand, compensations that were based upon contracts and for the coming into being of which the accident was only one cause, were not deducted, as payments from private insurance, collections of fellow-workers, etc. (see Reichsgericht 1935 Juristische Wochenschrift 3369). Since the decision of December 10, 1908 (70 R.G.Z. 107) the Reichsgericht had judged the compensation from an insurance—that the employer had taken out for his employees under the labor contract or conventionally—like a civil servant's pension and denied that such title from insurance was based upon contract. The question might arise whether the same idea could be useful for the decision of the reported case of Frankfurt. But the Reichsgericht had expressed some doubt as to the bearing of its own practice in a decision of November 17, 1930—130 R.G.Z. 258—and in the decision of January 10, 1935—146 R.G.Z. 287—the Supreme Court changed its mind by pointing out that it would be against the sense of insurance to allow the advantage of the insurance to the injurer. See also note 304.

302. The statement of the Court of Appeal implied that defendant was entitled to payments from the liability insurance policy.
restricted as to its amount, and further, that it was replaced by a voluntary liability based upon an agreement and restricted to the amount fixed by defendant on the basis of the collective insurance. Said interpretation is also in conformity to the provisions in the transportation contracts of most of the air transport enterprises which all contain corresponding clauses."

Professor Richter in his comment on the decisions\(^{303}\) said that to him the claim was based upon the Air Traffic Act itself since the elements for the liability were the same as those provided by the Act and there was only the restriction as to the amount, a restriction that in principle was found also in the Air Traffic Act. Furthermore, he felt that also an agreement in respect to the liability for damages was to be regarded as a title based upon the law in the meaning of § 1542 Reichsversicherungsordnung. The courts did not follow. The Reichsgericht in its decision of January 10, 1935\(^{304}\) referred to the principle generally stated in the German practice and pointed out that a claim from accident insurance is always and only based upon contract and is to be differentiated from a title founded directly upon a provision of an act or other statute itself. In this case the question was discussed in reference to the compensatio lucrum cum damno as to the amount of damages, since the damaged person had received payment from the insurance company in the meantime. But there is no reason that the question as to whether a claim is based upon contract or upon statute could be answered differently in respect to the relation of the liability for an aviation accident and the above rendered provision of § 1542 Reichsversicherungsordnung.

b. In fact, the Kammergericht in its decision of July 28, 1938,\(^{305}\) dealing with an aviation accident accepted the discrimination without further discussion. The case referred to an airplane crash with the loss of lives of passenger and crew. The passenger was insured in the compulsory Reichs Accident Insurance.\(^{306}\) The airplane, which was on a flight from Berlin to Königsberg with a projected stop-over in the Free City of Danzig, crashed somewhere in the province of Pommerania (Germany). The public accident insurance which was liable for compensation sued the airline for the amount of 25,000 RM that a private insurance company had paid

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\(^{303}\) 1933 Archiv für Luftrecht 96.

\(^{304}\) 146 R.G.Z. 287, see note 301.

\(^{305}\) 9 U 1761/38-1938 Archiv für Luftrecht 295. See also notes 309, 340, 388.

\(^{306}\) Reichsunfallversicherung. In respect to the problem as to the application of § 1542 there is no difference in so far as to whether an employee or a passenger was injured. But it is understood that the problem only arises if the injured was under a compulsory public insurance to which the workmen’s insurance code (Reichsversicherungsordnung) applied.
to defendant for the accident and that defendant was willing to pay to the widow and the son of the deceased passenger to balance its liability. In reference to the transportation contract the facts stated by the Court in its opinion were the following: "All contracts of carriage by defendant are subject to 'General Conditions of Carriage of Passengers and Baggage' that also copy partly the wording in the provisions of the Warsaw Convention of October 12, 1929. Art. 18, § 5 of the General Conditions reads as follows:

'Passengers and baggage are accepted for carriage only upon condition that, except in so far as liability is expressly provided for in these Conditions of Carriage, no liability whatsoever is accepted by the carriers, or their employees, or parties or undertakings employed by them in connection with their obligations, or their authorized agents, and upon condition that (except in so far as liability is expressly provided for in these Conditions) the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage, caused directly or indirectly to passengers or their belongings, or to persons who, except for this provision, might have been entitled to make a claim, and especially in connection with surface transport at departure and destination, whatever may be the legal grounds upon which any claim concerning any such liability may be based.'

Art. 19 says: 'Within the limits prescribed by Article 18 carriers are liable for damage sustained during the period of the carriage as defined in Article 18 paragraphs 2 and 3; (a) in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger;' . . . '(3) Carriers are not liable if they prove that they and their agents have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures. . .

Paragr. 2: (1) In the carriage of passengers the liability of carriers for each passenger is limited to the sum of 125,000 francs unless a larger sum has been agreed upon (20,000 RM).'

Article 21 provides: 'Only the party who produces the ticket or baggage check as the case may be, or who in default to do so establishes his right, is entitled to bring an action arising out of the contract of carriage against the carrier.'"

Defendant had adhered to a contract that on January 1, 1935, the Deutsche Lufthansa had made with the Allianz and Stuttgarter Verein Versicherungs-Aktiengesellschaft (Allianz) for a general accident insurance for air passengers. According to that contract the Allianz granted insurance protection to the passengers. Passen-
gers of the insured airlines were insured in so far as they had paid the fare specified in its tariff (that was done in the case at bar) or, before setting out on the flight, had paid a dispatching fee fixed by the airline. (§ 1 Insurance Terms.) The sum insured amounted to 25,000 RM in case of death. § 3 II Insurance Terms read as follows:

“The sum insured will be paid in case of death to those persons who would be entitled to damages under the provisions of Art. 18-21. The amount will be paid if an insured airline has acknowledged that the payment will be accepted as a cover for the liability to the airline passengers as fixed by the transportation conditions. The insured airline may enforce the payment of the insured sum to those persons who are the heirs at the time of the death in proportion to their shares. It may ask for proof that there are no other persons who might be entitled to damages under the transportation conditions or that such persons have given their consent to the payment.”

§ 3 of the contract of January 1, 1935, reads as follows:

“If a passenger does not accept the general air passengers' accident insurance as covering the personal liability of the insured airline resulting from the transportation conditions, because he intends to claim damages under the transportation conditions, the Allianz is prepared to grant protection to the Lufthansa for its liability. Said protection will be based upon the general and special conditions for liability insurance. The protection will cover in the case of death the sum of 25,000 RM.” The conditions of the liability insurance provided under § 2 that the insurance covered the liability of the airline to passengers which the insured entrepreneur had to answer for under the general conditions of carriage of passengers and baggage and under eventual divergent agreements.

Plaintiff rested its case upon contention that the heirs of the deceased passenger were entitled to damages under the law itself, particularly under the provisions of (1) § 19 Air Traffic Act, (2) § 823 German Civil Code, (3) the Warsaw Convention, and (4) the insurance contract, and that these claims were transferred to it by § 1542 Reichsversicherungsordnung. As to contentions (1) and (2), the Court held that the liability stated by the mentioned provisions was excluded.307 In so far there was no transfer of title to damages pursuant to § 1542 Workmen's Insurance Code. In respect to point (3), the Warsaw Convention, the Court stated that this was a case of international transportation in the meaning of Art. 1 of the

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307. The Reichsgericht (note 309a) confirmed the decision. For the contents of the judgment as to the admissibility of exclusion of liability see below note 329 and as to the legal significance of the conditions in respect to the construction of liability exemption see note 340.
Warsaw Convention, because there was a stop scheduled in Danzig that was not under the sovereignty, suzerainty mandate, or authority of Germany. In respect to the question of whether the title to damages under the Warsaw Convention is based upon contract or upon law, the Court stated that the Warsaw Convention applies only by virtue of a contract for international transportation and that claims granted by the law from such contract are always based upon contracts even if they are not enumerated in the contract. Therefore, as the Court held, the claims have not been transferred under § 1542 Workmen’s Insurance Code. The Court denied that a person carried in international air transportation was entitled to damages against the operator of the aircraft under the Warsaw Convention without any reference to the transportation contract. Besides this, the Court stated that a valid transportation contract was made.

The Reichsgericht confirmed the decision of the Kammergericht. In reference to the point in question the Supreme Court declared: A claim for damages which rests upon § 19 Air Traffic Act is based upon the law itself within the meaning of § 1542 Reichsversicherungsordnung, since § 19 entitles one to damages regardless of whether or not a contract was agreed upon. The Warsaw Convention, however, does not apply without a contract for international transportation: Hence, a claim for damages as provided by the Warsaw Convention must always be based upon the transportation contract and such claim is not transferred to the public insurance fund pursuant to § 1542 Reichsversicherungsordnung.

Regarding contention No. (4) plaintiff had urged that aviation enterprises are bound to take out a liability insurance by the provision of § 29 Air Traffic Act that the accident insurance was put in the place of the liability insurance and that therefore a claim would be based upon the law itself. The Kammergericht said in its opinion: “The law prescribes only a liability insurance to be taken out by the defendant. The contract for liability insurance itself is always a contract and there could arise from it only contractual claims. Besides this the injured person would not have a direct claim from the liability insurance against the insurer; he would be entitled only against the injurer. The same was to be said in respect to the accident insurance. Defendant was bound by the conditions of the Reichs Minister for Aviation to take out accident insurance to protect its passengers if it was not willing to make a liability insurance. Claims from accident in-
urance are always based upon contract (See 146 R.G.Z. 288). Therefore, there was no way that claims from accident insurance—after all they are not claims for damages—might have been transferred to plaintiff. Hence there was no need for an examination as to whether the relicts were entitled directly to demand the insured sum.

With regard to contention 4 the Reichsgericht pointed out that plaintiff's claim was founded neither upon the accident nor upon the liability insurance. The Court rejected the argument that a title based upon the insurance contract was only a transformation of the liability provided by § 19 Air Traffic Act. It said that the liability insurance was required by § 29 Air Traffic Act, in the wording of 1921, in order to secure the payment for compensation but not to substitute another title to damages for the liability provided by § 19; the damaged passengers or his dependents having no direct title from the insurance contract. The Reichsgericht concluded that the accident insurance was prescribed by the authority as a preliminary condition, if the authority was expected to consent to 'general transportation conditions' wherein the airline excluded its liability. The Court left no doubt that the accident insurance was neither a requirement for the operating of an airline nor the basis of the transportation contract. Hence, it deduced that the liability for damages based upon § 19 Air Traffic Act was not transformed to an accident insurance. By construing the 'General Conditions' the Reichsgericht found that the liability under the terms of the contract was not affected by the insurance: the damaged passenger had to choose whether he would accept the sum insured or would prefer to claim compensation under the proviso of the transportation contract. The Court held that § 1542 Reichsversicherungsordnung, providing for the transfer of claims based upon the law itself, contained a specific rule which could not be extended to claims founded otherwise. The Reichsgericht agreed with the Kammergericht's statement that the plaintiff was not entitled to any claim against the insurer, finding that under the terms of the insurance contract, the accident insurance was to be paid to those persons who were entitled to damages under the transportation contract unless they accepted the accident insurance. Finally the Supreme Court considered plaintiff's allegation that a decision against him would be unreasonable or unfair. Answering in the negative the Reichsgericht said that the principle set up by § 1542 Reichsversicherungsordnung left to chance whether or not the public insurance fund was entitled to a reimbursement of the payments which it must make to the injured. In addition the Reichsgericht
emphasized the fact that the passenger and not the public insurance fund had paid the insurance premium which was included in the fare. Finally it was said that cases in which the injured passenger might get a twofold compensation could hardly happen and thus might be left out of the consideration.

D. Contract for carriage by air and liability to passengers. The German airlines generally accepted passengers only upon condition that the operators and air carriers liability was excluded or restricted and that passengers renounced claims for damages except in so far as a liability was expressly provided. The problems arising in this connection are the following.309b

1. Is a restriction or exclusion of liability consistent with the Air Traffic Act?
2. What other legal provisions are opposed to an agreed restriction or exclusion of liability?
3. What form is provided for such agreement?
4. What is the legal significance and effect of different clauses restricting or excluding liability?

1. It is a generally recognized practice of the German Courts that the provisions of the Air Traffic Act are not opposed to restrictions of liability by contract. The Reichsgericht in its decision of May 19, 1927310 pointed out that the question as to whether and to what extent in July, 1925, the operator of aircraft could exempt himself and his pilot from liability toward the passenger and his legal representatives through transportation conditions is not expressly regulated in the Air Traffic Act. For its interpretation, as the Court said, the Reichshaftpflichtgesetz (Liability Act), § 844 II German Civil Code and the Automobile Act (KFG.) may be taken in consideration as analogous.

"According to § 5 of the first statute the owner of a railroad may not in advance through a contract exclude or limit liability for the damages suffered by the dependents. In § 844 Abs. 2 BGB such a prohibition is absent. Precedents indicate that such an exemption within the limits of the lines drawn by the law (§ 276 Abs. 2 BGB) and the judicial construction of § 138 BGB may be agreed upon in advance. (R.G.Z. Bd. 65 S. 315.) The automobile law did not have to confront this question because neither owner nor chauffeur are according to § 8 No. 1 KFG responsible for injury

309b. The problems 1-3 are the same as to the liability for employees. Compare supra chapter III C2. Explanations made at that point are also significant here.

to the passenger or his heirs. A similar provision was contemplated according to § 16 of the first draft of the Air Traffic Act of January 31, 1914. (RT Drucks. 1912-14 No. 1338.) When the act was passed this provision was omitted as suggested by the second draft of July 8, 1921. The viewpoint that the passenger assumes the danger voluntarily was in this draft overruled on the ground, that a liability for damages to a passenger who has been injured as against the owner of the plane advances the development of flying which is in the public interest. However, the annotation to §§ 15 and 16 adds at the end that the right of the owner to limit his liability within the permitted lines by special contract is not affected thereby. (RT Drucks. 1920/21 No. 2504 S. 2474.)"

The same opinion is expressed by other courts, but they do not give new or further reasonings.311

2. Restriction or exclusion of liability in respect to general provisions of civil law.

The exclusion of liability is restricted by § 276 II German Civil Code, providing that the liability for one's own wilful default cannot be excluded beforehand by mutual agreement, and as to that there arose no doubts in the opinion of the courts.312 The Kammergericht stated that a waiver that was contained in the conditions of a contract of carriage by air was not void, whenever it did not mention the liability for wilful default. The Court said that the meaning of the waiver was to exclude liability within the limits of the law and that there was no need to say that the liability for wilful default, that was not to be excluded, was not excluded. Furthermore, it is established by courts and writers that a contract providing the exclusion or restriction of liability must not be contra bonos mores. Here, the practice referred to the principles laid down by the Reichsgericht as to the misuse of a monopoly. Such principles were developed in cases dealing with the restriction of liability through general conditions for contracts that had been made for forwarding


312. See 117 R.G.Z. 102.—As to 'juristic persons' in the sense of the German law. § 276 II is applicable to the acting of the board of directors and other agents properly constituted by the statute, but not to the employees in the limits of § 831 German Civil Code.

313. October 16, 1926—5 U 694/26—1927/28 Zeitschrift für das gesamte Luftrecht 228, as to the wording of the waiver see the facts in the judgment of the Reichsgericht quoted note 332.
contracts by the General German Forwarder's Association and for the contracts of some other trusts and syndicates of enterprises on whose use the public is dependent, (e. g. plants for gas, water or electric power supply). As to the contract of carriage by air the Reichsgericht in the quoted decision of May 19, 1927, summarized the principles as follows: "It would be beyond reason if after the full development of air navigation and in view of the general public being dependent on the use of such navigation, to grant the air companies the liberty to misuse their monopoly and the situation of the public to force passengers to waive the protection which the Act gives them". Since the contract in question was made in 1925, the Court had to examine the situation of the German air traffic at that time and continued: "Such a situation of the public did not exist in 1925. There was then very little flying. The operation of regular scheduled passenger flights was just opened by the Aero Lloyd and the Junkers Concern and still in the initial stage. Generally, traffic used almost exclusively overland and sea-routes. Therefore, it was not contra bonos mores, if the young industry attempted to unload the risk of aviation on the passengers by contract, particularly, since at that time there was not sufficient experience as to the ventures that air traffic would run." Corresponding opinions were expressed in the judgments of other courts. The Landgericht Aurich in a decision of July 28, 1926, said: "At the present time the general public is not so imperiously and exclusively dependent on the use of airways that such an exemption (viz. of liability) amounts to the exploitation of an economic monopoly and as such is against public policy." (i.e. contra bonos mores). It must be admitted that the point of view is not to be disputed for the air traffic at the time of the contract, i.e. 1925, but it seems that the Court did not take into consideration that the accident happened in a circuit flight. Circuit flights generally are intended for sightseeing or entertainment; hence, it does not appear that the public should be dependent on the use of airplanes for such purposes. The Landgericht I Berlin dealing with an accident that happened on September 7, 1925, on a scheduled airline flight pointed out that the restriction of liability was

315. Note 311, quoted in the translation of Professor Zollman.
316. Same viewpoint in Kammergericht: October 10, 1926, notes 310, 311.
317. Sometimes circuit flights are used for the purpose of medical treatment (whooping cough), but, it seems that such treatment is not so generally acknowledged that the public would be dependent on this kind of remedy. The Landgericht Aurich did not discuss that viewpoint.
not contra bonos mores, since defendant had no monopoly for traffic. The Court stated that everybody had the choice as to the means of traffic he would prefer for transportation. If the plaintiff choose the airplane, he did not make such choice under compulsion to which he had to yield in consequence of a monopoly which was founded on facts or on the law, as he had in using the railway for overland trips or a forwarder for transportation of goods, but he made the choice plainly aware of the venture that he took upon himself. With a similar reasoning the Landgericht I Berlin\textsuperscript{319} denied that there existed a monopoly for airlines at the time of an accident, on June 1, 1927.

Since the former decisions denied that for the time in question, in respect to the cases at bar a monopoly was existent, there was no need to examine as to whether the conditions of the airlines contained a misuse of the monopoly. Yet, the decision of June 14, 1927 (Landgericht Berlin) in support of the mentioned reasoning denied also a misuse of a supposed monopoly and said that the restriction of liability was only of a small extent, and that only the liability for acts of God had been waived, whereas the cases, in which the Reichsgericht stated a misuse of monopoly, referred to an exclusion of liability for the faults of the forwarder himself or his directing agents. The German writers on air law agreed generally with the opinion of the courts as to denying a monopoly: Schleicher, e. g., in his commentary published in 1933,\textsuperscript{320} stated that the exclusion of liability would not be the utilization of a monopoly. But the position of aviation enterprises has changed fundamentally from the development of aeronautics in the last ten years. The same author, in the edition of 1937\textsuperscript{321} explained that, at that time, the problem as to whether the airlines held a monopoly should be decided in the opposite sense than by the Reichsgericht in 1927. The Kammergericht in a decision of July 28, 1928, dealing with an accident in 1935 divergently from the former practice pointed out:\textsuperscript{322} "The decision of the Reichsgericht (117 R.G.Z. 102) denied that the public was dependent on the use of airlines in 1925 and held that a waiver of a passenger could not be deemed as a misuse of a monopoly of the airline and of a helpless situation of the public. But, in regard to the tremendous development of aviation, especially since 1933,\textsuperscript{323} it

\textsuperscript{320.} Luftverkehrsrechts ed. 1933, p. 105 note 10b to § 19.  
\textsuperscript{322.} See notes 305, 340. The Reichsgericht upheld the decision: see note 309a.  
\textsuperscript{323.} In the beginning of 1933 the National Socialistic Government came into power.
will have to be admitted that, already in 1935, a monopoly existed in regard to the air traffic for the Deutsche Lufthansa, in as much as scheduled air traffic had been used in the year 1926 by 37,600 persons, in the year 1935 by 175,000 persons. Besides, the speed was increased considerably by modern machines and therefore the use of airplanes has become indispensable for urgent cases.”

Since the Kammergericht found that the airline had virtually a monopoly, it had to examine whether said monopoly was misused or not. The Court denied any misuse and, in its reasoning, gave four arguments: (a) The contract of carriage excluded only the liability for damages as provided by the Air Traffic Act and §§ 823 sq. German Civil Code;324 but on the other hand there was still a liability established by contract and such liability was considerably strengthened by an accident insurance. (b) Under the provisions of the contract the liability was equivalent to that in the Warsaw Convention. The Warsaw Convention had become a German Statute325 and it would be inconceivable that the same restriction of liability admitted by one German statute should be prohibited by another. (c) The General Conditions326 of the carriage contract had been approved by the Ministry of Aviation. (d) The requirements for airlines rated by the Ministry of Aviation later under August 21, 1936, provided that the entrepreneur might exclude the liability by agreement with the passenger but that he had to take out an accident insurance for such passengers.

The Reichsgericht in confirming the decision agreed with the Kammergericht’s opinion that a monopoly for air traffic existed. In respect to the contention that the limitation of liability was a misuse of the monopoly it pointed out: “If a monopoly was misused in order to dictate unreasonable sacrifices to the community, and, especially in order to enforce a waiver of a protection that was provided by the law, such procedure is regarded in German practice as contravening public policy (i.e. contra bonos mores) (See 99 R.G.Z. 107; 103 R.G.Z. 82; 106 R.G.Z. 386; 115 R.G.Z. 218; 117 R.G.Z. 102). In such a case the relative terms of a contract are void. On principle, it is held to be a misuse of a monopoly only, if the proceeding which are alleged to be selfish, took place in regard to a partner in contract and if the latter as a member of the public was forced to make unreasonable sacrifices. The case at bar, however, is not of this kind. As it was established by the Kammergericht, in

324. As to the reasoning for this construction see text to note 340.
325. The Warsaw Convention was published in the Reichsgesetzblatt by Decree of Nov. 30, 1933 (1933 RGBI. II 1039) and on Dec. 15, 1933 an Act to Put in Effect the Warsaw Convention has been issued (1933 RGBI. I 1079).
326. See text after note 306.
lieu of the liability provided by the Air Traffic Act, the liability based
upon the transportation contract was maintained and was reinforced
by the insurance protection." The Reichsgericht added that the re-
striction of liability might also be against public policy if the pas-
enger and the airline as contracting parties intended to prevent the
transfer of the rights to the plaintiff by agreeing upon a limitation
of liability. However, here there was no basis for such a construction.

3. Form for waiver.

Neither the Air Traffic Act nor the German Civil Code prescribe
any particular form for the exclusion of the liability for damages.
That the declaration of a renouncement is supposed to prove clearly
the intention of the declarer to renounce it, is an understood and gen-
erally established rule. The Reichsgericht in its decision of May 19,
1927\textsuperscript{327} called special attention to this rule. Since there is no form
prescribed, a waiver may also be made tacitly. The Landgericht
Halle\textsuperscript{328} discussed the problem as to whether a passenger of a bal-
loon had tacitly waived the operators liability. Plaintiff, a member
of a club belonging to the German Aviators Association (Deutscher
Luftfahrer Verband), participated in a balloon ascent free of charge.
Under the rules of the association every pilot of a balloon was bound
to require that every rider renounce the liability for damages of the
operator before taking off. The operator had asked another rider to
waive the liability in the presence of the plaintiff without the latter
making any declaration. Plaintiff urged that, in respect to the weather
conditions, he would not have participated in the flight, if he would
have had to waive claims for damages, and furthermore that there
was no need for such waiver since probably his damages in view of
his being a club member were covered by insurance. The Landgericht
in its opinion stated that plaintiff was familiar with the proviso
established by the German Aviator's Association requiring a waiver
before the starting on a flight and that, in 1923, he had waived the
operator's liability in two cases when he participated in balloon
ascents, and that he personally heard when his co-rider waived liabil-
ity. But in the feeling of the Court those facts were not held to be
sufficient in order to infer therefrom that plaintiff had renounced
tacitly.\textsuperscript{329} In the case at bar the defendant had stressed the fact that

\textsuperscript{327} See notes 310, 332.
\textsuperscript{328} Sept. 30, 1931—1932 Archiv für Luftrecht 185—see also judgment
of the Landgericht Stuttgart as quoted note 284.
\textsuperscript{329} Certain enterprises like theaters, concert-halls, etc., are used to
restricting their liability for checked clothing by posters. The courts held
formerly that such a poster did not have any effect at all unless the customer
had read it. But the Reichsgericht in the decision of May 14, 1926 (113 R.G.Z.
425) changed the former practice. It found that such posters were in accordance
with general rules of Intercourse and of which customers must be aware. As to the
application of these principles in other legal problems the Reichsgericht, in its
decision of Nov. 22, 1934. (145 R.G.Z. 380) dealing with a poster in a private
car: 'You ride on your own risk', stated that they must not be transferred with-
plaintiff was allowed to participate gratuitously. The Landgericht pointing out that the principles developed in the jurisdiction of the Courts were not to be applied forthwith, said: "If it is established in the Courts' practice as a rule, that in respect to riders of motorcars and horse carriages, to whom a gratuitous ride is given it might be agreed tacitly that, under a standard of fairness, everyone stands his own damages (65 R.G.Z. 313), in other words, that each rider is considered to have tacitly waived all claims for damages there will be no doubt that this rule is in accordance with the general sentiment of law as to such daily occurrences. Another judgment has to take place in air traffic. A flight is not yet—like a ride in an autocar—a daily occurrence. The risk of a flight, particularly in stormy weather, is beyond comparison greater than that of a drive over land. The liability which is established by the Automobile Act is also different from the liability under the Air Traffic Act. Under the latter statute the operator is liable for damages caused by operating aircraft, unless there is some fault of the injured person himself. The Automobil Act, on principle, provides the same. But the liability under this act is excluded if the injured was carried by the automobile or if the accident was caused by an inevitable occurrence."

out further ado to transportation cases. But it may be called into question as to whether the idea that a person has to be prepared for the intention of the other party to exclude or restrict liability was not significant in the case before the Landgericht Halle. It may be noticed that plaintiff knew the requirement of the Association as to a waiver, that he was aware of the pilot's intention to comply with the requirement since the co-rider was asked for a waiver and that plaintiff himself had waived the liability two times before, when he participated in similar balloon ascents. See also note 320. On the other hand the Civil Landesgericht in Prag (1928 Zeitschrift für das gesamte Luftrecht 56) denied that an agreement restricting liability was concluded upon plaintiff's contention that he did not understand the language (Czech) in which the proviso was printed and that he did not take cognizance of the meaning of the words.

330. The practice is not uniform and also the German Jurists disagree as to the requirements under which the exemption of liability may be inferred. The decision 65 R.G.Z. 17 held that the permission to board a conveyance for a lift was a mere actual event without legal significance. A similar idea was expressed in 141 R.G.Z. 263 by explaining that in such case no contract for carriage was concluded and that there was no liability from a contract. For further decisions in this sense see Kommentar der Reichsgerichter zu den Bürlichen Gesetzen, note 45 before § 823. In 145 R.G.Z. 150 the Reichsgericht restricted the significance of former judgments, that therein no general principle was laid down, but, that the question whether a contract was concluded or not had to be examined in every case in due consideration of the facts.

As to the extent of a restriction of liability, in other words, whether negligence might be waived by a restriction of liability, the Reichsgericht (128 R.G.Z. 229; 145 R.G.Z. 394) said that it might be in favour of such interpretation if the ride was given without consideration. But there are many decisions stating that the driver is only liable for gross negligence (grobe Fährlässigkeit: 128 R.G.Z. 225; 141 R.G.Z. 262; 145 R.G.Z. 394; RG. in 1928 Juristische Wochen- schrift 2025). As to the poster mentioned note 329 the Reichsgericht said that such poster must not be considered as a declaration of intention to any rider, but that the driver or operator had to refer the rider expressly to such poster before boarding the car, since there was a greater risk than in the cases of a check room. Differently from the possibility of a tacit contract the Reichs- gericht discussed, in such cases, also the question of acting on one's own risk. The theoretical foundation of this problem is various. (see Enneccerus-Lehmann, Lehrbuch des bürlichen Rechts, vol. II, § 10 1 1, § 243 V; 141 R.G.Z. 282 with further quotations). The Reichsgericht l. c. held that it might be concluded from an acting on one's own risk that the acting person consented previously to an injury that might possibly happen later. Authors like Oertmann, Kommentar zum Bürlichen Gesetzbuch, note 2 to § 254, note 7d to § 832, note 8d to § 833; Krückmann in 1932 Juristische Wochen- schrift 3688 refer to the principle of contributory default.

331. The accident happened in 1930.
The Landgericht explained with regard to this difference that it would be fair to deem a tacit renouncement in automobile cases, because the rider has no claim for damages under the Automobile Act, but that it would not be fair at all in aviation cases, since a waiver would cover also casual events and acts of God. The Court held that for reasons of fairness an intention to renounce must not be attributed to a person only because he is transported in a gratuitous ride, if this renunciation would have such far reaching consequences. The Court inferred from the rule issued by the German Association for Aviation, which required that a waiver be expressly declared, that practically the intention to renounce was not to be attributed to transported persons for the mere fact that they did not pay.

4. Legal significance and effect of transportation conditions.

German Courts had to deal with the interpretation of General Conditions of Carriage Contracts only in a few cases and decisions as reported refer only to the carriage of persons.

AA. Passengers.

a. Conditions before the Warsaw Convention.

aa. In the case before the Reichsgericht the following provisions were found in the contract:

"Participation in flight and the transportation of baggage is at the exclusive risk of the passenger and his legal representatives as against the airline company, its employees and ticket selling agents. The passenger by accepting air transportation waives for himself and his legal representatives all claims for any damage or injury occurring mediately or immediately to himself, his personal effects and his baggage during or in connection with a flight. A claim for damages in consequence of being excluded from a flight in consequence of delay in, or interruption of a flight is particularly excluded. There is no claim for a repayment of the price charged if the passenger does not arrive at the airport or does not arrive in time." The first and third paragraph were printed on the rear side, the second on the front side of the ticket. The ticket was signed by the passenger. At bar the plaintiff urged that the conditions were not clear enough to have any effect at all, and in addition only the exclusion of liability under the Air Traffic Act was meant by agreeing to the conditions. The Kammergericht, as the Court of Appeal had pointed out: "From the wording of the contract there is no doubt that the airline and its employees were supposed to be free of any liability which could lawfully be waived. There-

332. 117 R.G.Z. 102, see note 310. Translation of Professor Zollmann.
fore, in deference to the law that admits an exclusion of any liability (viz. except for wilful default) the waiver must not be interpreted from the intention of the party in a restricted sense. If it was agreed that the flight was to be performed at the 'exclusive risk' of the passenger, the latter released the other party and its employees from all liability that could be excluded by agreement. If, on principle, it may be conceivable to renounce liability for endangering but not for negligence, in the present case, such separation is not admissible in view of the unambiguous contents of the contract of carriage. As to the question of negligence, there is no difference whether it was gross negligence or only slight negligence. If the law provides solely that liability for wilful default must not be excluded (§ 276 German Civil Code), such regulation involves that liability for any degree of negligence may be waived. There is no clue to a statement that parties were willing to differentiate (viz. in respect to the degree of negligence).

The Reichsgericht, on appeal, gave a more restricted interpretation. As to the liability under § 19 Air Traffic Act the Reichsgericht explained that liability was waived accepting the conditions of the transportation contract as printed on the reverse of the ticket either by the purchase of the ticket or at least by its signing. Defendant, in his petition: established that the exclusion of liability covered not only mishaps which were due to the inherent dangers connected with a regular and careful flight, but also such misfortune as resulted from unambiguous and clear faults of operator or pilot. The Reichsgericht did not agree with this interpretation and said: "In so far as the conditions impute to the passenger a waiver of legal damages, the interpretation cannot be extensive and the requirement of clear expression has to be taken into particular consideration. Besides, only the declared intention is to be considered for interpretation and the airline, which had formulated the conditions by itself, must approve of an interpretation such as the passenger would conceive of it in good faith and with due regard to ordinary usage. The wording alone is all the less conclusive, since, in the present case, it may be construed in many ways." In reference to the general knowledge and the estimate of the special dangers of air traffic in 1925, the Court explained that a passenger would have considered these dangers, if he learned that he was to abide the risk and thus to waive the liability stated by the law, but that the idea he was supposed to waive also the fault of operator and pilot and even gross negligence was more foreign to his thinking, and hence, that with respect to good
faith and ordinary usage he could presume that such imputation would be shown clearly and in a wording not to be misconstrued. The Court, stating that this was not done, continued:335

"The transportation conditions as printed on the rear of the ticket merely say that participation in flight is at the exclusive risk of the passenger but do not say that he waives all liability of owner or pilot for their own fault within the meaning of §§ 825, 831, 276 Abs. 1 BGB. The second paragraph of the general transportation conditions as reported in the statement of facts which uses the word "precaution" is not reprinted. There is no finding that the passenger knew about this paragraph or that the construction of it by the defendant was in any manner brought to his notice when he bought his ticket or signed it or that the complete transportation conditions were posted in the ticket office or pointed out to him. There was no particular reason why he should inquire about them because the general conditions were reprinted on the rear of the ticket and he was entitled to assume that such reprint was correct and essentially exhaustive."

Another construction could have taken place, as it follows from the Court's reasoning, if the passenger had known that the airline gave the contended sense to the conditions. Also the third paragraph, as the Reichsgericht stated, did not support the defendant, since it dealt essentially with damages for exclusion from and delay or interruption of flight, but not with damages resulting from fault of operator or pilot in reference to equipment or in selecting, instructing or supervising the pilot or in reference to duly fighting the particular dangers of aviation. The Court said furthermore:

"It was not necessary that the passenger should know that the 'employees' mentioned in the first paragraph—contrary to § 18 KFG—were not within the meaning of the Air Traffic Act, liable. It could not be expected that he would deeply ponder the meaning of this paragraph dealing as it did with employees. On the other hand it would have been easy for the company to express the meaning of the condition which it now contends far more clearly by the use of a few additional words."

bb. In a case before the Landgericht I Berlin336 the conditions printed on the ticket were the following: Paragraph 1 and 3 were the same as in the case of the Reichsgericht, except that paragraph 3 was here paragraph 2 and in the Landgericht's case par. 3 read as follows:

"As for the rest it is referred to the 'General Conditions for

335. Translation of Professor Zollmann, (1930) I JOURNAL AIR LAW 220.
Transportation, for Passenger Air Traffic,' which are put up on airports and in the agent's offices."

The Landgericht gave the following construction:

"The conditions contain a restriction of liability in so far as participation in flight is at the exclusive risk of passengers. From this proviso it does not result that defendant had the intention of being released from liability for fault of his own or of employees. In the law field the term risk (Gefahr) is used generally in the meaning of damages caused without fault or resulting from events for which there is no responsibility."

The court found defendant liable under §§ 276, 278 German Civil Code, examining the question whether there was any fault of defendant and denied there was.\textsuperscript{337}

cc. The same conditions obviously have been agreed upon for a transportation contract in the case decided by the Landgericht I Berlin on Feb. 5, 1929.\textsuperscript{338} No other principles are to be gathered from the opinion in this decision.

dd. In the case which was dealt with in the decisions of the Oberlandesgericht Karlsruhe and of the Reichsgericht (judgments of Sept. 22, 1938, and March 11, 1939)\textsuperscript{338a} a passenger was killed in a circular flight on May 1, 1934. The liability of operator and pilot had been excluded by an agreement, the wording of which is not reported. Both decisions held the exclusion of liability to be lawful. It is not clear whether the passenger had participated gratuitously. The Oberlandesgericht stated in reference to the exclusion of liability that no differentiation was to be made between a transportation contract for a fare and a gratuitous ride, but no particulars were given. The Court construed the agreement by which the liability was restricted without considering the question of whether or not the flight was paid for. It held that only the liability based upon § 19 Air Traffic Act was excluded but not liability for negligence. The Reichsgericht in its opinion stated that there was no reason to interpret the exclusion of liability in a wider sense implying also exclusion of the liability based upon § 831 German Civil Code.\textsuperscript{338b} Dr. Bärmann in annotating the decisions,\textsuperscript{338c} hints at the question whether a proviso excluding liability should not be construed in a more extended sense, if the flight was gratuitous.\textsuperscript{338d}

b. J.A.T.A. conditions (after February 13, 1933).

\textsuperscript{337} See note 346.
\textsuperscript{338} 20 O. 286/27—1930 Jurlstische Wochenschrift 1990.
\textsuperscript{338a} See note 346a.
\textsuperscript{338b} See text after note 355a.
\textsuperscript{338c} 1939 Archiv für Luftrecht 171.
\textsuperscript{338d} The problem was discussed in many decisions dealing with rides in other conveyances; see note 330.
The air line companies, among them the Deutsche Lufthansa and the Deutsche Zeppelin Rheederei which were members of the J.A.T.A., had agreed mutually on the introduction of uniform conditions for air transportation contracts as voted and amended in the conferences of Antwerp and Budapest in 1930/1931 and on February 13, 1933, the conditions came into operation. They are applicable to all carriage by the German airlines as named above. The construction of said conditions gained in importance for the judgments of the Kammergericht of July 28, 1938 and of the Reichsgericht of July 5, 1939. The Kammergericht in its opinion interpreted the conditions that they exempted all claims based upon § 19 Air Traffic Act and §§ 823 of German Civil Code which latter refer to torts or unlawful acts (unerlaubte Handlungen). The Court in its full reasoning said as follows: "The exemption from liability that is agreed upon under Art. 18 § 5 refers to any claim no matter upon whatever legal title they may be based, except the liability which is assumed under Art. 19 § 1. That liability, which conforms materially with the liability under the Warsaw Convention, is merely a contractual one. It follows from contents, connection and meaning of the "General Conditions of Carriage" and from the Warsaw Convention as its basis, which is copied partly in the wording. The "General Conditions" and the Warsaw Convention are applicable to "international carriage" of persons and so on. (Art. 1) As to whether "international carriage" is in question depends on the contract made by the parties (Art. 1 (2), and Art. 1 (3) refers expressly to a contract of carriage. Art. 3 of the Warsaw Convention and Art. 2 of the Conditions deal with the passenger tickets. Art. 3 of the Warsaw Convention and Art. 2, § 6 of the Conditions provide that the absence, irregularity or loss of the ticket does not affect the existence of the contract of carriage, which shall none the less be subject to the Conditions. Also Art. 4 of the Warsaw Convention, Art. 9 of the Conditions assume a contract in dealing with the baggage check. Art. 13 of the Conditions provides the "Conclusion of the Contract of Carriage," Art. 22 refers to actions under the provisions of a contract of carriage. Under the Warsaw Convention, and the General Conditions the air carrier is liable to passengers, under § 19 Air Traffic Act, on the other hand, the operator is liable if a person is injured. Art. 23 Warsaw Con-

340. See text after note 306, where the conditions of the transportation contract are given in particular.
341. In the German Conditions: "Beförderungsvertrag". The English text uses the word: "Contract."
342. Viz. passengers, other carried persons, and third persons.
vention provides: “Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.”

The connection of claims provided by the Warsaw Convention with any other “action for damages, however founded,” is ruled not before Art. 24 Warsaw Convention, under which provision all more extended claims for damages under other regulations and provisions are excluded. The Warsaw Convention establishes in Art. 24 in its paragraph 1 that, “(1) in the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.”

Consequently, Art. 18 § 5 in connection with § 19 of the “General Conditions of Carriage of Passengers” must be interpreted as to the effect that all claims, which are not founded upon the contract of carriage were excluded.”

Up to now, no other decisions dealing with the “General Conditions of Carriage of Passengers and Baggage” are reported. The case at bar referred to an international transportation; but since the conditions are applicable not only to international but also to internal carriage, the reasoning of the Kammergericht has to be taken in consideration for any contract of carriage. It may be remarked that the provisions of the “General Conditions” which do not apply to internal carriage pursuant to Art. 1 paragraph 2, were of no account for the decision of the Court.

BB. Representatives of a killed passenger.

The conditions of carriage in the different cases decided by German courts contained a proviso that the passenger renounce all claims not only for himself but also for his representatives. The binding effect of such waiver on the representatives is out of question under the assumption that the passenger himself was bound. The Reichsgericht established the rule that an indirect victim is not entitled to damages, under § 844 German Civil Code, if the deceased victim had waived any claim. The Kammergericht in the decision of October 16, 1926, adopted said principle. The widow of a passenger killed in a crash had founded an action in her own right upon § 21 II Air Traffic Act, § 844 German Civil Code, with the allegation that she had lost the right of maintenance. The Court

343. 65 R.G.Z. 315; 69 R.G.Z. 186. The decisions did not deal with aircraft accidents but the principle applies also here. § 21 II Air Traffic Act corresponds with § 844 II German Civil Code.

344. As did the court of appeal in the case quoted note 332. Decision of the Kammergericht 5 U 6294/26—1927 Zeitschrift für die gesamte Luftrechtswissenschaft 220.
held that the plaintiff had no title to damages, which the deceased
would not have had if he had been the injured and entitled person.
As to a claim vested in plaintiff by inheritance, the court referred
to a decision of the Reichsgericht\(^\text{346}\) that explained that a person
killed in a mishap could not be entitled to damages beyond his death.

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

In the case decided by the Landgericht Berlin\(^\text{346}\) it resulted
from the interpretation of the contract of carriage that defendant
was liable for any damage caused by the fault of its own or of its
employees. The plaintiff urged that the pilot acted negligently be-
cause weather conditions were such that the flight ought not to have
been executed and because, against general rules, the motor was
tested before the take-off not from 10 to 20 minutes, but for a few
minutes only. The Landgericht in its opinion stated that there was
no need to decide whether the pilot acted negligently in undertak-
ing the flight in spite of bad weather conditions, since the accident,
a breakage of the gasoline pipe, had no connection with the weather.
The Court remarked that the fact that other planes had been flown
as scheduled without accident argued against the assumption of neg-
ligence. In reference to the motor test the Court held that the pilot,
who had performed a flight from Dresden to Berlin in the same
plane the same day, could assume that the plane was in good trim.
From the fact that the pilot had flown the plane, the Court concluded
that he assumed a good condition with the reasoning that otherwise
he would have risked his own life too. In reference to the motor
test, the Court found that the test lasted only 5 minutes. Also here
the Court left undecided to what extent a pilot, not acting negligently,
had to make a motor test, since the plane had been flown the same
day for a longer time than 20 minutes, and it added that also a
test of 20 minutes would not have prevented the accident since the
crash happened after the motor was running in test 5 minutes and in
flight 20 minutes; in other words, after a total running time which
lasted longer than the test time alleged as necessary by the plaintiff.

A case dealing with the liability of a pilot who had motor trouble was decided by the Oberlandesgericht Karlsruhe and the

\(^{345}\) 55 R.G.Z. 24.

\(^{346}\) Decision of June 14, 1927—see note 336. The case of the Reichsgericht
(May 19, 1922—see note 311) involved after reversal for new trial, besides other
problems, the question of whether an essential fault on the part of the owner
or pilot of the aircraft was present, since the waiver was construed not to
exempt the liability for damages caused by fault. The Reichsgericht in its
opinion has not discussed the problem of fault because the facts were incomplete.
The problem of fault is also dealt with in some penal cases, see below Chapter
IV C.
Reichsgericht.\textsuperscript{846a} The widow and the children of a passenger killed in an airplane crash sued pilot and operator for damages. In reference to the problem of the pilot's liability under § 823 German Civil Code the following findings of the Courts are of interest: The pilot flew a single motored airplane at an altitude of nearly 650 feet when the motor misfired. He tried to get the motor going and, in the meantime, he considered the possibilities for an emergency landing and looked around for a suitable space on the ground. He failed to revive the motor and, in attempting an emergency landing, crashed thirty seconds after the motor had misfired. Under § 823 German Civil Code a person who unlawfully and with malice or negligence damages life, body, health, freedom, property or other rights of another person is liable for damages. § 823 II provides that the same rule applies if a person infringes a provision which is intended to protect other persons. The Oberlandesgericht held that the pilot had used the necessary care; the Reichsgericht reversed the decision. It held that the pilot acted negligently, because he ought to have taken the necessary steps for an emergency landing immediately. He was not allowed to lose any time in his efforts to start the motor. The Court established that a careful pilot would have landed immediately, since it is rather unusual that an airplane motor which misfired will work again regularly after a few seconds. The Reichsgericht held that it was of no significance in determining the amount of care necessary, whether or not the pilot was out of practice and whether or not he would have been equal to the task with more practice and whether or not most pilots had met with no accident up to now because they had never encountered a situation with which they could not cope. All these points might have importance in reference to the penal responsibility, but did not affect — as the Reichsgericht declared—the requirements which must be set up under the civil law for the care to be used by a pilot. The pilot had pleaded that he had not noticed the place best fitted for an emergency landing because his view was obstructed by the right wing. The Reichsgericht in its reasoning declared that the pilot was bound under the provision of § 78 Air Traffic Ordinance in the wording of 1930 (now § 78) to fly over towns and other inhabited places at such an altitude that he was able to land at the next airport or outside of the town in case of an emergency. The Court continued: "Therefore, during the flight over the town, the pilot had always to consider where he could find a place suitable for an emergency landing and had to fly at such an altitude that he was certain to reach the place if the motor misfired."

\textsuperscript{846a} Oberlandesgericht Karlsruhe,—Sept. 22, 1938—1939 Höchstrichterliche Rechtsprechung no. 1625; Reichsgericht,—March 11, 1939—VI 244/38—1939 Archiv für Luftrecht 168.
Due care required, as the Court added, that he watch also for the, atmospheric conditions and fly at a height that allowed a safe landing under all circumstances. The Reichsgericht deduced from the facts stated that the pilot acted negligently.

In addition the Supreme Court held that § 78 of the Air Traffic Ordinance in the wording of 1930 (now § 70) is a provision intended for the protection of other persons within the meaning of § 823 II German Civil Code and stated that the pilot was liable for damages also under § 823 II. From the fact that the plane crashed in an emergency landing the Reichsgericht concluded that the plane was not flown at an altitude as prescribed by § 78 (§ 70), i.e. an altitude which allows an emergency landing at the next airport or outside of the town. It should be noted that the Reichsgericht did not discuss the problem of causality and did not make any statement whether the pilot would have been able to make a safe landing from a higher altitude. Probably the opinion of the experts did not give rise to any doubts in this respect.

F. Contributory fault of the injured.

§ 20 Air Traffic Act, except for a slight change in the wording, copies § 9 of the Automobile Act. It establishes the rule that contributory fault of the injured person or, if a thing is damaged, of the person who had actual control, has to be taken into consideration pursuant to § 254 German Civil Code. As to the decisions, in which contributory fault is discussed, it has to be remarked that the courts had to decide only the question of whether the injured person contributed to the fault. General problems as to the theory of contributory default did not appear in the cases as reported. The Landgericht Stuttgart\textsuperscript{347} said in its decision of May 6, 1931, that it was no contributory fault to participate in an acrobatic flight, that was rated by the competent authority.\textsuperscript{348} As to the action of a balloon rider, who was injured in the landing, the defendant had raised the point of contributory fault. The Court\textsuperscript{349} referred to a decision of the Reichsgericht and explained that even if, at the moment of danger, plaintiff had taken an unsuitable position, such action would not be considered a contributory default.

In regard to a test flight in a repaired airplane, defendant urged contributory default of the crashed pilot because he had no para-

\textsuperscript{347.} 1932 Archiv für Luftrecht 100—see note 294.

\textsuperscript{348.} Since participation in a flight is no default as stated by the Reichsgericht 72 R.G.Z. 171, (see note 11) it is also not contributory default. The problem in question resulted from the fact that the flight was extremely dangerous, because the pilot had proposed to climb from a flying plane onto another one, but the court in its opinion abainted from any observation as to the particular risk.

\textsuperscript{349.} Landgericht Halle note 328. The decision of the Reichsgericht 1907 Juristische Wochenschrift 307 dealt with contributory fault in a non-aviation case.
chute. The Kammergericht in its decision of July 9, 1936,\textsuperscript{350} held that it was not material whether the pilot refused to take a parachute with him, since at the time of the crash, there was no rule providing that the pilot in a test flight had to be equipped with a parachute\textsuperscript{351}. The Court in its reasoning declared furthermore, that even if, as a general rule, the test flyer had to be equipped with a parachute the judgment would not be different. A wing was broken at an altitude of 200 meter (about 6500 feet) and the Court said: “In deciding the question of whether the pilot would not have been killed, if he had been equipped with a parachute, different facts are in consideration, that cannot be definitely ascertained, even by experts. It may be problematic whether the pilot frightened by the loss of the wing would not have missed the jump, whether he would have had the opportunity to jump and if so, whether he would have had the opportunity to make a safe jump and landing.” The Court inferred from all those doubts that defendant could not furnish proof that the pilot, equipped with a parachute, would not have been killed.

In reference to the action of a student pilot, who had crashed during a lesson with a glider in a flying lesson, the Landgericht Frankfurt am Main\textsuperscript{352} declared that it was quite natural that the student pilot, just as a student driver, makes mistakes, perhaps incomprehensible to an expert, but that not every mistake could be imputed as a fault on the part of a student and that otherwise the liability stated in § 19 Air Traffic Act would be without significance.

On the other hand, the Oberlandesgericht Hamm\textsuperscript{353} applied a more vigorous standard to the action of a student pilot, who was nearly 20 years old, shortly before entering the pilot’s examination and familiar with the risks of flight. The student had turned the propeller, though he was aware that the motor was hot and though he was warned by a police officer. The Court held the student guilty of such preponderant default that it confirmed the dismissal of a suit for damages against the operator. The plaintiff had urged that he was asked by the operator to turn the propeller; the Court found that the operator had not acted negligently in asking plaintiff, even if he knew that the motor was hot, but that he nevertheless should have informed the plaintiff that the motor was hot. However, since the plaintiff had been warned by the police officer the Court held that the omission of the operator was without causal con-

\textsuperscript{350} Note 264.
\textsuperscript{351} § 74 Air Traffic Ordinance in the wording of 1936 that provides such rule, came into effect later.
\textsuperscript{352} Decision of Jan. 31, 1932—note 296.
\textsuperscript{353} July 3, 1934—9 U 328/32—1934 Archiv für Luftrecht 274.
nection to the accident, that happened when in spite of the warning by the officer the plaintiff turned the propeller twice again.

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

§ 28 Air Traffic Act reads as follows: “Provisions of the laws of the Reich under which the operator of an aircraft, the person who uses it, (§ 19 II), the pilot or another person, is liable to a greater extent for damages resulting from the operation (Betrieb) of aircraft, are not affected.” The Reichsgericht, in the decision of July 4, 1938, construed § 28, that, above all, it refers to the provisions concerning unlawful acts. With regard to unlawful acts in the sense of §§ 823 seq. German Civil Code, a problem arises from § 831 German Civil Code which provides that a person who employs another for any kind of work is liable for damages unlawfully inflicted upon a third party by his employee in the course of his employment. As to whether a person is employed in the meaning of § 831 may cast some doubt in many cases. The owner of an airplane had asked a pilot for training. He had yielded the airplane to the pilot and the latter flew it for purposes of sport, transportation, advertisement, aviation exhibitions, etc., kept it in good repair and had his name put on it. An accident occurred when the pilot used the plane and the injured party brought a suit against the owner based upon § 831 German Civil Code. The Oberlandesgericht Hamm held that said provision did not apply because the pilot was independent as to the use of the plane and the owner had not employed him for any work.

On the other hand, the Reichsgericht in a decision of March 11, 1939 stated that a pilot was employed within the meaning of § 831 German Civil Code, if he had to fly an airplane owned by an air-sport-association. Consequently the association was liable under § 831 for all damages which the pilot inflicted to third persons in the course of his employment, regardless of his own default. The Reichsgericht pointed out that in the case at bar, under § 831, the employer was liable unless he could show that he had used the necessary care in selecting the pilot or that the damage would have resulted notwithstanding his care or that the liability was excluded. From the facts established by the Oberlandesgericht Karlsruhe, as court of appeal, the Reichsgericht found that the restriction of liability covered only the liability provided by § 19 Air Traffic Act, but not the liability for torts such as in question here. In reference to the argument that the damage would have been inflicted even though

354. Note 61.
355a. See note 346a.
the pilot was selected carefully the Supreme Court held that the mere fact that the pilot had acted negligently when the accident happened refuted the assumption of his having been carefully selected.

H. Apportionment of liability between several persons.

The Air Traffic Act provides an apportionment, if the damages are caused by several airplanes or if another person is liable for damages in addition to the operator. (§ 27) The question of the meaning of § 27 Air Traffic Act in respect to damages caused by flying over a fox farm was answered by the Reichsgericht. The Court held that under § 27 II Air Traffic Act any person, who is liable for damages, is bound to an apportionment, and, if the damaged person himself, as keeper of the foxes is liable under § 833 German Civil Code, such liability had to be taken into account pursuant to § 27 Air Traffic Act. Hence, the Court stated that it was to be examined, whether the destroying of the young foxes resulted from an arbitrary and spontaneous attitude of the female foxes, which was according to the nature of the animals as provided by § 833.

J. Liability in international carriage.

The Warsaw Convention was signed and ratified by Germany and came into force there on December 29, 1933. In a case before the Kammergericht an international transportation was in question. The lower Court had found that the carrier was not liable since he had proved that it was impossible for him to take measures to avoid the damage. (Art. 20 Warsaw Convention). The Kammergericht on appeal stated that the question of liability under the provisions of the Warsaw Convention was immaterial, since the plaintiff was entitled only for damages that were based upon the law, and the liability under the Warsaw Convention was held to be founded upon contract. That the Warsaw Convention applied to transportation from Berlin to Königsberg with a stop-over at Danzig as an international one, the Court said in its reasoning that there was no doubt of it. Consequently, a claim of the representatives of a killed passenger rested upon the Warsaw Convention. The contract of carriage was made in Germany between a German airline and a German passenger for a flight from and to German airports

357. § 833 paragraph 1 reads as follows: "If a person is killed or the body or health of a person is injured or a thing is damaged by an animal, the person who keeps the animal is bound to compensate the injured party for any damage arising therefrom." (Dr. Chung Hui Wang).
358. The states where the Warsaw Convention is in force are compiled in the (1937) 8 JOURNAL OF AIR LAW 298. Furthermore, New Zealand, Denmark without Greenland, Finland, Norway, Sweden, Greece adhered.
359. See above notes 305, 340 especially as to the facts and problems.
360. A wing was cut loose from a fatigue fracture of the wing attachment.
361. See notes 305, 340. At the time of the mishap Danzig was a Free City.
and the accident happened in Germany. The Kammergericht quoted all those facts for its finding that German laws were to be applied. It is understood that this was correct, and that there was no other way.

The Reichsgericht\textsuperscript{361a} upheld the decision. In reference to the Warsaw Convention, the Court agreed with the Kammergericht that the claim was based upon the transportation contract. Plaintiff argued that the provisions which limited the liability were null and void under Article 23 of the Warsaw Convention because they tended to relieve the carrier of his liability. The Reichsgericht did not enter into a discussion of this problem. It found that the Kammergericht had stated that the provisions of the Warsaw Convention applied to the liability of the carrier. The Supreme Court added that, assuming that the transportation contract eliminated the application of the Warsaw Convention, Article 23 would not apply, since the provisions of the Warsaw Convention were inserted in the transportation contract.

The first German decision interpreting the liability provisions of the Warsaw Convention was delivered by the Landgericht Frankfurt a. M. on March 8, 1939.\textsuperscript{361b} The facts were as follows: Plaintiffs' husband and father had made a round trip from Frankfurt a. M. in Germany to Milan in Italy on an airplane of defendant's airline, a Dutch company. On its way back the plane crashed in an emergency landing, on July 20, 1935, with loss of passengers and crew. The plaintiffs based a claim for damages upon the contention that the accident was caused by gross negligence of the airline and the members of the crew, particularly of the pilot.

The case was under the Court's jurisdiction, because Frankfurt a. M. was the place of defendant's business, through which the contract had been made and also the place of destination. (Article 28 Warsaw Convention.)

Plaintiffs rested the case upon Articles 17, 22, 25 of the Warsaw Convention. The Court held that the claim for damages was well founded only in so far as it was based upon Articles 17 and 22. It declared that the facts did not show any negligence of the airline. The Court discussed the technical condition of the crashed airplane and followed the opinion of experts in agreeing that certain minor defects which the plaintiffs held essential, did not interfere with a safe flight. The Landgericht found from a thorough investigation of the pilot's training and experience that he had satisfactory professional skill and that the airline did not act negligently in appointing him

\textsuperscript{361a} See note 309a.
\textsuperscript{361b} 2/7O. 169/37—1939 Archiv für Luftrecht 180.
to fly the plane across the Alps. In discussing the activity of the pilot the Court had to deal with several phases.

a. Plaintiffs argued that the pilot ought not to have started in view of bad weather conditions, and, if he did, that he ought to have climbed up to an altitude of at least 4,000 meters (13,350 feet) over the Po River plains, before turning towards the Alps. The Landgericht, which had heard several experts, did not agree and denied any negligence of the pilot in this respect.

b. Further the Court had to examine whether the pilot, finding bad weather conditions over the Alps, had taken all necessary measures to avoid the damage. After a minute discussion of the evidence and of the opinion of the experts the Court held that there was no way to elucidate the question, the witnesses which might have given particulars being dead. The Landgericht stated that defendant had to furnish proof that the pilot had taken all necessary measures and that this evidence had not been forthcoming. The burden of proof lay upon them. In this connection the Court denied that the pilot could not expect or foresee that he might possibly find ice and thunderstorms when flying through a bank of clouds at more than 13,000 feet.

c. Finally, the Landgericht examined the question whether or not the pilot took the appropriate measures in trying an emergency landing, during which the plane crashed from a height of nearly 135 feet. The Court said that the experts had developed three theories as to the cause of the crash, none of which showed any negligence of the pilot. The Court held that plaintiffs' further claims—beyond Article 22—were unfounded, and continued: "It follows from the Court's statements that neither defendant nor the pilot can be charged with gross negligence. Gross negligence however is the statutory condition as prescribed by Article 25 of the Warsaw Convention, if the restriction of liability provided by Article 22 ceases. Under Article 25 the carrier is not entitled to avail himself of the provision of the Warsaw Convention which limits the liability, if the damage is caused by him through malice or by such default (grade of negligence) as, in accordance with the law of the court to which the case is submitted, is equivalent to malice (wilful misconduct)." The writers in their comments on the Warsaw Convention agree that such a default implies only a really high grade of negligence (see Koffka-Bodenstein-Koffka, Luftverkehrsgesetz, I 3 to Article 25 Warsaw Convention). The wording in the Warsaw Convention was chosen only, because the Anglo-Saxon

361c. As to the alleged negligence of other crew members, the published judgment does not show that the court entered into that subject.
law does not know the term gross negligence as this term is recognized in our (viz. German) jurisprudence. When the draft of the Warsaw Convention was under consideration, there was unanimity that gross negligence ought to be equal to wilful misconduct within the meaning of Article 25, in those countries, the laws of which recognize this type of negligence. The plaintiffs must show gross negligence on the part of the defendant." The Court held that they failed to furnish the necessary proof.

The problems which were discussed by the Landgericht Frankfurt a. M. are of wide significance. It is not known at the present time, whether the decision became final. The construction of Article 20 of the Warsaw Convention as given by the Court complies with the general German theory, which sees in this rule the principle of liability for fault with a transfer of the burden of proof and thinks that this principle in its actual formulation is nearer to the German liability for the result as provided by § 19 Air Traffic Act than to the general liability for default. On the other hand, Professor Goedhuis in his monographs on the Warsaw Convention arrived at different conclusions. He believes that the fundamental theory of the Warsaw Convention is the principle of liability for default and he thinks that this principle would be changed into a liability for result, if the courts insisted on a strict proof that the operator and his agents had taken all necessary measures to avoid the damage, or that it was impossible to take such measures in a case such as at bar. Also the IATA felt the liability provisions to be too burdensome to the air carriers. It had the intention to ask the CITEJA for its opinion on the subject, and proposed an amendment under which the air carrier is not liable to damages unless a presumption is created by the facts that he or his agents acted negligently. De lege lata, however, the decision of the Landgericht Frankfurt a. M. is correct. Under the present political situation it is open to doubt whether or not the contemplated revision of the Warsaw Convention will come to pass and whether or not this revision will relieve the air carriers' burden.

The provision of Article 25 shows the difficulties which arose from the attempt to harmonize the principles of the Continental and of the Anglo-Saxon law. As it was pointed out by the decision of the Landgericht the term gross negligence is unknown to the latter system. The wording of Article 25 tried to express the term by cir-
cumlocution. The German Ministry of Justice in an official release interpreted the meaning of Article 25 that a particularly high degree of negligence was supposed to be equivalent to malice. The German Act introducing the Warsaw Convention, however left it to the decision of the German Courts, whether and to what extent they would regard gross negligence as equivalent to malice. The Landgericht, in discussing the question, whether the pilot acted with gross negligence, obviously regarded gross negligence as equivalent to malice. Its opinion is not consistent with the opinion of German writers. They deduce from the fact that the liability for gross negligence may be excluded by agreement (§ 276 II German Civil Code) that the German law does not regard gross negligence like malice. They believe that also the air carrier who has caused damage by gross negligence is entitled to avail himself of the provisions which exclude or limit his liability.

Professor Schleicher in his annotation of the decision puts another question. Under the Dutch law regarding air transportation, gross negligence is equivalent to malice. Consequently, the Dutch airline could not limit its liability for damages by excluding liability for gross negligence in so far as the contract was made in the Netherlands. (Article 24 Warsaw Convention). Hence, the problem arises, whether the Dutch airline which could not exclude its liability in the Netherlands might have done so in other countries. The Landgericht did not discuss the problem. Professor Schleicher answered in the affirmative, because Article 25 lex fori is decisive and because the Dutch law applies only in so far as no other provision is applicable under the Warsaw Convention.

K. Liability of other persons than operator and pilot.

The problem as to whether and under which circumstances the entrepreneur of an aviation exhibit may be liable for an aircraft crash happening during the exhibit, was exhaustively discussed in a decision of the Landgericht Essen and on appeal by the Oberlandesgericht Hamm. The facts found by the Courts were the following: On June 5, 1927, two aeronautic associations, both defendants, had organized extensive exhibition flights at the airport Mühlheim. Plaintiff, a patron who had paid for admission, was injured in the

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361g. Denkschrift des Reichsministers der Justiz zum Warschauer Abkommen (Sonderveröffentlichung der Deutschen Justiz 1933 no. 1).
361h. Riese in Pfündtner-Neubert, Das neue Deutsche Reichsrecht VI f 2 note 5 to § 1: Schleicher-Reymann, Recht der Luftfahrt, note 1 to § rt. 25 Warsaw Convention.
361i. 1939 Archiv für Luftrecht 189.
361j. 1931—50,51/29 (15, O. 104/30; 122/30; 5/20 O. 602/28; 604/28). 1933 Archiv für Luftrecht 39—Oberlandesgericht Hamm, Nov. 26, 1932—5 U 504/31—1933 Archiv für Luftrecht 348. (See also the decision of the Penal Court (Erweitertes Schäftengericht Essen Dec. 15, 1928—1938 Zeitschrift für das gesamte Luftrecht 54). The case was annotated by Tiemann and Victor Niemeyer 1939 Archiv für Luftrecht 44, 251.
crash of an airplane during the exhibition. As to the exhibition, defendants had engaged several pilots for acrobatic flights which were mentioned by name in an official program book. The plane which crashed was hired by a chocolate factory “Trumpf” for advertising and grounded at the airport shortly after the exhibition had been started. It was not named as participating in the program but an advertisement of the “Trumpf” firm showing the plane, was there published. The pilot was ordered by the Trumpf firm to perform advertising flights, during the exhibition, over the grounds used for the exhibition and to drop small bars of chocolate. After a first flight finished without objection to the flying of the pilot, he took off again carrying a certain W. whose task it was to throw off the bars. Then the plane crashed into a crowd of spectators and the plaintiff was injured. The plaintiff was dismissed from the Landgericht Essen Mülheim, his appeal was disallowed. Since the defendants were not operators of the plane, § 19 Air Traffic Act did not apply, but only liability based upon contract or unlawful act. Liability resulting from a contract made between the defendants and the plaintiff in respect to the observation of the exhibit was denied within the limits of such contract. The Landgericht characterized it as a contract for work in the sense of § 631 German Civil Code, the Oberlandesgericht as a bilateral contract, but it did not give a more detailed reasoning as to its characterization. Both Courts stated that the defendants had to provide for the security of the public and that they were liable under the provisions of §§ 276, 278 German Civil Code for malice and negligence not only their own but also of their agents and employees. Neither decision found any default. The Court of Appeal dealt with the problem as to whether the defendants should have interfered, if they had observed that the pilot flew incorrectly in the first flight. The Court decided that because the exhibition was under the supervision of the police, the defendants, who had no contractual connection with the pilot and the operator of the plane, would have had no other way than of calling upon the police, who also were in charge specifically of supervising the flights. It was established in both decisions that the pilot was not an agent or employee of the defendants, (Erfüllungsgehilfe). The Landgericht pointed out that an agent or employee (Erfüllungsgehilfe) is any person who is acting in the performance of a contract with the intention of the debtor, also if such person is not bound to act by an obligation to the debtor. Hence the acrobatic flyers, who

363. There was no need to decide the problem of characterization, since there would always arise the same question of negligence or malice and liability of a third person, whatever a type of contract it was.
were engaged for the exhibition and mentioned by name in the list of participants were agents, or employees, but the Court expressed considerable doubt as to the position of the "Trumpf" pilot. It stated in its opinion that the "Trumpf" factory had been asked in a letter to participate and that the firm had given a written promise to take part provided it could get an airplane fitted for its purpose. In the meantime, the Trumpf factory got a bargain for its advertisement and two honorary tickets, but in the opinion of the Court it was not to be inferred from those findings, that a contract was made. The Court of Appeal also denied that a contract was made and said: "Neither the pilot nor the airplane nor an advertised flight to be flown by the Trumpf firm were quoted in the program booklet, hence the defendants were not bound to present such flight to the patrons who paid admission." In so far as a performance is not announced, it may—as the Court stated,—also be presented in the limits of the exhibition, but only if the manager intended to do so. From a voluminous amount of evidence it concluded that no contract was made. The Court found that the pilot of the crashed plane asked the permission only of the police officer at the airport to make the advertisement flight. The Court in its opinion proceeded: "Since the defendants had no exclusive right to use the airport which was available for public flights also during the exhibit, they could not influence the Trumpf firm and its pilot and particularly not by forbidding the flight or giving binding instructions. A contract, by which they could be entitled to such instructions was not made, even if the attendance of the Trumpf airplane was proposed by the defendants." Since the defendants could not influence the pilot, it must not be supposed that they intended to present the advertisement flights to the spectators as a contractual performance in addition to the scheduled exhibition, all the less since the flight was executed in the advertising interests of the Trumpf firm which had ordered the flight and the dropping of chocolate." The Court added that the pilot did not participate in the exhibition itself which was planned to show the position and possibilities of aviation, and that the dropping of chocolate, that was permitted only outside the airport and outside the places for spectators did not affect the patrons who paid admission. The consequence of the finding is that the pilot was not an agent or employee (Erfüllungsgehilfe) nor was he employed in the sense of § 831 German Civil Code. The Court of Appeal in its opinion gave a further reasoning by denying that the pilot acted negligently. As to the denial of negligence the Court's reasoning was as follows: The defendants had made
a contract with the plaintiffs to show them the exhibition. For the performance of this contract defendants were responsible for wilful default and negligence. (§ 276 I I German Civil Code.) Under § 278 German Civil Code the defendants were responsible for negligence and malice of persons whom they employed in fulfilling their obligation to the same extent as for their own fault. The suit would have been substantiated if (1) a contract had been made, (2) the flight (of the crashed airplane) had been made in order to perform the contract, (3) the defendants or the pilot had acted with wilful default or negligence.

It seems that the Court felt that the answer in the negative to point 2 was not beyond all doubt and therefore question 3 was also discussed. The Oberlandesgericht said in denying fault in the pilot's acting: "The plaintiff's contention that flights over a gathering at a lower altitude than 200 m (about 650 feet) was prohibited on the day in question, June 5, 1922, is not correct since such prohibition was not in effect until § 29 of the Air Traffic Ordinance of July 19, 1930, came into force. The ordinance did not repeat an existing regulation but brought a regulation into being. At the time in question the pilot could go down to 30 m (about 100 feet) because there was no objection to flying at such an altitude, as experts stated in the penal case against the pilot. On the other hand, it must be stated that a flight at an altitude of 5 m (about 16 feet) over a crowd of people was not permitted at all. In the case at bar it might be possible that the pilot was not conscious of the low altitude of his flight, by an excusable error in estimating, as it was explained on appeal in the reasoning of the judgment of the penal court against the pilot. The testimony of the pilot, that in his estimation he was flying the second flight at an altitude of about 30 meter, is, as stated by the Penal Court, likely or at least not refutable. The ground on the west side of the airport is precipitous. Looking to the right the pilot might have estimated that he was flying at an altitude of 30 m. when really he was at 5 m." The court stated furthermore: "The plane pancaked over some uneven spots on the west side of the airport. Besides this it was pushed down by peculiar ground winds. The error in estimating and the failure in perceiving the dangerous situation of the wind are not to be imputed to the pilot as his fault.

364. The Landgericht said that the question of the pilot's negligence was not to be discussed, since he did not act for defendants in the performance of the contract defendant versus plaintiff.
The Oberlandesgericht in its opinion finally explained, that the pilot was not employed in the sense of § 831 German Civil Code as a servant (Verrichtungsgehilfe) and that it was no fault if the defendants omitted to interfere with the advertisement flights, because the first flight was performed correctly and because the police had the supervision of the exhibition and in so far as the defendants had no particular obligation to take care for the security of the public in respect to the performed flights.

In the case at bar a suit was also brought against the State based upon the contention that the police officers acted negligently, in permitting the dropping of chocolate from low altitudes during said exhibition where people were crowded together and that the police officers ought to have known that the dropping was only possible if the plane was flown at a low altitude and would be dangerous over the crowd of spectators. Defendant argued furthermore, that the police officer failed to interfere after the first flight was executed at a dangerously low altitude and that he failed to examine the necessary certificates as to registration, etc., before he permitted the start. The Landgericht held that the police officer did not act negligently in permitting the dropping of chocolate since neither general regulations of the Reich or State nor special rules for the airport in question had been issued at that time under which such flight was prohibited, and that there was nothing from which it could be inferred that the officer in his findings and decision acted negligently. The Court continued that flying against regulations in the first flight was not proved. As to the examination of the certificates the Court found that the police examined it within the limits of the law.

In agreeing with the Landgericht as to its reasoning in denying negligence, the Oberlandesgericht said in addition that the liability of the State was not evident since plaintiff failed to prove that there was no other way for compensation of the damages (§ 839 German

365. In the crash a 13-year old boy was killed by the propeller and 2 persons were injured. The Penal Court found the pilot guilty of manslaughter and bodily injury (see note 396). On appeal he was dismissed by a judgment of the Grosse Strafkammer Essen: Oct. 16, 1928 — 13 J. 577/27—not published.) Some suits for damages against the pilot led to judgments against him. His applications for appeal in forma pauperis were refused by the same Court of Appeal who decided now that the pilot did not act negligently.

366. The case was peculiar, since the liability insurance, the conclusion of which was examined by the Ministry before rating the airplane, had expired, because the operator had changed. Therefore, the insurance company did not cover the damages. The Landgericht held the police officer had nothing to do with the question of insurance and did not have to and did not examine the policy. Otherwise the start would have been forbidden. The question as to whether the Ministry acted negligently because it did not revoke the certificate of admission after the operator had changed and failed to ask for the insurance, was not discussed at bar. But this case induced the authority to bring into being the provision of § 106 Air Traffic Ordinance (1930) (§ 107 Ⅲ, wording of 1936), providing that liability insurance has to be contracted under the proviso that the liability of a new operator in the case of change is also covered for the insured period.
L. Private insurance.

The operators of aircraft and the entrepreneurs of airports and of aviation enterprises are required to guarantee their responsibility for damages either by liability insurance or by lodging cash or negotiable documents with the authority. The liability insurance has to cover the liability to third persons; in other words, to persons who are not carried by the aircraft and are not employed by or held in other contractual relations to the operator. As to the organization and form of private air insurance the Air Traffic Act and Ordinance prescribes that the insurance policy must also cover a new operator in case of change during the insured period. It was left to the interested parties to find and develop a form of contract suitable to the economic purposes. In connection with a liability insurance that covers also liability against passengers, the German Airlines (Deutsche Lufthansa and Deutsche Zeppelin Reederei) take out a passenger's accident insurance. A passenger who is injured in an accident may refer to the accident insurance, provided he waives any claim for damages against the airline, but no payment from the insurance will be made if the person entitled to damages sues the air line for damages. Since the Warsaw Convention provides that any provision tending to relieve, the carrier of liability or to fix a lower limit than that which is laid down in the Convention is null and void, the German Air lines cut out the reference which was formerly made in the ticket to the accident insurance, and leave it to the passenger in case of an accident to make his choice. In the case that was decided by the Kammergericht on July 28, 1939, the airline had proceeded in this way. The Court discussed the admissibility of restriction of liability but did not touch upon insurance problems. Since the beginning of summer 1939 all German airlines have had to take out this combined insurance for internal transportation pursuant to an ordinance of the German Ministry of Aviation. It is remarkable that insurance cases were brought to courts only in an amazingly small number. The reasons for this fact are found by Professor Oppikofer primarily in a close co-operation between

367. § 29 Air Traffic Act. §§ 106-110 Air Traffic Ordinance. Said obligation does not apply to the Reich as operator or entrepreneur. The Air Traffic Ordinance 1930 provided in § 106 a general liability insurance covering any liability of the operator, that meant also liability against persons who are carried by the plane and in other contractual relations as employees.

368. Note 305.

369. See Dr. Hermann Döring, Die Entwicklung der Luftversicherung In Deutschland 39 Zeitschrift für die gesamte Versicherungswissenschaft no. 1, p. 53.

insurance companies and insurance takers, from which resulted care-
fully drafted and fairly performed insurance contracts giving the
insurance protection exactly as needed for all kinds of insurance
as for accident, for liability and for injuries to the body.

The interpretation of an accident insurance policy was disputed
in a case decided by the Reichsgericht July 5, 1929. The Court
held that, if the accident insurance of a pilot by profession excludes
acrobatic flights, the whole flight, that was started with the pur-
pose of performing acrobatic exercises, is an acrobatic flight and not
only the single exercise. In reference to a presentation flight (Vor-
führungsflug) the Landgericht Berlin in a decision of July 9,
1929 said, that the meaning of such word was to be interpreted in
the sense which the insurance taker must give it, whenever there
was a dispute over the interpretation. The term “contrivance for
flight” (Flugapparat) was interpreted by the Oberlandesgericht
Hamm as referring to all appliances by which men are able to
entrust themselves to the air and therefore including parachutes.

Chapter IV. Penalties

A. General Provisions.

Under the German Penal Code §§ 315, 316 as amended by the
Act of June 28, 1925, a person who interferes intentionally with air
navigation resulting in a “common peril” is subject to penal servitude
or capital punishment. If the transgressor acts negligently he is sub-
ject to imprisonment or fine or both. The use of aircraft against
the intention of the entitled person is punishable pursuant to the
Ordinance of Oct. 20, 1932, against unlawful use of motor con-
veyances and bicycles. It seems that cases of general interest are not
reported.

B. Penalties in the Air Traffic Act.

In addition, the Air Traffic Act contains numerous provisions
for general penalties, in respect to contraventions against regula-
tions of the Air Traffic Act, the Air Traffic-Ordinance and adminis-
trative ordinances and decrees.

1. § 31 no. 1 Air Traffic Act subjects a person who violates
an ordinance issued for public order and security under any provi-
sion of the Air Traffic Act in respect to air traffic and operating of
aircraft to a fine or detention, if the violator is not liable to greater
punishment under other penal laws.
a. The Strafkammer of the Landegricht Plauen\textsuperscript{375} had to decide the question as to what kind of ordinances are covered by § 31. The Ministry for Traffic had issued a decree on Nov. 23, 1926. The decree was communicated only to certain persons and officials especially to the police officers in charge of supervision of flight. It contained the following:\textsuperscript{376} “I have communicated to all owners of aircraft, to all aircraft undertakings and to all flying schools the following disquisitions: . . . A warning must be issued. . . . It must be considered as punishable lack of care (strafbarer Leichtsinn) . . . It is expected from each pilot . . . A pilot makes subject to an action for damages and runs the risk of being punished criminally under the provisions of the strafgesetzbuch. In order to cut down the number of mishaps I request all owners of aircraft.”

The Landgericht disapproved of the ruling of the trial judge that the decree fell in the provision of § 31 of the Act and said: “A decree within the meaning of § 31 is either a law in the formal sense of the word or a regulation. A mere administrative order which deals only with the relation between various officials and not with their relation toward third persons does not come therein.” From the lack of proclamation, its very words and contents the Court deduced that the decree did not refer to § 31 Air Traffic Act.

On the other hand, there is no doubt that the provisions of the Air Traffic Ordinance come within § 31 of the Act. Here arose the problem as to whether the application of § 31 might be excluded by other penal laws. § 100 Air Traffic Ordinance of 1930 (§ 102 in the wording of 1936) provides that foreign aircraft are forbidden to enter German territory unless such flight is generally permitted by an international convention or by a special permission of the Authority. Several cases of unlawful entering on the air into the German airspace are reported.\textsuperscript{377}

a. The Schöffengericht Oppeln\textsuperscript{378} had to decide the following facts. On Jan. 9, 1931, three Polish military airplanes flew over German territory and two of them landed near Oppeln. W. a first sergeant of the first Polish aerial regiment piloted the guiding plane; J. a sergeant of the same regiment piloted the second plane with orders to follow W. Both were accused of violating different laws

\textsuperscript{375} June 9, 1927—see note 184.

\textsuperscript{376} Quoted from Prof. Zollmann’s translation (1931) 2 JOURNAL OF AIR LAW 127.

\textsuperscript{377} The French pilot Coster was punished in 1925 because he had flown over Germany without permit. (see 1925 (9) Revue Juridique Internationale 425; VI Air Service Information Nr. 586 of July 15, 1926).—See also: L’affaire Franco-Roumaine de Navigation Aérienne.

\textsuperscript{378} Jan. 31, 1931—5 JM 7/31—1931 Archiv für Luftrecht 72 translated by Professor Zollmann (1931) 2 JOURNAL OF AIR LAW 594.
by this same action, that of, a) crossing the German boundary without permission, particularly without any paper stating their identity, b) having failed to prove their identity by passport or other admitted identification paper, c) contravening to § 31 No. 1 Air Traffic Act: by entering into the German air space without permission and without a general permit by an international convention. Both defendants stated that they entered Germany unintentionally and the Court did not find any reason to suppose that they acted wilfully. The Court condemned W. stating that W. was guilty in the sense of c. The Court in its opinion explained that it was the necessary consequence of passing the boundary without proof of identity that W. could not prove his identity by passport or by other papers and, therefore, that he was not to be punished on the contravention b. As to the violation of the Air Traffic Act the Court held that this provision as an auxiliary did not apply since defendant's acting also violated § 1 of the passport ordinance of April 6, 1923. Defendant W. had changed his statements in regard to the flight repeatedly particularly as to the reasons for the loss of his bearings. The Court found that defendant could not trust the compass alone and that he was well aware of this and that he acted negligently because he failed to make an emergency landing in Poland in time to get the necessary information. Defendant J. was acquitted. The Court established that J. did not act negligently in crossing the German boundary since he was under military command to follow W.'s plane, and since he had no sound reasons for believing that W. had lost orientation.

As to the relation of § 31 No. 1 Air Traffic Act the Court followed a well established practice of the Reichsgericht in reference to the application of an auxiliary penal law, stating that the auxiliary rule does not come into question if another penal law is violated. There is no doubt that § 31 Air Traffic Act is an auxiliary penal law, since it provides punishment only for such cases where no other laws inflicting higher punishment are violated.

bb. On the other hand the Amtsgericht Schweinfurt in a decision of May 20, 1931 held French military flyers guilty of having violated by one and the same act the passport regulations and the provisions of § 31 Air Traffic Act. Said flyers had flown military planes carrying machine guns over the German boundary on May

379. The punishment was 2 weeks imprisonment making allowance for the time that defendant had served by detention before trial. Professor Zollmann, Cases on Air Law 2d ed. p. 56 said that the judgment was more a political one. It is beyond the limits of this article to examine the different elements of the judgment, but to me the general findings as to negligence and as to the relation of the different provisions seem to be in no way influenced by political considerations.

380. 38 R.G.St. 383; 44 R.G.St. 1; 58 R.G.St. 240.

16, 1931. They were not provided with passports or other identification cards and were not authorized either by a general convention or by special permit to enter Germany by plane. The Court did not explain for what reasons it deviated from the general opinion of the Reichsgericht. It may be that the Court had overlooked the nature of § 31 Air Traffic Act as an auxiliary penal law.

As to the fact that the planes were not registered in Germany and defendants had no pilot certificates, the Court found that § 31 I 1, 3 II Air Traffic Act did not apply because they refer only to intra-German air traffic. In respect to § 14 Air Traffic Act, that forbids carrying of arms in an airplane unless with special permission, the Court stated that § 31 No. 1 Air Traffic Act was not in question, because § 14 also refers only to intra-German air traffic. As to the importation of arms, which is forbidden and subject to punishment under the Act regarding War Material, the Court held the defendants not guilty, because they did not bring the arms to Germany with the intention of leaving them there.

cc. In a third case before the Schöffengericht Braunsberg the Court held that the unlawful entry by air without identification documents of a Polish military pilot was to be subjected to penalty only under the passport regulations. Since the defendant had landed after his entry and finding himself in Germany took off again with the intention of reaching Polish territory, the Court held him guilty of a second violation of the law and subjected him to a punishment pursuant to § 31 No. 1 Air Traffic Act.

2. The pilot of a German aircraft, who, in a foreign country, violates an international convention or treaty agreed upon by the Reich is subject to criminal penalty under § 31 No. 2. Such a case has been brought before the Amtsgericht Altdamm. A German airplane, enroute from Norderney to Friedrichshafen, flew over Swiss territory on July 2, 1936. Near Basel in Switzerland he flew at an altitude less than 1650 feet (500 m). The Swiss regulations of Aug. 3, 1923 forbid such low flying except in case of emergency and the Air Traffic Convention between Germany and

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382. May 19, 1931—1 F. 54/31—1931 Archiv für Luftrecht 124.
383. § 104. Air Traffic Ordinance 1930 (§ 105 Air Traffic Ordinance in the wording of 1935 has the same purport): Foreign aircraft that had entered Germany unlawfully must land and is forbidden to continue the flight without special permission.
384. Since the amendment of Dec. 19, 1935 (1935 R.G.Bl. I 1516). Formerly such violations were not to be punished since the German Penal Code in § 6 provides that contraventions (i.e. an act subject to detention or fine up to 150.- R.M.= $60) committed in foreign countries are subject to criminal penalties only under special laws or conventions. Generally violations of foreign regulations refer to such light contraventions.
386. 1923 Bundes Blatt II 722.
Switzerland provides that private flyers of both countries in so far as they are allowed to fly over the other country's territory are subjected to its regulations. Defendant argued that he was in an emergency because of bad weather conditions. The experts concluded that defendant was unable to turn back or aside before crossing the Swiss border, that he had to keep below the clouds as he could not fly blind, and that the attainment of a height necessary to pass over the mountains without danger to plane or passengers required a flight, after the skies cleared, of about ten miles. The Court followed the experts and held that defendant was in an emergency near Basel and the flight as performed at a lower altitude than 1,650 feet was justified. Defendant was acquitted.

3. Until the Act regarding the Reorganization of the Reich was passed in 1934, the Reich and the States were competent to issue rules and regulations for air traffic. How competency was distributed between them is of mere historical interest, since said act abolished the independent existence of the German States. In a decision of Nov. 24, 1931 the Kammergericht had to deal with the problem of whether an ordinance issued on Oct. 26, 1928, by the Police President of Dortmund relating to management and traffic of the Airport Dortmund was within the jurisdiction of this officer. The Court had to deal with two questions: Was the ordinance lawful from a general viewpoint, and did the Air Traffic Ordinance as it came into being 1930 affect the police ordinance? The Court developed the following principles: Besides § 31 Air Traffic Act of 1922 there was no room for criminal regulations of the States as far as they subjected the same act to criminal penalty. The opinion of some German writers that, in the aviation field, the legislative power of the States to issue supplementary regulations was abolished by § 17 I 3 Air Traffic Act is not to be agreed with. The legislative power of the Reich over “the traffic with power conveyance in the air” as stated by Art. 7 No. 19 German Constitution is enlarged by the Air Traffic Act § 1. Since the Act was voted by a qualified majority the enlargement is not against the constitu-


389. The Act of Dec. 15, 1933—1933 RGBI. I 1027—provided that the air police was to be transferred to the Reich. It was obsolete a few weeks later by the Reorganization Act (note before).

390. 1 S. 408/31—1932 Archiv für Luftrecht 88.

391. See Basarke in 1927/28 Zeitschrift für das gesamte Luftrecht 65, 72, 94, 130, 135.

tion. § 17 I 3 Air Traffic Act in the wording before 1933 did not provide an exhaustive regulation. The States had legislative power to regulate aviation pursuant to Art. 7, 12, 13, 14 German Constitution §§ 1, 17 Air Traffic Act, until and in so far as the Reich did not issue regulations within the limits of its legislative power. From a review of the different regulations existing on Oct. 26, 1928, the Court found that at that time an ordinance concerning the air traffic in the airport of Dortmund was admissible. As to the relation to the Air Traffic Ordinance the Court stated that the ordinance was annulled in so far as the Air Traffic Ordinance contained the same or inconsistent regulations, but that the regulations of the police ordinance remained in force, in so far as they were neither inconsistent with the provisions of nor with a subject ruled by the Air Traffic Ordinance.

Under the new organization of the Reich the police are placed under the Reich. Hence there will arise only the problem of whether a police ordinance was within the limits of the general laws and particularly of the acts and ordinances relating to aviation.

4. The Air Traffic Act, in § 32 No. 5, subjects to criminal punishment any person who without permission or contravening the conditions prescribed by the Authority, trains airmen, who constructs or operates airports or undertakes aviation enterprises or affairs. The cases reported are discussed supra, since the problem are of less interest in their penal aspects than as to general questions and definitions.

The cases deal with the interpretation of § 6 Air Traffic Act as to the meaning of the training of students for airmen, and with § 11 C.c. as to the definition of aviation enterprises and affairs and airlines.898

C. Penalties in General Penal law.

The violation of general penal laws was the problem of the following decisions, both dealing with harm done to third persons by accident.

1. On June 3, 1932, defendant took off in an airplane that he had constructed himself and that was rated for experimental and test flights. The plane crashed upon the roof of a factory in the neighborhood of the airport and two workers were injured and one killed by the parts of the plane coming through the roof. Defendant was acquitted of the charge of manslaughter and bodily injury.894


He stated in trial that he wanted to make a precision landing with standing propeller and stalled the airplane in order to stop the propeller quickly; that he was nearly upside-down when the plane did a left spin; and that he failed to regain control of the plane by opening the engine full out. It may be of some interest that the expert witnesses at the airport had the impression defendant was looping the loop, but they admitted that defendant might have flown upside-down unintentionally. The Court stated that there was some difficulty in differentiating from the ground whether the maneuvers of a flyer were intentional or not and held defendant's statement credible. The law requires in §§ 222 I, II, 230 I, II, 231 German Criminal Code that the act has been done negligently. The Court did not find that defendant was negligent.

2. A charge of manslaughter and bodily injury brought the pilot of the Trumpf firm to trial for the above discussed crash. The Schöffengericht Essen found the pilot guilty of manslaughter and of bodily injury by negligence. The Court held that the pilot acted negligently in flying over a crowd of people at such a low altitude as 15 feet “particularly since a companion was in the plane and defendant had to figure that he might act in a ‘maladroit’ manner.” Besides this “the pilot should have figured and he did figure”—as the Court explained—“that under the circumstances (low altitude, slow speed, choked motor) he lacked the necessary control of the craft to prevent danger to the public in case of any irregularity occurring in connection with it, such as a temporary failure of the motor to function.” As to the punishment the Court took into consideration that the purpose of dropping chocolate bars was only to be accomplished from a low altitude and over a crowd and that the defendant was employed to do the job as he did, and finally that the companion by his ‘maladroit’ manner cut down the low speed to a still lower level. On appeal the Strafkammer in Essen acquitted defendant. It held that defendant came down to a lower level than he realized and that this failure to note the exact altitude of the flight was due to circumstances beyond his responsibility.

395. Under § 81 Air Traffic Ordinance in the wording of 1930 looping was only permitted with an airplane rated for acrobatic flights and outside of inhabited places. It was forbidden over a gathering of people. § 72 of the amended Air Traffic Ordinance in the wording of 1936 prohibits acrobatic flights over airports, inhabited places, and a gathering of people, unless the Airboard has granted a special permit.
