

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Judge Cooper

CURTIS C. FLOOD,

Plaintiff,

vs.

BOWIE K. KUHN, individually and
Commissioner of Baseball, et al

Defendants.

Before:

HON. IRVING BEN COOPER,
District Judge.

70 Civ. 202

New York, May 28, 1970

STENOGRAPHER'S MINUTES

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE 7, NEW YORK

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Curtis C. Flood

v.

70 Civ. 202

Bowie K. Kuhn, et al.

New York, May 28, 1970

10:00 a.m.

(Trial resumed.)

- - -

THE COURT: Good morning. Mr. Kuhn, resume the stand, please.

THE WITNESS: Yes, sir.

B O W I E K. K U H N, resumed.

MR. HOYNES: Your Honor, before we begin this morning, I have a housekeeping detail I would like to take up with you and Mr. Topkis.

THE COURT: Certainly.

MR. HOYNES: You will recall that when Mr. Kennedy, the Commissioner of the National Basketball Association, was on the stand the other day, I made inquiry of Mr. Kennedy about the litigation pending in this court concerning the possible merger of the American National Basketball Leagues and at that time Mr. Topkis objected to my question, noting the fact that the papers were in the court and they would be the best indication or evidence of the purport of that suit.

You permitted the question to be answered.

Nevertheless it seemed to me that Mr. Topkis' objection had

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certain force to it and that in order to make the record as complete as possible on the subject I would like to introduce this morning the complaint in that action and the order of Judge Tenney, which is the outstanding order enjoining any further merger efforts by the two leagues, so that we will have the details of that in the record.

THE COURT: Very well. I take it there is no objection.

MR. TOPKIS: No, your Honor.

THE COURT: Received in evidence. Mark it as one exhibit.

(Defendant Feeney et al. Exhibit G received in evidence.)

MR. HOYNES: Did you mark them both with the same letter? Perhaps we could make them G-1 and G-2?

THE COURT: That's fine. G and G-1.

MR. HOYNES: Or G and G-1 would be fine, G being the complaint and G-1 the order of Judge Tenney.

(Defendant Feeney et al. Exhibits G and G-1 received in evidence.)

MR. HOYNES: Thank you very much, your Honor.

THE COURT: Not at all.

CROSS EXAMINATION BY MR. TOPKIS (CONTINUED):

Q Mr. Kuhn --

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2 MR. TOPKIS: Shall I proceed, your Honor? I apolo-
3 gize.

4 THE COURT: Please; oh, yes, indeed.

5 Q Mr. Kuhn, your firm appeared before the Celler
6 Committee in the early 1950's, didn't it?

7 A Yes.

8 Q Mr. Hughes was counsel there?

9 A Yes, I believe so.

10 Q And Mr. Carroll?

11 A Yes, I believe so.

12 Q And yourself?

13 A No.

14 Q You didn't participate?

15 A No.

16 Q But the firm did, and its appearance was noted on
17 the record?

18 A I believe so.

19 Q And the firm took the position there that the
20 legality of the reserve clause, under the antitrust laws,
21 would and should be tested by the rule of reason, didn't it?

22 A I believe so.

23 Q You take that same position today, of course.

24 A I do.

25 Q And is it your position, Commissioner, that not the

2 slightest deviation from the reserve system as it operates
3 today is feasible without destroying the operation of base-
4 ball as it exists today?

5 A Can I hear the question?

6 THE COURT: Yes. Mr. Reporter, would you please.

7 (Question read.)

8 A It is not my position.

9 Q What changes could be made without destroying base-
10 ball as it exists today?

11 A Obviously the changes that could be made are changes
12 that are best bargained out between parties that are involved
13 here, such as the clubs and the players. Those are the
14 parties who are involved. However, the reserve system,
15 Mr. Topkis, has evolved over the years. There have been
16 many changes in the reserve system, changes in the workings
17 of the waiver rule, changes in the workings of the option
18 provision, changes in the workings of the minimum salary
19 provisions and so forth.

20 The reserve system has been an evolving system,
21 and I expect it to continue to be an evolving system.

22 In the present negotiations, where we have tentative
23 agreement, there have been changes in the minimum salary.
24 It has been raised from 10,000 to 12,000 in the first year,
25 and so forth, increasing in subsequent years. There have

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2 been changes tentatively agreed on in the termination pay,
3 in the event a man is terminated, so all of these things are
4 changes in the reserve system, and I can expect and would
5 expect that this kind of thing would continue if the parties
6 are permitted to use their normal bargaining positions to
7 accomplish their goal.
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2 Q Now, would you please, Commissioner, try to
3 answer my question. I asked you what changes could be
4 made without destroying the fabric of baseball?

5 A The changes that the parties can agree to. I
6 think I have indicated in my testimony that there are areas
7 where I think the parties might be able to reach some
8 bargained solution if in the totality of a bargaining com-
9 plex, bargaining situation, taking into consideration all
10 the other factors, not just the reserve system, but all
11 the other factors that are being bargained for. Whether
12 in the total picture that you are dealing with a particular
13 additional change is fair is something that I can't sit
14 here and judge. The reserve system has changed. In my
15 judgment it will change. The players are well-represented
16 and I am sure Mr. Miller and the Players Association are
17 capable of bargaining changes in the reserve system.

18 Q Mr. Kuhn, were the players and the owners to
19 agree that at the end of five years a player would become
20 a free agent and be able to bargain with any other team
21 that he wished and that were arrived at as the result of
22 collective bargaining, you would regard that as perfectly
23 reasonable and proper, is that right?

24 A You would have to give me the full details of
25 the workings of that and I really can't answer the question.

gwb-2

Kuhn-cross

Q Suppose the mechanical workings were no more involved than what I just stated, Mr. Kuhn, namely, that at the end of five years in the majors a player would be free to bargain with any other club for his services and that arrangement were arrived at by collective bargaining. Would that in your judgment be a reasonable and proper arrangement?

MR. KRAMER: Could I inquire as to whether when counsel --

THE COURT: I don't hear you.

MR. KRAMER: Could I inquire when counsel asks about a player in the majors whether he means every player in the majors?

MR. TOPKIS: I do, indeed.

THE WITNESS: May I hear the question?

THE COURT: Yes. Read the whole thing, including Mr. Kramer's comment, so the witness gets the full import of the question.

(Record read.)

A I simply don't understand what you mean by reasonable and proper arrangement. I don't know what you are getting at in terms of my position.

Q Would it operate to destroy baseball?

A I would have to refer back to my answers of

gwb-3

Kuhn-cross

yesterday where I dealt with that particular subject and gave my views on that. If you would like me to repeat them, I will.

Q No. Here is my problem, Commissioner, and perhaps you will help me with it. As I understand it, it is your testimony that whatever the players and the owners arrive at by collective bargaining will be an appropriate modification of the reserve clause?

A I have said that is what I believe to be the proper mechanism for achieving modifications in the reserve system.

Q But if the modification that I described were to be reached by collective bargaining, you would regard it as fatal to baseball?

A I would have to say that I do not anticipate any such result in bargaining. It is a hypothetical question and I will give you that answer.

Q I might suggest to you, Commissioner, that your notion that this might be achieved by collective bargaining might also be hypothetical. Would you agree with me?

A No. I am referring to appropriate modifications. I am understanding you to mean appropriate modifications of the reserve system. That can be achieved by bargaining

between the clubs and the players.

Q And you would regard, then, as inappropriate modifications the various alternatives which you testified about yesterday which Mr. Miller proposed, is that right?

A Well, I took those one by one in some detail. If you would like to do the same thing, I will try to answer your question. I simply can not answer that shotgun.

Q Let's take just one, Commissioner. How about compulsory arbitration of the "players' salaries; would that be fatal to the structure and operation of baseball today?

A It would not.

Q And how about giving the player a right to play out his option as is done in professional football; would that be fatal to the operation of professional baseball today?

A I believe it would be very damaging to the operation of professional baseball.

Q Do you believe professional baseball could survive?

A It would depend on the degree to which the public view of the integrity of the game was that the game had become rife with tampering, that sort of thing. I couldn't judge that as I sit here. Sure I am that the public attitude would be that tampering would be inevitable in such a situation, and I am equally sure that that would have an

adverse effect on the game. It would depend a great deal, Mr. Topkis, on the number of players who might move under those circumstances, and so forth.

Q You were in court when Commissioner Rozelle testified?

A Yes.

Q You heard him testify that about fifteen players a year play out their option in professional football?

A I don't understand the question.

MR. KRAMER: Objection.

THE COURT: He didn't understand the question. Reframe it.

Q Did you hear Commissioner Rozelle testify that approximately fifteen professional football players per year play out their options?

A I heard him say something about ten in the past year. I didn't hear the word "fifteen" used, no, I did not.

Q Would you take my assurance that that was the figure?

A I don't recall it.

Q I will look it up, if you want.

Mr. Kramer and Mr. Gitter advise me that it was ten. My assurance would have been unwarranted and you

would have been wise not to take it.

A I suspected it was.

Q All right. What is there about professional baseball that makes you think that more than ten professional ballplayers would play out their option per year, or don't you think so?

A Well, I haven't said that. I think you are assuming something that I haven't said.

Q What is there about professional baseball that makes you think that the public would expect tampering in professional baseball when apparently there is none in professional football?

A I have never said there is none in professional football.

Q Do you believe that the public regards professional football as lacking in integrity because there is tampering?

A I believe that when you have a system such as --

Q Would you answer that question yes or no, please?

THE WITNESS: May I hear the question?

THE COURT: Surely.

Would you repeat it, Mr. Court Reporter?

(Question read.)

A I think it is inescapable that a certain element of that --

Q Could I have a yes or no answer to that, please?

A I can not answer it yes or no.

THE COURT: Answer it your own way.

A I think it inevitable where you have a system such as professional football used that there is going to be a danger that the public will fear tampering and, indeed, has feared tampering.

Q And you want baseball to be freer of that danger than football, is that right?

A I want baseball to be free of any danger of that kind.

Q At no matter what cost to the players?

A No, sir.

Q Incidentally, who does pay the economic cost of the reserve system?

A I don't know what the question means.

Q Does it cost the clubs any money in terms of economic analysis, and you are trained as an economist, you told us yesterday?

A Thank you for the concession. I didn't realize I had said that.

Q I thought you told us that you took a degree in economics at Princeton.

A I did. That's not quite saying you are trained

as an economist.

MR. KRAMER: I agree with that last statement.

Q By your standards you are not trained as an economist?

A I have a degree in economics from Princeton University.

Q How many hours of economics did you take at Princeton?

A Whatever it requires for a major in that subject. I don't really recall.

Q The bare minimum or more?

A I believe I took the required amount.

Q Now coming back to my question. With the judgment and insight conferred upon you by your studies at Princeton in economics, could you tell us whether the clubs have any economic cost in operating the reserve system?

A Yes.

Q You were in court when Mr. Nathan testified?

A No.

Q Have you read his testimony?

A No.

Q I believe he testified that the operation of the reserve system had as one of its consequences a depressant effect upon the wage level of the players. Would you

1 agree with that statement?

2 A No.

3 Q Would you believe that the operation of the
4 reserve system tends to raise the wage level of the players?

5 A Yes.

6 Q And would you believe that a seller normally
7 does better in selling his services when he has one buyer
8 or when he has more than one potential buyer?

9 A In the normal market situation, when he has more;
10 not in baseball.

11 Q In baseball you believe there are some peculiar
12 circumstances operating which makes the seller of services,
13 a ballplayer, likely to derive more for his services through
14 dealing with one possible buyer than were he to deal with
15 a number of possible buyers, is that right?

16 A THE WITNESS: May I explain, your Honor?

17 THE COURT: Yes.

18 In baseball the totality of the players are better
19 off, in my judgment, with the present system. Obviously
20 a few ballplayers might get higher economic benefits if they
21 were free to sell their services on the open market. The
22 great majority of the ballplayers would be injured because
23 there is a limited amount of resource available to meet
24 player compensation needs within any particular club operation.
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2 The result is for the great rank and file of ballplayers
3 there would be a loss of revenue, in my judgment.

4 Q You speak of a limited amount of resource. You
5 mean the resources of the club to pay the players' salaries?

6 A Salaries, bonuses, whatever it is, benefits, the
7 whole thing.

8 Q Compensation?

9 A Yes.

10 Q And you say that's limited?

11 A Yes.

12 Q As a matter of fact, it's been declining steadily
13 ever since the enactment or the original adoption of the
14 reserve clause, hasn't it, Commissioner?

15 A What?

16 Q The resources available or used to pay players'
17 compensation?

18 A No.

19 Q I believe it is stated in the Celler Report
20 that at the time the reserve system was adopted the player
21 compensation accounted for more than 50 per cent of club
22 expenses.

23 MR. KRAMER: Objection, because it is not a
24 question.

25 MR. TOPKIS: I will try to put a question mark

at the end of it, your Honor.

Q Do you recall that, Commissioner?

A I do not.

MR. TOPKIS: If I may have a moment, your Honor.

THE COURT: Surely.

(Pause.)

Q Commissioner, if I may read to you from the Celler Report.

A Would you give me a page?

Q 109. Commissioner, reading to you from Page 109.

"Since the adoption of the first reserve rule in September 1879, the share of major-league clubs' expenses going for team salaries has exhibited a continual decline. In 1874, the Boston Red Stockings spent 59.5 per cent of their expenses for team salaries. This increased steadily to 68 per cent by 1878, dropped to 54 per cent in 1880, the first year the reserve rule was in force. The Philadelphia Phillies spent 54 per cent of their 1885 expenses for team salaries.

"By 1929, however, team salaries accounted for only 35.3 per cent of major-league expenses. This share has continued to drop, reaching 32.4 per cent in 1939, 28.9 per cent in 1943, 24.8 per cent in 1946, and 22.1 per cent in 1950."

1 You recall that statement, Commissioner?

2 A I see it. I don't recall it. No.

3 Q You don't challenge it?

4 A Do I challenge those figures?

5 Q Yes.

6 A I don't challenge the exact figures, no.

7 Q Commissioner, what proportion of major league
8 expenses today is accounted for by players' salaries?

9 A When you say "salaries," have you switched to
10 "salaries" from "compensation"?

11 Q No, I meant compensation.

12 A I would say the percentage today is something
13 in the neighborhood of 25 per cent. I really am not sure
14 but it is something in that neighborhood.

15 Q I think, Commissioner, that the data produced
16 to us by your counsel reveals the figure 19.4 per cent.

17 MR. KRAMER: I object to that, because I have
18 produced no data.

19 MR. TOPKIS: Excuse me. By counsel for the other
20 defendants, then.

21 Q Would that figure strike you as appropriate?

22 A If that is what the data shows, Mr. Topkis, I
23 certainly wouldn't quarrel with it.
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Kuhn-cross

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MR. TOPKIS: A moment, if I may, your Honor.

THE COURT: Yes, indeed.

Q Pardon me, Commissioner. I inadvertently misled you. The 19.4 per cent was a five-year summary figure for the last five years. The 1969 figure was 21.5 per cent.

THE WITNESS: May I explain my answer, your Honor?

THE COURT: Yes, indeed.

A If you look at the totality of salaries in which major league clubs are involved, I am sure you will find it is higher than that figure. You are dealing only with major league salaries in the present system, where you have owned and controlled minor league clubs.

Of course, the amount of money going to professional baseball salaries is higher than the figure you are using by a considerable amount.

Q Now, Commissioner --

MR. TOPKIS: Excuse me just a second.

Q Commissioner, the figures that I read to you earlier from the Celler Report as to 32.4 per cent in 1939; 28.9 per cent in 1943: There were the expenses to which you just adverted to in those years, weren't there?

A There were the expenses to which I adverted. Is that what you are asking me?

Q Yes.

mpbr 2

Kuhn-cross

A They were certainly operating minor league clubs in those yeasrs, yes.

Q All right. Now, Commissioner, I think you said yesterday in your discussion of integrity that the appearance of integrity as well as the fact of integrity is indispensable. Do I recall correctly?

A Yes, sir.

Q Will you say that there is the appearance of fairness in baseball being regulated by a Commissioner picked by the owners without consultation with the players?

A Yes. I believe there is, and I think that is established by the record of the Commissioners who have served in this job, Mr. Topkis.

Q Now, you based your concern for what might happen were the reserve clause to be eliminated or modified on the history of the '70's and '80's, principally; is that right?

A '70's, '80's, '90's.

Q Now, the Phillies of 1884, Philadelphia National League team --

MR. TOPKIS: Strike that, please.

Q You testified, I believe, that one of the works you consulted was Seymour's book on baseball, is that right?

A Yes.

Q Do you recall Mr. Seymour -- I suppose it is

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mpbr 3 Kuhn-cross 821
Professor Seymour -- stating that the Philadelphia National
League Club of 1884 had gross receipts of \$39,582.84?

A I don't recall that, no.

MR. TOPKIS: Does the Times Library mind if a
book belonging to them is marked for identification?

May this be marked for identification, your Honor?
I do not propose to offer it as an exhibit.

THE COURT: Certainly.

(Plaintiff's Exhibit 26 marked for identification.)

MR. TOPKIS: So that the record may be clear, we
have just marked for identification a volume entitled,
"Baseball, The Early Years," by Harold Seymour, published in
1960, in New York, by the Oxford University Press.

Q That is the book you were referring to, Commissioner?

A Yes.

Q Now, drawing your attention to page 118, I call your
attention to the last paragraph, and if I may approach, do
you see the statement there about the Philadelphia National
League Club?

A Yes. I see it.

Q Do you accept that statement, namely, that the
Philadelphia Club of 1884 had total receipts of thirty-nine
thousand --

THE COURT: Wait a minute. You can't read it.

1 It is not in evidence. You may ask him, "Do you accept that
2 statement?" If he says, "Yes," then you might be allowed to
3 read it.
4

5 Q Do you accept that statement, Commissioner?

6 A I have no reason to doubt that statement.

7 MR. TOPKIS: May I, then, read it?

8 THE COURT: "The Philadelphia Club of 1844 had total
9 receipts of \$39,582.84."

10 Q Now, Commissioner, do you suggest to this Court
11 that the operations of a club or of a league made up of clubs
12 one of which grossed \$39,582.84, eighty-odd years ago, is a
13 reliable guide to how a business with one hundred times those
14 revenues might behave eighty years later?

15 A I do.

16 Q You consulted Seymour's work, the Celler Report and
17 what other volumes, did you say?

18 A The two encyclopedias and Wallop's Book on Baseball.

19 Q Both Professor Seymour and the Celler Report expressed
20 doubts as to the indispensability of the reserve system in
21 its present form, don't they?

22 A I believe they do.

23 Q Commissioner, would it be your view, from having
24 known them down through the years, that the club owners of
25 major league baseball are pretty good businessmen?

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2 A Some yes, some no.

3 Q Like other businessmen, in your experience?

4 A No. Not like other businessmen, in my experience.

5 Q Incidentally, Commissioner, do you happen to know
6 how many businesses founded in the '70's and '80's still
7 exist today?

8 A No; I do not.

9 MR. HUGHES: Your Honor, may I interrupt to point out
10 that referring to the question and the answer that the
11 Commissioner gave, the Celler Report didn't say any such
12 thing. What the Celler Report said is:

13 "Baseball's history shows that chaotic conditions
14 prevailed when there was no reserve clause. Experience
15 points to no feasible substitute to protect the integrity of
16 the game or to guarantee a comparatively even competitive
17 struggle. The evidence adduced in the hearings would clear-
18 ly not justify the enactment of legislation flatly condemning
19 the reserve clause."

20 That is on page 229, which is one of the conclusions
21 reached by that Committee.

22 MR. TOPKIS: Your Honor, there are various con-
23 clusions expressed by the Committee, and I would suggest
24 from the context that the Committee was speaking of some
25 kind of reserve system, not the holy system as it exists

today.

THE WITNESS: Your Honor, could I expand my answer?

THE COURT: Yes.

THE WITNESS: I am sorry. I did not hear you referring to the Celler Committee Report in your question. I thought you were referring to Seymour and one of the other books.

Obviously, Mr. Hughes is correct. I don't think the Celler Committee reached any such conclusion.

Q Well, the Celler Committee Report is in evidence, and I suppose it can speak for itself. You stand by your statements as to Professor Seymour's book?

A That was indicated. He quoted from you to that effect, Mr. Topkis.

Q I think I was among several authors Professor Seymour quoted; is that right?

A I recall you particularly. I don't recall the others.

Q In your most recent reading, was that? Well, let it pass.

Coming to the subject of the competence of major league club owners -- I am sorry. I have forgotten your answer to a question, and so I must put it again, with my apologies.

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2 In your experience, are major league club owners
3 better or poorer or about the same as businessmen engaged in
4 other industries?

5 A I think some of them are as good as the average
6 businessman; some are better, and some, where they are in-
7 volved in sports, are vastly more concerned with the sporting
8 aspects than they are with the business aspects.

9 Q Who are those who are vastly more concerned with the
10 sporting aspect?

11 MR. KRAMER: I object, your Honor, if we are going
12 to get into individual names now. This places the Com-
13 missioner in a very difficult position. Unless it is crucial
14 to his case, I suggest we not go into names now.

15 THE COURT: I think you ought to reconsider the
16 question, Mr. Topkis. Do you press it?

17 MR. TOPKIS: No; I do not, your Honor.

18 THE COURT: All right.

19 Q Commissioner, you told the Court, don't you, that
20 if a ball club pays too much for the player talent it will
21 go broke. Would that be a fair summary of part of your
22 testimony?

23 A That could happen, yes.

24 Q Well, that is true of any businessman, isn't it,
25 that if he pays too much for something that he uses he will

go broke?

A Yes. I believe so.

Q Why, then, Commissioner, would you believe that these businessmen who today own major league baseball would pay too much? Aren't they as bright as you are?

A The difficulty -- oh, they are as bright as I am, yes. Do you want me to stop there?

MR. KRAMER: I think so.

Q I am quite content to have you either stop there or go further.

A The difficulty is that you are talking about a sports league, and that obviously differentiates baseball from other business operations. If the New York Yankees, let us say, attract all the best talent, so that the other clubs in the American League cannot compete effectively with them, the Yankees are hurt, the other clubs are hurt, and the sport will ultimately fail.

Q Wouldn't it be stupid for the Yankees to do that, because nobody would come to watch the Yankees play, would they?

A No; it wouldn't be. Perhaps it would be unwise, but it is not necessary that you can say that it wouldn't happen, because in the past it has happened where the opportunity presented itself.

Q Well, one business or another in the course of American history has encountered adversity. I suppose we could agree on that.

A Yes.

Q Is there any particular reason why baseball should be free from that risk?

A Within a sports league you have a different problem. If you are talking about the application of the antitrust laws, if that's what you are asking me --

Q I am just asking you about the laws of economics. What is there about baseball that entitles it to immunity from the ordinary laws of economics?

A The ordinary laws of economics, and as applied by the antitrust laws, would plainly impair if not destroy the operations of sports leagues. That was the conclusion, I believe, of the Celler Committee. That is why baseball is exempt from the antitrust laws, in my judgment.

Q Oh, Commissioner --

MR. HUGHES: I object to that.

MR. KRAMER: I object to that.

MR. HUGHES: I move to strike it out.

MR. TOPKIS: I move to strike the last part of the witness' answer, your Honor.

THE COURT: Motion denied as to the last part of the

witness' answer. The motion to strike your comment, Mr. Topkis, is granted. It is stricken.

Q Who exempted baseball from the operation of the Federal Antitrust Laws, Commissioner, for the reason that but for such exemption the game would die?

A I believe the ruling of the Supreme Court in the Toolson case was grounded on such considerations. That's my judgment.

Q Well, you would agree with me that his Honor can read the Toolson case as well as you?

A I never quarrel with that.

Q Refresh me, if you will, Commissioner: What did you say yesterday about the effect on salary levels of a system of compulsory arbitration?

A In my view and in the event --

Q I will take that at this point. I will be glad to have it.

A If that is what you are asking me, that if compulsory arbitration would not result in the fairest decision, player by player, as to what the salary would be, inevitably, in my judgment, arbitration results in sort of a dividing of the loaf. Therefore, certain players would get more and certain players would, in my judgment, get less than they deserved.

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2 Q Is that what you would do if you were the Arbitra-
3 tor: Give somebody less than he deserved?

4 A No, sir.

5 Q Or somebody more than he deserved?

6 A No. I would not, but I believe that is the general
7 trend of arbitration. I know something about baseball.
8 I think I could handle that fairly, since you put the
9 question to me, if I were to be involved in it.

10 Q So that, if the Arbitrator were a fair man, exper-
11 ienced in baseball, he could do a fair job and treat baseball
12 clubs and players fairly?

13 A I don't know whether he would or not. It's possible.
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Kuhn-cross

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Q You could?

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A I believe I could.

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Q Would you think Hank Greenberg could?

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A I don't know.

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Q But someone experienced in baseball other than you could do a fair job?

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A If you are talking about a straight question of achieving essentially the fair salary for an athlete --

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Q That is what I am talking about.

11

A -- as opposed to the problems that were presented in other areas that I testified about, then I think the answer to your question is yes.

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Q That is to say, you are not unique?

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A No, I am not.

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Q Would you think that players' salaries would be increased under a system of compulsory arbitration -- not compulsory arbitration, but under a system which gave the player or the club the right to have a salary dispute arbitrated?

21

A I don't really know.

22

Q Would you think that the adoption of a system of arbitration would do great harm to the operation of major league baseball?

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A I think it would be particularly harmful in the area

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Kuhn-cross

of player-club relations as I testified yesterday. The measure, Mr. Topkis, I find it difficult to place upon it. It would be harmful in my judgment.

Q Harmful to player-club relations?

A Yes, sir.

Q And in what respect? Could you expand on that a little bit?

A Yes. It would, as I explained yesterday, it would tend to create a gulf between the players and the clubs, and this in a time when it is, in my judgment, essential that the player-club relations be improved, the players and clubs be brought closer together. It would tend to create a force between the players and the clubs which in its total effect, I think, would be harmful to that relationship.

Q What is this gulf that would be created if the players could appeal to some arbitration tribunal for fair treatment if they felt they were not being treated fairly?

A The gulf is simply a further inhibition on relationship between a club and a player. Inevitably, in my judgment, that would happen, and my feel for the situation, from my experience in the game, is that this would be a bad thing.

Q Your experience in the game has all been on the management side, hasn't it?

A I have been Commissioner of Baseball for the last

2 year and three months, so the answer is no.

3 Q Commissioner of Baseball appointed by, selected by
4 management.

5 A Well, I answered the question, yes --

6 Q I thought you did.

7 A -- I do not consider that to be on the management
8 side, I can assure you, nor have I conducted myself in this
9 office.

10 Q And you tell the Court that in your judgment player-
11 club relations would be worse if the players could appeal
12 to an impartial tribunal, for example, yourself, than if
13 the player had no alternative but to take the club's final
14 answer or quit baseball?

15 A Well, that simply isn't the situation. The player
16 does have an alternative to taking the final offer. The
17 players are in a perfectly respectable individual bargaining
18 position with the clubs. They are normally able to bargain
19 from the clubs a higher salary than the club offers. The
20 bargaining is certainly two-sided. The player is every bit
21 as important to that club as the club is to that player in
22 almost every case.

23 Q Commissioner, you recall that in the Gardella case
24 Judge Frank spoke of the players' lot as being "something
25 resembling peonage." Do you remember that language?

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A I recall it.

Q And I think he spoke also of them being highly paid but nonetheless peons. Do you recall that?

A I recall it.

Q And it is your feeling that they are something other than peons?

A Of course.

Q Even though they have no alternative to employ?

A You mean within baseball?

Q Yes.

A Yes, of course, they are not peons.

Q Commissioner, you testified yesterday, I believe, that you stay out of the owners' negotiations with the Players Association, is that right?

A I said I stayed out of the merits of those negotiations. I never said I stayed out of them. I did not participate in the strategy of those discussions. That is my policy.

Q Have you from time to time conferred with representatives of the owners in connection with their negotiations with the representatives of the Players Association?

MR. KRAMER: May I inquire if he means since he has become Commissioner?

MR. TOPKIS: Yes, of course.

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A Yes, I have.

Q Have you ever conferred with representatives of the Players Association in connection with their negotiations with the owners' representatives?

A Yes, I have.

Q Now, you testified yesterday, I think, that --

THE WITNESS: May I explain an answer?

THE COURT: Yes.

THE WITNESS: There is one area where I have gotten into the merits. This is the only area. In the current negotiations, one of the issues has been the arbitration powers of the Commissioner in handling grievances.

The Players Association has urged a curtailment of the Commissioner's powers.

Under the major league agreement, your Honor, which is part of the Blue Book, which is Plaintiff's Exhibit 6, Article IX, it is provided that each of the parties hereto subscribes this agreement in consideration of the promises of all the others that no diminution of the compensation or powers of the present or any succeeding Commissioner shall be made during his term of office.

Obviously, anything that affects my arbitration jurisdiction could diminish my powers while in office, so that I have discussed with the Players Association, as Mr.

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2 Miller knows -- not the Players Association; I mean with
3 the Player Relations Committee which represents the clubs,
4 the area of my arbitration jurisdiction and the bargaining
5 with respect to that.

6 Q You said yesterday, I think, that following a meet-
7 ing in Puerto Rico in December of 1969 of the players' repre-
8 sentatives, the subject of the reserve clause was laid aside
9 in the negotiations between the players and the owners in
10 January; is that right? Was that your testimony?

11 THE WITNESS: May I hear that question?

12 THE COURT: Yes; Mr. Court Reporter.

13 (Question read.)

14 A Essentially that is what I said, yes.

15 Q Where did you get that idea, Commissioner?

16 A I got that idea from discussions with counsel in
17 this case.

18 Q So you have no first-hand knowledge of it?

19 A No.

20 Q Now, did you participate in negotiations with
21 representatives of the players when you were an attorney in
22 private practice?

23 A Yes, sir.

24 Q Representing the National League?

25 A Yes, sir.

Q When was that, Commissioner?

A I participated in negotiations from the time that Mr. Miller came into the picture, which would have been in the summer of 1966, up until the time I became Commissioner, which would have been February 1969.

Q Now, at various times, Commissioner, didn't Mr. Miller make various proposals for modification of the reserve system?

A Yes. As I understand the reserve system, he did.

Q Did you or any other representative of management in those negotiations ever criticize those proposals because they were lacking in precision?

A Yes.

Q Do you have any difficulty in understanding the precision of a proposal that there be adopted a system of arbitration of the players' salaries?

A May I hear that, your Honor?

THE COURT: Would you repeat it, please, Mr. Court Reporter.

(Question read.)

A I don't understand the question.

Q Do you understand what I mean when I speak of a proposal that there be a system of arbitration under which either the player or the club would have the right to arbitra-

tion of a dispute over salary?

A In a very general way I do. Of course, you are putting no mechanics on that at all, so I have to say in a general way I do.

Q Suppose I add under AAA rules.

A That would help it. It certainly does not provide all the necessary details you would need in a proposal of that kind.

Q You have drafted a lot of contracts, I suppose, in your private practice?

A Yes, sir.

Q Have you written arbitration clauses into some of those contracts?

A Yes.

Q Have you ever used language like "Any dispute under this contract shall be determined pursuant to the rules of the American Arbitration Association"?

A I have.

Q Have you regarded that as sufficiently precise?

A In that context that we are talking about, not in this, yes.

Q Would you regard that as sufficiently precise to be comprehensible were that to appear in the player's contract?

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2 A No.

3 Q What is the imprecision that disturbs you?

4 A I don't know at what point you are suggesting that
5 a salary dispute would become arbitrable.

6 Q You don't know that when you write it into any other
7 contract, do you?

8 A You need to know it in this.

9 Q Why?

10 A How are you going to decide at what point you
11 refer to arbitration when you are working in the context
12 of a baseball season or the spring training approaching
13 and so forth? You need more details, in my judgment.

14 Q Otherwise it couldn't work?

15 A Oh, I wouldn't say that. You want to work it most
16 efficiently; you need more details.

17 Q I see, but you could judge its desirability, couldn't
18 you, or its feasibility if the proposal were no more complex
19 than I just outlined to you?

20 A Well, I have answered your questions on more general-
21 ized things than you have said, so, of course, you can get
22 some general idea, but when you get down to bargaining,
23 Mr. Topkis, you need something a good bit more precise than
24 the rather generalized questions you are asking here.

25 Q Now, while you were representing the league, a

proposal for arbitration was made by the Players Association, wasn't it?

A I don't recall.

Q Commissioner, did you say yesterday that baseball needs the reserve system as a means of enabling clubs to recoup their development costs, their player development costs?

A I said you need a reserve system in order to permit the player to give to the club, through his services, the services which will permit it to benefit from the expenditures it has made, yes.

Q Now, tell me, Commissioner, why couldn't that recovery by the club be accomplished if the player were under a contract for a term of years, say, five years?

A I don't know what you mean by that question.

Q Suppose every player on entering major league ball were to sign a contract.

A Major league ball, is that what you are saying now?

Q Yes, that's right.

A The recoupment which you refer to is part of the consideration which I think a club is entitled to. Beyond that you develop an organized team characterized by team work, playing together, and you develop a fan following for those players, such as a Johnny Bench from Cincinnati, and

1 if he were free to go at the end of five years, you lose not
2 only the investment that has been made in developing him,
3 but you lose that important ingredient which is the fan fol-
4 lowing, and you lose the critical part that he plays in the
5 team work of the Cincinnati Reds.
6

7 Q Well, you say you would lose the investment in
8 developing him. Why couldn't you recoup that over the five-
9 year term?

10 A It would depend on the ballplayer to a considerable
11 extent when you would recoup the investment, but the legitimate
12 interest of the club, in my judgment, goes farther than the
13 simple recoupment of investment.

14 Q I appreciate your testimony to that effect. I am
15 inquiring now, however, whether the problem of investment
16 recoupment could not be solved by a five-year term contract.

17 A I couldn't say unless you talked about particular
18 ballplayers. The value that a player gives his club varies
19 greatly from player to player.

20 Q Suppose everybody signed five-year contracts; wouldn't
21 that tend to average out the greater or lesser benefit from
22 varying players and thus solve the problem to which you re-
23 fer?

24 A I don't see how it would, because the whole thing
25 would fall in a different time.

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2 Q In your judgment, a far longer term would be re-
3 quired, is that right?

4 A I don't know what the precise period is in terms
5 of simple recoupment. I don't know how to answer that
6 question.

7 Q To your knowledge, Commissioner, what is the average
8 length of time that a player spends in the major leagues, or
9 don't you have the figure?

10 A I don't have a precise figure in mind.
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Q It has been suggested to me that of players who come up to the majors and last sixty days their average playing life is four and three-quarter years. Does that figure conform to your understanding?

A Mr. Topkis, I have heard that figure used by Mr. Miller. I am just not sure whether it is right or wrong.

Q All right. In your judgment, Commissioner, what term of years in a contract would be appropriate to permit the clubs to recoup their development costs?

A I thought I had answered that but if you want me to try again -- I don't know.

Q You can not. And when you said yesterday that ten years would not be a long enough term to give a club control over a player but that at the 16-year level the impact would be minimum, what considerations did you have in mind then? Were you talking about the desirability of maintaining a unified team?

MR. KRAMER: Objection because he has restated the testimony of the Commissioner.

THE COURT: I will let the Commissioner handle the question as he knows best. He seems to know how to take care of himself. Answer it, please.

THE WITNESS: May I hear it, please?

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Kuhn-cross

THE COURT: Yes. Read the question, Mr. Court Reporter.

(Question read.)

A Well, I think what I said yesterday will speak for itself, but the factors that I took into consideration in using a 16-year figure, which I think I did use in referring to Hank Greenberg, were simply that I felt in terms of the number of ballplayers that reached that level of years in baseball, there would be a minimal effect.

THE COURT: Mr. Topkis, are you going to something else?

MR. TOPKIS: In just a moment I was, your Honor, but I have a couple of questions in this area.

THE COURT: That is the reason I asked. Finish it and we will take a short recess.

MR. TOPKIS: Fine, your Honor. Thank you.

Q Well, when you say that the effect would be minimal after 16 years, is the consideration that you are concerned with the impact on a unified team?

A I think it could have some effect on a unified team, but it would be minimal because of the number of players involved.

Q But at the 10-year point it would still be a

significant impact, is that right?

A In my judgment, yes.

Q And it is that impact, that is to say, on team unity, that has you concerned when you say that baseball would be harmed by the adoption of a system whereby a player could negotiate with other clubs at the end of ten years?

A That is one factor.

Q What other factors did you have in mind?

A Those I mentioned yesterday. Would you like me to go into them again?

THE COURT: I think you should.

Q Very briefly, if you would, Mr. Commissioner.

A Without trying to cover the entire ground, the integrity question of course appears; the economic problem which I described appears; mechanical workability, one of those things that I think presents some difficulties but possibly could be worked out. I don't know. That is a kind of bargaining problem. Equalization of teams would present a problem. This also has an economic impact. These are some of the things I mentioned yesterday.

Q Commissioner, were you in court when Hank Greenberg testified?

A Yes, sir.

Q Do you remember his testimony that in his judg-

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2 ment a player ought to be set free at the end of five years,
3 and I mean no pejoratives by the language "set free"? You
4 heard that testimony?

5 A I think that is what he said, yes. I didn't
6 find Hank's testimony altogether crystal clear.

7 Q My recollection is that he said that unless a
8 team could establish such a rapport with a player over five
9 years that it would probably be in both their interests
10 for the player to go elsewhere.

11 A I think he said something to that effect.

12 Q Do you disagree with that?

13 A Yes.

14 MR. TOPKIS: Now, your Honor, I am prepared to
15 go to another subject.

16 THE COURT: Announce a short recess.

17 THE CLERK: Short recess. All rise.

18 (Recess.)

End 5

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Kuhn-cross

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MR. TOPKIS: May I proceed, your Honor?

THE COURT: Please.

MR. TOPKIS: Thank you.

Q Mr. Kuhn, there was negotiated prior to January 1, 1968, an agreement between the ten clubs comprising the National League of Professional Baseball Clubs and the ten clubs comprising the American League of Baseball Clubs as parties of the first part and the Major League Baseball Players Association as party of the second part, was there not?

A Both before and after that date, Mr. Topkis.

Q And you participated in the negotiations?

A Yes; I did.

Q That is known as the basic agreement, isn't it?

A Commonly referred to as the basic agreement, yes.

MR. KRAMER: Defendant Feeney Exhibit F.

THE COURT: Thank you.

MR. TOPKIS: Thank you, Mr. Kramer.

Q The basic agreement in Article 8 read, in part, did it not:

"The parties shall review jointly the matters of...
(b) possible alternatives to the reserve clause as now constituted... The joint review of the reserve clause shall be completed prior to the termination date of

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2 this agreement."

3 That termination date was December 31, 1969; isn't
4 that right?

5 A In the agreement it was December 31st, and it con-
6 tinued beyond that, by its own terms.

7 Q Now, who participated in that joint review on the
8 part of the players?

9 A I did not participate in that joint review, so I
10 couldn't really answer your question other than to speculate.

11 Q Do you know who participated in that joint review on
12 the part of the clubs?

13 A I know that Mr. Gaherin and his attorneys did.
14 Beyond that, I couldn't tell you.

15 Q What if any possible alternatives to the reserve
16 clause were proposed by the parties participating in the joint
17 review?

18 A I did not participate in those discussions, Mr.
19 Topkis, so I would be speculating if I tried to answer.

20 Q Do you know, Commissioner, whether the players'
21 representatives suggested any possible alternatives to the
22 reserve clause as now constituted in the course of that joint
23 review?

24 A I don't know.

25 Q Do you know whether the representatives of the clubs

suggested any possible alternatives to the reserve clause as now constituted in that joint review?

A I don't know. I repeat, I was not there and did not participate.

Q I understand.

Now, Commissioner, you testified yesterday in connection with Exhibit C -- do you recall that document?

MR. TOPKIS: May I show the witness my copy, your Honor?

THE COURT: Surely.

MR. TOPKIS: That is the document I have in mind. Right.

Q (Continuing) Commissioner, you will forgive me if from time to time in walking back I may turn my back on you.

A Yes, sir.

Q Commissioner, on page 2 of Exhibit C there appears a tabulation of players drafted and not drafted who were signed to professional baseball contracts; is there not?

A Yes.

Q Now, all of the players there tabulated, both those drafted and those not drafted, were subject to the draft; isn't that right?

A I would think most of them, yes, if not all. I am just not certain. There might be some exceptions not oc-

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Kuhn-cross

2 curring to me right now. But certainly, most of them.

3 Q Nearly all; is that right?

4 A I would say so.

5 Q Commissioner, I think yesterday you read to the
6 Court a statement quoted at page 18 of the Celler Report,
7 on the need for the reserve system, the author of which was
8 Abraham G. Mills. Do you remember --

9 A I do.

10 Q -- reading that excerpt to the Court?

11 A Yes.

12 Q That was the same Mr. Mills, was it not, who headed
13 the Commission which reported that Abner Doubleday discovered
14 baseball, was it not?

15 A I don't know that he headed that Commission. He
16 may very well have. I just don't know.

17 Q You have relied in your testimony here on the
18 writings of Professor Seymour?

19 A Yes. I read his book.

20 MR. TOPKIS: May I have it, please?

21 Q I show you Plaintiff's Exhibit 26 for identification
22 and call your attention to the last sentence appearing at the
23 bottom of page 9, and I ask you whether you accept that state-
24 ment as fact.

25 A Yes. I accept that he was chairman.

MR. TOPKIS: With that, I would read it into the record.

"After three years of collecting testimony consisting of recollections but no solid documentary evidence, Mills published a report dated December 30, 1907, claiming that baseball originated in the United States, and the first method of playing it was 'according to the best evidence obtainable to date' devised by General Abner Doubleday at Cooperstown, New York, in 1839."

Why is it, Commissioner, that you rely on Mr. Mills for his statement about the reserve clause when you have a certain scepticism about his statement about General Doubleday?

A The passage I read from is in a stipulated portion of the Celler Committee Report, to which you have agreed. I don't think there is any question about its accuracy in this forum.

Q Well, the stipulation, of course, is that Mills said that, not that it is fact. Now --

A Is that a question?

Q I thought you made a comment; so did I.

Commissioner, you testified, I believe, that trading and assignment of contracts of players is necessary, even indispensable to the operation of baseball today; is that

right?

A Yes.

Q Now, this was a clear perversion of the original intent of the reserve rule, was it not?

A Not in my judgment.

Q What in your judgment was the original intent of the reserve rule?

A To permit the clubs to protect their rights to the services of a certain number of players so as to avoid the host of evils which had entered into the professional game by reason of revolving, gambling and so forth.

Q Well, you relied for your historical information in part on the Celler Report, didn't you?

A Yes; I did.

Q And that report reads, at page 111 -- and it is, of course, in evidence -- as follows --

MR. KRAMER: Just a moment, please.

MR. TOPKIS: Surely.

Q (Continuing) "The original purpose of this rule was to reduce costs by curtailing competition for star players' services."

Do you disagree with the report?

A I believe that was one of the purposes, yes.

Q No. The report said, "the original purpose."

Do you want me to read it to you again?

A No. I heard what you read. Are you asking me if that was the original purpose?

Q That is correct.

A I am really not quite certain what that phraseology means, Mr. Topkis. I believe that was one of the purposes. I don't know how else to answer the question.

Q Well, the report continues, and I quote:

"Subsequently, this rationale was supplemented by the view that the rule was necessary both to equalize competition among clubs with unequal resources and to remove doubts as to the honesty of baseball contests by enforcing player loyalty to his contracting club."

Would you agree with that statement?

A I believe, if I may answer that in this way, that there were a number of reasons for the adoption of the reserve system. Certainly, one of them was -- was to curtail players' salaries, which had risen to a very high percentage of operations because of the bidding which resulted from revolving, and the clubs were not able to successfully operate financially, and the vast majority of them went out of business as a result.

That's the best answer I can give you.

Q Commissioner, the Celler Report, which you have

seen states that the original purpose of this rule was to reduce costs by curtailing competition for star players' services.

On what source do you rely for your belief that there was any other purpose than the purpose of curtailing competition for star players' services?

A Well, the Celler Report indicates that there were other purposes, and certainly the other history indicates that there were other purposes.

Q Well, I read to you two consecutive sentences from the Celler Report, one which says that the original purpose was to curtail competition for star players' services and another that says, "Subsequently this rationale was supplemented" by other considerations.

Now, I ask you, on what do you ground your belief that there was more than one original purpose? On what source?

A My reading on the subject of the history of baseball.

Q Could you tell me what source you have in mind?

A The sources that I have identified as what I have read in this area, plus my general reading on the subject, as I indicated in the beginning of my testimony.

Q There is no passage in Professor Seymour's work

which suggests that the original purpose was other than to reduce costs by curtailing competition for star players' services, is there?

A I don't recollect whether there was or not. I would have to go through the book to be certain.

Q You testified yesterday, Commissioner, that the resources of the owners varied widely. Do you recall that testimony?

A Yes, sir.

Q And I believe you then testified that you didn't know which club in each league had the greatest resources, and you didn't know which club had the least resources.

A Yes, sir.

Q Do you know which two clubs in the National League have the greatest resources?

A I don't, really. I couldn't give you any precise answer to that.

Q Nor which three clubs have the greatest resources?

A No. I couldn't answer that.

Q Nor which clubs have the least resources?

A No. I couldn't answer that.

Q And the same is true of the American League?

A The same is true.

Q What, Commissioner, is the source of your information

on which you ground your belief that the resources of the clubs vary widely?

A My experience in baseball, my general knowledge -- as Commissioner and as counsel; my observation of the operations of the clubs.

Q Are you given financial statements of the clubs, either operating or balance sheets?

A I actually have collected financial data of the clubs. I can't say that I am particularly familiar with it. It's in the hands of my accountants.

Q You have never seen any audited financial statements of any of the clubs, have you?

A Oh, I'm sure I have at some time in the past.

Q Well, I ask --

A But not on a regular basis, Mr. Topkis.

Q I ask, because the information that has been submitted to us consists of unaudited information. Have you seen audited information?

A I would assume that in the past I have seen some audited information here or there. I would assume that must exist. I certainly don't know. I have no recollection.

MR. HUGHES: Your Honor, I would like to interrupt to show that whatever information was furnished was furnished under enormous time pressure, and to suggest that we had to

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2 have audited figures to comply with the undertakings we made
3 I think taxes the credulity of the Court.

4 THE COURT: I think it no more than fair to add --
5 and this ought to be definite on the record -- that counsel
6 for the defense were under extreme pressure and did in my
7 estimation a yeoman's job in coming up with the material
8 that they were able to submit, but I don't think Mr. Topkis
9 meant to imply anything to the contrary.

10 MR. TOPKIS: Had your Honor not said that, I would
11 have. I certainly agree with you entirely. My friends on
12 the other side were entirely devoted in their zeal to comply
13 with our requests, and we truly appreciate it.

14 THE COURT: That does you credit and does counsel
15 all around credit that is due them. All right. Proceed.

16 Q Commissioner, do you have any idea how much of
17 the resources any owner has committed to any club in the
18 last ten years?

19 A I don't understand the question. I think it lacks
20 sufficient precision for me to answer it.

21 Q I have trouble with precision.

22 Have you been in any way advised as to what resources
23 any club owner has committed to his club or its operations
24 in the last ten years?

25 A Are you referring to out of his private funds as

opposed to corporate funds? I mean, this is where I am simply not clear on your question.

Q Either way, Commissioner.

A Well, I have seen the expense reports of the clubs, so I have some idea of what the corporate expenditures are, in a very general way, and my information about the commitment of private funds is the general information that I get in the normal course of my business. It doesn't necessarily have a precise dollar sign on it.

I gave you the example yesterday of Mr. Kaufmann's commitment to the Royal Academy at Sarasota, a \$3 million commitment, but generally my information is very generalized.

Q You don't get any regular reports?

A I do not.

MR. TOPKIS: A moment, if I may, your Honor?

THE COURT: Certainly.

Q Commissioner, do you know how many players entering major league ball last ten years?

A Well, I believe the rate would be four a club a year, something in that neighborhood.

Q Do you believe that each club -- I am just trying to understand your answer. Do you believe that each club has about four ten-year players?

A Well, I must have misunderstood your question.

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2 Could I hear it again, your Honor?

3 THE COURT: Certainly. Mr. Reporter, will you
4 please read the question.

5 (Question read.)

6 Q I am sorry, Commissioner. I or the reporter or
7 somebody slipped. Forgive me. My question is this: What
8 portion of ballplayers who enter major league ball survive
9 for ten years or remain active as players for ten years?

10 A There is a fair amount of these. I just don't have
11 the percentage in mind, Mr. Topkis.
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Q All right, Commissioner. Do I understand that so long as a ballplayer lives he never escapes the operation of the reserve system?

A If he is released, he is removed from the operation of the reserve system.

Q Other than by release, he remains bound for life, is that right?

A I believe release is the outlet from the reserve system. Offhand I don't recall any others. I may be overlooking something in the rule here, but I don't recall any others.

Q Commissioner, to your knowledge was it proposed by the Players Association that a ballplayer be made a free agent automatically upon attaining age 65, and was that proposal rejected by the owners?

A Mr. Topkis, I have heard something of that type. I couldn't tell you whether that is so or not.

Q The proposal was not made to you in your capacity as a representative of the National League?

A It was not. Not that I recollect.

Q Commissioner, major league Rule 14 provides that "A player who desires to retire from the profession shall make written application to his club stating fully his reasons therefor. The club shall forward the applica-

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Kuhn-cross

tion with the club's recommendation to its league president, and he will transmit it with his recommendation to the Commissioner. The Commissioner, if he deem proper, may grant such application upon the conditions hereinafter set forth and upon such other terms and conditions as the facts and circumstances may in his judgment warrant."

What happens, Commissioner, if you deny the application?

A It is a hypothetical question. It would be up to somebody to make some decision. I don't see how I can answer it any other way.

Q It would be up to somebody to make some decision. I am not sure --

A What I am really saying is, I guess, I don't understand your question, Mr. Topkis. What do you mean, what happens?

Q Well, what does the player do if you do not grant his application to retire?

MR. KRAMER: Objection. It has never happened. A hypothetical question; never happened to Commissioner Kuhn, so how can he answer such a question?

THE COURT: I will let the witness answer it if he can. What do you say to that?

THE WITNESS: It is, as I indicated, hypothetical,

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Kuhn-cross

your Honor, as I understand it. I simply don't know how to answer it.

THE COURT: There it is.

Next question.

Q It has never happened, is that right; that is why it is hypothetical?

A That I have denied -- I have never finally denied. I have deferred some decisions on retirement yes, for the protection of the player's interest.

Q The one that you mentioned yesterday?

A Yes.

Q Yes. Now, according to my notes, Commissioner, you said yesterday that Mr. Curt Flood will lose nothing in terms of pension benefits by failing to play ball this year. Did I note down your response correctly?

A Except the added pension benefits he would have gotten by playing actively.

Q That is just what I wanted to bring out. You were not challenging Mr. Miller's statement?

A Oh, no, I thought I was quite clear. I was not intending to challenge Mr. Miller's statement.

Q I think your statement was that you were not challenging his figures and I just wanted --

THE COURT: At any rate, it is cleared up now.

Next question.

MR. TOPKIS: May I have a moment, your Honor?

THE COURT: Surely.

(Pause.)

Q Commissioner, you testified yesterday, according to my notes, that in the course of preparing yourself in connection with the reserve system you read the MacMillan Encyclopedia, Turpin & Thompson, Seymour, Wallop and the Celler Report. Did you by any chance read the decision of the Supreme Court of the State of New York in 1914 in the action entitled, "The American Baseball Club of Chicago, plaintiff, against Harold H. Chase, defendant," reported at Volume 85 of the New York Miscellaneous Reports, page 441?

A No.

Q Did you read the decision of the United States Court of Appeals for the Second Circuit -- oh, I think you told me you did read the Gardella case.

A I have read it. I have read the Chase case. I did not read it in connection with preparing for this.

Q I see, you have read the Chase case?

A I have.

Q Describing the rules then pertaining to player-club relations and the reserve system, the Court there

1
2 said --

3 THE COURT: Who was the Court?

4 MR. TOPKIS: The Supreme Court, Erie County,
5 your Honor.

6 THE COURT: Who was the Judge?

7 MR. TOPKIS: Judge Bissell.

8 THE COURT: Pelham St. George?

9 MR. TOPKIS: I don't know whether it was Pelham
10 St. George Bissell or not. Erie County.

11 MR. HUGHES: It certainly wasn't Pelham St.
12 George, unless he moved down from Buffalo, your Honor.

13 THE COURT: I don't know. What would be wrong
14 with that?

15 MR. HUGHES: Nothing wrong with that, nothing
16 wrong, and I think --

17 THE COURT: All right, we will get it in just a
18 minute. I was just interested.

19 Come now, Mr. Topkis, you know, at the very
20 beginning, you know how they have the Judges listed.

21 MR. TOPKIS: I know, but I can't remember, your
22 Honor, which district Erie County is in. May I undertake
23 to apprise your Honor subsequently?

24 THE COURT: Yes, I will take a look at it later.
25 Thank you so much. I am sorry.

1 jkb-6
2 Q Commissioner, Judge Bissell there said that
3 "No opportunity is afforded the player to solicit employment
4 upon his own account, no right is afforded to enable him
5 to resist an unjust limitation upon his power to earn, no
6 consideration is afforded either himself or his family with
7 respect to choosing a home."

8 Do you agree with those statements?

9 A Certainly they are not true today. I couldn't
10 tell you whether they were true then. I have no idea.

11 Q What consideration is today afforded a player
12 or his family with respect to choosing a home under the opera-
13 tion of the reserve system?

14 A This is a matter of player-club relations,
15 Mr. Topkis, and I can assure you that consideration is given
16 on that score by the club.

17 Q Was consideration given to where Mr. Curt Flood's
18 home was when he was traded by St. Louis to Philadelphia?

19 A I couldn't tell you.

20 Q You have no knowledge on that subject?

21 A I do not.

22 THE COURT: Would you give that book to the
23 clerk, please.

24 (Book handed)

25 Q Now, at the beginning of the reserve system, back

1
2 in 1879 or 1880, the agreement was that each club could
3 reserve five players, was it not?

4 A Yes.

5 Q And at that time clubs had about 11 players?

6 A I would say so.

7 Q And was it your testimony that this eliminated
8 player raiding?

9 A No.

10 Q I thought that is the way my notes read, but I
11 will accept your modification.

12 A Limited would be correct.

13 Q Limited would be correct. That was all that
14 was found appropriate by the people who first established
15 the reserve system, is that right?

16 A That is what they did.
17
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1
2 Q As a matter of fact, Commissioner, they did it
3 in secret, didn't they?

4 A It was a league rule that was adopted. It was
5 not a part of the contract itself. It was a league rule,
6 if that is an answer to your question.

7 Q The players weren't given copies of the league
8 rules as far as your historical research reveals?

9 A I don't know.

10 Q To your knowledge, was the original reserve
11 rule, that which permitted each club to reserve five players,
12 adopted at a secret meeting or a meeting that was in any
13 way publicized?

14 A I don't recollect whether it was secret or not.

15 Q Perhaps I will come back to that, Commissioner.
16 I may be able to cast some light.

17 Commissioner, the Players League was organized
18 in 1889, wasn't it?

19 A Yes, I believe it was.

20 Q And it became operative in 1890?

21 A Yes.

22 Q And you testified yesterday that it had a reserve
23 system or clause?

24 A It had a reserve system, yes.

25 Q Do you know what kind of reserve system?

1
2 A I couldn't give you the precise words. I
3 believe all the players on the club were under reservation,
4 but I couldn't give you the precise words.

5 Q Nor could you give me the source of your belief
6 that all the players were under reservation?

7 A As I sit here right now I couldn't give you the
8 source of that, but I am certain I have read it in my
9 study, yes.

10 Q There was, of course, no radio or television revenue
11 derived in the 1880's, is that right?

12 MR. KRAMER: I will stipulate that.

13 Q And you testified yesterday, I think, that there
14 was at that time a great deal of concern with what was
15 called revolving, is that right?

16 A Yes.

17 Q And by revolving, did you mean a player's leaving
18 Team A and going to Team B in mid-season?

19 A Basically, revolving by this time had become
20 players jumping from one league to another, not in mid-
21 season. I think there was relatively little jumping in
22 mid-season.

23 Q And you testified, I believe, that in the absence
24 of the reserve system, that is, before the reserve system,
25 a number of problems crept into the game, of which one was

1 revolving and another was the player's lack of respect
2 for the system or for the game the way it was played, is
3 that right?
4

5 A I believe I said something to that effect, yes.

6 Q And you said also that something called hippo-
7 droming developed?

8 A Yes.

9 Q And hippodroming was an arrangement between two
10 clubs that they would throw games to each other?

11 A It was a fix.

12 Q It was a fix. Arranged by the clubs?

13 A Correct.

14 Q Tell me, if you will, how did the adoption of
15 the reserve system correct hippodroming?

16 A The reserve system was the beginning of the
17 construction of an overall baseball agreement whereby you
18 have the early stages of central government of leagues,
19 and it is out of central government of leagues that the
20 evils of player fixes and club fixes and disrespect for
21 rules was curbed and ultimately largely eliminated so that
22 there could be public confidence in the game, and that
23 is happily what the game has enjoyed in the part of the
24 century that followed the major league agreement of 1921.

25 Q Is it your testimony, then, that it was not

gwb-4

Kuhn-cross

until 1921 that there was sufficient central government obtained to cope with these problems?

A It was an evolutionary process. I believe it reached its peak in 1921. The problems had not been totally dealt with theretofore, nor have they ever been totally dealt with, Mr. Topkis. We can only do the best thing we can as we go along.

Q Human beings being fallible. I am sure Mr. Kramer will stipulate to that, too.

MR. J. KRAMER: Yes.

A If he won't, I will.

Q In any event, this evil that you testified to, hippodroming, that wasn't the players' fault?

A No, presumably the players had to be involved or you couldn't have hippodromed, but I take it the initiation came from the club. The clubs were certainly involved in dishonesty. There is no question of it.

Q Actually you say the players would have had to be involved. Isn't it possible to fix a game by putting in a sore arm pitcher or inadequate pitcher?

A It's possible. It's unlikely.

Q Not today?

A Then or now. This was part of the show. This was essentially an exhibition business. Everybody under-

stood it was, so you fixed it and tried to make it more attractive.

Q Commissioner, you testified that from 1871 to 1879 only two teams operated profitably of 40 or more.

A Of the teams that operated in the National Association and the National League, yes, whatever the number is.

Q Right. You of course didn't audit their books?

A No.

Q Or make any study of their books?

A No, sir.

Q And these were the same people who were arranging hippodroming?

A Hippodroming was largely a product of the period from 1857 up to the formation of the National Association. I believe the hippodroming is not a particularly significant factor in the 1870's.

Q I see. But there was some, is that your testimony?

A I am not sure. The danger perhaps was always there.

Q In any event, in the 1870's, going to a ball park you wouldn't have had any particular confidence that you were going to see an honest game?

1
2 A Oh, I wouldn't say that, no, but there was a
3 great deal of fixing.

4 Q And do you trust the books of the people who
5 did this fixing any more than you would their play?

6 A Well, the data we have stipulated here I
7 think has trusted the books, Mr. Topkis. I don't suggest
8 that the owners of these clubs were all dishonest, by
9 any stretch of the imagination, and I do indicate to you
10 that hippodroming was a thing that really preceded the
11 leagues of the seventies. The important thing to remember
12 is that the National League came into existence out of a
13 great sense of rectitude and trying to set straight the
14 evils. This was one of William Hulbert's great character-
15 istics that the histories record, the second president of
16 the National League, who really founded it. It was designed
17 to overcome these evils. I think certainly in that period
18 you get a more reliable type of operation.

19 Q Commissioner, you read yesterday to the Court
20 a sentence from the Celler Report, Page 229, which reads:
21 "Baseball's history shows that chaotic conditions prevailed
22 when there was no reserve clause. Experience points to no
23 feasible substitute to protect the integrity of the game
24 or to guarantee a comparatively even competitive struggle."

25 Do you remember reading that?

2 A Yes.

3 Q Would you agree with me there is nowhere in the
4 Celler Report a statement that the reserve system as it
5 exists today is the only kind of reserve system which
6 could accomplish these objectives?

7 MR. KRAMER: We stipulate that since today
8 is 1970.

9 MR. TOPKIS: Very well.

10 THE COURT: Question withdrawn?

11 MR. TOPKIS: Yes, your Honor.

12 Excuse me a second, your Honor. I am looking
13 for a document.

14 THE COURT: Of course. Take your time.

15 (Pause.)

16 MR. TOPKIS: I have it.

17 Q Commissioner, you testified yesterday, I think,
18 that it was your expectation that the players coming into
19 baseball other than drafted players, that is, the number
20 of non-drafted players recorded on Exhibit C, you testified
21 it was your expectation that the proportion of players
22 signed to their first professional baseball contract who
23 were not drafted would increase, is that right?

24 A I gave it as an opinion, yes.

25 Q You gave it --

1 A As an opinion.

2 Q An opinion, right. But the trend has been the
3 other way as recorded on Exhibit C, isn't that right?
4

5 A No, that is not right.

6 Q Well, we will perhaps draw a trend line and resolve
7 it. In any event, all players, drafted or undrafted,
8 you testified earlier this morning, were subject to the
9 draft with the exception of a possible handful?

10 A Nearly all I think we agreed, Mr. Topkis.

11 Q Right. And no club can sign a player until he
12 has been through the draft, is that right, one of these
13 free agents?

14 A There are a number of limitations on when a
15 player can be signed, but in order for a player, a non-
16 drafted player, to be signed, I believe in nearly every
17 case -- and again I take a little qualification there because
18 I may be overlooking something -- he has to have gone through
19 the draft and not be drafted, yes.

20 Q Right. This Kansas City team school that you
21 mentioned, at what point is a man signed who goes to that
22 school?

23 A What do you mean?

24 Q Before or after he goes to the school?

25 A Before.

gwb-9

Kuhn-cross

Q He is signed to a Kansas City club contract before he goes to the school?

A He is signed to some kind of contract, some professional contract. I don't know exactly how it would look.

Q An organized baseball contract?

A I would think so.

Q So that is a condition of a player going to the school?

A I shouldn't be so fast to say that it is an organized baseball contract. I am not sure whether it is or not, Mr. Topkis. If he progresses through that school, then they would go into the rookie leagues and sign an organized baseball contract of the type I think you are thinking of. I think theretofore they might not. I am just not sure.

Q Incidentally, Commissioner, what is the age of the youngest player ever drafted in organized baseball under the free agent draft?

A I do not know.

Q Have you ever heard of anyone being drafted at the age of 14?

A I can't say that I have.

Q How about the age of 15?

1
2 A I don't have any particular ages in mind.
3 Generally they are drafted only after they have graduated
4 from high school with certain qualifications within our
5 high school rule. This would mean when they are 17 or 18
6 normally, as far as the high school fellows are concerned.

7 Q Has it come to your attention, Mr. Commissioner,
8 that a player has two ages, his program age and his actual
9 age?

10 A I have heard that suggested, yes.

11 Q Have you ever heard of any young man lying about
12 his age in order to permit himself to be drafted?

13 A No.

14 Q Commissioner, to your knowledge, what is the
15 fastest growing professional sport in terms of attendance
16 or gate receipts?

17 A I am pretty hard-pressed to answer that question.
18 We gained five million last year, so I guess at the moment
19 you would have to say baseball.

20 Q Do you know how well football did last year?

21 A I don't think they gained in attendance particu-
22 larly. Their attendance in terms of percentage capacity
23 had been pretty good the prior year.

24 Q Actually they could scarcely gain because most
25 teams have been selling out, isn't that true?

gwb-11

Kuhn-cross

1
2 A A good many of them do. I won't quarrel with
3 you. I just don't know. A good many of them do.

4 Q I realize you have sources in this field. Have
5 you tried to get a ticket to a Giants' game or Jets' game?

6 A I talk to Commissioner Rozelle.

7 Q And I think you testified yesterday that you had
8 no reason to doubt the integrity of professional football?

9 A What I said yesterday, if I may, and certainly
10 what I intended to say, is I have no reason to doubt the
11 integrity of the people in that game. When you get to
12 their option rule, I think it raises a question of integrity
13 for them as well as for us.

14 Q Do you have any reason to doubt the public
15 acceptance of that game?

16 A Of the game of football in general?

17 Q Yes.

18 A No, but I do with respect to their tampering
19 rule -- with respect to their option rule.

20 Q Commissioner, today, according to data that has
21 been furnished to us, the revenue which a club in major league
22 baseball derives from games played away from home accounts
23 for a rather small percentage of its total revenues, that
24 is right, isn't it?
25

1
2 A I believe so.

3 Q There was a time when that percentage was much
4 higher, was there not?

5 A I don't recollect that.

6 Q Well, Commissioner, the rule as to sharing gate
7 receipts is that the visiting club gets 50 cents a ticket
8 or something like that, isn't that right?

9 A It is different in both leagues and it is not
10 50 cents per ticket, no. I don't have the precise figures
11 in mind, but that is not it.

12 Q In any event, has that rule in either league
13 changed in the last 50 years?

14 A I don't know.

15 Q There is no reason, is there, Commissioner, why
16 the teams in baseball couldn't split gate receipts?

17 A Well, they do now.

18 Q On a 50-50 basis?

19 A You mean 50-50?

20 Q Yes.

21 A No, I don't think there is any -- are you asking
22 me is there a legal reason?

23 Q Yes.

24 A I don't know that there is any legal reason.
25 Practical reasons would present themselves.

1 Q What reasons would present themselves?

2 A Practical reasons.

3 Q The game would not be adversely affected,
4 would it, if gate receipts were split 50-50 between home
5 and visiting teams?
6

7 A It is a hard question, Mr. Topkis. I really
8 don't know how to answer it.

9 Q I do my best. Can you think of any way in which
10 the game would be adversely affected by the clubs splitting
11 gate receipts 50-50?

12 A Yes, I can.

13 Q Tell the Court.

14 A The investments that have been made on the basis
15 of the present system, so you have a problem there. You
16 have contract problems. You would have to do it by a vote
17 of the league. You would have to see what the league
18 provisions are, whether it could be accomplished under the
19 league constitution. I just don't have those in mind,
20 but you certainly could have problems for the game presented
21 by the process of trying to do this.

22 Q Now I think you have talked about either the
23 economic interests of the owners or regulations in the major
24 league rules or the basic agreement or whatever.

25 A There are no major league regulations on this, as

1 I recall. These would be league regulations, constitutional
2 or otherwise.
3

4 Q Right. But I am talking about the level of play
5 on the field, the level of competition. Would the interests
6 of the game as a game be adversely affected by such an
7 agreement among the owners to split gate receipts?

8 A Do I think it would adversely affect the level
9 of competition on the field, is that what you are asking me?

10 Q Yes.

11 A Mr. Topkis, the answer is really three-fold. In
12 the first place, I find it difficult to form a very defini-
13 tive opinion on this question; secondly, you have got the
14 problem of how you would achieve it, and the difficulties you
15 might have in trying to achieve it could adversely affect
16 the game on the field by creating eruptions of some kind
17 within the structure.

18 If you could lay all those considerations aside
19 and say would the game be better off if gate receipts were
20 split evenly, it is possible.

21 Q And how about radio and television revenues?
22 Suppose they were put into a common fund as professional
23 football does with the exception of post-season games. Would
24 the level of play and the vigor of competition on the field
25 be adversely affected?

1
2 A Again, you come back to the problem of the
3 conditions under which investments were made, and this
4 permeates both of these questions you are asking. If
5 you are trying to attract capital under certain conditions
6 and you change those conditions, you may create some problem
7 which could have a definite effect on the way the game is
8 played and the effectiveness of the game on the field and
9 the level of competition and so forth. It is difficult
10 to answer it because of those preliminary problems that
11 you run into. You do have legal obstacles that exist.

12 Q But you couldn't be sure whether there would
13 be any adverse impact on the game?

14 A I couldn't be sure.

15 Q You testified yesterday, I believe, that were
16 there no reserve clause or system the wealthier teams would
17 drive the smaller ones out of business.

18 A Yes, and ultimately themselves.

19 Q Why wouldn't the owners be smart enough to limit
20 their expenditures for players to what they could afford?

21 A I think history demonstrates that where the
22 opportunity to compete is there, that you can expect the
23 clubs to compete as vigorously as the rules permit in
24 obtaining players.

25 Q You started to say as vigorously as possible,

1
2 didn't you? Didn't you start to say as vigorously
3 as possible?

4 A I started to say what I believe I said.

5 Q What is it, Commissioner, in your judgment that
6 would drive club owners to uneconomic choices, to drive
7 themselves out of business?

8 A History, human nature.

9 Q Bad judgment?

10 A Possibly.

11 Q You said, Commissioner, that baseball needs the minor
12 league system and that without the reserve system ball clubs
13 wouldn't invest in the minor leagues; that was your testimony,
14 wasn't it?

15 A I believe that is so, yes.

16 Q Why couldn't the major league clubs subsidize
17 minor league baseball jointly as is done in hockey?

18 A The question remains as to whether or not a par-
19 ticular team in the major leagues is going to be able to
20 protect its interests in young ballplayers, which are the life
21 blood, of course, of the club's success, and how this can
22 be accomplished in such a system as you broadly indicate,
23 Mr. Topkis, I don't know.
24
25

MR. KRAMER: If your Honor please, I would like to move to strike the last clause of the question but no part of the answer. The last clause was "as is done in hockey." I do not believe the record is sufficiently clear to indicate what is done in hockey. There was some testimony, but certainly none to the effect that Mr. Topkis stated.

MR. TOPKIS: It was my recollection, your Honor, and it was this on which I was basing my question.

THE COURT: Well, the record will speak for itself.

MR. TOPKIS: Quite so.

THE COURT: I will let the question stand.

MR. TOPKIS: Could I now, in order to refresh myself, have the question and answer read back, your Honor?

THE COURT: Surely. Would you be kind enough to do that, Mr. Court Reporter.

(Record read.)

Q You don't know any reason why it couldn't be done?

A I am not familiar with the hockey system, if that is what you are alluding to. I don't know anything about the hockey operations.

Q Commissioner, have you at any time made any study yourself of possible alternatives to the reserve system in its present form?

A In my mind, yes.

2 Q But never any formal inquiry?

3 A No, sir.

4 Q Commissioner, I think you testified yesterday that
5 baseball competes with other professional sports and horse
6 racing, both flat and harness, and other forms of outdoor
7 recreation.

8 A Yes, sir.

9 Q And movies and television as well?

10 A Yes, sir.

11 Q Now, there is very little player overlap between
12 these differing activities, isn't that right?

13 A What do you mean by that?

14 Q Oh, I mean there is an occasional baseball player
15 who will also play professional baseball as Conley did, but
16 those instances are rare, aren't they?

17 A No.

18 Q Oh, they are frequent?

19 A They are not uncommon.

20 Q Oh? All right. How many professional baseball
21 players today play another sport professionally?

22 A Professionally?

23 Q Yes.

24 A I don't know of any that play another sport pro-
25 fessionally. I am talking about the interchangeability of

skills which I understood you to mean. We have a number of players in baseball who are highly skilled football players and basketball players.

Q So that you regard professional football as competing, to some degree, with baseball where the seasons overlap?

A Yes.

Q And you regard professional basketball as competing with baseball where the seasons overlap?

A Yes.

Q And in terms of a consumer's total expendable dollars for a year, I suppose professional hockey also competes for a share of that with baseball, is that right?

A Their season overlaps with baseball.

Q Their season actually does overlap. They seem to get longer and longer these days.

A Yes, sir.

Q Now, none of these sports has the total reserve system of baseball, does it?

A Well, without addressing myself to the precise details of each reserve system, and now talking only about the general effect of the reserve systems, it is my judgment that hockey, basketball and football are essentially like baseball.

Q I see. Commissioner, when you were testifying about the consequences of a player being free to negotiate at the end of five years with any other club for his services and you said that that would be a threat to the integrity or the appearance of integrity in the game, did you mean that a player might be tempted to do less than his best in playing his fifth season when appearing against another club?

A No.

Q Now, I think you testified that one of the advantages of the reserve system is that it operates to bar or handicap a wealthier club from buying up all the good players, isn't that right?

A One of the advantages?

Q Yes.

A Yes.

Q Well, wealthier clubs from time to time, even with the reserve system, have bought up the good players, haven't they?

A Yes, to some extent.

Q That was done by the New York Yankees in the '20's when they bought all the Boston Red Sox stars, wasn't it?

A It really occurred in the teens, if you want to be accurate.

Q I appreciate the correction.

1
2 A They did buy a number of contracts from the Red Sox,
3 yes.

4 Q And it has happened on other occasions, hasn't it?
5 Didn't the St. Louis Browns practically operate as a farm
6 system for other clubs for a number of years?

7 A I wouldn't say that, no.

8 Q Well, the St. Louis Browns sold a great many player
9 contracts to wealthier clubs, didn't they?

10 A A great many may be too much, Mr. Topkis. They sold
11 some.

12 Q Do you remember any of the athletes whose contracts
13 the Browns sold in the '40's and '50's?

14 A I can't remember whether they were sales or trades,
15 but George McQuinn certainly stands out.

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Kuhn-cross

887

Q In New York he surely does?

A Yes.

Q Any others?

A I can remember the Washington Club acquiring all kinds of Brownies. They never did us much good.

Q There is no guarantee against bad judgment?

A No.

Q And, for that matter, the Philadelphia Athletics of the early '30's sold off all their best players, didn't they?

A They sold off a significant number of player contracts, yes.

Q And they were among their best players, weren't they?

A Yes.

Q And they sold them to wealthier clubs?

A I don't know about that.

Q So that, in sum, the reserve system does not operate perfectly to bar clubs from acquiring the players of another club by the use of cash?

A Today, for all intents and purposes, it does it perfectly.

Q You mean because nobody buys and sells players anymore?

A There's very little buying and selling of player contracts except via waivers, and certainly you will not find

1
2 today the sale of a player contract of any outstanding player.

3 Q Well, there has been no change in the reserve system
4 in the last 35 or 40 years that has brought that about, has
5 there been?

6 A Oh, yes. Oh, yes. The changes in the system which
7 have permitted equality of competition to emerge have been
8 very important in that.

9 Q What changes have you adverted to?

10 A Well, I am referring to the changes I have generally
11 described since 1952 and also some of the other modifications
12 of the reserve system that have been made over the years,
13 but surely the free agent draft and the unrestricted minor
14 league draft have played a part in this and explained why
15 teams such as the New York Mets have been able to become
16 champions as rapidly as they have within a decade -- less than
17 a decade.

18 Q Well, have those changes in the reserve system that
19 you have just referred to in some way operated to stop sales
20 of player contracts as opposed to trades?

21 A Yes.

22 Q In what way?

23 A By strengthening the condition of each club through
24 the equalization of team strength. In other words, the
25 reason that Connie Mack sold a certain number of player

contracts and the reason that certain others have occasionally done it was that it found itself in economic straits.

Q And today no club is in economic straits?

A No, I can't say that. There are clubs that are not very profitable today but none as bad off as some of the clubs in that era became.

Q The Red Sox of the late teens you have taught me to understand: Were they in economic straits?

A Mr. Topkis, I'm not sure.

Q Neither am I.

Commissioner, you testified, I believe, that it would be your expectation that there were two leagues, and a club from one league could sign a player from another, although he could not be signed by a club in his own league -- I think you testified that under that system baseball would be destroyed as it now exists because of the effect on the pre-existing equality of play. Have I made myself clear?

A I wish you wouldn't base that on my prior testimony, because I am not certain you have stated it quite the way I testified, but if you will ask me a question, I will be glad to answer it.

Q Well, my notes read roughly: Competitive leagues would destroy the game as it now exists, that is, two leagues competing for players.

A I said something of that nature.

Q Now, that didn't happen when the Players' League was around, in 1890, did it?

A The Players' League only lasted for one year, Mr. Topkis, and it was destroyed.

Q But competition on the field was not affected, was it? I mean --

A Oh, yes.

Q I had thought that in 1890 and 1891, according to your records, the first-place club in the National League did about as well as the first-place club had been doing down through the years.

A Oh, that's possible, but any one year isn't going to prove what the overall effect is, Mr. Topkis. The quality of play on the field during the period of the Players' League war and the American Association war that followed, but certainly during the first period, diminished.

Q Commissioner, I think you said yesterday that in effect baseball and pro football cannot be meaningfully compared, since football just about gets its talent free, supplied by the colleges; is that right?

A I said something to that general effect.

Q According to the newspapers, O.J. Simpson of Buffalo was paid about \$600,000 to sign a professional foot-

ball contract. Have you heard anything about that?

A I read some newspaper stories, Mr. Topkis.

Q Have you ever heard of a baseball player being paid \$600,000 to sign a baseball contract?

A No, nor do I necessarily credit the story I read with respect to O.J. Simpson. I would like to see the details.

Q Well, we were told, principally on the urging of your counsel, that we cannot go into those matters here, otherwise I would be glad to satisfy your curiosity.

Commissioner, there is a Triple-A league in Mexico, isn't there?

A Yes, sir.

Q And it is part of organized baseball?

A Yes, sir.

Q Subject to the rules and regulations of organized baseball?

A In general, yes.

Q Well, the reserve clause or the reserve system is unlawful in Mexico, isn't it?

A Not to my knowledge.

Q You haven't heard of any legislation in Mexico abolishing or forbidding the reserve system there?

A No.

MR. TOPKIS: May this be marked for identification, please.

(Plaintiff's Exhibit 27 marked for identification.)

MR. TOPKIS: I have had marked a clipping from the Washington Post of Saturday, April 11, 1970, page E-4, bearing the headline, "Mexico abolishes reserve clause" the first sentence of which reads --

MR. KRAMER I object, your Honor, this has been marked for identification. It has not been offered.

THE COURT: Sustained.

MR. KRAMER: I move that the headline be stricken, your Honor.

THE COURT: Sustained.

MR. TOPKIS: I will show it to the witness, your Honor.

THE WITNESS: I see it.

Q Do you accept the statement made in the first sentence, Mr. Kuhn?

A No.

THE COURT: Next question.

Q To your knowledge, Commissioner, has any new labor law been enacted in Mexico which went into effect May 15th?

A Yes.

Q And does it provide that a baseball player or any

professional athlete cannot be sold without his permission, and, if he is sold, he must get a portion of the sale price?

A I don't know if it does so provide.

Q Do you have access to a copy of the text?

A Oh, I'm sure I have access to it.

Q Do you have a copy in your office?

A No.

MR.TOPKIS: If I may have a moment, your Honor, to confer with counsel.

THE COURT: Of course.

MR. TOPKIS: Your Honor, I will go to another subject now, and I will give Mr. Hughes an opportunity to consider the clipping that I was reading -- that I was not reading from but referred to.

Q Now, Commissioner, I think you testified yesterday that the so-called Hot Stove League was a traditional and treasured part of baseball.

A Yes.

Q And I think you testified also that fans devote considerable interest to speculating about which of the six or seven possibilities on other teams was going to fill that hole at second base that our team has.

A I think I said that.

Q Well, doesn't this indicate, Commissioner, that

2 both fans and players alike are pretty much aware of what
3 players are under consideration for trades?

4 A Oh, there are rumors.

5 Q Now, the rumors being true -- I mean, it being
6 true that there are rumors, why would an additional morale
7 problem be created because of the slight additional information
8 contributed to the rumor mills by informing veteran players
9 of impending trades in order to obtain their consent or re-
10 fusal?

11 A You say slight additional information. That as-
12 sumes that the rumor mills are substantial information,
13 which I don't agree with.

14 Q Well, the rumor mills frequently find their way
15 into the newspapers, don't they?

16 A Yes. That's one of the jobs of newspapers: To
17 report rumors.

18 Q And players typically read the newspapers?

19 A Yes, sir.

20 Q And on hearing a rumor, wouldn't it be likely that
21 a player would pick up his telephone and call his club and
22 find out whether he was going to be traded?

23 A I would have to speculate to answer that question.

24 Q Well, wouldn't you agree with me as a matter of
25 human conduct that that is what you would expect?

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Kuhn-cross

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A Possibly. The rumors are quite common. I'm not certain it would prompt the player to do that. It might in some instances and might not in others, Mr. Topkis.

Q Why is an additional morale problem created by telling the player?

A Well, this is positive information, not rumor.

Q And in your judgment, people are more concerned about positive information than they are about rumors?

A I both believe and hope so.

THE COURT: What is not rumor is that lunch time is at hand. Partake of it, but don't go too far, because you have got to keep your thinking processes clear.

I will see you promptly at 2:15.

(Luncheon recess.)

AFTERNOON SESSION

2:15 p.m.

B O W I E K. K U H N, resumed.

THE COURT: Please proceed.

MR. TOPKIS: Thank you, your Honor.

CROSS EXAMINATION BY MR. TOPKIS (CONTINUED):

Q Mr. Kuhn, I believe you testified that the changes in the baseball map since 1953 have benefitted the players, the clubs and the fans, is that right?

A Yes, sir.

Q No player was consulted in connection with any one of these franchise moves, was he?

A I would say the answer is no.

Q The Milwaukee franchise was transferred a few years ago from Milwaukee to Atlanta, wasn't it?

A Yes, sir.

Q And you appeared in connection with that franchise move in some litigation in the Wisconsin Courts?

A Yes, sir.

Q Did you there argue that Milwaukee was unable or unwilling to support a major league team?

A Yes, sir. At that time that was correct.

Q You no longer adhere to that view, do you?

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2 A I certainly do not. The circumstances have changed
3 very much since that time.

4 Q Would you tell us, please, the circumstances which
5 have so changed?

6 A In general -- and the story is a very long one, Mr.
7 Topkis, as I am sure you know from some familiarity with the
8 record, as you obviously have -- the problem was a growing one
9 over a period of years of a disenchantment between the public
10 and the management of that ball club, fanned by a highly
11 critical press situation which did not help the support of
12 the ball club any, a diminishing broadcast market, which made
13 it difficult for that ball club to compete effectively, a
14 diminishing attendance brought about by the general kinds of
15 problems that were occurring there which were largely a mat-
16 ter of personalities, and unwillingness of the local, county
17 and city administrations to see the problems of the ball club
18 operations, difficulty in obtaining a long term lease from
19 the county, all of which added up ultimately to a transfer
20 of the ball club.

21 It did not indicate to me for the long run any more
22 than the transfer from Seattle has indicated to me for the
23 long run that Milwaukee was not prepared, under certain cir-
24 cumstances, to support a major league team and support it
25 well.

I believe the present operation in Milwaukee with the Brewers will prove that I am right in that regard.

Q Wasn't the principal reason for the transfer from Milwaukee to Atlanta the availability of an extremely lucrative television contract in Atlanta?

A I do not believe so.

Q Now, when Seattle entered the league, what was the price that was paid for that franchise?

A Something in excess of \$5 million, as I recall, for the entire set of rights that the new operators got there.

Q And the Seattle Club operated during the one year that it operated in Seattle at a dollar loss, did it not?

A At a loss?

Q At a dollar loss, yes.

A I believe so, yes.

Q And the very next year the franchise was sold?

A The franchise was transferred this year by order of the Bankruptcy Court in Seattle.

Q Do you happen to know the price at which it was transferred?

A I do not.

Q Do you have any idea of that price?

A My best recollection is somewhere between 10 and 11 million dollars.

2 Q What was there, to your knowledge, which made a
3 franchise which was purchased for something over \$5 million
4 in one year and which operated unprofitably during that one
5 year, what was there that made that franchise worth between
6 10 and 11 million dollars the next year?

7 A I think the interest of Milwaukee, in the first
8 place, in acquiring a team and the people in Milwaukee. I
9 think also their costs of operating during that year, the
10 losses they suffered would have to be a factor in determining
11 what the price would be. At least I assume this is a factor
12 that the Bankruptcy Court considered.

13 Your Honor, I am making assumptions about the
14 Bankruptcy Court that made the order for the transfer of this
15 franchise. Considerations of that kind, Mr. Topkis. I can't
16 pretend to be an expert on all of these considerations.

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2 Q Well, can you pretend to be an expert to the
3 extent of explaining why a losing franchise was increased
4 in value by 100 per cent in the course of one year?

5 A I don't think it was.

6 Q You don't think it was what?

7 A It was increased in value by 100 per cent.

8 Q It was bought for \$5 million and sold the next
9 year for \$10 million?

10 A You have to take into consideration these other
11 factors, the money that was lost and so forth.

12 Q You mean that -- excuse me, Commissioner, I am
13 not sure I understand you. The venture had lost money?

14 A That is correct.

15 Q Are you suggesting that these people who bought
16 the franchise for in excess of \$10 million took the losses
17 that that franchise had experienced in the prior year into
18 consideration and wanted to pay as much as \$10 million because
19 of those losses?

20 A I am only suggesting it as a possibility. You
21 are probing speculation on my part, Mr. Tolson's. I repeat
22 that this was done by order of the bankruptcy court in
23 Seattle.

24 THE COURT: The details with which you are un-
25 familiar?

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2 THE WITNESS: I am not familiar with the details
3 except in a general way.

4 THE COURT: It is of very little help to me
5 when we engage in that sort of guesswork.

6 Next question.

7 Q Commissioner, do you recall what price was paid
8 for a franchise in the 1961-'62 expansion?

9 A Counsel sitting at the table could tell you pre-
10 cisely. I can't give you the precise figure.

11 Q How about for '68-'69 expansion?

12 A Well, that was the Seattle price that I referred
13 to before.

14 Q I take it again -- I don't want you to speculate.

15 A That was the American League. The National
16 League had a different price. Counsel can give you a
17 figure. It is a public figure, I believe.

18 Q Very well. Now, you testified about the adoption
19 of the free agent draft in 1965. That draft was preceded
20 in time by several major league rules designed to discourage
21 large bonus payments to new players, was it not?

22 A There, Mr. Topkis, were rules which were designed
23 to do a number of things with respect to free agents, and
24 the most important thing they were designed to do was to
25 make talent broadly available to all clubs. The effect of

1 those rules I believe was to discourage very large bonuses
2 in some situations, but by no means all, and I believe
3 the effect of them was to make talent more broadly available
4 to all clubs, which I believe to have been their principal
5 goal.
6

7 Q But one goal at least was to discourage the
8 payment of large bonuses?

9 A In the interest of having more funds available
10 for all free agents, in my judgment, let alone other parts
11 of the operation, including the active player roster.

12 Q But the impact of the rule or rules was to
13 discourage the payment of large bonuses?

14 A To an individual situation, perhaps. Overall,
15 I would think not. And certainly some large bonuses were
16 paid.

17 Q Have been in recent years?

18 A No, paid in the years to which you refer.

19 Q I see. And the payment of such large bonuses
20 was discouraged by these rules, is that right?

21 A I say large bonuses were paid. So apparently
22 they were not altogether discouraged, no.

23 Q You testified yesterday, I believe, that one of
24 the changes that has taken place in baseball since 1952
25 was the deletion of the rule that barred the Commissioner

gwb-4

Kuhn-cross

from invalidating a major league rule so that today the Commissioner has the power to invalidate a major league rule, is that right?

A Yes, in my judgment.

Q During your tenure have you invalidated any rule?

A No, sir.

Q Do you intend to invalidate any rule relating to the reserve clause?

MR. KRAMER: Are you asking for a future --

MR. TOPKIS: I am asking for his current expectation.

MR. KRAMER: Your Honor, I don't know whether to object or not. May I state my problem? Here we have a man, and so long as the Toolson case is law, in a quasi-judicial capacity. He is being asked to predict what he may do. If your Honor orders that he answer the question, of course he will, but I would like to object to it.

THE COURT: I think there is a good basis to your objection. What are you saying to that?

MR. TOPKIS: I will withdraw the question, your Honor. I see the point.

THE COURT: Withdrawn. You are all fair. Very good. You make my task so easy.

MR. TOPKIS: We will try, your Honor. I am sure

1 all of us will. I am trying to cut as I go, your Honor.

2 I trust you will permit me a few seconds as I go along.

3 THE COURT: You must know I want you to do
4 exactly that sort of thing. That goes for all of you.

5 Q To your knowledge, Commissioner, did Judge Landis
6 ever propose an easing or modification of the reserve system?

7 A Yes.

8 Q What easing or modification did he propose, if
9 you recall?

10 A Well, certainly one that comes to mind were his
11 proposals with respect to what was known as the farm system.
12 He wanted to so amend the rules and operations of baseball
13 as to make it easier for young men in the game to reach
14 the major leagues.

15 Q In any other respect did he propose modification?

16 A Offhand, Mr. Topkis, I don't recall any.

17 Q Tell me, Commissioner, have you ever heard of
18 anyone losing money who bought and subsequently sold a
19 major league baseball franchise?

20 MR. HUGHES: I am not sure I understand that
21 question. Is he asking whether the purchase price and the
22 sale price would produce a paper profit? Is he taking into
23 account what losses may have occurred? I just don't under-
24 stand the question.
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Kuhn-cross

THE COURT: Mr. Topkis, would you care to --

MR. TOPKIS: I was not considering losses suffered possibly during the tenure of ownership, but only the difference between the purchase price and the subsequent sale price.

A Mr. Topkis, I can only answer that question by saying it is my impression that that has occurred, but I couldn't give you so much as an example. It is my impression that that has occurred.

MR. TOPKIS: Excuse me just a second, if I may, your Honor.

THE COURT: Yes.

(Pause.)

Q Commissioner, I have been informed that one player last year, namely, Gregg Washburn, of the Los Angeles Angels, was traded or optioned out and brought back a total of eleven times. Does that accord with your understanding or do you have no knowledge on the subject?

A You mean the California Angels?

Q That's right. Excuse me.

A I know about them. I must say I am not familiar with the circumstances you are referring to. I have never heard of them.

End 2

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Q Commissioner, you have testified, I think, that one of the purposes of the reserve system is to equalize competition on the field.

A Yes, sir.

Q In your judgment, has that objective been achieved?

A Not perfectly, but it has moved the overall game of baseball in that direction.

Q According to my calculations, Commissioner, of the one hundred major league pennants during the fifty-year period beginning 1920 and ending 1969, four teams have won on a total of sixty-three occasions.

Do you regard that as compatible with your belief that the reserve system has equalized competition on the playing field?

A I did not say that it has equalized competition, Mr. Topkis.

Q Well, do you regard it as compatible with your belief, whatever your belief may be?

A That it tends to equalize competition?

Q Yes.

A Yes. It is compatible, and you will also find that in the last several -- certainly in the last decade that this concentration of winners has diminished, and that this has been a result of further modifications in the

reserve system, such as the free agent draft, which have made it possible for more teams to develop strength.

Q You think that is the result of the adoption of the free agent draft?

A Along with the reserve system and the other aspects of the systems of organized baseball which lend to this.

Q Now, the free agent draft came into existence only in 1965, didn't it, Commissioner?

A That is correct.

Q Could you tell us the Court how many men who were drafted in the free agent draft beginning in 1965 are today on the rosters or have been at any time since on the rosters of major league clubs?

A Offhand I cannot tell you. I feel certain that there are a number.

Q Well, without knowing how many of them have been on the rosters, Commissioner, how can you assert that the adoption of the free agent draft tend significantly to equalize competition on the field?

A The manifestation of this I think is quite plain, Mr. Topkis, in what has happened in recent years in the major leagues. I point out to you, for instance, the race in the National League West last year, where with I think two weeks to go there were five teams in hot contention for

the divisional title.

It is my opinion and the opinion of most people in baseball --

Q Just your opinion, if we may, Commissioner.

A Well, my opinion is sometimes a consensus of opinions, and I certainly would say that. It is my opinion, in any event --

Q Very good.

A -- that the free agent draft contributes considerably to that result and in the future will contribute more.

Q And you have that opinion although you haven't the faintest idea of whether any free agents drafted in the free agent draft were on those five clubs?

A Oh, I have a very considerable idea that many of them are on those clubs. I just can't go through chapter and verse and tell you who it is.

Q You don't know?

THE COURT: He was not able to give you the number, but he so testified.

MR. TOPKIS: My understanding of his testimony, your Honor, was that he didn't know, but there were some.

THE COURT: No. Would you like to have it read?

MR. TOPKIS: No, your Honor. I won't press the point.

If I may have just a moment to confer with my colleagues, your Honor, I think I have just about concluded.

THE COURT: Surely. Take your time.

Q Commissioner, in your study of the laws pertaining to baseball, the antitrust laws and so forth, have you ever had occasion to read the Northern Securities case?

A I don't recollect that I have.

Q Let me ask if I may try to refresh your recollection. According to this report which I have in Volume 193 of the United States Reports, at page 351, the Court, by Justice Harlan, said:

"It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted by legislation to restrain their operations and to protect the public against their exactions."

Does that accord with your experience?

A No.

MR. TOPKIS: I have no further questions.

THE COURT: Very well. That is the end of the cross. Any redirect?

MR. KRAMER: First, if your Honor please, I neglected to offer in evidence yesterday Defendant Kuhn Exhibit B. It was identified at transcript page 647, and I now offer it in evidence. That was the telegram to the plaintiff from this

defendant.

THE COURT: I remember that distinctly. I did not know what you had in mind, and I know you did not offer it.

Any objection?

MR. TOPKIS: No objection.

THE COURT: Any objection, Mr. Hughes?

MR. HUGHES: No objection.

(Defendant Kuhn Exhibit B for identification received in evidence.)

THE COURT: May I look at it, or would you rather read it into the record? I think you should read it into the record, because so many of these short exhibits have been read into the record.

MR. KRAMER: With your Honor's permission, Mr. Kheel will read it.

THE COURT: Very well.

MR. KHEEL: Telegram sent to Curt Flood by the Commissioner of Baseball. It is addressed to Curt Flood, 4466 West Pine, St. Louis, Missouri.

"You declined my invitation for personal conference in Los Angeles on Friday. I desire an opportunity to discuss with you personally your baseball career without prejudice to the basic issues involved in the pending litigation. My counsel has ascertained from your counsel that the latter

1 had no objections to such a conference, with the explicit
2 condition that he was not recommending that you assent or
3 decline. This is to advice that if you reconsider I will
4 continue to be available."

5
6 It is signed Bowie K. Kuhn, Commissioner of Base-
7 ball.

8 THE COURT: Thank you, Mr. Kheel.

9 REDIRECT EXAMINATION BY MR. KRAMER:

10 Q Mr. Kuhn, at transcript page 705, lines 3 to 5,
11 yesterday, you testified as follows:

12 "Of course, he must have graduated from high school,
13 because you can't draft anybody who hasn't graduated from
14 high school."

15 Would you like to amplify or clarify that sentence?

16 A That is an oversimplification of the high school
17 rule. The high school rule is in Plaintiff's Exhibit 6 at
18 page 511, Major League Rule 3 H, and it provides that nor-
19 mally, your Honor, you cannot draft a young man until he's
20 graduated from high school, but if he has dropped out for a
21 certain period of time, then he can be eligible, and if he
22 is part of an American Legion program, then he would not be
23 eligible until he is out of the American Legion programs
24 under the provisions of American Legion rule, page 515, and
25 if he is going to college then he comes under the college