RECENT CASES

Illinois appellate court holds that agreements between The Ohio Players and Westbound Records were valid and enforceable, and that Westbound was entitled to a trial in its action against Mercury Records for allegedly interfering with the business relationship between The Ohio Players and Westbound

An Illinois appellate court has held that recording and publishing agreements between the musical group known as The Ohio Players and Westbound Records, Inc. and Bridgeport Music, Inc., were valid and enforceable. The court therefore reversed a lower court's decision granting the group's motion for summary judgment in its action for declaratory relief against Westbound. In a related case brought by Westbound and Bridgeport against Phonogram, Inc. and Unichappell Music, Inc. (doing business as Mercury Records) alleging tortious interference with a contractual relationship between Westbound and The Ohio Players, the appellate court found that the lower court also erred in granting summary judgment in favor of Mercury Records.

In March of 1972, Westbound and The Ohio Players entered into a contract in which the group agreed to make records exclusively for Westbound for a five-year period (with an option on the part of Westbound to extend the contract for two years). The group also agreed that it would be exclusively employed by Bridgeport as authors and arrangers during the term of the recording contract. The group accepted a $4,000 advance from Westbound. Westbound subsequently advanced approximately $60,000 for the costs of recording sessions, artwork, travel expenses and recording session wages. Westbound also advanced approximately $22,000 to enable the group to pay taxes and litigation expenses. These advances could only be recouped by Westbound from the royalties payable to the group. The group recorded four single records and two albums for Westbound. One of the records, "Funky Worm," received a gold record (symbolizing sales in excess of $1,000,000).

In January of 1974, five members of the group repudiated the recording and publishing contracts and signed an agreement to record exclusively for Mercury Records. These individuals (who were the plaintiffs in the case) then sought a judgment against Westbound declaring that the contracts between the group and Westbound were invalid and unenforceable and that they were no longer obligated to record for Westbound.

The plaintiffs contended that there was no consideration for the Westbound contracts, particularly because the contracts lacked mutuality; that is, although the group was required to make a minimum number of recordings, Westbound was not required to make any recordings using the group.

The court first noted that consideration passed to the group when it accepted $4,000 to enter into the contracts with Westbound and Bridgeport, and that the contracts would therefore be valid and enforceable even if they lacked mutuality. According to the court, the fact that the $4,000 was an advance against royalties did not "disqualify the payment from being regarded as consideration. If sufficient royalties were not earned to repay Westbound the $4,000, [the group] would not have been obligated to repay it. By making the $4,000 advance, Westbound suffered a legal detriment and the [group] received a legal advantage."

The court then noted that even if the $4,000 advance had not been made, the lower court erred in finding that there was no obligation on the part of Westbound and Bridgeport to do anything under their respective agreements with the group. The appellate court found that Westbound's expenditures on behalf of the group and the group's recording efforts demonstrated a "consistent pattern of good faith best efforts" during the first 21 months of the contract and showed that the parties intended to be bound and to bind each other. Further, even if such performance were disregarded, mutuality could be established, according to the court, by the rule that "the law implies mutual promises to use good faith in interpreting an agreement and good faith and fair dealing in carrying out its purposes."

The plaintiffs contended that the contracts contained provisions negating this implied promise of good faith performance. The recording contract provided, "Company is not obligated to make or sell records manufactured from the master recordings made hereunder or to license such master recordings or to have artist record the minimum number of record sides referred to in

Paragraph 2(b).” The publishing contract provided, “The extent of exploitation of any musical composition, including the publication of sheet music or other printed editions, or the decision to refrain therefrom, shall be entirely within the discretion of the Publisher.”

The court rejected the plaintiffs’ interpretation of these provisions, finding that it was inconsistent with the meaning of the contracts as a whole and that neither provision would enable Westbound or Bridgeport to “sit idly by for five years” or to act in bad faith. The provisions gave Westbound and Bridgeport “discretion to control the content of recordings and the timing and numbers of releases. Nothing in either . . . agreement or in the conduct of the parties demonstrates that Westbound or Bridgeport could or did use this discretion arbitrarily or in bad faith.”

The appellate court then held that the lower court had also erred by not using the doctrine of promissory estoppel as a substitute for consideration in order to uphold the contracts. The appellate court pointed out that prior to entering into the contracts with Westbound, the group was virtually unknown in the recording field. However, in reasonable reliance upon the recording agreement, Westbound undertook a substantial business risk and incurred more than $80,000 in expenses, recoupable only if the group's recordings were successful. The court held that the group therefore became obligated to perform as its members had promised to do.

The court, stating that it was considering the promissory estoppel issue to "illuminate the fundamental unfairness of the plaintiffs' claim," proceeded to discuss the plaintiffs' contention that promissory estoppel would not apply unless unjust enrichment were shown. The plaintiffs contended that there would be no unjust enrichment once Westbound recouped its advances from royalties because Westbound would have suffered no actual loss. The court rejected this argument, pointing out that "The Ohio Players had nothing to offer Westbound but an interest in their future . . . The Ohio Players had nothing to lose; Westbound was to take all the risks . . . The Ohio Players now seek to deny Westbound the sole reward of its success. Their aim is to keep for themselves the fame and money which, judging by their past experience, they could not have acquired without Westbound's aid, by asserting that Westbound did not originally promise to do what it has already actually- done. This the plaintiffs are estopped to do. . ."

The plaintiffs also argued that the agreements were unenforceable because they had not been approved by the American Federation of Musicians. The court found, however, that the AFM bylaws relied upon applied only to live traveling engagements of union members and not to studio recording sessions, and that nothing in the AFM bylaws required AFM approval before the recording contract would become effective. Westbound also had not become a signatory with the AFM until 11 months after the plaintiffs repudiated the contracts.

The court also rejected the plaintiffs' contention that the contracts conflicted with a statute outlawing restraints of trade, because the statute in question related only to restraints on employment after a contract ends; it did not prohibit employment contracts calling for an employee's exclusive services during the period of employment. The fact that the contracts in this case prohibited the group from rerecording, for a limited time, songs recorded for Westbound, did not restrain the plaintiffs from employment in the recording business.

In Westbound's action against Mercury, the lower court, incorporating its order granting summary judgment in the "Ohio Players" action, found that Mercury could not be guilty of tortious interference with any business relationship between The Ohio Players and

Westbound or of tortiously inducing some members of the group to breach their contracts with Westbound, because there were no such binding contracts. The appellate court, having upheld the validity of the contracts, reversed the summary judgment.

The appellate court found that there were significant issues of fact remaining to be tried with respect to the circumstances surrounding the departure of members of the group from Westbound and their signing with Mercury. Conflicting accounts had been given regarding when and how initial contact had been made between members of the group and Mercury, when the terms of the Mercury agreement were initially proposed and thereafter negotiated, and when and how it was determined that the Westbound contracts were invalid. The court concluded that there were numerous genuine disagreements between Westbound and Mercury concerning material facts and that in construing the pleadings most strictly against the moving party (in accordance with the law regarding summary judgments) "it appears that Westbound could recover against Mercury Records for, as alleged in the complaint, tortiously tampering and interfering with and inducing the breach of a 5-year contract between Westbound and The Ohio Players which had at least 3 years to run." The court therefore remanded the matter for trial.

Bonner v. Westbound Records, Inc., 394 N.E.2d 1303 (Ill.App. 1979); Westbound Records, Inc. v. Phonogram, Inc., 394 N.E.2d 1315 (Ill.App. 1979) [ELR 1:13:1]

Federal District Court denies pre-trial motion to dismiss Ohio blind-bidding case

In June of 1978, the Ohio legislature enacted a statute banning blind-bidding in that state. The law, which is similar to blind-bidding statutes that have been enacted in some 15 other states as well, was passed at the behest of the National Association of Theater Owners and over the opposition of the Motion Picture Association of America. The Ohio law prohibits distributors from soliciting bids for their films before Ohio exhibitors have had an opportunity to "trade screen" or preview the films; it prohibits minimum payment guarantees and advance payments under certain circumstances; and it regulates the bidding procedure itself so as to provide Ohio exhibitors with liberal notice and inspection rights.

Shortly after the statute was enacted, ten motion picture production and distribution companies filed suit in Federal District Court on Ohio seeking to have the Ohio blind-bidding statute declared unconstitutional on the grounds that it infringes First Amendment free speech rights, violates the Commerce, Supremacy and Equal Protection clauses of the United States Constitution, violates the Sherman Antitrust Act and the Federal Copyright Act, and deprives the movie companies of property without due process of law.

The lawsuit was tried this past summer, and a decision is being awaited at this time. Prior to trial, however, the defendants, who are the governor and certain other elected officials of the State of Ohio, moved to have the case dismissed. The court denied their motion, and its opinion doing so has just been published.

The defendants' motion to dismiss was made on three grounds, none of which went to the constitutional merits of Ohio's blind-bidding statute. The defendants first argued that the lawsuit was barred by the Eleventh Amendment to the United States Constitution which provides that Federal Courts shall not have the power to hear lawsuits against a state filed by citizens of another state. In this case, the State of Ohio itself was not named as a defendant; only its governor and certain other officials were. While the Eleventh Amendment does shield state officials if they are sued only as surrogates for their state, "the Eleventh Amendment will not bar a suit against state officials to enjoin their enforcement of an unconstitutional state statute." The defendants argued that the blind-bidding statute created rights which were to be enforced between exhibitors and distributors privately, and that the defendants have no enforcement responsibilities. The court found, however, that Ohio's governor (though not the other officials) does have a connection with the enforcement of the statute, by virtue of his general enforcement powers under Ohio law. Accordingly, the court held that the Eleventh Amendment did not bar the movie companies' lawsuit.

The defendants also argued that Federal Courts have the Constitutional power to hear only actual cases or controversies, and that the mere enactment of the blind-bidding statute did not create such a "case or controversy." The court concluded otherwise, however, finding that the law absolutely prohibits blind-bidding and substantially alters the way in which movies are distributed in Ohio.

Finally, the defendants argued that the court ought to abstain from deciding the case until the statute is construed by Ohio state courts. While Federal Courts will abstain from deciding cases on occasion, their right to do so is "an extraordinary and narrow exception" to their duty to adjudicate controversies properly before them. Accordingly, the court was not persuaded that abstention was warranted in this case.

Although the court denied the defendants' motion to dismiss and did proceed to trial, the court specifically stated that it was doing so because the motion was not well taken "at this time," and it said that it would reexamine the issues presented by the motion again in light of the evidence produced at trial.

Allied Artists Corp. v. Rhodes, 473 F.Supp.560 (S.D. Ohio 1979) [ELR 1:13:3]

Acquisition of stock in Columbia Pictures by Kirk Kerkorian s Tracinda Investment Corporation did not violate Clayton Act

Federal District Court Judge A. Andrew Hauk held that the acquisition of approximately 19% of the stock of Columbia Pictures by Kirk Kerkorian's wholly owned Tracinda Investment Corporation did not violate Section 7 of the Clayton Act, and thus Kerkorian and Tracinda were not required to divest themselves of their Columbia stock.

In December of 1978, Tracinda commenced a tender offer for approximately 1,750,000 shares of the common stock of Columbia. At the time, Kerkorian owned approximately 5% of the outstanding common stock of Columbia and also owned approximately 6% of the common stock of Metro-GoldwynMayer, Inc.; Tracinda owned 42% of MGM's common stock. As a result of the tender offer (which the Antitrust Division of the U.S. Department of Justice had unsuccessfully attempted to enjoin, United States v. Tracinda Inv. Corp., 464 F.Supp. 660 (C.D. Cal. 1979)), Kerkorian, individually and through Tracinda, became the owner of approximately 25 of Columbia's common stock.

Judge Hauk found that Section 7 of the Clayton Act had not been violated, both because the evidence presented did not show that the acquisition would have any "reasonably probable anticompetitive effects" and because the acquisition was within the "investment exemption" to Section 7.

Section 7 of the Clayton Act (15 U.S.C. Section 18) provides, in part, "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."

Judge Hauk first noted that the Government could not seek divestiture of the Columbia stock personally purchased by Kerkorian, because Section 7 only extends to acquisitions made by corporations. There was no allegation or evidence that Kerkorian acquired any Columbia stock on behalf of Tracinda, and the court therefore dismissed the complaint against Kerkorian for lack of jurisdiction.

In considering the possible anticompetitive effects of the stock acquisition, the court first noted that Columbia's principal business is the production and distribution of theatrical motion pictures, television series and features and phonograph records and tapes. Columbia also distributes motion pictures produced both by Columbia and by others. Among other activities, including owning and operating hotel-casinos in Nevada, MGM produces approximately 4 theatrical motion pictures per year and motion pictures and other programs for television. However, MGM has not distributed motion pictures to theaters since 1973.

The Government contended that MGM and Columbia are competitors in the product market consisting of the production and distribution of motion pictures grossing over $1,000,000 and "quality" motion pictures. The court rejected as a "flight of fantasy" the Government's attempt to so define the area of competition and found that the relevant product market would have to encompass motion pictures generally.

Further, according to the court, since the production and distribution of motion pictures are recognized as separate and distinct activities, the relevant line of commerce was held to consist of the production of motion pictures, particularly since MGM is no longer a distributor. (Although MGM has an agreement with United Artists pursuant to which UA distributes motion pictures produced by MGM, the court found that UA "has control over the day-today operation of the distribution of MGM motion pictures and that MGM did not become a distributor by reason of...joint participation with its distributor in certain distribution decisions.") The court then concluded that the Government "has utterly failed to show any anticompetitive effect. All the credible evidence points to the opposite direction, that there will be no substantial lessening of competition as a result of the subject acquisition. There has been no evidence that competition between MGM and Columbia will be affected, let alone evidence that competition in the line of commerce would be affected . . . The evidence clearly . . . points to the conclusion that these two companies will remain separate companies, operating separately and competing against each other."

The Government also had suggested that the acquisition would enable Kerkorian to obtain access to competitively sensitive information. However, the court noted that a Stockholders' Agreement between Columbia, Kerkorian and Tracinda restricted such access. The court also dismissed the Government's contention that Kerkorian and Tracinda would use their control of MGM to cease production of motion pictures by that company, saying the contention was "ludicrous" in view of their substantial investment in both companies.

After examining the structure of the motion picture industry, including the large number of firms engaged in production and distribution and the ease of entry into these fields, the court concluded that the Government had failed to prove that there is concentration in the relevant market and therefore failed to make out a prima facie case of antitrust violation.

The court also based its decision on the "investment exemption" to Section 7 which provides, "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. The court relied upon the Stockholders' Agreement that had been entered into between Kerkorian, Tracinda and Columbia at the time the tender offer was extended. The 3-year Agreement stated that the acquisition of Columbia stock was "solely for investment"; it limited

Tracinda and Kerkorian's Columbia stock ownership at 25.5%; it limited Kerkorian use of the stock; and it contained provisions setting forth the manner in which Kerkorian's stock could be voted in connection with the election of directors. According to the court, there was no showing that at the time of the acquisition, the stock had been purchased for the purpose of taking control of Columbia. The court also found it unlikely that Kerkorian would effectively control Columbia through his influence over the management and directors of the company. And, said the court, there had not been a "single scintilla of evidence to show that Kerkorian has used . . . the stock . . . to bring about or in attempting to bring about, the substantial lessening of competition."

In dismissing the action against Kerkorian and Tracinda, the court awarded them costs because of the complexity of the case, even though the plaintiff was the Government.

The United States Department of Justice abandoned its appeal from the judgment dismissing its action.

United States of America v. Tracinda Investment Corp., 477 F.Supp. 1093, 1979-2 CCH Trade Cases, Para. 62,889 (C.D.Cal. 1979) [ELR 1:13:4]

Internal Revenue Service concedes that the sale of artistic property constitutes earned income which qualifies for the foreign income exclusion ; Court of Claims rules that sale of artistic property should be attributed to the country in which artistic services were performed in determining whether the income is foreign

For tax years prior to 1979, the Internal Revenue Code permitted United States citizens who were residents of foreign countries (or who were physically present in foreign countries for a certain number of days per year) to exclude from their incomes at least some of the income they earned from sources outside the United States.

However, the IRS has taken harsh positions with respect to the sale of artistic and musical property abroad. In Revenue Ruling 71-182, 71-1 C.B. 214, the IRS ruled that income received by a musical composer, who was a United States citizen but a foreign resident, under a contract with a foreign music publisher by which the composer assigned copyrights to all musical compositions written by him during the period of the contract, did not constitute "earned income" which was eligible for the "foreign earned income exclusion." This ruling was based on the rationale that the composer was not an employee of the publisher, but rather created musical compositions without supervision for the publisher. Therefore, the IRS ruled that his income was not income derived from services performed in an employment relationship, but rather was income from the sale of property.

In Revenue Ruling 71-183, 71-1 C.B. 215, the IRS ruled that a United States citizen who was a foreign resident was not entitled to the foreign earned income exclusion for the sale of his paintings on a non-commissioned basis. Once again, the IRS ruled that income from an artist's sale of artistic properties which were created without a prior commitment for sale to anyone constituted proceeds from the sale of property and therefore were not "earned income" eligible for the exclusion.

However, the position of the IRS faired poorly in the courts. In Mark Tobey v. Comissioner, 60 T.C. 227 (1973), the Tax Court held that income from the sale of Tobey's paintings to customers throughout the world constituted earned income which was eligible for the foreign earned income exclusion, because capital was not a material income producing factor in Tobey's artistic endeavors.

The IRS has now revoked Revenue Rulings,71-182 and 71-183 and has acquiesced in the Tobey decision. Revenue Ruling 79-85 79-10 I.R.B. 19.

Strangely, however, the IRS has not revoked or modified Revenue Ruling 71-315, 71-2 C.B. 270. Revenue Ruling 71-315 held that royalty payments received by an author from a foreign publisher were not "earned income" where the royalty payments were made pursuant to a contract by which the author transferred his property rights in his "product" to the publisher. On the other hand, Revenue Ruling 71-315 also held that payments received by the same author pursuant to another contract by which the author had agreed to write articles on certain subjects once a week for a period of one year for a newspaper and to write a book on a certain subject, were "earned income" eligible for the foreign earned income exclusion. The IRS explained the distinction it perceived between the two contracts as follows: "Where the royalties received by the taxpayer are derived either from the sale, leasing, or renting of an intellectual product, as in the first contract, they are not paid for `personal services actually rendered,' but are paid for the use or sale of property."

Conversely, where the cash or cash plus royalties received by the taxpayer from his intellectual products are derived, as in the second contract, under a contract requiring him to write articles and a book at some time in the future for a publisher, such amounts are compensation for personal services. The taxpayer's intellectual product belongs to the publisher and the taxpayer has no property rights in the published product.

Even if that distinction were realistic when originally drawn by the IRS in Revenue Ruling 71-315, it may no longer be valid in view of the IRS's acquiescence in the Tobey decision, unless the IRS now perceives a distinction between paintings and similar works of art on the one hand and literary works on the other.

Revenue Ruling 71-315 is also at odds with Section 1.1348-3(a)(1)(i)(D) of the internal Revenue Regulations which provides that "earned income" includes gains from the sale or licensing of property by an individual whose personal efforts created the property. The Regulations even state, by way of example, that "earned income" includes royalties received by an author from a publisher pursuant to a contract by which the author granted the publisher the exclusive right to publish a book he "had written." Regs. Section 1.1348-3(b)(4) Example (14).

The IRS also has challenged taxpayers' contentions that certain income was "foreign." For example, in the recently decided case of Cook v. United States, the IRS argued that although a sculptor realized "earned income" from the sale of his work while he was a United States citizen and foreign resident, such sales should be treated as sales of personal property for the purpose of determining the source of such income. The reason for this argument was that in the absence of contrary provisions in a contract of sale to a United States resident, the Uniform Commercial Code provides that title is transferred on delivery. Therefore, title would pass in the United States on the delivery of artistic property to a United States buyer. The sale of this property would then be treated as "United States income" and would not qualify for the exclusion, since it would not constitute "foreign" income.

The Court of Claims held, however, that such a position would create "artificial and technical distinctions without genuine substantive foundation," and it rejected the IRS's position. The court held that the sale of artistic property constituted earned income for the artist, and that the source of such income was the country in which the services producing such property were performed.

For tax years after 1978, the "foreign earned income exclusion" is available only to individuals living in specifically designated "hardship areas." United States citizens residing in other foreign areas must include their foreign earned income with their United States income for tax purposes, but may be permitted to deduct certain foreign living costs from their foreign earned income.

Rev. Rul 79-85, 79-10 I.R.B. 19; Cook v. United States, 599 F.2d 400, 79-1 U.S.T.C. Para. 9335 (Ct. Cl. 1979) [ELR 1:13:5]

Directors Guild arbitration award affirmed by California Court of Appeal, even though award deviated

from director s personal service contract, because personal service contract conflicted with DGA Basic Agreement

DGA member Edward Montagne entered into a personal service contract with That Way Production Company, a signatory to the DGA Basic Agreement, to direct a film being produced by That Way. The personal service contract provided that Montagne would be paid $4,500 per week over a ten-week period. It also gave That Way the right to terminate Montagne, without cause, after three weeks, upon payment to Montagne of $20,000.

The termination clause in Montagne's personal contract violated the DGA Basic Agreement which provided that the minimum period of employment was 13 weeks. Thus, when That Way terminated Montagne in accordance with the termination clause in his contract, Montagne and the Directors Guild instituted arbitration proceedings against That Way pursuant to the arbitration clause in the DGA Basic Agreement.

The arbitrator found that at the time That Way and Montagne entered into Montagne's personal contract, neither was aware that it violated the DGA Basic Agreement. He also found that Montagne's personal contract could be construed to require payment to him of $4,500 per week for the 13-week minimum specified by the DGA Basic Agreement, rather than the 10-week period called for in his personal contract. However, "In recognition of the inadvertent nature of the breach and the good faith of the parties, the arbitrator limited the award to $45,000."

That Way then filed a petition in California Superior Court to vacate the arbitrator's award. It argued that "Montagne, a sophisticated and knowledgeable individual represented by an equally sophisticated agent, voluntarily entered into the contract with his `eyes wide open,' and should not be permitted to enjoy a windfall for services not performed."

Under California law, an arbitration award may be vacated only on specific grounds (set forth in California Code of Civil Procedure Section 1286.2). One of those grounds is that the arbitrator exceeded his or her powers. That Way argued that the arbitrator had exceeded his power, because the DGA arbitration clause specifically provided that the arbitrator did not have the power to "vary, alter, modify or amend" the terms of a personal contract between a director and a producer.

The Superior Court refused to set aside the award, however. And the California Court of Appeal has affirmed that refusal. The Court of Appeal noted that, The generally accepted rule is that an error of law by an arbitrator is not grounds for vacating an award. In other words, it is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible. Moreover, the Court of Appeal also held that in this case "no error of law appears on the face of the award. The award appears to be a proper sanction for breach of the Basic Agreement."

That Way had argued that Montagne had accepted the termination clause in his personal contract, "because he knew that without it the Employer would have found another more experienced director." This failed to convince the Court of Appeal that the arbitrator's award was improper, however, for the court observed that, "The very purpose of the Basic Agreement was to put a floor under directors' compensation and to prevent producers, with their obvious leverage, from requiring directors who, for one reason or another lacked individual leverage, to agree to work for less money in order to obtain employment. Failure to enforce the Basic Agreement by sanctioning individual contracts in contravention thereof would render it meaningless."

That Way Production Co. v. Directors Guild of America, 96 Cal.App.3d 960 (1979) [ELR 1:13:6]

Tort law principles held applicable to violent acts committed by players during professional football games

In a game between the Cincinnati Bengals and the Denver Broncos in 1973, Charles "Booby" Clark of the Bengals intentionally struck Dale Hackbart of the Broncos on the back of the head while Hackbart was down on his knee watching the aftermath of a play in which the two players were no longer crucially involved.

Hackbart apparently sustained a serious neck fracture from the blow and sued Clark and the Bengals for damages.

Despite the fact that Clark admitted that he had intentionally struck Hackbart, the trial court ruled in favor of the defendants. The judge explained that the pervasive violence in professional football rendered even intentional batteries beyond the scope of the judicial process. A Federal Court of Appeals has held, however, that the trial court erred in its determination that tort law principles are inapplicable to injuries sustained during a professional football game.

The appellate court pointed out that, contrary to the position of the trial court, "there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it." Since nothing in Colorado law (which was applied in the case) gave the trial court discretion to determine that as a matter of social policy professional football is so violent and unlawful that valid lines could not be drawn, the Court of Appeals ordered a retrial to focus properly on the defendants' liability.

The Court of Appeals noted that recklessness, not assault and battery, was the proper standard to be used in the retrial for assessing liability. As the court pointed out, recklessness exists where a person intentionally performs a harmful act, but without the realization that the act will produce the extreme harm which it subsequently causes. The court found the fact situation of the case to fit this definition perfectly since the defendant Clark admittedly acted impulsively and in the heat of anger, and even though it could be said from the admitted facts that he intended the act, it could also he said that he did not intend to inflict serious injury which resulted from the blow which he struck.

The appellate court also made two evidentiary rulings. First, it held that the trial court had erred in receiving into evidence films which depicted acts of violence between other players and other teams. The court stated: "Unless the game of football is on trial . . . the acts of violence which occurred in other games and between other teams and players were without relevance. The view we take is that the game of football is not on trial, but, rather, the trial involves a particular act in one game."

Second, it noted that in order for evidence of prior acts of violence by Hackbart to be relevant and therefore admissible, "It would be necessary for an issue to exist as to whether Hackbart was the aggressor." This was unlikely, according to the court, since the blow in question was struck while Hackbart was down on his knee watching the action.

The U.S. Supreme Court has declined to review the case further, at this time.

Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979) [ELR 1:13:7]

Briefly Noted:

Obscenity.

The Massachusetts Supreme Court has reversed the conviction of a nightclub dancer for disseminating obscene matter, because the evidence did not warrant a conclusion that the dance depicted sexual conduct in a "patently offensive" way, as required by the Massachusetts statute. According to testimony of two police officers, the dancer was wearing a "babydoll see-through negligee," open in front, revealing her breasts, pubic area and buttocks; and while "gyrating" to music from a jukebox, she touched her bust and pubic areas three or four times. The court held that "patent offensiveness" must be decided in context. Where, as in this case, the dance took place on stage in a club before willing adult patrons, and where the dancer did not mingle with other entertainers or patrons, nudity alone was not enough to make the dance legally obscene. Jenkins v. Georgia, 418 U.S. 153 (1974). The court held that additional evidence that the dancer touched herself in the places mentioned was insufficient to warrant a finding that an average citizen of Massachusetts today would be repelled.

Commonwealth v. Plank, 392 N.E.2d 841 (Mass. 1979) [ELR 1:13:7]

Tax.

Maurice Dreicer, a noted television and radio performer in the 1950s, has been denied a deduction for expenses incurred in writing a book on dining at noted restaurants around the world. The Tax Court noted that, despite having written one book and various articles on that general subject, Dreicer had never earned a profit in his 20-year history of writing. In fact, he had lost an average of $25,000 a year over that period. In addition, after rejection by two publishing houses, Dreicer never pursued further publication of his book. Dreicer's substantial independent income from stocks and trusts suggested to the Court that Dreicer's activities were for personal pleasure.

Dreicer v. Commissioner, T.C. Memo 1979-395; 79(10) CCH Standard Federal Tax Reports, Para. 7855(M) [ELR 1:13:8]

DEPARTMENTS

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