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# Taxation - Partnerships - Validity of the Family Partnership

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## CASE NOTES

TAXATION — PARTNERSHIPS — VALIDITY OF THE FAMILY PARTNERSHIP. Partners Coon and Culbertson, Texas ranchers, agreed that the partnership should sell out to Culbertson upon condition he form a new partnership with his four sons, who were 24, 22, 18 and 16 years of age respectively. This was done and Culbertson took a note in payment of the boys' undivided half interest. The note was later partly paid with profits and the remainder forgiven as a gift. Except when at school the sons intended to give their services and to share in the control and management of the ranch. However, the two older sons were called into the army before this arrangement could be put in effect. The two younger sons attended school during the winter and worked on the ranch during the summer. In 1940 and 1941 partnership income tax returns were filed which showed a division of profits approximating capital contributions. The commissioner of internal revenue ruled the family partnership invalid for tax purposes and attributed the entire income to the father, Culbertson, under Sections 11 and 22 (a), 26 U.S.C.A. Int. Rev. Code, and accordingly found a deficiency in Culbertson's income tax return. The Tax Court, in *W. O. Culbertson*, 1947 P-H TC Memorandum Decisions, Par. 47,168, *held* for the commissioner of internal revenue, finding that the sons contributed neither "vital services" nor "original capital" to the partnership as supposedly required by *Commissioner of Internal Revenue v. Tower*, 327 U. S. 280 (1946), and *Lusthaus v. Commissioner*, 327 U. S. 293 (1946). Deeming an intention to contribute time and services in the future sufficient to satisfy the requirements of the *Tower* and *Lusthaus* cases, the Fifth Circuit court reversed the decision. *Culbertson v. Commissioner*, 168 F.2d 979 (5th Cir. 1948). On writ of certiorari the Supreme Court, in its first consideration of the family partnership since the *Tower* and *Lusthaus* opinions, reversed the Fifth Circuit and remanded the case to the Tax Court, making it clear that both courts erred. *Commissioner of Internal Revenue v. Culbertson*, 69 Sup. Ct. 1210 (1949). "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case, but whether, considering all the facts . . . the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." 69 Sup. Ct. 1210, 1214.

The case could easily have been distinguished from the *Tower* and *Lusthaus* decisions in that the sons in substance acquired Coon's existing partnership interest and there was no splitting of their father's income. *Durwood v. Commissioner*, 159 F. 2d 400 (8th Cir 1947); *Sinne B. Forsythe*, 10 T.C. 417 (1948). *But cf. Nordling v. Commissioner*, 166 F. 2d 703 (9th Cir. 1948). However the court recognized this as merely one of the facts to be considered in determining the intent of the parties, which is the basic issue.

Intent of the parties has always been determinative of the partnership relation. *See, e.g., Drennen v. London Assurance Co.*, 113 U. S. 51, 56 (1884); *Meehan v. Valentine*, 145 U.S. 611, 621 (1892); *Barker v. Kraft*, 259 Mich. 70, 242 N.W. 841 (1932); *Zubak v. Bakmaz*, 346 Pa. 279, 29 A.2d 473 (1943); *cf. Stone v. Stone*, 319 Mich. 194, 29 N.W. 2d 271 (1947);

*Lowry v. Kavanaugh*, 322 Mich. 532, 34 N.W. 2d 61 (1948). This is necessarily so because partnership arises out of a contract, express or implied, between the parties. *Cook v. Carpenter*, 34 Vt. 121, 80 Am. Dec. 670 (1861); MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP, Sec. 4 (2d ed.) 1920); see RESTATEMENT, CONTRACTS, Sec. 21 (1932). But intent can only be shown by objective conduct and actions. *Belcher v. Commissioner*, 162 F. 2d 974 (5th Cir. 1947); *James L. Robertson*, 20 B.T.A. 112 (1930); 4 PAUL AND MERTENS, LAW OF FEDERAL INCOME TAXATION, Sec. 33.05 and 33.06 (1934); see Annotation, 131 A.L.R. 550 (1940). The Bureau of Internal Revenue's most recent statement of policy upon the family partnership recognizes this. I.T. 3845, 1947-1, Cum. Bull. 66. Since objective factors indicate state of mind which in turn is determinative of partnership, it follows that objective factors are the basis for decision. See Veron, *Taxation of Income of Family Partnerships*, 59 HARV. L. REV. 209, 274 (1945).

Following the *Tower* and *Lusthaus* decisions, the courts have repeatedly fastened upon concepts of "vital services," "original capital," and "control and management" as conclusive "tests" of partnership. *See, e.g., Weizer v. Commissioner*, 165 F. 2d 772 (6th Cir. 1948); *Rupple v. Kuhl*, 81 F. Supp. 318 (E. D. Wis. 1948); *Simmons v. Commissioner*, 164 F. 2d 220 (5th Cir. 1947); *Weinstein v. Commissioner*, 166 F. 2d 81 (6th Cir. 1948); *David L. Jennings*, 10 T.C. 505 (1948); *Walter F. Seidel*, 10 T. C. 1135 (1948); *Jay A. Mount*, 1946 P-H TC Memorandum Decisions, Par. 46,276; *W. R. Winchester*, 1947 P-H TC Memorandum Decisions, Par. 47,073. The instant opinion clearly indicates that these "tests" are *not* conclusive. Accordingly a failure to fulfill these tests will not dictate a decision against the taxpayer. Of course, income cannot be attributed to a partner unless he has supplied the ingredients of income — capital or services, or both. *Ward v. Thompson*, 22 How. 330, 334 (U.S. 1859); *Eisner v. Macomber*, 252 U. S. 189, 207 (1920); *Lucas v. Earl*, 281 U. S. 111 (1930); *Max German*, 2 T.C. 474 (1943). But services need not be "vital" and capital need not be "original" if other considerations show a bona fide intent to carry on business in partnership. See Veron, *Taxation of Income of Family Partnerships, supra*, at 265; Mannheimer and Mook, *A Taxwise Evaluation of Family Partnerships*, 32 IOWA L. REV. 436, 447 (1947).

Determining subjective intent is admittedly difficult, *Edginton v. Fitzmaurice, supra*, at 483, and every case must be decided upon its own facts. *Woosley v. Commissioner*, 168 F. 2d 330 (6th Cir. 1948); *Appel v. Smith*, 161 F. 2d 121 (7th Cir. 1947). Moreover, the Internal Revenue Bureau and the courts suspect collusive hidden agreements, and every family arrangement reducing taxes is subjected to special scrutiny. *Helvering v. Clifford*, 309 U. S. 331 (1940); *Grant v. Commissioner*, 150 F. 2d 915 (10th Cir. 1945); *Byerly v. Commissioner*, 154 F. 2d 879 (6th Cir. 1946); Veron, *Taxation of Income of Family Partnerships, supra*, at 217; Miller, *Some Results of the Supreme Court Decisions in the Family Partnership Cases*, 19 TENN. L. REV. 510, 513 (1940). This uncertainty is underlined by the instant opinion; it may give added impetus to proposals for expanding the present husband-wife income-splitting provisions, 26 U.S.C.A. Int.

Rev. Code, Sec. 12(g), into a family income tax return. See *Proposals for Preventing Family Tax Avoidance*, 57 YALE L. J. 788, 803 (1948).

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TORTS — THEATERS AND SHOWS — ASSUMPTION OF RISK. Plaintiff sustained injuries from a flying puck while she was watching a hockey contest in an arena owned and operated by the defendant. The thirty-seven year old plaintiff in this negligence action had previously attended several hockey games, had a brother who played hockey, and was shown to be familiar with the general terms and purpose of the game. No evidence was introduced that the plaintiff could not have taken a protected seat back of the wire netting behind either goal had she so desired, her ticket allowing her the choice of entire seating area. From a verdict in the trial court for the plaintiff, the defendant on alternative motion for judgment or a new trial was granted motion for judgment. On plaintiff's appeal *held* that judgment for defendant be affirmed. The plaintiff by sitting in an unscreened area had assumed risks of injury incident to the contest. The rule of law applied in baseball games is applicable since hockey is played to such an extent in Minnesota that dangers incident to attending a game are matters of common knowledge which a person attending is presumed to comprehend. *Modec v. City of Eveleth*, 224 Minn. 564, 29 N. W. 2d 453 (1947).

The effect of the instant case is to broaden the risk of injury assumed by the hockey patron to coincide with that assumed by the baseball spectator. See Comment, 31 MARQ. L. REV. 298 (1948). Courts uniformly deny recovery to baseball spectators injured while sitting in unprotected seats on the ground that baseball is so well known that its risks are a matter of common knowledge which the patron will be held as a matter of law to appreciate, and in taking an unprotected seat assumes the risk of injuries incident to the game. *Quinn v. Recreation Park Ass'n*, 3 Cal. 2d 725, 46 P. 2d 144 (1935); *Brisson v. Minneapolis Baseball & Athletic Ass'n*, 185 Minn. 507, 240 N.W. 903 (1932); *Crane v. Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S. W. 1076 (1913); 24 CALIF. L. REV. 429 (1936). Some courts indicate that the defense of contributory negligence may be invoked barring recovery where the plaintiff has not exercised reasonable care in view of the foreseeable risk. *Grimes v. American League Baseball Co.*, 78 S.W. 2d 520 (Mo. 1935); *Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 177 Pac. 776, *rev'd*, 181 Pac. 679 (1919); *Crane v. Kansas City Baseball & Exhibition Co., supra.* The holding in the principal case is opposed to the decisions of the majority of jurisdictions who have been faced with the question, yet there is reasoned authority in accord with the Minnesota view. *Ingersoll v. Onondaga Hockey Club Inc.*, 245 App. Div. 137, 281 N. Y. Supp. 505, 11 NOTRE DAME LAW. 93 (1935); *Hammel v. Madison Square Garden Corp.*, 156 Misc. 311, 279 N. Y. Supp. 815 (1935); 17 BOSTON U. L. REV. 485 (1937); See annot. 149 A.L.R. 1174. The majority of courts have refused to hold that the

dangers incident to attending a hockey contest are so well known as to constitute common knowledge which the patron will be held to comprehend as a matter of law. *Shurman v. Fresno Ice Rink*, 205 P. 2d 77 (Calif. 1949); *Tite v. Omaha Coliseum Corp.*, 144 Neb. 22, 12 N.W. 2d 90, 149 A.L.R. 1164 (1943); *James v. Rhode Island Auditorium*, 60 R.I. 405, 199 Atl. 293 (1938); *Shanney v. Boston Madison Square Garden Corp.*, 296 Mass. 168, 5 N.E. 2d 1 (1936); See 149 A.L.R. 1179. They regard it instead as a question of fact to be determined by the jury after a consideration of all the evidence. *James v. Rhode Island Auditorium, supra; Shanney v. Boston Madison Square Garden Corp., supra.* A recent decision declared that it is up to the jury to determine whether defendant was negligent in not providing either notices warning the patrons of danger from flying pucks, or screens to protect the spectators. *Shurman v. Fresno Ice Rink, supra.* Also the size and type of the auditorium may be considered in comparison with others used for the same purpose but such evidence is not conclusive as establishing negligence. *Tite v. Omaha Coliseum Corp., supra; James v. Rhode Island Auditorium, supra.* Where the patron of any amusement occupies an unprotected seat with full knowledge of the risks involved and thus exposes himself to danger of injury, it is well settled that he assumes the risk of injuries incident to the contest as a matter of law, *Quinn v. Recreation Park Ass'n, supra; Brisson v. Minneapolis Baseball & Athletic Ass'n, supra;* PROSSER, TORTS 383 (1941); 24 CALIF. L. REV. 429, 433, even though such seat is only temporary while waiting for the usher to find one protected, *Quinn v. Recreation Park Ass'n, supra,* and even where the patron is hit on his way to his seat it has been held that such risk of injury is assumed. *Blackhall v. Albany Baseball & Amusement Co., Inc.* 157 Misc. 801, 285 N.Y.Supp. 695 (1936); *Lorino v. New Orleans Baseball & Amusement Co. Inc.*, 16 La. App. 95, 133 So. 408 (1931). If such dangers would have been obvious to a person of ordinary intelligence under the same circumstances, the patron, even though unaware will be held to have assumed the risk, thereby relieving the proprietor of the duty to exercise protective care toward the patron. *Tite v. Omaha Coliseum Corp., supra; Ingersoll v. Omondaga Hockey Club Inc., supra;* PROSSER, TORTS 377, 383 (1941). But see *Lemoine v. Sprinfield Hockey Ass'n*, 307 Mass. 102, 29 N. E. 2d 716 (1940). The patron does not assume the risk of hidden or undisclosed dangers which he had no reason to anticipate, BOHLEN, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906), such as a defective screen. *Edling v. Exhibition Co.*, 181 Mo. App. 327, 168 S.W. 908 (1914). There is unanimity that the proprietor of an athletic game or contest is not the insurer of the safety of the patron, *Tite v. Omaha Coliseum Corp., supra; Beverly Beach Club Inc. v. Marron*, 172 Md. 471, 192 Atl. 278 (1937); *Rich v. Madison Square Garden Corp.*, 149 Misc. 123, 266 N.Y.Supp. 288 (1933), *aff'd*, 241 App. Div. 722, 270 N.Y. Supp. 915 (1934), nor is he required to anticipate improbable results, *Rich v. Madison Square Garden Corp., supra* (recovery denied where player after being "body checked" thrust hockey stick in patron's face), but instead the proprietor has only the duty of exercising ordinary and reasonable care to protect the spectators from harms of which the proprietor has knowledge or those of which he should be reasonably aware. *Ingersoll v. Onondaga Hockey Club, supra; Chardon v.*

*Alameda Park Co.*, 1 Cal. App. 2d 756, 36 P. 2d 136 (1934); *Phillips v Butte Jockey Club & Fair Ass'n*, 46 Mont. 338, 127 Pac. 1011 (1912). He is required to provide screened seats for only those who might be expected to apply for them on an ordinary occasion. *Hammel v. Madison Square Garden Corp.*, *supra*; *Quinn v. Recreation Park Ass'n*, *supra*; *Brisson v. Minneapolis Baseball & Athletic Ass'n*, *supra*. In fact the patron has the duty to use reasonable care to protect himself from injuries of which he has knowledge or would be apparent to the average person. *Tite v. Omaha Coliseum Corp.*, *supra*; *Lemoine v. Springfield Hockey Ass'n*, *supra*; *James v. Rhode Island Auditorium*, *supra*.

The trend of decisions as illustrated by the principal case is to extend the application of the doctrine of *volenti non fit injuria* — no wrong is done to one who consents. It can be predicted that as the general public becomes more familiar with ice hockey the rule of law applied in baseball cases will be applied to hockey.

Tort actions by spectators against state educational institutions will generally fail due to state immunity, and even where the school has created an athletic governing body, *e.g.*, University of North Dakota, the doctrine will ordinarily be extended barring recovery. *Anderson v. Board of Education of Fargo*, 49 N.D. 181, 190 N.W. 807 (1922); PROSSER, TORTS 1065 (1941); 28 CALIF. L. REV. 237 (1940) (school immunity criticized); See annotation, 160 A.L.R. 7. Of course, the state may assume liability by statute absent constitutional prohibition. *Mills v. Stewart*, 76 Mont. 429, 247 Pac. 332 (1926); *Sirrine v. State*, 132 S.C. 241, 128 S.E. 172 (1925).

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