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RECENT CASES

CONSTITUTIONAL LAW—CONGRESSIONAL INVESTIGATIONS —RELEVANCY OF REQUIRED TESTIMONY

Defendant was summoned before the House Un-American Activities Committee, which was authorized to investigate (1) the extent, character, and objects of un-American propaganda activities; (2) the diffusion within the United States of subversive and un-American propaganda instigated from foreign countries or of domestic origin; and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.[1] Defendant refused to disclose to the Committee the names of communists in a certain union between 1942 and 1947, a period prior to the enactment of existing legislation. The district court found him guilty of contempt[2] and defendant appealed. *Held,* reversed. The information sought was not pertinent to a determination of the need for remedial legislation but was obviously requested in order to expose communists, a matter outside the scope of the Committee's investigatory power. *Watkins v. United States,* 233 F.2d 681 (D.C. Cir. 1956).

It is generally conceded that legislative bodies have an inherent power to conduct investigations in the aid of prospective legislation and for the purpose of securing information necessary to the discharge of their functions and powers. Although there is no provision in the Constitution expressly investing either house of Congress with power to conduct investigations, this power is deemed so far incidental to the legislative functions as to be implied.[3] The power is not limited to matters which may be the subject of legislation, but extends to all matters germane to the proper and intelligent exercise of any constitutional power of Congress or of either house.[4] However, neither house of Congress is invested with power to inquire into private affairs and compel disclosures except as necessary to make its express powers

1. 60 STAT. 828 (1946).
2. "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." 11 STAT. 155 (1857), as amended, 2 U.S.C.A. § 192 (1946).
3. McGrain v. Daugherty, 273 U.S. 135 (1927); Seymour v. United States, 77 F.2d 577 (8th Cir. 1935).
4. Seymour v. United States, 77 F.2d 577 (8th Cir. 1935).

effective.[5] Unless the inquiry is for a disclosed and legitimate purpose and based upon specified grounds, it is unlawful and cannot be made lawful by what it may or does bring to light.[6]

The basic limitation on the congressional power of investigation—pertinency—is designed to safeguard the individual's privacy and to protect him from needless annoyance.[7] Both the contempt statute[8] and the common law[9] require that questions be pertinent to the declared purpose of an inquiry. Pertinency is a question of law properly decided by the court,[10] the Government having the burden of proof,[11] and in so deciding the court must look to the enabling resolution and determine the scope of the committee's duty as there defined.[12] *Bowers v. United States*,[13] decided by a court of appeals in 1953, apparently was the first case in which it was held that pertinency was not proved, but the principle involved was by no means a new concept.[14] A Senate resolution had established the much publicized "Kefauver Committee" to investigate organized crime in interstate commerce. The court held that the Government failed to prove the pertinency of questions which related to the business of a witness in 1927, to the source of monies spent by him, to his interest in a certain restaurant in Florida, and to his knowledge of a certain person who was reputedly a Florida gambler. In 1952 a district court in considering the same resolution and the same special Committee had ruled that questions were pertinent which related to the business of a witness in 1945 and to the indentity of persons with whom he was acquainted.[15]

5. McGrain v. Daugherty, 273 U.S. 135 (1927). If an investigation by a committee of the House of Representatives was judicial in its character and one which could only be properly made by a court of justice and by a judicial proceeding, it is by the Constitution a judicial and not a legislative power. Kilbourn v. Thompson, 103 U.S. 168 (1880).

6. Jones v. SEC, 298 U.S. 1 (1936).

7. Note, 32 B.U.L. REV. 326, 335 (1952).

8. See note 2 *supra*.

9. See Kilbourn v. Thompson, 103 U.S. 168 (1880).

10. Sinclair v. United States, 279 U.S. 263 (1929); United States v. Di Carlo, 102 F. Supp. 597 (N.D. Ohio 1952); United States v. Emspak, 95 F. Supp. 1012 (D.D.C. 1951).

11. See United States *ex rel.* Cunningham v. Mathues, 33 F.2d 261 (3d Cir. 1929), *dismissed as abated*, 282 U.S. 802 (1930); United States v. Di Carlo, 102 F. Supp 597 (N.D. Ohio 1952).

12. See note 11 *supra*.

13. 202 F.2d 447 (D.C. Cir. 1953).

14. In Sinclair v. United States, 279 U.S. 263 (1929), the Court laid down the rule that the United States must "plead and show that the question pertained to some matter under investigation" but the decision provided no criterion for the application of the rule, for ultimately the Court found the "question asked" to be pertinent and affirmed defendant's conviction. In United States v. Browder, No. 1784-50, D.D.C., March 14, 1951, a witness objected to certain questions on the ground that they were not pertinent, but defendant's motion for acquittal was granted on the theory that he was entitled to know the Committee's ruling on his objection, the court not deciding whether the questions were pertinent.

15. United States v. Di Carlo, 102 F. Supp. 597 (N.D. Ohio 1952).

In the instant case the duty of the Committee was to investigate communist infiltration of labor unions in order to determine the need for legislation depriving communist-infiltrated unions of the benefit of the National Labor Relations Act. The questions which defendant refused to answer concerned the presence of communists in a certain union between 1942 and 1947. The court noted that the adequacy of present legislation enacted in 1947 would seem to depend on what had happened prior to its enactment. The Committee, howeve, claimed an unlimited authority to question the witness concerning his knowledge of former communists. The instant decision seems to be an attempt to abrogate the tendency of investigating committees to assume the role of grand juries, and to protect the interests of every individual in his own privacy and freedom from interference.

CONSTITUTIONAL LAW—STATE TAXATION OF INTERSTATE COMMERCE—SALES TAXATION OF INCOME FROM TRANS-SHIPMENT OF GOODS WITHIN STATE

A gas transmission company constructing a pipeline in Mississippi had the necessary pipe shipped from out of state to railheads and depots within the state, where the company's agent accepted the pipe and inspected it to determine damage in transit. Plaintiff, a motor freight carrier, then took charge of the pipe, gave the railroad a receipt from the gas company, and transported the pipe to the gas company's right-of-way, all of plaintiff's actions taking place in Mississippi. The state tax commission demanded a sales tax of two percent on plaintiff's income, which consisted entirely of freight charges for handling the gas company's pipe. Plaintiff paid the tax under protest and instituted a suit for refund in which the circuit court allowed recovery. *Held,* reversed. The interstate commerce ended when the pipe was delivered by the railroad in Mississippi and, therefore, plaintiff's transportation was a local activity subject to local taxation. On rehearing a suggestion of error was overruled on the ground that even if the motor transportation was in fact interstate, nevertheless plaintiff was subject to the tax as a recompense for its use of the state highways. *Stone v. Dunn Brothers,* 80 So. 2d 802 (Miss. 1955), *suggestion of error overruled,* 81 So. 2d 712 (Miss. 1955), *appeal dismissed for want of substantial federal question,* 350 U.S. 878 (1955), *petition for rehearing denied,* 350 U.S. 943 (1956).

The Supreme Court has repeatedly held that the states cannot impose taxes for the privilege of engaging in business which is ex-

clusively interstate in character.[1] In an interstate movement of goods, a transfer from one carrier to another or a stoppage in transit with a subsequent movement to the ultimate destination brings into focus the question of where the interstate commerce terminated for state tax purposes.[2] It is settled that once a transportation acquires the character of interstate commerce, it remains so until the shipment reaches the ultimate destination intended by the parties.[3] In determining the character of a movement the courts have looked beyond the immediate situation and considered several factors. These include the general course of dealing in similar transactions, the plurality of carriers, the contractual relations, the form of billing, the title and custody of the goods, and the continuity of transit.[4] Individually, however, these incidents are not decisive but are merely evidence of the manifest intention of the parties as to the ultimate destination.[5] With respect to a break in an interstate transit, the courts have looked to the purpose of the stoppage and have said that if the break is caused by the exigencies or conveniences of the means of transportation or by natural events over which the taxpayer has no control, the continuity of the transit remains unimpaired as does

1. See Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952).

2. For a general discussion of the extent to which the commerce clause insulates interstate commerce from local and state taxation, see HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE (1953); Tarnay, *Methods for Differentiating Interstate Transportation from Intrastate Transportation,* 6 GEO. WASH. L. REV. 553 (1938); Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?,* 4 VAND. L. REV. 496 (1951).

3. East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465, 470 (1931) ("The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determinative of the question where interstate commerce ends."); Binderup v. Pathe Exchange, Inc., 263 U.S. 291 (1923); General Oil Co. v. Crain, 209 U.S. 211 (1908).

4. Puget Sound Stevedoring Co. v. Tax Comm'n, 302 U.S. 90 (1937); Minnesota v. Blasius, 290 U.S. 1 (1933); East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465 (1931); Hughes Brothers Timber Co. v. Minnesota, 272 U.S. 469 (1926); Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922); Baltimore & O.S.W.R.R. v. Settle, 260 U.S. 166 (1922).

5. In Tennessee Natural Gas Lines, Inc. v. Atkins, 287 S.W.2d 67 (Tenn. 1956), a pipe line company operating entirely within the taxing state was engaged in buying natural gas from an interstate pipe line company, reselling portions to a large industrial user and the remainder to a wholly owned subsidiary which distributed gas to consumers. The corporation was held subject to a gross receipts tax for the privilege of engaging in intrastate commerce. The sale to the industrial user was a taxable local activity: interstate commerce had ended. This holding is in line with the rationale of Southern Natural Gas Corp. v. Alabama, 301 U.S. 148 (1937), where the tax was allowed for the local activity of selling gas that came from out of state, although taxpayer also sold gas to distributors. The sale to the distributors presumably would not have been taxable. See also Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942); East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465 (1931) (interstate movement ended when the gas passed into the local mains).

the immunity from local taxation.[6] Only where the interruption is for the business convenience or profit of the owner does it destroy the immunity from local taxation.[7]

In its initial determination that plaintiff's transportation was intrastate, the court in the instant case emphasized the bill of lading from the gas company as out-of-state consignor to itself as consignee in the state. But it is well settled that a bill of lading is not conclusive of the final destination.[8] It seems clear from all the facts shown that the shipper intended the pipeline right-of-way to be the ultimate destination, which would render plaintiff's transportation to that point a tax-free interstate activity. The court also relied heavily on *Interstate Oil Pipe Line Co. v. Stone*[9] in finding that interstate commerce ended before plaintiff's transportation began. In that case the Supreme Court, by a five-to-four decision, sustained a state tax on gross proceeds received at the beginning of an interstate journey even though the taxpayer's business was entirely interstate. It is significant, however, that four justices upheld the tax even on the assumption that it was a direct tax upon the privilege of engaging in interstate commerce; one justice upheld the tax on the ground that it was imposed on a local activity; and the dissenting members of the court maintained that the activity was interstate commerce and immune from state taxation. A later holding in *Spector Motor Service, Inc. v. O'Connor*[10] made it plain that the Court will not now permit a state to levy a tax upon the privilege of engaging in interstate commerce. In view of this decision, it would seem that the *Interstate Oil* case is no longer reliable authority.

On rehearing the court appears to be on firmer ground in finding that the tax was imposed for the use of state highways. It is well settled that motor carriers using state highways in interstate commerce are subject to exactions from the state as compensation for the state's expense in regulating and maintaining its highways, so long as the tax is non-discriminatory, fair and reasonable.[11] Once it is

6. See Powell, *Taxation of Things in Transit*, 7 VA. L. REV. 167, 245, 429, 497 (1920-21); Annot., 171 A.L.R. 283 (1947).

7. Minnesota v. Blasias, 290 U.S. 1 (1933); Coe v. Errol, 116 U.S. 517 (1886). The problem becomes more difficult when the stoppage may be for both reasons, as demonstrated in Kelley v. Rhoads, 188 U.S. 1 (1903), where a flock of sheep grazed from Utah across Wyoming to a point in Nebraska. As it was said, did the sheep go to graze or graze to go? See Powell, *supra* note 6.

8. Western Oil Refining Co. v. Lipscomb, 244 U.S. 346 (1917). See also Minnesota v. Blasius, 290 U.S. 1 (1933); Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929); Hughes Brothers Timber Co. v. Minnesota, 272 U.S. 469 (1926); Baltimore & O.S.W.R.R. v. Settle, 260 U.S. 166 (1922); Illinois Cent. R.R. v. Fuentes, 236 U.S. 157 (1915).

9. 337 U.S. 662 (1949).

10. 340 U.S. 602 (1951).

11. Aero Mayflower Transit Co. v. Commissioners, 332 U.S. 495 (1947); Dixie Ohio Express Co. v. Commissioners, 306 U.S. 72 (1939); Hendrick v.

demonstrated that the charge is for highway use, the objecting taxpayer has the burden of showing that the amount is unreasonable for that purpose.[12] It does not appear that the taxpayer in the instant case had an opportunity to contest the reasonableness of the tax, since this facet of the case apparently was injected for the first time in the court's opinion after rehearing.

CRIMINAL LAW—FELONY-MURDER DOCTRINE—CO-FELON KILLED BY VICTIM OF CRIME

As two holdup men were fleeing after armed robbery of a store, the storekeeper apprehended and killed one of them in a gun battle. The other was later captured and brought to trial for murder under the felony-murder doctrine. The defendant's demurrer to the evidence was sustained and the state appealed. *Held* (4-3), reversed. When the victim of a felony kills one of the felons the co-felon may be guilty of murder. *Commonwealth v. Thomas,* 117 A.2d 204 (Pa. 1955).

Criminal statutes very often do not define "murder,"[1] merely adopting the common-law definition which distinguishes murder from other homicide by the element of malice aforethought.[2] Under the common-law felony-murder doctrine, one who causes the death of another while in the commission of a felony which is dangerous to human life may be guilty of murder although there was no actual intent to kill or to inflict serious bodily harm.[3] The basis upon which the doctrine originated is not entirely clear; at one time the courts indulged in a fiction, saying that the commission of the felony implied that the felon was determined to kill rather than forego the crime.[4] This concept has been abandoned, however, and the implication of malice is now generally thought to arise from the commission of a felony the foreseeable result of which is danger to human life.[5] "Malice aforethought" does not mean malice in its ordinary sense; the words are

Maryland, 235 U.S. 610 (1915). See Annots., 17 A.L.R.2d 421 (1951), 92 L. Ed. 109 (1947).

12. Capitol Greyhound Lines, Inc. v. Brice, 339 U.S. 542 (1950); Ingels v. Morf, 300 U.S. 290 (1937); Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931) (dictum).

1. *E.g.,* MASS. GEN. LAWS c. 265, § 51 (1932); PA. STAT. tit. 18, § 4701 (Purdon 1936).

2. 4 BLACKSTONE, COMMENTARIES 198; CLARK AND MARSHALL, A TREATISE ON THE LAW OF CRIMES 313 (5th ed. 1952).

3. See 1 WHARTON, CRIMINAL LAW 685 (12th ed. 1932).

4. For an excellent treatment of the evolution of "implied malice," see Perkins, *A Re-examination of Malice Aforethought,* 43 YALE L. J. 537, 546 (1934). See also MORELAND, HOMICIDE 13-16 (1952).

5. Marcus v. United States, 86 F.2d 854, 861 (D.C. Cir. 1936), Perkins, *supra* note 4, at 558.

legal words of art which have a technical meaning described by Perkins as "a man-endangering state of mind."[6]

The other prerequisite to a conviction of murder is the establishment of a causal connection between the acts of the defendant and the death. Because of the causation element there is an irreconcilable split of authority as to whether a felon can be guilty of murder when a homicide is accidentally committed by a person attempting to prevent the felony or apprehend the felon. The courts have taken three positions: (1) a killing done by a person other than the felon or his accomplices cannot be imputed to the felon;[7] (2) if the victim of the crime is killed after being forced from a place of safety to a dangerous place, for example, as a shield or hostage, the felon may be guilty of murder;[8] (3) if any person is killed as a foreseeable result of the commission of the felony, the felon may be guilty of murder.[9] In all three situations malice aforethought clearly exists. The distinction seems to be that the necessary causal connection has been established at different degrees of proximity. In any case, of course, the killing must be within the *res gestae* of the original felony in order to constitute murder under the felony-murder doctrine.[10]

Although there is a paucity of opinions from other jurisdictions on similar fact situations, the court in the instant case had substantial precedent upon which to base its decision. In *Commonwealth v. Bolish*[11] it was indicated that when one of two arsonists is accidentally burned to death the other may be convicted of murder. In another case the defendant was convicted for accidentally killing his accom-

6. PERKINS, CRIMINAL LAW ARTICLES 407-08 (1926). See also Nestlerode v. United States, 122 F.2d 56 (D.C. Cir. 1941) (act done regardless of social duty with wilfull disregard of the rights or safety of others); State v. Wetter, 11 Idaho 433, 83 Pac. 341, 346 (1905) ("[M]alice is not confined to ill will which one individual holds toward another, but it is intended to denote any action flowing from a wicked and corrupt motive."); Warren v. State, 44 Tenn. 130, 136 (1867).

7. People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920); Butler v. People, 18 N.E. 338 (Ill. 1888); Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Commonwealth v. Campbell, 89 Mass. 541 (1863); State v. Majors, 237 S.W. 486 (Mo. 1922). See Commonwealth v. Thompson, 321 Pa. 327, 184 Atl. 97 (1936); Commonwealth v. Mellor, 294 Pa. 339, 144 Atl. 534 (1928) (assuming the point without deciding it).

8. Taylor v. State, 63 S.W. 330 (Tex. 1901); Keaton v. State, 57 S.W. 1125 (Tex. Crim. Ct. 1900). Both cases arose out of the same train robbery in which it was disputed whether the fireman was forced into the line of fire or entered it voluntarily.

9. Marcus v. United States, 86 F.2d 854 (D.C. Cir. 1936); Johnson v. State, 142 Ala. 70, 38 So. 182 (1905); Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); Letner v. State, 156 Tenn. 68, 299 S.W. 1049, 1051 (1927) (manslaughter). See also Perkins, *supra* note 4, at 558. *But see* Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905).

10. See State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1936).

11. 381 Pa. 500, 113 A.2d 464, 475 (1955) (dictum). *Contra*, People v. Ferlin, 203 Cal. 587, 265 Pac. 230 (1928); People v. LaBarbera, 287 N.Y. Supp. 257 (1936).

plice in robbery[12] and in *Commonwealth v. Moyer*[13] a robber was found guilty of the murder of a policeman although it was never established who fired the fatal shot, the court holding that this was immaterial so long as the defendant's conduct was the proximate cause of the death. The majority of the court in the instant case felt bound by the decision in *Commonwealth v. Almeida*[14] which upheld the conviction of two robbers for the death of a policeman killed by a fellow officer attempting to prevent their escape. These cases seem to equate the necessary causal connection to proximate cause.[15] This, of necessity, reintroduces the element of foreseeability and it is not made clear whether the foreseeability necessary to proximate cause is the same as that required to establish malice aforethought. It would seem that a greater degree of foreseeability would be required to establish proximate cause of a particular death than merely to establish that the defendant had a man-endangering state of mind.

The dissenting justices in the instant case argued that because the homicide was justifiable no murder was committed, and that the felony-murder doctrine is applicable only when the killing was done by the felon or one acting in furtherance of the felonious undertaking.[16] The latter point has sound historical basis[17] and probably no other jurisdiction would depart from it as far as did the instant case. But in view of the fact that the decision is simply a declaration of public policy in relation to the prevention and punishment of crime, based upon the precedents in Pennsylvania, the instant decision should not be criticized unless it be on the ground that the entire felony-murder doctrine is of questionable value as a legal concept.[18]

EVIDENCE—JUDICIAL ADMISSIONS—TESTIMONY AS TO OBJECTIVE FACTS

Plaintiff was a passenger in an automobile driven by defendant when it collided with an automobile driven by one Johnson. He sued both defendant and Johnson to recover for his resulting injuries. During the trial plaintiff testified that defendant was driving at a reasonable speed on his side of the road and that Johnson, coming from

12. People v. Cabaltero, 31 Cal. App. 2d 52, 87 P.2d 364 (1939).
13. 357 Pa. 181, 53 A.2d 736 (1947).
14. 362 Pa. 596, 68 A.2d 595 (1949).
15. Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947).
16. 117 A.2d at 215, 224 (dissent).
17. Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085, 1086 (1905); Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922); Commonwealth v. Major, 198 Pa. 290, 47 Atl. 741, 743 (1901); 40 C.J.S., *Homicide* § 21(b) (1944).
18. See MORELAND, HOMICIDE 42-54 (1952).

the opposite direction, swerved into defendant's lane. Defendant's motion for a directed verdict was denied and the jury returned a verdict against him, exonerating Johnson. Judgment was rendered accordingly and defendant appealed. *Held,* reversed. Plaintiff's testimony, as to facts within his observation, established that the sole cause of the accident was the negligence of Johnson and that defendant was not negligent; such testimony constitutes a judicial admission that plaintiff has no rightful claim against defendant and precludes recovery from him. *Bell v. Harmon,* 284 S.W.2d 812 (Ky. 1955).

A judicial admission is defined as an express act of waiver by a formal statement in the pleadings or stipulations which concedes for the purpose of trial the truth of some alleged fact. It is conclusive upon the party making it and has the effect of withdrawing the fact from controversy.[1] This orthodox definition has been extended by most courts to include testimony of a party during a trial which would be fatal to his cause of action or defense.[2] There is a conflict of authority, however, with respect to the kind of testimony which may constitute an admission.[3] The difficult problem arises when other evidence is introduced which tends to negative the party's adverse testimony and to establish facts more favorable to his cause.[4] As a general rule a party will be held bound by his testimony as to facts within his peculiar knowlege,[5] but not by testimony as to estimates, opinions or events about which he could be mistaken.[6] Recognizing that where observed

1. 9 WIGMORE, EVIDENCE § 2588 (3d ed. 1940).

2. See, *e.g.,* Kansas Transp. Co. v. Browning, 219 F.2d 890 (10th Cir. 1955); Ercoli v. United States, 131 F.2d 354 (D.C. Cir. 1942); Long v. Brown, 64 Idaho 39, 128 P.2d 754 (1942); Burton v. Ostertag, 166 Kan. 374, 201 P.2d 676 (1949); Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021 (1941); Rappe v. Metropolitan Life Ins. Co., 322 Mass. 438, 77 N.E.2d 641 (1948); Mollman v. St. Louis Public Service Co., 192 S.W.2d 618 (Mo. App. 1946); Harlow v. Laclair, 82 N.H. 506, 136 Atl. 128 (1927); Miller v. Stevens, 63 S.D. 10, 256 N.W. 152 (1934); Tebbs v. Peterson, 247 P.2d 897 (Utah 1952); Stark v. Hubbard, 187 Va. 820, 48 S.E.2d 216 (1948); Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922). But many of the cases which intimate that a plaintiff is conclusively bound by his own testimony are not authority for the proposition because no contrary testimony was introduced. See, *e.g.,* Fulgham v. Atlantic Coast Line R.R., 158 N.C. 555, 74 S.E. 584 (1912); Zamora v. Thompson, 250 S.W.2d 626 (Tex. Civ. App. 1952); Frazier v. Stout, 165 Va. 68, 181 S.E. 377 (1935).

3. Annot., 169 A.L.R. 798 (1947). See also 9 WIGMORE, EVIDENCE § 2594a (3d ed. 1940); Note, *Evidence—Party's Testimony as Judicial Admission,* 5 WESTERN RES. L. REV. 398 (1954); 36 MICH. L. REV. 688 (1938); 22 VA. L. REV. 365 (1936).

4. If at the end of the trial a party's unequivocal testimony stands uncontradicted, he is bound by it regardless of its credibility. See cases collected in Annot., 169 A.L.R. 798 (1947).

5. "She was not simply giving her impressions of an event as a participant or observer but she was testifying to facts peculiarly within her knowledge, *i.e.,* realization of the fact that appellee was drunk at the time of the accident . . ." Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021, 1025 (1941).

6. Harlow v. Laclair, 82 N.H. 506, 136 Atl. 128 (1927), quoted extensively in 9 WIGMORE, EVIDENCE § 2594a (3d ed. 1940), is the leading case setting forth the distinction of facts within one's peculiar knowledge. But see Alamo v. Del Rosario, 98 F.2d 328, 331 (D.C. Cir. 1938), in which it was said that even

facts or opinion are being related, even the calmest and most disinterested witness sees things that did not happen and remembers things that he did not see, most courts will not hold such testimony of a party conclusive. He will be allowed to refute or explain his position as mistaken[7] or to rely on the benefit of more favorable testimony.[8]

Those facts deemed to be within the peculiar knowlege of a party have been limited by some courts to subjective facts, such as those bearing upon the state of mind, knowledge, emotions or intent.[9] But many courts have held that a party is bound by his testimony when he testifies positively to what he may reasonably be assumed to know, whether objective or subjective.[10] Thus, if a party testifies positively and unequivocally to basic facts as to which there is little likelihood of error, and if he makes no subsequent modification or correction under claim of confusion or mistake, he will not be allowed to avert the consequences of his testimony by the introduction of or reliance on other evidence in the case.[11] But the rule as applied in the better reasoned cases has been a flexible one; the character of the testimony

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the *Harlow* case itself misapplied the distinction. "The elusive distinction which these cases attempt rests upon the premise that 'When a party testifies to facts in regard to which he has special knowledge, such as his own motives, purposes, or knowledge, or his reasons for acting as he did, the possibility that he may be honestly mistaken disappears.' Harlow v. Laclair. . . . If he is human, it does not disappear. Knowledge may be 'special' without being correct. Often we little note nor long remember our 'motives, purposes, or knowledge.' There are few, if any, subjects on which plaintiffs are infallible." *Id.* at 331-32.

7. Kanopka v. Kanopka, 113 Conn. 30, 154 Atl. 144 (1931); Cote v. Stafford, 94 N.H. 251, 51 A.2d 144 (1947); Leonard v. Smith, 186 S.W.2d 284 (Tex. Civ. App. 1945); Burruss v. Suddith, 187 Va. 473, 47 S.E.2d 546 (1948).

8. Hill v. West End St. Ry., 158 Mass. 458, 33 N.E. 582 (1893). "There is no sound reason why the familiar doctrine that a party may contradict, though not impeach, his own witness, should not, if the circumstances are consistent with honesty and good faith, be applied when he is himself the witness; nor, under the same circumstances, is there any reason why, to prove material facts denied by his own testimony, he may not rely on the testimony of witnesses called by the adverse party. . . ."

9. See, *e.g.*, Reynolds v. Sullivan, 330 Mass. 549, 116 N.E.2d 128 (1953); McFaden v. Nordblom, 307 Mass. 574, 30 N.E.2d 852 (1941); Rueger v. Hawks, 150 Neb. 834, 36 N.W.2d 236 (1949).

10. Davis v. Akridge, 199 Ga. 867, 36 S.E.2d 102 (1945); Tennes v. Tennes, 320 Ill. App. 19, 50 N.E.2d 132 (1943); Green v. Higbee, 176 Kan. 596, 272 P.2d 1084 (1954); Kight v. American Eagle Fire Ins. Co., 125 Fla. 608, 170 So. 664 (1936) (dictum on rehearing).

11. "It appears from these decisions that among the circumstances which should be considered in such a case are the following: (1) Was the party at the time when the occurrence about which he testified took place, and when he testified, in full possession of his mental faculties? (2) Was his intelligence and command of English such that he fully understood the purport of the questions and his answers thereto? (3) What was the nature of the facts to which he testified? Was he simply giving his impressions of an event as a participant or an observer, or was he testifying to facts peculiarly within his own knowledge? (4) Is his testimony contradicted by that of other witnesses? (5) Is the effect of his testimony clear and unequivocal, or are his statements inconsistent and conflicting?" Harlow v. Laclair, 82 N.H. 506, 136 Atl. 128, 131 (1927).

and the attendant circumstances of the case are weighed in determining whether the testimony is within the party's peculiar knowlege.[12]

In the instant case the court followed the rule which it had formulated in *Sutherland v. Davis*.[13] In that case the testimony in question concerned the party's state of mind on the issue of contributory negligence. The court pointed out that each case should be viewed in the light of the "conditions and circumstances" which might "give rise to the probability of error in the party's own testimony."[14] The rule apparently was extended in the instant case by the holding that plaintiff was bound by testimony as to objective facts. However, as the court noted, plaintiff "was in a favorable position to observe accurately what occurred."[15] It is important that the court did not set up an arbitrary rule that all testimony as to objective facts may constitute a judicial admission.

FEDERAL TORT CLAIMS ACT—"PRIVATE INDIVIDUAL" CLAUSE—UNIQUELY GOVERNMENTAL ACTIVITY

Petitioners' tug and towed barge went aground on an island in the Gulf of Mexico, causing extensive damage to the barge's cargo. Claiming that the accident was due to the negligence of Coast Guard personnel in failing to maintain the light in the island's lighthouse, petitioners brought this action against the United States under the Federal Tort Claims Act.[1] The district court granted the Government's motion to dismiss on the ground that the act did not extend the liability of the Government to a "uniquely governmental" activity. The Court of Appeals for the Fifth Circuit affirmed per curiam. *Held* (5-4),[2] reversed. Under the Federal Tort Claims Act the Government is liable for injuries caused by the negligence of its employees in the performance of a uniquely governmental activity if a private individual would be liable under like circumstances. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

The Federal Tort Claims Act is regarded as the expression by Congress of its desire to modify the sovereign immunity of the United States and to minimize the burdensome practice of private relief bills

12. 9 WIGMORE, EVIDENCE § 2594a (3d ed. 1940).
13. 286 Ky. 743, 151 S.W.2d 1021 (1941).
14. *Id.*, 151 S.W.2d at 1024.
15. 284 S.W.2d at 816.

1. 28 U.S.C.A. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1950).
2. Mr. Justice Frankfurter wrote the majority opinion. Mr. Justice Reed, joined by Justices Clark, Burton, and Minton, dissented.

by allowing tort actions in the federal district courts.[3] The United States Supreme Court generally adheres to the proposition that the act should be liberally construed in order to effectuate the Congressional purpose.[4] The problem raised by the instant case is the extent of the Government's liability in view of its identification with the liability of "a private individual under like circumstances."[5]

The two principal Supreme Court decisions construing the Government's liability under this clause prior to the instant case are *Feres v. United States*[6] and *Dalehite v. United States*.[7] In the *Feres* case the Court held that the Government is not liable under the act for injuries to servicemen arising out of or incident to military service.[8] The apparent rationale was that where Congress has provided an adequate system of compensation for injuries arising out of a particular activity,[9] its tacit intention is to exclude recovery under the Federal Tort Claims Act. The opinion also indicated, however, that no liability would be found if the activity and the relationship it established between the litigants was uniquely governmental.[10] In the *Dalehite* case the Court refused to impose liability on the Government for injuries arising out of the Texas City holocaust. The decision rested principally on the holding that the injuries arose in connection with the performance of a discretionary activity,[11] but in part rested on the rationalization that negligence of the Coast Guard while fighting a shipboard fire is not actionable because there is no analogous

3. See Aron, *Federal Tort Claims Act: Comments and Questions for Practicing Lawyers*, 33 A.B.A.J. 226, 227 (1947); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 2 (1946).

4. United States v. Yellow Cab Co., 340 U.S. 543 (1951); United States v. Aetna Cas. & Surety Co., 338 U.S. 366 (1949). In the *Aetna* case the Court quoted Judge Cardozo's famous statement: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced," from Anderson v. John L. Hayes Constr. Co., 243 N.Y. 140, 153 N.E. 28, 29-30 (1926). *But cf.* Feres v. United States, 340 U.S. 135 (1950).

5. "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C.A. § 2674 (1950). Certain express restrictions coextensive with this definition are set forth in sections 2674 and 2680 of the act, but are not pertinent to the present discussion.

6. 340 U.S. 135 (1950).

7. 346 U.S. 15 (1953). This and the *Feres* decision were thought controlling by the dissenting Justices in the instant case.

8. It is interesting to note that service personnel on furlough are not engaged in activity "incident to service," and therefore may recover from the Government for injuries suffered during that period. Brooks v. United States, 337 U.S. 49 (1949).

9. Compensation for injuries or death of armed services personnel is provided in 38 U.S.C.A. §§ 718, 725, 731, 740, 741 (1954).

10. 340 U.S. at 142. *Cf.* Yellow Cab Co. v. United States, 340 U.S. 543, 548 (1951), in which the Court said, "This Act does not subject the Government to a previously unrecognized type of obligation."

11. 28 U.S.C.A. § 2680(a) (1950) exempts the Government from liability for injuries arising out of the performance or failure to perform a discretionary function or duty.

liability in general tort law.[12] The Court reasoned that private individuals do not fight fires; that municipalities are not liable for the injurious acts of their firefighters; and, therefore, the act did not impose liability on the Government while engaged in this activity. Both these cases narrowed the scope of the act, and consequently left the question of the extent of the Government's liability very much in doubt.[13]

Numerous lower federal courts have also considered the extent of the Government's liability under the "private individual" clause, and their opinions have reflected the continuing difficulty of the problem. The statements in the *Feres* and *Dalehite* decisions relating to uniquely governmental activity were endorsed in dictum by one court of appeals,[14] but in general the lower courts have reached conclusions which imposed liability on the Government. They have allowed recovery for injuries caused by the negligence of municipal airport control tower personnel,[15] government airport employees,[16] a soldier standing guard duty,[17] a Coast Guard helicopter officer conducting rescue operations,[18] and government employees engaged in marking a submerged wreck[19] —all of which involved purely governmental activity.

The decision in the instant case seems to confirm the general climate of opinion prevalent in the lower courts and to modify the Court's approach to the problem as expressed in the *Feres* and *Dalehite* opinions. The Court made it clear that whether the activity was proprietary or governmental was immaterial;[20] when the Government undertakes the operation of navigational aids it acquires a duty to the public to act with care.[21] Consequently, a breach of this duty will impose liability. The decision was based on the belief that since almost any governmental activity on the "operating level" could be

12. "[A]n alleged failure or carelessness of public firemen does not create private actionable rights." Dalehite v. United States, 346 U.S. 15, 43 (1953). For a more thorough analysis of the case, see Heuser, *Dalehite v. United States: A New Approach to the Federal Tort Claims Act?*, 7 VAND. L. REV. 175 (1954).

13. For a discussion of the law on this subject prior to the instant case, see O'Donoghue, *Some Possible New Fields in a Narrowing Act*, 7 VAND. L. REV. 180 (1954). See also Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167 (1952).

14. National Mfg. Co. v. United States, 210 F.2d 263, 277 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954). *Contra*, Mid-Central Fish Co. v. United States, 112 F. Supp. 792, 795 (W.D. Mo. 1953) (dictum), *aff'd*, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954).

15. Union Trust Co. v. United States, 113 F. Supp. 80 (D.D.C. 1953), *aff'd*, 221 F.2d 62 (D.C. Cir.) (modifying amount of recovery), *aff'd per curiam*, 350 U.S. 907 (1955).

16. Air Transp. Associates, Inc. v. United States, 221 F.2d 467 (9th Cir. 1955).

17. Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948).

18. United States v. Lawter, 219 F.2d 559 (5th Cir. 1955).

19. Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951).

20. The distinction had earlier been refuted in more explicit terms by the lower federal courts. Air Transp. Associates, Inc. v. United States, 221 F.2d 467 (9th Cir. 1955); Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948).

21. See also Union Trust Co. v. United States, note 15 *supra*.

done by a private person, Congress did not intend to predicate the Government's liability on the "fortuitous presence or absence of identical private activity." The real test, therefore, would seem to be not whether private persons actually engage in such activity but whether they could conceivably do so.

The decision seems sound. To begin with, the doctrine that the act should be liberally construed not only seems inherently just but is supported by abundant authority.[22] Secondly, whatever may be the technical distinctions between sovereign and proprietary acts, to determine the Government's liability on this basis would nullify Congress' attempt to effectuate a practical administration of just claims. Thirdly, the act identified the Government with a private individual —not a state, municipal corporation, or other legal entity. The individual has never been protected by the cloak of sovereign immunity. Why should the Government, now in his shoes with regard to sovereign acts on an operational level, be so protected? It seems fortunate, at any rate, that the determination of the Government's liability in this type of situation was not based on a consideration of whether the act created new private rights or merely waived sovereign immunity.[23]

INCOME TAXATION—CAPITAL GAINS AND LOSSES—BUSINESS PURPOSE FOR CONTRACTING IN COMMODITY FUTURES

Petitioner, a corn products manufacturer, entered into futures purchase contracts[1] as part of its regular corn buying program to protect itself against increases in the price of spot corn and to provide an adequate supply of raw corn without additional storage costs. Delivery was taken on these contracts when necessary to petitioner's operations and the remainder were sold if no shortage was imminent. If shortages did appear futures were sold only to offset purchases of spot corn. Gains and losses realized on these sales were reported as ordinary profit and loss, but in this suit petitioner contended that any

22. See note 3 *supra*. See also Gilroy v. United States, 112 F. Supp. 664 (D.D.C. 1953); 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 6204, 6302-03 (3d ed., Horack 1943); James, *Inroads on Old Tort Concepts*, 15 NACCA L.J. 281 (1955).

23. The Court evidently felt that this consideration was immaterial and would only create needless confusion. The dissenting Justices, however, took a different approach, apparently relying heavily on the theory that the act created no new private rights.

1. A futures contract is an agreement to purchase or sell a fixed amount of a certain commodity at a designated future date for a fixed price. It does not include a sale of a cash commodity for deferred shipment or delivery. See 42 STAT. 998 (1922), 7 U.S.C.A. § 2 (Supp. 1955).

gain or loss from the sale of its futures should have been treated as arising from the sale of a capital asset. Certiorari was granted to review a judgment of the court of appeals affirming a determination by the Tax Court that the futures were not capital assets.[2] *Held,* affirmed. The futures transactions were not so divorced from the everyday operation of the company's business as to come within the congressional purpose of providing preferential treatment for transactions in property which are not the normal source of business income. *Corn Products Refining Co. v. Commissioner,* 350 U.S. 46 (1955).

Being a question of policy, the special tax treatment accorded gains and losses on certain dispositions of property classified as "capital assets"[3] has frequently presented the federal courts with the problem of finding that elusive criterion—the intent or purpose of Congress.[4] Specifically, the problem with regard to a contract in commodity futures has been one of classification.[5] Such contracts would normally appear to be capital assets within the statutory definition which excepts only certain types of property directly related to the taxpayer's trade or business;[6] however, many transactions involving the purchase and sale of futures have all the earmarks of dealing in the ordinary course of business. In the earlier enactments of the Revenue Code the definition of capital assets included a two year holding period.[7] Since exchange rules have always required futures contracts to be closed out within a shorter period, any dealing in futures necessarily produced ordinary gain or loss. However, the time requirement was eliminated in 1934[8] to prevent security holders from taking timely losses which entirely offset ordinary income.[9] The change in definition focused attention on those taxpayers who used futures for hedging

2. Tax Court opinion commented on in 65 HARV. L. REV. 187 (1951).
3. See note 6 *infra.*
4. See Wells, *Legislative History of Treatment of Capital Gains Under the Federal Income Tax, 1913-1948,* 2 NAT'L TAX J. 12 (1949).
5. The Supreme Court has classified parties dealing in futures as: (1) those who use them to hedge; (2) legitimate capitalists; and (3) gamblers or irresponsible speculators. United States v. N. York Coffee and Sugar Exchange, Inc., 263 U.S. 611, 619 (1924). The difficulty of classification was noted in a previous discussion of this topic: "While the stigma of wagering will be rarely applied, the distinction between hedging and legitimate investment will survive as a recurrent issue." Note, *Trading in Commodity Futures Under Federal Income Tax Statutes,* 51 YALE L. J. 505, 511 (1942).
6. Under the present code, the term "capital asset" includes all property held by the taxpayer except: (1) stock in trade or property includable in inventory or property held primarily for sale to customers; (2) depreciable business property or real property used in the business; (3) certain literary works; (4) accounts receivable; (5) certain government obligations. INT. REV. CODE OF 1954 § 1221.
7. Revenue Act of 1921, c. 136, § 206, 42 STAT. 233.
8. Revenue Act of 1934, c. 277, § 117, 48 STAT. 714.
9. See Commissioner v. Covington, 120 F.2d 768, 772 (5th Cir. 1941), *cert. denied,* 315 U.S. 822 (1942) (concurring opinion applied the congressional purpose to transactions in commodity futures).

purposes[10] and the Treasury Department distinguished such transactions from mere speculations.[11] This distinction subsequently controlled the classification of futures and unfortunately emphasized the true hedge while failing to recognize similar business purposes for futures transactions.

Conversely from the opposing contentions in the instant case, almost all the litigation in point has involved taxpayers seeking ordinary loss treatment when the Commissioner has determined that losses on the futures market were capital losses subject to the statutory limitation.[12] The first decision applying the Treasury Department's interpretation found in favor of a wheat farmer who had dealt in futures to protect against fluctuations in the price of wheat.[13] This decision, however, was followed by a leading case which allowed only capital loss to a manufacturer of crude cottonseed oil who had used refined oil futures for reasons of business necessity.[14] The theory of the opinion was that the taxpayer did not establish a true hedge because "it had no actual commodity on hand or future commitments to be protected from price variations."[15] This strict application continued in several subsequent decisions, the courts finding that futures were not stock in trade, property includable in inventory nor property held primarily for sale to customers.[16] However, in two substantially identical cases before the Tax Court a business purpose for contracting in commodity futures was satisfactorily shown. In each case a manufacturer, holding a large inventory of raw materials and fearing a decline in its market value, entered into futures sales contracts as a protective measure. Actually the market rose and losses were incurred when the contracts were closed out. Ordinary loss was allowed on the principle that this was a hedging transaction.[17]

10. Board of Trade v. Christie Grain and Stock Co., 198 U.S. 236, 249 (1905). See also Browne v. Thorn, 260 U.S. 137, 139 (1922); Commissioner v. Farmers & Ginners Cotton Oil Co., 120 F.2d 772, 774 (5th Cir.), *cert. denied*, 314 U.S. 683 (1941).

11. "[H]edging transactions are essentially to be regarded as insurance rather than a dealing in capital assets. . . ." G.C.M. 17322, XV-2 CUM. BULL. 151, 155 (1936).

12. The present limitation is that capital losses are allowed only to the extent of capital gains and $1000 of ordinary income. INT. REV. CODE OF 1954 § 1211. As a necessary corollary to the special treatment afforded capital gains, the allowance of capital losses has been limited in varying ways since 1924. Revenue Act of 1924, c. 234, § 208, 43 STAT. 263.

13. Ben Grote, 41 B.T.A. 247 (1940).

14. Commissioner v. Farmers & Ginners Cotton Oil Co., 120 F.2d 772 (5th Cir.), *cert. denied*, 314 U.S. 683 (1941).

15. *Id.* at 774.

16. Trenton Cotton Oil Co. v. Commissioner, 147 F.2d 33 (6th Cir. 1945); Commissioner v. Banfield, 122 F.2d 1017 (9th Cir. 1941); Estate of Dorothy Makransky, 5 T.C. 397 (1945), *aff'd per curiam*, 154 F.2d 59 (3d Cir. 1946); Tennessee Egg Co., 47 B.T.A. 558 (1942). See cases collected in 3 MERTENS, FEDERAL INCOME TAXATION § 22.07 (Supp. 1955).

17. Fulton Bag & Cotton Mills, 22 T.C. 1044 (1954); Stewart Silk Corp., 9 T.C. 174 (1947).

In the instant case the Supreme Court sidestepped the inadequate hedge test and found ordinary income because the taxpayer dealt in futures as an integral part of its business operations.[18] The futures purchase contracts were used both as a measure of insurance in the acquisition of raw materials and as a substitute for the commodity itself.[19] To classify these operations as capital asset transactions obviously would have distorted the taxpayer's income picture.[20] The decision serves to emphasize that for the purpose of classifying property as capital assets, the controlling factor should be the kind of taxpayer dealing with the property and the use to which it is put rather than the nature of the property itself.[21] A proper result was reached by relying on the purpose behind the legislative enactment when literal adherence to the statutory language might not have fulfilled that purpose.

LABOR LAW—TAFT-HARTLEY ACT—DISCHARGE OF EMPLOYEES BECAUSE OF UNION MEMBERSHIP

Respondent, operator of a small trucking line, employed two persons in its service department. When these employees joined a labor union and the union sought to include them in its uniform contract, which would raise the wages of each by about fifty cents an hour, respondent eliminated the service department and discharged the employees. The union then filed a complaint with the NLRB charging violations of the Taft-Hartley Act's provisions against discrimination in employment because of union membership.[1] A trial examiner found that respondent closed the service department because it

18. This approach had been suggested in a thorough analysis of the problem of classifying commodity futures. However, the remedial legislation advocated in that discussion appears unnecessary in view of the instant decision. Rich & Rippe, *Tax Aspects of Commodity Futures Transactions With a Business Purpose*, 2 TAX L. REV. 541 (1947).

19. 350 U.S. at 50.

20. "It is clear that the prices for futures have a direct relation to, and effect upon, the prices in 'spot' sales." United States v. New York Coffee and Sugar Exchange, Inc., 263 U.S. 611, 616 (1924). Where the futures sales were matched by purchases of spot corn, the cost of raw materials was actually reflected in the price of the futures purchase contracts. Thus, the cost of goods manufactured would have been unrealistic if these were classified as separate and independent transactions.

21. *Cf.* Hort v. Commissioner, 313 U.S. 28 (1941) (lump sum payment to lessor for cancellation of lease was a substitute for the rent and not a return of capital); Fisher v. Commissioner, 209 F.2d 513 (6th Cir.), *cert. denied*, 347 U.S. 1014 (1954) (proceeds above face amount of notes in default as to interest constituted ordinary income where seller had status of lender rather than investor).

1. Labor Management Relations Act, 61 STAT. 140 (1947), 29 U.S.C.A. § 158 (1956).

could not be profitably maintained at the higher wages. The Board rejected this finding and ordered respondent to reinstate the employees and to award them appropriate back pay. Upon respondent's refusal to comply, the Board brought this action to enforce its order. *Held,* enforcement denied. Where the evidence shows a legitimate economic reason for the discharge of employees, a finding of union discrimination is not justified, notwithstanding that the reason stems from the employees' union membership. *NLRB v. Adkins Transfer Co.,* 226 F.2d 324 (6th Cir. 1955).

At common law an employer's right to hire and fire his employees for any reason whatsoever was inviolate.[2] The Taft-Hartley Act protects the right of the individual to engage in or refrain from union membership and activity. Accordingly, it limits the traditional power of the employer by providing that discrimination in regard to hiring, firing, or other terms of employment is an unfair labor practice when the desired objective is to encourage or discourage membership in a labor organization.[3] However, union membership in and of itself does not guarantee to any employee the right to be free from discharge.[4] In all cases involving the moving of a particular plant or department, the NLRB has sought to determine whether or not the motive behind the action was an illegal discrimination.[5] The traditional remedy for such discrimination has been the award of back pay from the date of discharge to the date of an offer of reinstatement, together with reinstatement in the same or similar position.[6] Where there was a clear showing that the employer acted from economic motives in moving his shop and discharging the employees, the Board has dismissed the complaint.[7] Examples of economic motives are the conclusion of an experimental project and the unusual expense incurred in maintaining a certain post.[8] In many cases, however, the

2. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); NLRB v. Cape County Milling Co., 140 F.2d 543 (8th Cir. 1944); Mechanics' Foundry & Machine Co. v. Lynch, 236 Mass. 504, 128 N.E. 877 (1920); Paul v. Mencher, 169 Misc. 657, 7 N.Y.S.2d 821 (Sup. Ct. 1937).

3. 61 STAT. 140 (1947), 29 U.S.C.A. § 158(a)(3) (1956).

4. NLRB v. Supreme Bedding & Furniture Mfg. Co., 196 F.2d 997 (5th Cir. 1952); NLRB v. Piedmont Cotton Mills, 179 F.2d 345 (5th Cir. 1950); NLRB v. Hinde & Dauch Paper Co., 171 F.2d 240 (4th Cir. 1948); NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946); NLRB v. Edinburg Citrus Ass'n, 147 F.2d 353 (5th Cir. 1945).

5. NLRB v. E. C. Brown Co., 184 F.2d 829 (2d Cir. 1950); Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953); Joseph E. Cote, 101 N.L.R.B. 1486 (1952); Barr Marketing Co., 96 N.L.R.B. 875 (1951).

6. See 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 992 (1940).

7. NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953); NLRB v. Fuchs Baking Co., 207 F.2d 737 (5th Cir. 1953); NLRB v. Machine Products Co., 198 F.2d 313 (10th Cir. 1952); Utah Construction Co., 95 N.L.R.B. 30 (1951); Southern Fruit Distributors Inc., 80 N.L.R.B. 1283 (1948).

8. NLRB v. Fuchs Baking Co., 207 F.2d 737 (5th Cir. 1953); Frank P. Slater, 102 N.L.R.B. 153 (1953); Arthur G. McKee & Co., 94 N.L.R.B. 399 (1951); W. Hawley & Co., 93 N.L.R.B. 1127 (1951); Sub Grade Engineering Co., 93 N.L.R.B. 406 (1951). See NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953).

discharge of the employees stems from a dual motivation on the part of the employer.[9] In these cases the test applied by the Board has been whether or not there was a dominant anti-union motive—the burden being upon the Board to show affirmatively that discrimination was the basis of discharge.[10] In the instant case the Board apparently abandoned this test and held that respondent was guilty of a prima facie unfair labor practice because the employees would not have been discharged had they not joined the union.

The courts have held that when the Board could as reasonably infer a proper motive as an unlawful one, an inference of illegality is not supported by substantial evidence.[11] This sharply contradicts the policy adopted by the Board in the instant case, but the court in denying enforcement of the Board's order concurred with the majority of courts which have decided the issue.[12] Had the Board reached its decision by finding that respondent was motivated by both anti-union and economic considerations, it seems likely that the court would have sustained the order, giving weight to the economic considerations as mitigating factors. This has been done in similar cases.[13]

The instant case indicates that the Board needs to point out the rationale which it plans to use in determining cases involving an abandoned department. It is clear that those courts which have passed upon this question will not sustain the Board when it bases its decision upon a prima facie test. So long as the Board bases its decision upon a finding of fact rather than a conclusion of law, the courts will allow the Board a wide discretion; but they feel free to overturn a decision resting upon purely legal grounds.

NEGLIGENCE—HIGH TENSION POWER LINES—DUTY TO WARN OF DANGEROUS CONDITION

Deceased was electrocuted while repairing his television antenna which broke and came in contact with the defendant's high tension wires. Plaintiff, administratrix, brought an action for wrongful death

9. NLRB v. National Die Casting, 207 F.2d 344 (7th Cir. 1953); John S. Barnes Corp. v. NLRB, 190 F.2d 127 (7th Cir. 1951); NLRB v. E. C. Brown Co., 184 F.2d 829 (2d Cir. 1950).

10. NLRB v. Mac Smith Garment Co., 203 F.2d 868 (5th Cir. 1953); NLRB v. Reynolds Int'l Pen Co., 162 F.2d 680 (7th Cir. 1947).

11. See NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954). *But see* NLRB v. Nevada Consol. Copper Corp., 316 U.S. 105 (1942).

12. See, *e.g.*, NLRB v. General Drivers, 225 F.2d 205 (5th Cir. 1955); NLRB v. Huber & Huber Motor Express, 223 F.2d 748 (5th Cir. 1955); NLRB v. National Paper Co., 216 F.2d 859 (5th Cir. 1954); NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954).

13. See, *e.g.*, Tennessee-Carolina Transp. Inc., 108 N.L.R.B. 1369 (1954); Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953).

charging the power company with negligence in failing to warn that the lines were high tension distribution wires which made contact with them extremely dangerous. The trial court granted the defendant's motion for a compulsory nonsuit and plaintiff appealed. *Held* (4-1), affirmed. An electric power company owes no duty to warn of a dangerous condition merely because its wires contain a high voltage charge.[1] *Jowett v. Pennsylvania Power Co.*, 118 A.2d 452 (Pa. 1955).

Is the absence of a special contract, an electric company is held not to be the insurer of the safety of the persons who may come in contact with its appliances and are injured.[2] The liability of an electric company is based on negligence.[3] Although each case depends largely upon its own facts, there have developed from the litigation of cases involving death and injuries resulting from contact with high tension wires some general fact situations where a duty is said to exist on the part of a power company.[4] Generally a duty exists to prevent harm coming to others from deadly current at places where they may be reasonably expected to go,[5] and to exercise such care as is commensurate with the danger involved.[6]

The most frequent causes of electricity being out of bounds and injuring others arise in fact situations involving defective insulation,[7] broken wires,[8] sagging wires,[9] and wires located in places where they may be dangerous by reason of proximity to persons or to objects which may carry the current where it will be harmful.[10] There does not

1. No question was raised that the wires were in undue proximity to the house or that they should have been insulated.
2. CURTIS, THE LAW OF ELECTRICITY § 400 (1915), and cases cited therein.
3. *Ibid.*
4. See Challener, *Injuries Incident to the Production and Use of Electricity in Pennsylvania*, 24 TEMP. L.Q. 42 (1950); Feezer, *Tort Liability of Suppliers of Electricity*, 22 WASH. U.L.Q. 357 (1937).
5. Polk v. City of Los Angeles, 26 Cal. 2d 412, 159 P.2d 931 (1945); Lozano v. Pacific Gas & Electric Co., 70 Cal. App. 415, 161 P.2d 74 (1945); International Harvester Co. v. Sartain, 32 Tenn. App. 425, 222 S.W.2d 854, 867 (W.S. 1948). See Sweatman v. Los Angeles Gas & Electric Corp., 101 Cal. App. 318, 281 Pac. 677 (1929). See also Illinois Power & Light Corp. v. Hurley, 49 F.2d 681, 689 (8th Cir. 1931); Arkansas Power & Light Co. v. Shryrock, 180 Ark. 705, 22 S.W.2d 380 (1929) (duty of reasonable and prompt inspection of power lines); Alabama Power Co. v. Matthews, 226 Ala. 614, 147 So. 889 (1933) (duty as to proper construction and maintenance).
6. American Gen. Ins. Co. v. Southwestern Gas & Electric Co., 115 F.2d 706 (5th Cir. 1940); Lewis v. Pacific Gas & Electric Co., 95 Cal. App. 60, 212 P.2d 243 (1949); 29 C.J.S. *Electricity* § 39 (1941). See CURTIS, THE LAW OF ELECTRICITY §§ 404-06 (1915), for the variety of expressions used by the courts in an attempt to define more clearly the degree of care required.
7. Reynolds v. Iowa Southern Utilities Co., 21 F.2d 958 (8th Cir. 1927); Walpole v. Tennessee Light & Power Co., 19 Tenn. App. 352, 89 S.W.2d 174 (M.S. 1935); Northern Virginia Power Co. v. Bailey, 194 Va. 464, 73 S.E.2d 425 (1952).
8. Hagerstown & F. Ry. v. State, 139 Md. 507, 115 Atl. 783, 19 A.L.R. 797 (1921).
9. Northern Virginia Power Co. v. Bailey, 194 Va. 464, 73 S.E.2d 425 (1952).
10. Humphrey v. Twin State Gas & Electric Co., 100 Vt. 414, 139 Atl. 440,

appear to be a duty on the part of a power company to give warning of high tension wires because of that fact alone. However, it seems that a power company does have a duty to give such warning if it knows or reasonably should know that there is a danger of persons coming in contact with its wires.[11]

In the instant case there were circumstances[12] from which the existence of a duty to warn might have been found. However, the decision is in accord with the apparent weight of authority in holding that there is no duty to warn just because the company's wires contained a high voltage charge.

REAL PROPERTY—JOINT TENANCY—SEVERANCE OF ESTATE BY MURDER OF CO-TENANT

The heir at law of a woman murdered by her husband sought to have the court declare her entitled to an undivided half interest in property which had been held jointly by the spouses, on the ground that a murderer should not benefit from his crime. The complaint was dismissed for failure to state a cause of action. On direct appeal to the Illinois Supreme Court, *held,* reversed. When one of two joint tenants murders the other, the act of murder prior to the death terminates the tenancy and extinguishes the murderer's right of survivorship before it becomes operative; thereafter the murderer and the heirs of the deceased tenant hold legal title to the property as tenants in common. *Bradley v. Fox,* 7 Ill. 2d 206, 129 N.E.2d 699 (1955).

Under traditional common-law property concepts the murder of one joint tenant or tenant by the entirety[1] by the other operates to

56 A.L.R. 1011 (1927). See Annots., 14 A.L.R. 1023 (1921) (electric wire over private property), 40 A.L.R.2d 1299 (1955) (electric wires—injury to adults).

11. Croxton v. Duke Power Co., 181 F.2d 306 (4th Cir. 1950) (no duty to warn when power company could not be charged with knowledge of the danger of persons coming in contact with its wires); Worley v. Kansas Electric Power Co., 138 Kan. 69, 23 P.2d 494 (1933) (duty of power company to place warning signs for the protection of those coming within danger zone); Lewis v. Pacific Gas & Electric Co., 95 Cal. App. 60, 212 P.2d 243 (1949) (crane operator electrocuted—no duty to warn of high tension wires under the circumstances). circumstances).

12. The plaintiff introduced evidence of the deceptive appearance of the wires strung on poles owned by the telephone company; that the defendant had written a number of property owners warning of the danger of antennae coming in contact with the wires; and that the defendant's meter reader, charged with the duty of reporting hazards, had a notation "T.V. Aerial" on the page devoted to the plaintiff's house, thus tending to show that the defendant was aware of the danger of the antenna coming in contact with the wires.

1. "A tenancy by the entirety . . . is essentially a form of joint tenancy, modified by the common-law theory that husband and wife are one person." 2 TIFFANY, REAL PROPERTY 217 (3d ed. 1939). See also 4 THOMPSON, REAL PROP-

extinguish all rights of survivorship in the decedent and establishes the murderer as the sole owner of the property.[2] This view is said to follow logically from the rule that joint tenants individually hold the entire estate subject to a right of survivorship in the surviving tenant. Running counter to this result is the well-established equitable maxim that no one shall be permitted to take advantage of his own wrong or to acquire property by his own crime.[3] Efforts to effectuate this equitable doctrine have been met first by the traditional property rule and second by the usual state constitutional prohibition against forfeiture of estate because of conviction of a crime.[4]

Solutions to this much discussed but seldom litigated problem are represented by a confused variety of decisions. The traditional view that the murderer acquires the entire estate is followed in one group of cases.[5] A second group gives all to the decedent's heirs and nothing to the murderer. New York altogether bypasses legal barriers and awards the entire estate to the victim's heirs.[6] Wisconsin conceives

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ERTY §§ 1803-26 (perm. ed. 1940). "[It] is sometimes referred to as a joint tenancy." 26 AM. JUR., *Husband and Wife* § 66 (1940). The principal difference between the estates is that a tenancy by the entirety can be terminated only by joint action of husband and wife during their lives, whereas a joint tenancy may be terminated by a transfer of his interest by one tenant. Illinois, however, has abolished tenancies by the entirety. ILL. REV. STAT. c. 68, § 9 (1947). Had it not, the tenancy in the instant case would have been by the entirety, and perhaps the rationale of this court could not have been employed. Though the annotators of the *American Law Reports* suggest that a distinction exists between joint tenancy and tenancy by the entirety as regards the disposition of property upon murder of one tenant by the other, none of the leading cases turn upon this distinction. Annot., 32 A.L.R.2d 1099, 1101 (1953).

2. For an excellent discussion of the common-law property concepts here involved, see 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952).

3. BROOM, LEGAL MAXIMS 227 (7th ed. 1900). See AMES, *Can a Murderer Acquire Title by His Crime and Keep It?* in LECTURES ON LEGAL HISTORY 310 (1913); Reppy, *The Slayer's Bounty—History of the Problem in Anglo-American Law*, 19 N.Y.U.L.Q. REV. 229 (1942).

4. *E.g.*, "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of the blood or forfeiture of estate. . . ." ILL. CONST. art. II, § 11. See also TENN. CONST. art. I, § 12.

5. Smith v. Greenburg, 121 Colo. 417, 218 P.2d 514 (1950) (household goods held jointly); Di Lalla v. Corea, 19 Pa. D. & C. 282 (C.P. 1933) (jointly held bank account); Hammer v. Kinnan, 16 Pa. D. & C. 395 (C.P. 1931) (real property held by the entirety); Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935) (joint bank account); Shuman v. Schick, 95 Ohio App. 413, 120 N.E.2d 330 (1953) (joint bank account); Wenker v. Landon, 161 Ore. 265, 88 P.2d 972 (1939) (real property held by the entirety); Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S.W. 108 (1907) (real property held by the entirety). See Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

6. Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y. Supp. 176 (4th Dep't 1935) (real property and bank account held in joint tenancy); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918) (real property held by the entirety); *In re* Santourian's Estate, 125 Misc. 668, 212 N.Y. Supp. 116 (Surr. Ct. 1925) (joint bank account); Cf. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (intestacy). It has been said that the *Van Alstyne* case purports to apply the constructive trust view. 3 SCOTT, TRUSTS 2384 n.3 (1939); Reppy, *The Slayer's Bounty—In New York*, 20 N.Y.U.L.Q. REV. 424, 425 (1945); 11 B.U.L. REV. 129, 130 (1931). A doubtful 1953 decision from

the joint tenancy as continuing in the victim's heirs, refusing to recognize the effect of the crime and vesting legal title in the victim's heirs upon the slayer's death.[7] Minnesota allows legal title to vest in the murderer but gives beneficial ownership to the heirs by the imposition of a constructive trust.[8]

A third group, representing the majority of modern decisions, divides the property in differing ways between the murderer and the victim's heirs by imposition of a constructive trust upon some part of the legal interest vested in the survivor. The language of some of the opinions is seriously confused, creating misunderstanding as to whether legal or equitable title goes to the heirs of the decedent.[9] Some of the courts have given an equitable life interest in half the estate to the heirs, and disposed of the remainder by a conclusive presumption that the murderer would have predeceased the victim[10] or have given the remainder to the tenant whose life expectancy had been the longer, in one case even giving the remainder to the slayer.[11] The Delaware court imposed a constructive trust on all the property but allowed the murderer the commuted value of half for life.[12] The courts of two other jurisdictions have given a beneficial fee in half the property to the decedent, in effect reducing the tenancy to a tenancy in common.[13]

A fourth view adopted in a few recent cases involving real property

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Ohio, cited for this proposition, but distinguishable because the joint banking contract had no survivorship clause, in Bauman v. Walter, 160 Ohio St. 273, 116 N.E.2d 435 (1953), *cert. denied*, 347 U.S. 947 (1954).

7. *In re* King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952) (real and personal property held jointly), criticized in 1953 WIS. L. REV. 567.

8. Vesey v. Vesey, 237 Minn. 295, 54 N.W.2d 385 (1952) (bank account held jointly).

9. The source of this confusion may be traced to Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d 757, 760 (1930) (bank deposit held by the entirety), which said, "conceding, but not deciding, that full legal title may pass to the [survivor] . . . [the court] will treat him as a constructive trustee." Following this case, this issue was further confused by Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948), and hopelessly entangled in Cowan v. Pleasant, 263 S.W.2d 494, 496 (Ky. 1953), in which the court cited the *Barnett* case as authority for its conclusion, but stated that the "heirs, however, are entitled to his one-half of the property, just as would have occurred in the event the marital relation had been severed."

10. Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927) (real property held by the entirety). Though the deceased victim's life expectancy was greater than the survivor's, the court indulged the conclusive presumption that because the slayer "by his crime took away his wife's interest . . . he must be held a constructive trustee for the benefit of her heirs." 137 S.E. at 191.

11. Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952) (real property held by the entirety and personal property held jointly); Sherman v. Weber, 113 N.J. Eq. 451, 167 Atl. 517 (Ch. 1933) (real property held by the entirety; remainder to murderer whose life expectancy was the longer).

12. Colton v. Wade, 32 Del. Ch. 122, 80 A.2d 923 (1951) (realty held by the entirety).

13. Hogan v. Martin, 52 So. 2d 806 (Fla. 1951) (real property held by the entirety); Ashwood v. Patterson, 49 So. 2d 848 (Fla. 1951) (real property held by the entirety); Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948) (real property held by the entirety); Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d

held by the entirety is that the wrongdoer by his felonious act dissolves the marital relationship and creates a tenancy in common.[14] The instant decision apparently extends this analysis to a joint tenancy. In rendering its decision, however, the Illinois court employed a somewhat obscurely phrased rationale. Recognizing that the murderer does in practical effect benefit by the operation of his right of survivorship, the court utilized a preventive rather than a remedial application of the principle that a murderer may not benefit from his wrongdoing. The joint tenancy was deemed severed into a tenancy in common before the victim's death by the murderer's breach of an implied condition in the contract of joint tenancy that neither tenant shall terminate the estate by murdering the other. Thus the crime itself prevented maturation of the murderer's right of survivorship and the constitutional provision against forfeiture of estate was not violated by the result reached.[15]

This rationale presents three doubtful elements. First, the court assumed that each tenant in practical effect owns half the estate despite the common-law concept that the entire estate is vested in each tenant subject to a right of survivorship in his co-tenant.[16] Either tenant may sever the tenancy and secure an undivided half interest in the property. Noting this, the court inferred that the entire interest of each tenant is equal to an undivided half. Thus conclusion may not be accurate in all cases, for the right of survivorship of one tenant may render his interest considerably more valuable than a mere undivided half.

Second, the court found that the crime of murder logically occurs prior to the victim's death. It is too well settled for argument that a murder cannot exist without a death, and it should logically follow that one is not a murderer until the sufferor has died. Even then, if the victim lives more than a year and a day there is no murder though he may die as a direct consequence of the culpable act.[17] A few old cases contain language suggesting that the crime and the

757 (1930) (bank deposit held by the entirety). All four cases have been cited as giving legal title to half the property to the deceased's heirs; see note 9 *supra,* for the source of misunderstanding regarding their holdings; *i.e.,* 37 MINN. L. REV. 71, 73 (1952).

14. Hogan v. Martin, 52 So. 2d 806 (Fla. 1951), criticized in 6 WYO. L.J. 266 (1952); Ashwood v. Patterson, 49 So. 2d 848 (Fla. 1951); Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1953); Budwit v. Herr, 339 Mich. 265, 63 N.W.2d 841 (1954). Perhaps *Barnett v. Couey* and *Grose v. Holland, supra,* likewise stand for this proposition, but as pointed out in note 9 *supra,* this is doubtful.

15. See 44 ILL. B.J. 353, 357-58 (1956).

16. According to the common-law concept of joint tenancy, the killer took all his interest when he became joint tenant in the first place, and therefore was not enriched by the killing. Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S.W. 108 (1907); 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952).

17. State v. Dailey, 191 Ind. 658, 134 N.E. 481 (1922); cases collected in Annot., 20 A.L.R. 1006 (1922). *Contra,* People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934) (statute abolishing common-law crimes abrogated this requirement).

death may be separated, but their authority for this proposition is doubtful.[18]

Third, an implied condition against termination of the tenancy by murder creates a heretofore unrecognized mode of severing the joint estate during the lives of the tenants.[19] The ordinary modes have been deemed to be severance of one of the four unities which are the foundation of the estate[20] by unilateral or mutual alienation of their interests by the parties or by mutual agreement, upon which a tenancy in common would result. Murder of a co-tenant, even assuming that it occurs before death, does not appear to sever any of the unities.

It has been suggested that the best solution to the problem of the instant case lies in the employment of the constructive trust theory.[21] Although the court discussed that form of relief with evident approval, it recognized that once the survivor's legal and beneficial interests are indefeasibly vested, deprivation of those rights would work a forfeiture.[22] To avoid the necessity of legal fictions it has been forcibly suggested that the problem can best be handled by legislation directed to that end.[23]

TORTS—LANDOWNER—DUTY TO SOCIAL GUEST

Plaintiff, a relative of defendant making a social visit in defendant's home, received injuries when she slipped on grease left upon defendant's steps. Plaintiff asserted that the conduct of any occupier of land toward any entrant thereon should be examined under the general principles of negligence to determine whether the occupier acted rea-

18. Debney v. State, 45 Neb. 856, 64 N.W. 446 (1895) (the crime is committed at the time the wound is inflicted though death is subsequent); see cases collected in Annot., 34 L.R.A. 851 (1897); 26 AM. JUR., *Homicide* § 237 (1940) ("[for determining the situs] the death is regarded as a mere consequence [of the crime]").

19. It would perhaps be more difficult to imply this constructive condition into a tenancy by the entirety than into a joint tenancy. In the former, each tenant holds *pur tout*, and the consent of both is necessary to terminate the relation; but in the latter, each tenant holds *pur my et pur tout*, and either may cause severance unilaterally. 2 AMERICAN LAW OF PROPERTY § 6.6 (Casner ed. 1952). Hence, because the joint tenancy is essentially contractual, and the tenancy by the entirety essentially a property interest, it is easier to imply a condition into the joint tenancy.

20. These are the unities of time, title, interest and possession. 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952).

21. RESTATEMENT, RESTITUTION § 188a (1937), proposes that the trust be impressed to the extent that the murderer has enlarged his interest and states that age, health, and other factors of life expectancy are immaterial. 3 SCOTT, TRUSTS 2398 (1939), advocates the same view; *accord*, 2 VAND. L. REV. 147 n.11 (1948); 9 WASH. & LEE L. REV. 149 (1952).

22. Instant case, 129 N.E.2d at 705.

23. See Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

sonably under all of the circumstances, and that this was a question for the jury. The trial court upheld plaintiff's contention. The court of appeals reversed,[1] but the case was transferred to the state supreme court for final determination. *Held,* trial court reversed. The duty of the host to a social visitor is not determined by due care under the circumstances, but is governed by the historical rule that a social guest in the home is a mere licensee who can recover only when his injury is the result of active or affirmative negligence of the host. *Wolfson v. Chelist,* 284 S.W.2d 447 (Mo. 1955).

Historically, the duty owed by an occupier of land to one injured on the land due to defects therein was determined by classifying the visitor as a trespasser, invitee or licensee,[2] and applying a set of rules peculiar to the category into which he fell. Since the leading English case of *Southcote v. Stanley*[3] in 1856, the social visitor has been classified as a licensee to whom no general duty exists to use care to make the premises safe.[4] Although the *Southcote* case has been criticized as founded on now rejected grounds,[5] its rule has been applied by the majority of the American jurisdictions which have considered the question.[6] The host's duty is generally expressed as identical with the duty owed to an ordinary licensee who takes the premises as he finds them, but is protected from injury from something on the premises in the nature of a trap or from the host's affirmative conduct.[7]

1. Wolfson v. Chelist, 278 S.W.2d 39 (Mo. App. 1955).

2. The *Restatement of Torts* renames invitees "business visitors" and licensees "gratuitous licensees." 2 RESTATEMENT, TORTS §§ 331-33 (1934).

3. 1 H. & N. 247, 156 Eng. Rep. 1195 (Ex. 1856).

4. The guest may "maintain no action, for there was no act of commission, but simply an act of omission." *Id.*, 156 Eng. Rep. at 1197.

5. It is argued that the rule of the servant's assuming the risk having been changed, the analogy between the guest and servant expressed by a justice in the *Southcote* opinion is no longer accurate. The court in the instant case recognized this criticism, but felt that the rule of the *Southcote* case is not unjust to the parties. Instant case, 284 S.W.2d at 451.

6. Annot., 25 A.L.R.2d 598 (1952). The popularity of the rule may result largely from its consistency with society's concept of the sacredness of the home. See 53 MICH. L. REV. 1011, 1012 (1955). Apparently, the first American case of liability to a guest is Greenfield v. Miller, 173 WIS. 184, 180 N.W. 834 (1921). Until recently, however, there have been few cases. *Compare* 25 A.L.R.-2d 598 (1952) *with* 12 A.L.R. 987 (1921) and 92 A.L.R. 1005 (1934). Perhaps this recent frequency reflects the spread of liability insurance. James, *Tort Liability of Occupier's of Land: Duties Owed to Licensees and Invitees,* 63 YALE L.J. 605, 612 (1954).

One of the principal foundations of the rule—the common-law sanctity of the landowner—has been criticized as having no place in the modern law of torts. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers,* 69 L.Q. REV. 182, 359 (1953). See also 1955 CAMB. L.J. 1, 6.

7. See, *e.g.,* Comeau v. Comeau, 285 Mass. 578, 189 N.E. 588 (1934); Greenfield v. Miller, 173 Wis. 184, 180 N.W. 834 (1921). See also HARPER, TORTS § 96 (1933); 38 AM. JUR., *Negligence* § 117 (1941); 65 C.J.S., *Negligence* § 32 (1950). The licensee classification is most often invoked to deny the host's liability for harm caused by a concealed danger of which he was not aware, but which would have been discoverable by inspection. See, *e.g.,* Vogel v. Eckhert, 22 N.J. Super. 220, 91 A.2d 633 (1952) (no duty to know of defective conditions of outdoor furniture.)

Some American cases[8] have adopted a slightly different standard of duty, following the *Restatement of Torts*.[9] This standard imposes a special liability to the gratuitous licensee[10] involving a duty to warn the guest of concealed dangers when the host has actual knowledge of them, realizes they constitute an unreasonable risk to the guest, and has reason to believe that the guest will not discover them by the exercise of ordinary care.[11]

Efforts to avoid the manifest inequities of the social-guest-licensee doctrine have found fruition in three principal ways. The most frequent method of circumventing the rule is to urge, where at all plausible, that the guest was a business visitor rather than a licensee. Courts have gone far in finding business purpose in the visit in order to allow recovery by the visitor.[12] Another method of evading the rule was adopted by the Ohio court in *Scheibel v. Lipton*.[13] There the court held that a social guest is neither a licensee nor an invitee but belongs in a separate duty-category simply as a social guest. However, the standard of case set out is quite similar to the orthodox one.[14]

A third escape from the majority view was urged by the plaintiff in the instant case, namely, to apply the ordinary rules of negligence.[15] A New York case has language which may support this argument, but the issue has not yet been finally decided in that state.[16] In England, the

8. See Goldberg v. Straus, 45 So. 2d 883 (Fla. 1950), and Comment, 4 U. FLA. L. REV. 122 (1951); Mitchell v. Legarsky, 95 N.H. 214, 60 A.2d 136 (1948) (host with knowledge of torn linoleum and realization of the risk to his social guest held liable for guest's injuries).

9. 2 RESTATEMENT, TORTS § 342 (1934).

10. 2 *id.* at 932.

11. *But cf.* Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

12. In Guilford v. Yale University, 128 Conn. 449, 23 A.2d 917 (1942), for example, it was held that an alumnus returning for a class reunion at commencement was an "invitee" while on the premises of the university. This case was criticized by a noted writer in the field of torts: "It is not easy . . . to discover a 'business visitor' in an old grad, wandering about university property at 2:00 o'clock in the morning to find a place to urinate." Harper, *Licensor-Licensee, Tweedledum-Tweedledee*, 25 CONN. B.J. 123, 125 (1951). The statement in the *Guilford* case that one invited to the premises is entitled to the status of invitee, though widely cited, was later thought to be "too broad." Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693, 697 (1951). See also Kalinowski v. Young Women's Christian Ass'n, 17 Wash. 2d 380, 135 P.2d 852 (1943) (chaperone at YWCA dance is an invitee).

13. 156 Ohio St. 308, 102 N.E.2d 453 (1951).

14. The duty owed is to exercise ordinary care not to cause injury to the guest by any act of the host or by any activity carried on by the host while the guest is on the premises, coupled with the duty to warn the guest of any condition known to the host and which one of ordinary prudence and foresight in his position would reasonably consider dangerous if the host has reason to believe that the guest does not know and will not discover the dangerous condition for himself. *Id.*, 102 N.E.2d at 463.

15. Plantiff suggested several factors for the jury to consider in determining due care. Instant case, 284 S.W.2d at 449.

16. There is "no decision by the court of last resort of . . . New York . . . dealing with the general subject of the duty owed by a host to a social guest." Schiebel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453, 461 (1951). In Bogateroff

third report of the Law Reform Committee recommended the abolition of the existing categories of invitees and licensees, and the substitution of one uniform duty of care owed by the occupier of premises to all persons coming upon them at his invitation or by his permission, express or implied.[17] This test is, essentially, "reasonable care to see that the premises are reasonably safe."[18]

It would seem that there is substantial merit to the argument put forth in the instant case, but as yet no court has adopted it in the ordinary host and guest situation although it is recognized in the analogous driver-host and passenger-guest cases.[19] While the limits of the application of the ordinary rules of negligence might be difficult to define, there should be no reason why they could not serve adequately to determine the liability of the host to his injured guest.[20]

WILLS—PRETERMITTED HEIR STATUTE—SOLE GIFT TO CHILD DEFEATED BY ACT OF TESTATOR

After execution of her will, testatrix sold a parcel of realty which was the sole gift to her son. During probate of the will the son brought a petition to determine heirship, contending that the sale of the land revoked the only portion of the will wherein he was mentioned and left him an omitted child entitled to take an intestate share under the pretermitted heir statute.[1] The trial court denied the claim, ruling that because the petitioner was mentioned in the will the failure of the devise must be deemed intentional and, therefore, the statute was inapplicable. *Held* (3-2), reversed. A testatrix's sale of property previously devised to a child revokes that portion of the will, and unless it appears elsewhere in the will that the failure to provide was intentional, the child is entitled to share in the estate as a pre-

v. Caplan, 108 N.Y.S.2d 205, 207 (Sup. Ct. 1951), a lower court held that the occupier owed the social guest who stepped upon a softball "a duty to use reasonable care to avoid an accident." This statement may be dictum inasmuch as the guest was contributorily negligent. But see Roth v. Prudential Life Ins. Co., 266 App. Div. 872, 42 N.Y.S.2d 592 (2d Dep't 1943), and Faber v. Meiler, 278 App. Div. 849, 104 N.Y.S.2d 485 (2d Dep't 1951), in which the guest was treated as a licensee.

17. Law Reform Committee, *Third Report*, CMD. No. 9305 (1953).

18. See Comment, 1955 CAMB. L.J. 1, 8.

19. Annot., 3 A.L.R.2d 938 (1949).

20. The confusion concomitant with inaugurating this rule led a commentator on the recommendation to Parliament to favor keeping the present system. 1955 CAMB. L.J. 1, 10.

1. "When any testator omits to provide in his will for any of his children, or the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate. . . ." IDAHO CODE ANN. § 14-321 (1948).

termitted heir. *Halfmoon v. Moore*, 291 P.2d 846 (Idaho 1955).

In all but two states,[2] pretermitted heir statutes have been enacted to prevent an inadvertent disinheritance.[3] Since this is their purpose, any mention of a child by name in the will avoids their application.[4] In a majority of states the statutes apply only to children born after execution of the will. In twenty states, however, the statutory protection extends to children and issue of deceased children living at the time the will is executed.[5] These statutes are of two broad types between which the essential difference is the manner of determining the intent of the testator. Under the Massachusetts type statute[6] the intent of the testator may generally be proven by extrinsic evidence[7] while under the Missouri type statute[8] the child must be mentioned in the will or he will take an intestate share.[9]

In the instant case the gift to the child in the will failed because of the subsequent act of the testatrix. Though this problem has infrequently arisen, in every case in which it has been presented the courts have held the pretermitted heir statute inapplicable.[10] The opinions of these courts are to the effect that the statute applies only at the time of the execution of the will and if the child is mentioned therein a careless omission could not have occurred. No extraneous act of the testator could erase the name of the child from the will.[11] Notwith-

2. Maryland, Wyoming.

3. Their purpose is not to restrict the power of the testator or to require him to provide for his children. Culp v. Culp, 206 Ark. 875, 178 S.W.2d 52 (1944); Goff v. Goff, 352 Mo. 809, 179 S.W.2d 707 (1944); ATKINSON, WILLS 139 (1953); *Mathews, Pretermitted Heirs: An Analysis of Statutes*, 29 COLUM. L. REV. 748 (1929).

4. Walker v. Case, 211 Ark. 1091, 204 S.W.2d 543 (1947); Kinnear v. Langley, 209 Ark. 878, 192 S.W.2d 978 (1946); Culp v. Culp, 206 Ark. 875, 178 S.W.2d 52 (1944); *In re* Benolkin's Estate, 122 Mont. 425, 205 P.2d 1141 (1949); Boucher v. Lizotte, 85 N.H. 514, 161 Atl. 213 (1932).

5. See 29 COLUM. L. REV. 748 (1929) for an excellent analysis of the various statutes.

6. "If a testator omits to provide in his will for any of his children, whether born before or after the testator's death, or the issue of a deceased child . . . they shall take the same share of his estate which they would have taken if he had died intestate . . . unless it appears that the omission was intentional and not occasioned by accident or mistake." MASS. ANN. LAWS c. 191, § 20 (1955).

7. Whittemore v. Russell, 80 Me. 297, 14 Atl. 197 (1888); Goff v. Britton, 182 Mass. 293, 65 N.E. 379 (1902); Wilson v. Fosket, 47 Mass. (6 Met.) 400 (1843); Hannah v. Hannah, 70 R.I. 175, 37 A.2d 783 (1944); Goulet v. Miller, 144 Atl. 156 (R.I. 1929). See Annot., 94 A.L.R. 26 (1935).

8. "If any person make his last will, and die leaving a child or children, in case of their death, not named or provided for such will . . . such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate . . . ." MO. REV. STAT. § 468.290 (1949).

9. Goff v. Goff, 352 Mo. 809, 179 S.W.2d 707 (1944); McCoy v. Bradbury, 290 Mo. 650, 235 S.W. 1047 (1921); Bower v. Bower, 5 Wash. 225, 31 Pac. 598 (1892). See Annot., 170 A.L.R. 1321 (1947).

10. Kinnear v. Langley, 209 Ark. 878, 192 S.W.2d 978 (1946); *In re* Callaghan's Estate, 119 Cal. 571, 51 Pac. 860 (1898); Faucher v. Bouchard, 47 R.I. 150, 131 Atl. 556 (1926).

11. See especially Kinnear v. Langley, *supra* note 10, at 983.

standing such authority, the court in the instant case allowed the child to take an intestate share. The rationale is a syllogism which can be stated in three steps. First, according to its previous holding in *In re Fell's Estate*,[12] as interpreted by the court, any failure to provide for a child in a will is presumed to be unintentional and this presumption can only be rebutted by words in the will itself. Second, a sale of property previously devised in a will, not only revokes that portion of the will but also completely obliterates any mention of the devisee.[13] Third, a child is not mentioned in the will if his only gift was defeated by the testator's act, and the presumption of inadvertent omission prevails.

The reasoning of the court seems fallacious when compared with the supposed theory underlying pretermitted heir statutes. Certainly the name of the child was physically present in the will when the will was offered for probate as proof that at the time of its execution the testator had his child in mind. The name was not literally obliterated. Regardless of the reasoning used, implicit in the opinion is an extension of the protection of the statute to cover a careless ademption.

12. 70 Idaho 399, 219 P.2d 941 (1950).

13. Most modern cases seem to hold that a conveyance of previously devised property is not a revocation by alienation, but an ademption. See ATKINSON, WILLS 433 (1953). However, as the court in the instant case construed their statute, an alienation of previously devised property revokes that portion of the will. 291 P.2d at 848.