UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 36 | Number 1 Article 9

12-1-1957

Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

Constitutional Law—Due Process—Admissibility of Evidence in State Courts Obtained by Invasion of Bodily Integrity

That the due process clause of the fourteenth amendment of the federal Constitution prohibits the use in state courts of evidence obtained through coerced confessions was first decided in *Brown v. Mississippi*,[1] where three defendants were convicted of murder in a state court solely on the basis of confessions wrung from them by physical torture. In reversing the conviction, the Supreme Court of the United States held that the use of confessions obtained in such a manner was a denial of due process. The Court held four years later that the due process clause was violated when a defendant's confession was obtained after protracted questioning lasting five days and climaxed by an all night session.[2] But protracted questioning alone does not necessarily violate due process, and information thus obtained may be admissible.[3] On the other hand, a confession was found to be coerced where defendant was subjected to psychological humiliation by being kept naked for several hours and put in fear of being tortured.[4] The Court further extended due process protection by excluding a confession obtained by a state employed psychiatrist who extracted the confession from a physically exhausted defendant by subtle, suggestive questioning.[5]

In this line of cases the test used to determine whether the requirements of due process of law had been met was whether or not the conduct of state officers had offended what the Court terms a "sense of justice."[6] Furthermore, the use of a coerced confession may result in

[1] 297 U. S. 278 (1936). For an extensive review of the state court cases through 1948, see Bader, *Coerced Confessions and the Due Process Clause*, 15 BROOKLYN L. REV. 51 (1949).

This Note will only be concerned with cases which have originated in state, as opposed to federal, courts. The self incrimination clause of the fifth amendment of the Constitution prohibits the use in federal courts of evidence obtained through coerced confessions. Bram v. United States, 168 U. S. 532 (1897). However, in later cases arising in federal courts, the Supreme Court has held "involuntary" confessions inadmissible on an evidentiary, rather than constitutional, basis. Upshaw v. United States, 335 U. S. 410 (1948); Adamson v. United States, 318 U. S. 350 (1943); McNabb v. United States, 318 U. S. 332 (1943).

[2] Chambers v. Florida, 309 U. S. 227 (1940).

[3] Lisenba v. California, 314 U. S. 219 (1941).

[4] Malinski v. New York, 324 U. S. 556 (1945).

[5] Leyra v. Denno, 347 U. S. 556 (1954).

[6] Brown v. Mississippi, 297 U. S. 278, 286 (1936). In Leyra v. Denno, 347 U. S. 556 (1954), the Court gives little or no indication of the application of a particular test. After an extensive review of the facts, Mr. Justice Black merely stated: "We hold that the use of confessions extracted in such a manner . . . is not consistent with due process of law as required by our Constitution." *Id.* at 561.

a reversal of conviction even though statements made in the confession be independently established as true[7] or even where other evidence alone would be adequate to sustain a conviction if the Court cannot determine that the verdict was based solely on the admissible evidence.[8]

In 1952, in *Rochin v. California*,[9] the concept of inadmissibility of coerced confessions was broadened to include real, as opposed to verbal, evidence obtained by a flagrant violation of bodily integrity. In this case police officers entered the defendant's home without a warrant and unsuccessfully attempted forcibly to prevent him from swallowing two morphine capsules. The defendant was then handcuffed and taken to a hospital where the capsules were obtained by the forcible use of an emetic solution. The use of this evidence resulted in his conviction in the state court of illegal possession of morphine. Since the Supreme Court was of the view that "to sanction the brutal conduct . . . would be to afford brutality the cloak of law,"[10] the conviction was reversed. The Court could not rely for reversal on the privilege against self incrimination,[11] nor could it rely on the unreasonable search and seizure cases without overruling the well-established *Wolf* case.[12] Thus, in order to condemn such police practice, the Court resorted to the coerced confession type cases.[13] In determining that the *coercion* and *brutality* present here was a violation of due process, the Court used the same nebulous criterion it applied in *Brown v. Mississippi*,[14] *i.e.*, "that convictions cannot be brought about by methods that offend 'a sense of justice,' "[15] and spoke with approval of the lack of well defined limits in determining what constitutes an invasion of human rights.[16]

[7] Watts v. Indiana, 338 U. S. 49, 50 n. 2 (1949), 28 N. C. L. REV. 390 (1950).

[8] Haley v. Ohio, 332 U. S. 596, 606 (1948); Malinski v. New York, 324 U. S. 401, 402 (1945); Lyons v. Oklahoma, 322 U. S. 596, 597 (1944); Note, 40 CALIF. L. REV. 311, 314 (1952). *But see* Stein v. New York, 346 U. S. 156, 189-92 (1953), 32 N. C. L. REV. 98.

[9] 342 U. S. 165 (1952), 30 N. C. L. REV. 287.

[10] 342 U. S. at 173.

[11] Twining v. New Jersey, 211 U. S. 78 (1908). This case held that the fifth amendment's exemption from compulsory self incrimination was not included within the due process clause of the fourteenth amendment. Therefore, abridgment of this privilege by the states constituted no violation of the federal Constitution.

[12] In Wolf v. Colorado, 338 U. S. 25 (1949), the Court, through Mr. Justice Frankfurter, held that the due process clause of the fourteenth amendment included protection of the individual from unwarranted search and seizure, but that the exclusion of evidence thus obtained from a state criminal prosecution was not "an essential ingredient of that right," *id.* at 29, and that the doctrine of excluding such evidence, Weeks v. United States, 232 U. S. 383 (1914), would be limited to federal courts.

[13] "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach." Rochin v. California, 342 U. S. 165, 173 (1952).

[14] 297 U. S. 278 (1936).

[15] Rochin v. California, 342 U. S. 165, 173 (1952).

[16] "In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions." *Id.* at 169.

In *Irvine v. California*,[17] an effort was made by the petitioner to extend the *Rochin* rule to evidence obtained by illegal entries into his home. The Court, while finding the officers' conduct reprehensible,[18] held firmly to the principle of *Wolf v. Colorado*,[19] *viz.*, "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[20] In distinguishing *Rochin* from the facts before it, the Court, through Mr. Justice Jackson, stated:

> An effort is made, however, to bring this case under the sway of *Rochin v. California* [Citation omitted]. That case involved, among other things, an illegal search of the defendant's person. But it also presented an element totally lacking here—coercion . . . applied by a physical assault upon his person to compel submission to the use of a stomach pump. This was the feature which led to a result in *Rochin* contrary to that in *Wolf*. Although *Rochin* raised the search-and-seizure question, this Court studiously avoided it and never once mentioned the *Wolf* case. Obviously, it thought that illegal search and seizure alone did not call for reversal. However obnoxious are the facts in the case before us, they do not involve *coercion, violence* or *brutality* to the *person,* but rather a trespass to property, plus eavesdropping.[21] (Emphasis added.)

Another unsuccessful attempt was made recently to have the Supreme Court apply the *Rochin* doctrine, this time to a case involving the making of a blood test. After a motor vehicle collision in which three persons were killed, the defendant driver was suspected of being intoxicated. While he was still unconscious from the accident, a physician in the emergency room at the hospital took a blood sample of defendant upon request of a police officer. On the basis of the results of the blood test, defendant was convicted of involuntary manslaughter. The conviction was affirmed by the United States Supreme Court in *Breithaupt v. Abram*,[22] which held that the admission of the evidence did not violate the due process clause of the fourteenth amendment.

The defendant's primary contention was that a conviction based on evidence obtained from his body without his consent was a violation

[17] 347 U. S. 128 (1954), 33 N. C. L. Rev. 100.
[18] "Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment . . . ." 347 U. S. at 132.
[19] 338 U. S. 25 (1949).
[20] *Id.* at 33.
[21] Irvine v. California, 347 U. S. 128, 133 (1954).
[22] 352 U. S. 432 (1957).

of due process.[23] The Court rejected the argument that *Breithaupt* was indistinguishable from *Rochin* on the grounds that: (1) Although defendant had not given his consent to the blood test, he had not expressly withheld it;[24] (2) the only person actively engaged in extracting the evidence from the defendant's body was a skilled technician; and (3) the blood test procedure, as opposed to the administration of an emetic solution, is a routine occurrence in the life of almost everyone. Thus, the Court concluded that the action taken against the defendant was "not such conduct that 'shocks the conscience' . . . nor . . . offends a 'sense of justice.' "[25]

In reaching the above conclusion the Court considered the degree of the invasion of bodily integrity as weighed against its justification in the light of the public interest in detection and deterrence of crime. The degree of invasion in the taking of a blood test was found to be less than that in the *Rochin* case where a "stomach pump" was used. The menace to society from drunken driving tends toward vindication of the bodily integrity invasion in the *Breithaupt* case.[26] Public awareness that judicial evidence may be obtained through blood tests is more likely to deter drunken driving than the knowledge that judicial evidence may be acquired by a "stomach pump" is apt to deter the illegal use of narcotics.

An interesting point made by the Court in *Breithaupt* was that due to the proven accuracy of the blood test for determining intoxication, its judicial use will prevent the sober defendant-driver from being the victim of unreliable lay testimony. For this reason, it would seem that the Court has wisely excluded real evidence taken from the defendant's body only when there has been coercion coupled with brutality, while still excluding verbal confessions extracted by subtle, non-violent, yet coercive means.[27] Involuntary verbal confessions, whether obtained by physical or psychological coercion, may well be forced from the innocent,

[23] *Id.* at 435. Defendant further contended that the use of the evidence constituted an unreasonable search and seizure and also violated the privilege against self incrimination. These arguments were summarily dismissed by the Court on the authority of Wolf v. Colorado, 338 U. S. 25 (1949), and Twining v. New Jersey, 211 U. S. 78 (1908). See notes 11 and 12 *supra.*

[24] For an argument that this point was not pertinent, see Chief Justice Warren's dissent. Breithaupt v. Abram, 352 U. S. 432, 440 (1957).

[25] *Id.* at 437.

[26] "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." *Id.* at 439.

To be sure, the curbing of the traffic in dope (*Rochin*) is as meritorious as the reduction of traffic deaths due to intoxicated drivers, but the universality of the latter problem makes it of primary public concern. But see the dissent of Chief Justice Warren. *Id.* at 440.

[27] Leyra v. Denno, 347 U. S. 556 (1954); Haley v. Ohio, 332 U. S. 596 (1948); Malinski v. New York, 324 U. S. 401 (1945); Ashcraft v. Tennessee, 322 U. S. 143 (1944).

while real evidence such as a blood test would seem to speak for itself.

From the foregoing, it appears that real evidence obtained by an invasion of bodily integrity may be found inadmissible in state criminal prosecutions as a violation of due process only if the obtaining of the evidence is accompanied by brutality and coercion.[28] However, this exclusionary principle will be limited to evidence acquired from the body and will not be extended to evidence procured by an unreasonable search and seizure no matter how great the trespass of the close.[29] Moreover, the Court, in determining whether such conduct "shocks the conscience," apparently will consider the importance of detection and deterrence of the particular crime as against the degree of the invasion of bodily integrity.[30]

JOHN T. ALLRED

Criminal Law—Trial De Novo—Power of Superior Court to Amend Warrant

In a recent case[1] the North Carolina Supreme Court held that when warrants upon which defendants were convicted in a municipal county court were amended in the superior court so as to charge a trespass on property of a person other than the person named in the original warrant, the court substituted one criminal charge for another. Since on the appeal the defendants could only be tried for the crime for which they were convicted in the lower court, the judgment on the amended warrant was arrested.

The decision in this case raises the question of the power of the superior court to allow amendments to warrants upon which defendants were convicted in a lower court. As a general rule, upon appeal from a court of inferior jurisdiction, the defendant is granted a trial de novo in the superior court.[2] The state may then try the defendant on the original warrant[3] or by indictment charging the same offense of which he was convicted in the lower court.[4]

As to the power of the superior court to allow amendments to proceedings begun before an inferior court, it is provided by statute that "the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms

[28] Rochin v. California, 342 U. S. 165 (1952), as limited by Breithaupt v. Abram, 352 U. S. 432 (1957).
[29] Irvine v. California, 347 U. S. 128 (1954).
[30] Breithaupt v. Abram, 352 U. S. 432 (1957).

[1] State v. Cooke, 246 N. C. 518, 98 S. E. 2d 885 (1957).
[2] State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934).
[3] State v. Thomas, 236 N. C. 454, 73 S. E. 2d 283 (1952).
[4] State v. Wilson, 227 N. C. 43, 40 S. E. 2d 449 (1946).

as shall be deemed just, at any time either before or after judgment."[5] The court has liberally translated the broad terms of the statute into specific, workable rules for its application in criminal cases. It is held that the amendment must not change the character of the action or the nature of the offense intended to be charged in the original warrant.[6] The amendment may be allowed before or after verdict, but should be allowed after verdict only where the evidence was sufficient to prove the offense as if properly and sufficiently charged in the first instance.[7] The warrant as amended may not charge an offense not cognizable before the inferior court in which the case originated.[8] The power of the court to allow an amendment is discretionary with the trial judge and his refusal to allow an amendment is not reviewable.[9] An amendment will not be allowed which charges a completely new and different offense from the one of which the defendant was convicted in the lower court.[10]

The cases in which the question of the power to amend arises may be divided into four general classes:[11] (1) where the original warrant fails to charge a criminal offense,[12] (2) where the original warrant charges the offense "inartfully,"[13] (3) where the original warrant charges an offense not cognizable before the inferior court in which defendant was convicted,[14] and (4) where the original warrant adequately charges the crime but there is a variance between the charge as

[5] N. C. GEN. STAT. § 7-146 Rule 12 (1953). While the statute in terms applies only to proceedings begun before a justice of the peace, the court has construed it to apply to proceedings begun before other inferior courts when the action is re-tried in the superior court. State v. Brown, 225 N. C. 22, 33 S. E. 2d 121 (1945).

[6] State v. McHone, 243 N. C. 231, 90 S. E. 2d 536 (1955); State v. Brown, 225 N. C. 22, 33 S. E. 2d 121 (1945); State v. Norman, 110 N. C. 484, 14 S. E. 968 (1892); State v. Vaughan, 91 N. C. 532 (1884).

[7] State v. Brown, *supra* note 6; State v. Baker, 106 N. C. 758, 11 S. E. 360 (1890).

[8] State v. Clegg, 214 N. C. 675, 200 S. E. 371 (1939).

[9] State v. Taylor, 118 N. C. 1262, 24 S. E. 526 (1896). In State v. Vaughan, 91 N. C. 532, 535 (1884), the court said: "His Honor in the court below might have refused, as a matter of discretion, to allow the amendment, but where his refusal was put upon the ground of his not having power to allow it, there was error."

[10] State v. Hall, 240 N. C. 109, 81 S. E. 2d 189 (1954); State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934); State v. Taylor, *supra* note 9.

[11] The Court has made no attempt to classify the cases. This general classification is used by the writer in an attempt to separate the cases for purposes of understanding when an amendment may be allowed and the effects of the amendment on the case in question.

[12] State v. Morgan, 226 N. C. 414, 38 S. E. 2d 166 (1946); State v. Johnson, 188 N. C. 591, 125 S. E. 183 (1924); State v. Smith, 103 N. C. 410, 9 S. E. 200 (1889); State v. Smith, 98 N. C. 747, 4 S. E. 517 (1887).

[13] State v. Stone, 231 N. C. 324, 56 S. E. 2d 675 (1949); State v. Bowser, 230 N. C. 330, 53 S. E. 2d 282 (1949); State v. Mills, 181 N. C. 530, 106 S. E. 677 (1921).

[14] State v. Clegg, 214 N. C. 675, 200 S. E. 371 (1939); State v. Myrick, 202 N. C. 688, 163 S. E. 803 (1932).

stated in the warrant and the evidence adduced at the trial in the superior court.[15]

Where the original warrant upon which defendant was tried and convicted in the inferior court fails to charge a criminal offense because of the omission of some essential element of the crime, it may be amended in the superior court so as to charge the offense originally intended to be charged. But this is subject to the general rule that the effect of the amendment must not be to change the nature of the offense.[16] Thus, where the defendant is convicted upon a warrant charging him with going upon the land of another without a license, having first been forbidden to do so, it is proper for the court to allow an amendment so as to show that the entry upon the land was "wilful and unlawful."[17] If the essentials of the crime are not set forth in the warrant, and no amendment is made, the warrant is fatally defective, and on motion of the defendant the judgment rendered thereon will be arrested.[18]

In the second group of cases, where the warrant charges a crime, but the statement of the offense is defective in form, an amendment will be allowed in order to clearly and accurately set forth the offense or in order that the warrant may conform to the language of the statute.[19] In *State v. Grimes*,[20] the defendant was convicted in recorder's court on a warrant charging him with "assault on . . . a female."[21] In the superior court, a jury found the defendant "guilty of an assault on a female as charged in the warrant."[22] After verdict and before judgment the warrant was amended so as to charge an assault on a female by a *male over eighteen years of age*. The court said that there was no error in allowing the amendment, but remanded the case for another hearing on other grounds.[23]

[15] State v. Holt, 195 N. C. 240, 141 S. E. 585 (1928); State v. Poythress, 174 N. C. 809, 93 S. E. 919 (1917); State v. Baker, 106 N. C. 758, 11 S. E. 360 (1890).

[16] See note 12 *supra*.

[17] State v. Smith, 103 N. C. 410, 9 S. E. 200 (1889).

[18] State v. Coppedge, 244 N. C. 590, 94 S. E. 2d 569 (1956); State v. Morgan, 226 N. C. 414, 38 S. E. 2d 166 (1946); State v. Johnson, 188 N. C. 591, 125 S. E. 183 (1924); State v. Smith, 98 N. C. 747, 4 S. E. 517 (1887).

[19] See note 13 *supra*.

[20] 226 N. C. 523, 39 S. E. 2d 394 (1946).

[21] *Id.* at 524, 39 S. E. 2d at 395.

[22] *Ibid.*

[23] The warrant adequately charged a simple assault on a female and was sufficient to raise a presumption that the defendant was a male over eighteen years of age. But it was necessary for the jury to find as a fact, either specifically or by reference to the warrant, that the assault was committed by a male over eighteen years of age. This is true because a simple assault committed by anyone other than a male over eighteen years of age is punishable only by fine of not more than fifty dollars ($50.00) or thirty days. The defendant was given eighteen months, both in the lower court and the superior court. The amendment, coming after the jury verdict, was ineffectual to supply the deficiency of the jury's finding. It would appear that had the warrant been amended prior to the jury verdict, it would have been sufficient to sustain the conviction. In that event, the jury verdict of

Where the original warrant charges an offense not within the jurisdiction of the inferior court, the superior court may not allow an amendment which would bring the case within the jurisdiction of the inferior court. Since the jurisdiction of the superior court on appeal from a lower court is derivative, and since the lower court had no jurisdiction, none can vest in the superior court.[24]

Where the crime is adequately charged, but there is a variance between the charge as stated in the warrant and the evidence presented at the trial, the court may allow an amendment of the warrant so that it may conform to the evidence presented.[25] However, the warrant and any amendments thereto must relate to the charge and the facts supporting it as they existed at the time the warrant was orginally presented in court. Therefore an amendment may not charge the defendant with an offense committed after issuance of the warrant.[26]

It will be observed that once the power of the court to allow an amendment has been established, the problem then becomes one of determining when the amendment charges a different crime or changes the nature of the offense intended to be charged. For example, where the original warrant charges the defendant with "transporting illegal tax paid liquor," it may be amended so as to charge "illegally transporting taxpaid liquor" since the amendment does not change the nature of the offense intended to be charged.[27] In *State v. Carpenter*[28] the original warrant on which defendant was tried in the county court charged an "assault attended with cruel and unusual punishment."[29] In the superior court the warrant was amended to charge "inflicting serious injury." The defendant objected to the amendment as changing the nature of the crime. It was held that the amendment was properly allowed.

On the other hand, where the defendant is convicted in the lower court on a warrant charging possession of whiskey for the purpose of sale, the warrant may not be amended so as to charge possession of nontax paid liquor, because these are different crimes—"specific misdemeanors of equal dignity created by separate statutory provisions."[30] Also,

---

guilty *as charged in the warrant* could only mean guilty of an assault on a female by a *man or boy over eighteen years of age.*

For a similar amendment made after a plea of guilty, see State v. Terry, 236 N. C. 222, 72 S. E. 2d 423 (1952).

[24] See note 14 *supra.*

[25] See note 15 *supra.* This is subject to the general rule that the amendment must not change the nature of the crime or charge a different crime. See note 6 *supra.*

[26] State v. Thompson, 233 N. C. 345, 64 S. E. 2d 157 (1951).

[27] See State v. McHone, 243 N. C. 231, 90 S. E. 2d 536 (1955).

[28] 231 N. C. 229, 56 S. E. 2d 713 (1949).

[29] *Id.* at 241, 56 S. E. 2d at 722.

[30] State v. Hall, 240 N. C. 109, 111, 81 S. E. 2d 189, 191 (1954); State v. Mills,

where the warrant charges assault and battery on a female, it may not be amended so as to charge assault and battery on a female inflicting serious injury.[31]

In the principal case[32] the original warrants charged that the defendants "did unlawfully and willfully trespass upon the property of *Gillespie Park Golf Course,* Greensboro, North Carolina, after having been forbidden to do so."[33] (Emphasis added.) In the superior court the warrants were amended to read: "Did unlawfully and willfully enter and trespass upon the premises of *Gillespie Park Golf Club, Inc.,* after having been forbidden to enter said premises and not having a license to enter said premises . . . ."[34] (Emphasis added.)

The court might have treated the amendment as merely curing a defect in form as in the second group of cases where the warrant charges the crime "inartfully."[35] This view would have been in conformance with previous liberal decisions of the court.[36]

The somewhat narrower view which the court took was based on the nature of the law of criminal trespass, that possession is an essential element of the crime.[37] Treating *Gillespie Park Golf Course* and *Gillespie Park Golf Club, Inc.* as separate entities and different "persons,"[38] the court found that the amended warrants charged a different crime from that charged in the original warrants. It could only follow that such an amendment was improperly allowed.

HENRY E. FRYE

Criminal Procedure—General Verdict Rendered on Indictment Charging Mutually Exclusive Crimes

By statute in North Carolina separate counts may be used in the indictment to charge separate offenses.[1] This Note is concerned with the practice of using several counts to charge separate and distinct

242 N. C. 604, 89 S. E. 2d 141 (1955).
See also, *Second Annual Survey of North Carolina Case Law,* 33 N. C. L. REV. 157, 182 (1955).
[31] State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934).
[32] State v. Cooke, 246 N. C. 518, 98 S. E. 2d 885 (1957).
[33] *Id.* at 519, 98 S. E. 2d at 886.
[34] *Ibid.*
[35] See note 13 *supra.*
[36] *Ibid.* See also State v. Brown, 225 N. C. 22, 33 S. E. 2d 121 (1945).
[37] State v. Cooke, 246 N. C. 518, 520, 98 S. E. 2d 885, 887 (1957).
[38] *Id.* at 521, 98 S. E. 2d at 888.

[1] N. C. GEN. STAT. § 15-152 (1953). The statute provides: "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated . . . ."

crimes and with the problem of a general verdict rendered on an indictment charging mutually exclusive crimes.

There are many reasons for using two or more counts in the indictment. If a single count charges more than one offense, it may be subject to a motion to quash for duplicity.[2] Therefore, a separate count will be used for each offense. In cases where there is uncertainty as to how the offense was committed, several counts may be used in order to have the proof conform to the charge, each count stating in a different way the manner in which the offense was committed.[3] One count will support a conviction, and the others will be treated as surplusage.[4]

Each count within the indictment is regarded as a separate indictment, and the jury may render a separate verdict as to each count.[5] Occasionally however, separate verdicts are inconsistent. In the case of *Dunn v. United States,*[6] the defendant was acquitted of unlawful possession of intoxicants, but convicted of maintaining a nuisance by keeping intoxicating liquor for sale, although possession of the liquor was an essential element of the nuisance count. In rejecting the defendant's contention that he should be discharged because of the inconsistent verdicts, the court said that "consistency in the verdict is not necessary."[7] There is, however, authority to the contrary.[8] In the case of *Kuck v. State,*[9] the defendant was convicted of selling intoxicating liquor, but acquitted of unlawful possession of the intoxicants. In this case the court refused to affirm the conviction on the ground that an inconsistent verdict cannot stand.

In some instances the jury returns a general verdict rather than a finding as to each count within the indictment. In the recent case of *State v. Meshaw*[10] the defendant was charged in separate counts for larceny and for receiving the same stolen goods. In the lower court the jury was erroneously instructed as to the second count. The jury returned a general verdict of "guilty as charged," which carried a conviction on all of the counts within the indictment.[11] As the court

[2] See State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930).

[3] In State v. Baker, 63 N. C. 276 (1869), there were four separate counts charging the same offense (first degree murder) in different ways.

[4] *Ibid.*

[5] Selvester v. United States, 170 U. S. 262 (1877); State v. Mills, 181 N. C. 530, 106 S. E. 677 (1921); 23 C. J. S., *Criminal Law* § 1403 (1940).

[6] 284 U. S. 390 (1932), 45 HARV. L. REV. 931.

[7] 284 U. S. at 393. See, Williams v. United States, 244 F. 2d 303, 304 (4th Cir. 1957), where it is said: "And it is equally well settled that a verdict of guilty on one count of an indictment is not invalidated by an inconsistent verdict of acquittal on another count."

[8] People v. Andursky, 75 Cal. App. 16, 241 P. 591 (1925); State v. Tuerk, 165 Wash. 322, 5 P. 2d 308 (1931).

[9] 149 Ga. 191, 99 S. E. 622 (1919).

[10] 246 N. C. 205, 98 S. E. 2d 13 (1957).

[11] State v. Austin, 241 N. C. 548, 85 S. E. 2d 924 (1955); State v. Hammond, 188 N. C. 602, 125 S. E. 402 (1902); Simmons v. State, 162 Ga. 316, 134 S. E. 54 (1926); 23 C. J. S., *Criminal Law* § 1403 (1940).

pointed out, however, the defendant could not have been guilty of both offenses, since the crimes are mutually exclusive.[12]

In remanding the case for a new trial, three factors governed the court's decision. First, the crimes were mutually exclusive. Second, there were erroneous instructions as to one of the counts. Third, the jury returned a general verdict of guilty which, when rendered on an indictment containing counts mutually exclusive, must be treated as a conviction as to one of the counts and as an acquittal as to the other. Since the jury had not indicated on which count the conviction was based and since the defendant could be guilty of only one of the offenses, the court ordered a new trial on the ground that the conviction may have been upon the count on which the court had given the erroneous instructions. The invalidity of one of the counts was of utmost importance, for the court stated that if the trial had been without error and if both counts had been valid, a single judgment on the verdict would have been affirmed.[13]

Prior to *State v. Meshaw* a general verdict of guilty upon an indictment charging mutually exclusive crimes in separate counts had been sustained even though one of the counts was defective on the basis of a presumption that the conviction was upon the good count.[14] This was the theory upon which the conviction was allowed to stand in the case of *State v. Beatty*[15] in which the defendant was indicted for larceny and for receiving the same goods knowing them to have been stolen. The count for receiving stolen goods was defective in that there was no averment as to the person from whom the stolen goods were received. Yet the court held the valid count would be sufficient to support a general verdict of guilty. Admitting that there are no previous cases involving mutually exclusive counts with erroneous instructions as to one of the counts, there seems to be no reason to distinguish between counts which are defective because of erroneous instructions and counts which are defective by reason of admission of incompetent evidence or

[12] In the following cases the court stated the crimes of larceny and receiving the same stolen goods to be mutually exclusive offenses: State v. Neill, 244 N. C. 252, 93 S. E. 2d 155 (1956); State v. Worthington, 64 N. C. 594 (1870); Shue v. State, 177 Ark. 605, 7 S. W. 2d 315 (1928).

[13] 246 N. C. at 209, 98 S. E. 2d at 16. *Cf. In Re* Powell, 241 N. C. 288, 84 S. E. 2d 906 (1954), where the defendant pleaded guilty to a two-count indictment charging larcency and receiving the same stolen goods. On the receiving count the defendant was given an active sentence, and on the larceny count he was given a suspended sentence. The court held that punishment could be imposed upon only one count since the defendant could be guilty of only one of the offenses.

[14] State v. Bailey, 73 N. C. 70 (1875). The defendant was charged with larceny and with receiving the same stolen goods. The accused claimed that the lower court did not have jurisdiction of the offense of receiving stolen goods. The supreme court held that even if one count were defective the valid count would support the general verdict of guilty.

[15] 61 N. C. 52 (1866).

by reason of failure to state an essential element of the crime charged in the count.[16] It appears that the court is no longer willing to sustain a general verdict of guilty to an indictment containing mutually exclusive counts when one of the counts is defective.[17]

EMMANUEL M. PATURIS

Eminent Domain—Limited Access Highways

In a recent note in this *Law Review*,[1] a question was raised as to what authority the State Highway and Public Works Commission has to create limited-access highways in this state. This question was before the North Carolina Supreme Court for the first time in *Hedrick v. Graham*.[2] In this case, an owner of land which abutted on a public highway requested an injunction to prohibit the Commission from restricting access to that highway except at certain designated points. The lower court sustained the Commission's demurrer and the supreme court affirmed. In so ruling, the court veered from its policy of strictly construing eminent domain statutes against the state.[3] Instead, the court emphasized the benefits to the public that emanate from a limited-access highway, liberally construed statutes then in effect, and found that the Commission had the power to condemn land for limited-access highways.

Three factors in particular were pointed out by the court in reaching

[16] Although State v. Toole, 106 N. C. 736, 11 S. E. 168 (1890), did not involve counts charging mutually exclusive crimes, the case clearly stated a rule of law which became the basis of later decisions. In that case the court stated that where a general verdict of guilty is rendered against an indictment charging offenses of the same grade and subject to the same or similar punishment, the verdict upon either count, if valid, supports the judgment, ". . . and it is immaterial that the verdict as to the other counts is not good, either by reason of defective counts, or by the admission of incompetent evidence, or giving objectionable instructions as to such other counts, provided the errors complained of do not affect the valid verdict rendered on this count." *Id.* at 739, 11 S. E. at 169. State v. Carter, 113 N. C. 639, 18 S. E. 517 (1893), also involved larceny and receiving stolen goods; and although both counts were declared to be valid, the court said that if only one of the counts was valid the general verdict of guilty would be placed on the good count.

[17] It is conceivable that this stand may lead the court to eventually overrule the case of State v. Baker, 63 N. C. 276 (1869). In the *Baker* case the defendant was charged in four separate counts for homicide. Evidence was given as to the first count only. The general verdict of guilty was sustained on the basis that the conviction was presumed to have been upon the valid count. If the same situation would appear in the future, the same reasoning could be applied as was used in the *Meshaw* case. Are not counts which state the same offense in different manners as mutually exclusive as the counts of larceny and receiving? Would not all defective counts, regardless of the reason, be equally unable to sustain a conviction? A general verdict of guilty is a verdict of guilty as to each count, but the defendant can be guilty of only one of the counts. If the court is unwilling to presume the conviction rested upon the valid count, there would be a new trial.

[1] 34 N. C. L. REV. 130 (1955).
[2] 245 N. C. 249, 96 S. E. 2d 129 (1957).
[3] Sechriest v. Thomasville, 202 N. C. 108, 162 S. E. 212 (1932).

its decision. First, the Federal-Aid Highway Act of 1956[4] encourages the creation of a national highway system and offers federal funds to those states agreeing to comply with standards prescribed in the act and to be prescribed by the Secretary of Commerce. One criterion contained in this act is that states will not add points of access to roads in this system without approval of the Secretary of Commerce.[5] Our General Assembly has provided that the Commission " . . . shall have such powers as are necessary to comply fully with the provisions of the present or future federal aid acts."[6]

Second, the court emphasized the importance of the safety aspect in highway planning and construction. There is no doubt that highways are safer where access is limited. But this is commonly considered an argument more appropriately made to the General Assembly than to the court.[7] It is not usually felt to be sufficient grounds for the court to disregard obvious legislative intent.

Third, the broad language of chapter 136 of the General Statutes on Roads and Highways was found to confer the power in question on the Commission. Concerning the statutes, excerpts from sections 1,[8] 18(b),[9] 18(e),[10] and 19[11] of chapter 136 are referred to by the court as "not ambiguous or of doubtful meaning, but are so clear and plain . . . that there can be no reasonable doubt as to their meaning . . . ."[12] This interpretation is contrary to the rule of long standing in most jurisdictions, including North Carolina, that eminent domain statutes are

[4] 70 STAT. 374 (1956), 23 U. S. C. §§ 151-75 (Supp. IV, 1957).

[5] 70 STAT. 383 (1956), 23 U. S. C. § 163 (Supp. IV, 1957).

[6] N. C. GEN. STAT. § 136-18(1) (1952). This statute raises a question beyond the scope of this Note, *viz.*, whether or not a grant of legislative power to an administrative agency, allowing it to comply with provisions of federal statutes that may be passed in the future, constitutes an unconstitutional delegation of legislative power.

[7] The legislature has the law making function and the courts will not usurp it. Elliott v. Elliott, 235 N. C. 153, 69 S. E. 2d 224 (1952); Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923); State v. Barksdale, 181 N. C. 621, 107 S. E. 505 (1921); Hightower v. Raleigh, 150 N. C. 569, 65 S. E. 279 (1909).

[8] "The intent and purpose of this section is that there shall be maintained and developed a State-wide highway system commensurate with needs of the State as a whole and not to sacrifice the general state-wide interest to the purely local desires of any division." N. C. GEN. STAT. § 136-1 (1952).

[9] The Commission has power "to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsover that may be necessary for a State highway system." N. C. GEN. STAT. § 136-18(b) (1952).

[10] The Commission has power "to make rules, regulations and ordinances for the use of, and to police traffic on, the State highways . . . ." N. C. GEN. STAT. § 136-18(e) (1952).

[11] The Commission may condemn private property "as it may deem necessary and suitable for road construction, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work." N. C. GEN. STAT. § 136-19 (1952).

[12] 245 N. C. at 260, 96 S. E. 2d at 137.

to be strictly construed.[13] These statutes do not even mention limited-access; in fact, according to a source[14] cited by the court in the principal case, a system of limited-access highways was not provided for by statute in any state until 1938.[15]

Reading the sections as a whole, it appears that the General Assembly was concerned with condemnation of *land,* not *rights*[16] of owners of property adjacent to that condemned land. The reasons for allowing the Commission to condemn any more land than necessary for the road itself were for the purpose of drainage, elimination of overhanging trees, etc.

In 1951, the question raised by the *Hedrick* case was acted on by the General Assembly when a highway bill[17] providing for restriction of highway access by the Commission died in committee. The court considered this in the principal case, but stated that 170 miles of limited-access roads were in use in the state by 1955 and that the General Assembly did nothing to curtail them. It also states as a rule that courts are controlled by the language of the statute, the subject matter, and purpose, rather than what the General Assembly thought the interpretation should be, and that the language of these statutes is so clear as to suggest only one meaning.[18] This bill authorized the acquisition of an entire lot, if advantageous to the public, although not needed for the right of way. The court points out that this may have been the reason the bill was not passed. Finally, the court states that, "Perhaps, the Senate thought that the Commission had the power under existing statutes to construct limited-access roads, and that was the reason it declined to pass the House Bill."[19]

This writer has been able to find only one jurisdiction in the country with a holding similar to the *Hedrick* case, based on similar fact and statutory situations.[20] In that case, the statute offers stronger support

[13] Blanton v. Fagerstrom, 249 Ala. 485, 31 So. 2d 330 (1947); Hampton v. Arkansas State Game & Fish Commission, 218 Ark. 757, 238 S. W. 2d 950 (1951); Johnson City Southern Ry. v. South and Western Ry., 148 N. C. 59, 61 S. E. 683 (1908). *But see,* United States v. Certain Parcels of Land, etc., 141 F. Supp. 300 (D. Wyo. 1956).

[14] LEVIN, PUBLIC CONTROL OF HIGHWAY ACCESS & ROADSIDE DEVELOPMENT 19 (1947).

[15] The sections referred to above, *supra* notes 8-11, were enacted originally between 1921-33.

[16] At common law, condemnation of land for a public road had no effect on the right of access invested in abutting property owners. McCandless v. City of Los Angeles, 10 Cal. App. 2d 407, 4 P. 2d 139 (1931); Minnequa Lumber Co. v. City and County of Denver, 67 Colo. 472, 186 Pac. 539 (1920); City of Atlanta v. Gore, 40 Ga. App. 70, 169 S. E. 776 (1933).

[17] House Bill No. 569, Session 1951, N. C. General Assembly.

[18] 245 N. C. at 260, 96 S. E. 2d at 137.

[19] *Ibid.*

[20] Petition of Burnquist, 220 Minn. 48, 19 N. W. 2d 394 (1945).

for the court's decision.[21] In another case,[22] embodying the same issues and similar facts, the court held against the state, saying that: ". . . in the enactment of this statute the legislature did not have in mind the acquirement of access rights . . . ." Legislative intent was recognized and acknowledged by this court in that their legislature had previously failed to pass a proposed bill[23] similar to our 1951 highway bill.

With regard to the issue in the *Hedrick* case, the 1957 General Assembly has eliminated the problem of statutory construction by passage of a new highway bill[24] authorizing the Commission to restrict access. Yet the broader and more important problem still remains: has the court changed its rule of long standing that eminent domain statutes will be strictly construed?

BOYD B. MASSAGEE

Fair Labor Standards Act—Wage and Hour—Coverage of New Construction

Plaintiff-workers were engaged in building a $37,000,000 causeway, twenty-five miles long, across Lake Pontchartrain immediately north of New Orleans. This was a new project designed to relieve traffic congestion on old highways around the east and west shores of the lake. It was physically separated from existing highways, but when completed, it would be an integral part of the state and federal highway systems, with four-lane approach roads connecting with east-west and north-south U. S. highways. Plaintiffs were also engaged in building a field plant at the job site, which, when completed, would house the casting of huge concrete pillars and deck slabs which were to serve as the base of the causeway. Plaintiffs brought an action under the Fair Labor Standards Act[1] for penalties and overtime compensation. The construction company defended on the ground that this was new construction and that therefore the act was inapplicable to these operations.

[21] MINN. STAT. ANN. § 161.03 Subd. 1 (West 1945). The Commissioner is authorized "to acquire by purchase, gift or condemnation . . . all necessary right of way needed in laying out and constructing the trunk highway system . . . ."

[22] State v. Superior Court for Cowlitz County, 33 Wash. 2d 638, 206 P. 2d 1028 (1949).

[23] *Id.* at 645, 206 P. 2d at 1032.

[24] N. C. Sess. Laws 1957, c. 993. Section 5 of this law is as follows: "Acquisition of property and property rights. For the purposes of this Act, the Commission may acquire private or public property and property rights for contolled-access facilities and service or frontage roads, including rights of access, air, view and light, by gift, devise, purchase, or condemnation in the same manner as now or hereafter authorized by law to acquire such property or property rights in connection with highways . . . ."

[1] Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended, 29 U. S. C. §§ 201-211 (1956).

The Court of Appeals for the Fifth Circuit held that the employees were "engaged in commerce" and applied the act.[2]

Whether "new construction" is covered by the FLSA has long been a source of confusion. The act itself is silent. It simply provides that an employee "engaged in commerce or in the production of goods for commerce"[3] is covered by the act and is entitled to the minimum wage and overtime compensation specified therein.[4] The act defines the word "produced" as ". . . manufactured, mined, handled, or in any other manner worked on. . . ."[5] "Fringe" employees are deemed to be covered if their work is "closely related" or "directly essential" to production.[6]

Shortly after the passage of the FLSA, the Administrator expressed the view that:

> The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that the employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce.[7]

The adoption of such a limitation of what is "in commerce" was a reiteration of the "new construction" doctrine adopted long before the enactment of the FLSA in *Raymond v. Chicago M. & St. P. R. R.*[8] In that case, plaintiff-employee sued under the Federal Employee's Liability Act for injuries sustained, as he alleged, "in commerce." When the injury occurred, plaintiff was working on a new railroad tunnel which was to serve, when completed, as a cut-off through which trains carrying interstate commerce would be re-routed. The Supreme Court reasoned that the tunnel was not "in commerce" until it was actually used for such and denied recovery under the act.

Following the administrator's interpretation of the FLSA, the courts adopted the new construction rule in cases arising under the FLSA.[9] Thus, it was clear that the construction of a new plant was not "in

[2] Archer v. Brown & Root, Inc., 241 F. 2d 663 (5th Cir. 1957), *cert. denied*, 26 U. S. L. WEEK 3117 (U. S. Oct. 15, 1957) (No. 232).

[3] Fair Labor Standards Act § 7, 52 STAT. 1060 (1938), as amended, 29 U. S. C. § 207 (1956).

[4] Fair Labor Standards Act §§ 6-7, 52 STAT. 1060 (1938), as amended, 29 U. S. C. §§ 206-207 (1956).

[5] Fair Labor Standards Act § 3 (j), 52 STAT. 1060 (1938), as amended, 29 U. S. C. § 203 (j) (1956).

[6] *Ibid.* The 1949 amendment added "closely related" and "directly essential." Previously, "fringe" employees were those "necessary" to production. Fair Labor Standards Amendments of 1949 § 3 (b), 63 STAT. 911.

[7] WAGE & HOUR INTERPRETATIVE BULLETIN No. 5, Dec. 2, 1938.

[8] 243 U. S. 43 (1917).

[9] Murphy v. Reed, 335 U. S. 865 (1948).

commerce" although the plant, when completed, would produce goods for interstate commerce.[10] In *Koepfle v. Garavaglia*,[11] the plaintiff-employee was employed in the construction of a new highway. He contended that he was either "engaged in commerce," or in the "production of goods for commerce." The court held that the highway retained its local character until finished and denied recovery.

The confusion in this area of the law has centered around a well established exception to the "new construction" idea: if the work was deemed to be reconstruction, improvement or repair of an *existing facility* of commerce, it was covered by the Act. Such work was so closely related to interstate commerce as to be in practice and legal contemplation a part of it.[12]

The line of demarcation between new construction and repair or reconstruction of an existing facility of commerce has not been an easy one to draw. It has resulted in apparently conflicting decisions in the circuit courts.[13] With the advent of a large volume of highway construction enlarging a great network of national and state roads, the status of such construction under the act has become increasingly uncertain.

Where the work is on an *existing* highway or related facility of commerce, the courts have applied the "existing instrumentality" exception. Thus, in *Alstate Constr. Co. v. Durkin*,[14] the first group of employees were engaged in repairing and maintaining interstate highways and the second group in producing paving mixture at a place removed from the site of the road work. In granting an injunction against violations of the act, the court held that the workers in the first group were doing a service indispensable to commerce and were therefore "engaged in commerce." Employees in the second group were deemed to be producing goods for commerce because their work was inseparable from reconstruction and repair of the existing facilities.[15]

[10] Kelley v. Ford, Bacon & Davis, Inc., 162 F. 2d 555 (3d Cir. 1947); Noonan v. Fruco Constr. Co., 140 F. 2d 633 (8th Cir. 1943).

[11] 200 F. 2d 191 (6th Cir. 1952).

[12] Overstreet v. North Shore Corp., 318 U. S. 125 (1943); Moss v. Gillioz Constr. Co., 206 F. 2d 819 (10th Cir. 1953); Walling v. McCrady Constr. Co., 156 F. 2d 932 (3d Cir. 1946).

In the area of highway reconstruction and repair, the employee is most often deemed to be "engaged in commerce" rather than in the "production of goods for commerce." The cases do not recognize a clear distinction between the two categories. *Compare* Walling v. McCrady Constr. Co., *supra, with* Overstreet v. North Shore Corp., *supra*. See Engelbrelsen v. E. J. Albrecht Co., 150 F. 2d 602 (7th Cir. 1945), where it was held that viaducts, bridges, etc., are not "goods" within the meaning of the act. However, if the employee produces the "ingredients" for road repair, and it is found that the road is an existing instrumentality of commerce, the employee is deemed to "produce goods for commerce." Alstate Constr. Co. v. Durkin, 345 U. S. 13 (1953).

[13] *Compare* Walling v. McCrady Constr. Co., *supra* note 12, *with* Moss v. Gillioz Constr. Co., 206 F. 2d 819 (10th Cir. 1953).

[14] 345 U. S. 13 (1953).

[15] Overstreet v. North Shore Corp., 318 U. S. 125 (1943) (maintenance work on

In *Walling v. McCrady Constr. Co.*,[16] the employer was engaged in, *inter alia,* the construction of a new conduit for a telephone company and foundations for a new railroad signal tower. It had also done repair work on highway and railroad bridges. Regarding the repair work, the court repeated the rule that work on existing facilities of commerce is "so vital to the functioning of all of the . . . instrumentalities of commerce as to be for practical purposes part of interstate commerce itself."[17] In holding that the new construction was also covered, the court concluded that the "conduit and the signal tower, while not reconstruction jobs were so closely allied, the first to the existing telephone system and the second to the railroad . . ."[18] as to be "in commerce."

In *Moss v. Gillioz Constr. Co.*,[19] the plaintiff-employee was employed in the construction of a new bridge across the Arkansas River. The bridge, when finished, was to serve a main east-west highway and relieve congestion over an existing bridge. The court held that this was new construction not covered under the act.[20] The difference between the *Moss* and *McCrady* cases would appear to lie in the divergent views as to what constitutes an existing facility.

This was the uncertain state of the law when the United States Supreme Court decided the perplexing case of *Mitchell v. C. W. Vollmer & Co.*[21] In that case, the employees were building a new lock on the Gulf Intracoastal Waterway which would provide an alternate route for boats traveling the waterway and would relieve congestion in other areas of the waterway. The defendant argued that this was new construction and in the same category as the tunnel being constructed in *Raymond v. Chicago M. St. P. R. R.,* the parent case of the "new construction" doctrine. In allowing an injunction against violations of the act, the

---

a bridge across the intracoastal waterway); Thomas v. Hempt Bros., 345 U. S. 19 (1953). In most of the highway construction cases allowing recovery, the courts have found the employees to be either engaged in commerce or in actually producing goods for commerce. Therefore, it has not been necessary to determine the coverage of "fringe" employees. See note 6 *supra.*

[16] 156 F. 2d 932 (3d Cir. 1946).

[17] *Id.* at 936.

[18] *Ibid.* The court relied on Pederson v. J. F. Fitzgerald Constr. Co., 318 U. S. 740 (1943), where the employees were engaged in building new abutments for a railroad bridge carrying interstate trains. It was held that the employees were engaged in commerce.

[19] 206 F. 2d 819 (10th Cir. 1953).

[20] "The line of demarcation between new construction . . . and repairs and improvement of existing facilities of commerce . . . becomes more vague and indistinct as we enter the twilight zone separating these two classifications. We ultimately reach a point where it cannot be said with that finality or certainty of conviction which is desirable that an activity falls within one or the other of these two classifications." *Id.* at 822 (concurring opinion). *Accord,* Van Klavern v. Killian-House Co., 210 F. 2d 510 (5th Cir. 1954).

[21] 349 U. S. 427 (1955).

Court pointed out that the *Raymond* case arose under the FELA and stated that:

> We are dealing with a different Act of another vintage—one that has been given a liberal construction. . . . The question whether an employee is engaged "in commerce" within the meaning of the present Act is determined by practical considerations, not by technical conceptions. . . . The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity.[22]

This language might be taken as a rejection of the new construction idea. Had the court stopped there, the import of the decision might have been quite clear. But the court then stated:

> Repair of facilities of interstate commerce is activity "in commerce" within the meaning of the Act. . . . And we think the work of improving existing facilities of interstate commerce, involved in the present case, falls in the same category.[23]

The decision is susceptible to two interpretations. In the first place, it can be interpreted as abolishing the new construction idea. The broad language used by the Court and its reference to an act of "another vintage" would seem to sustain this view. To support this argument is the later case of *Southern Pacific Co. v. Gileo*,[24] a case arising under the FELA, which held that a 1939 amendment to the FELA in effect supplanted the *Raymond* decision. Thus, it would seem to follow, that if the case which first adopted the new construction idea is overruled, then the rule itself is abolished and should no longer be applied to cases arising under the FLSA—an act of "another vintage." In referring to the *Vollmer* case, the Court stated: "This Court recently rejected the 'new construction' doctrine in determining whether an employee is 'engaged in commerce' within the meaning of the Fair Labor Standards Act."[25] Although this was *dictum*, it becomes significant when taken with the rejection of the *Raymond* decision.

The *Vollmer* case may also be interpreted as merely enlarging the scope of what is to be included within the meaning of "an existing facility of commerce"; that a network of national and state highways will now be regarded as an existing facility and therefore construction of new highways or bridges is merely improvement of an existing facility. This seems to be the view of the circuit courts which have attempted to interpret the *Vollmer* case.

[22] *Id.* at 429.
[23] *Ibid.*
[24] 351 U. S. 493 (1956).
[25] *Id.* at 500.

In the principal case, the Fifth Circuit refused to say that *Vollmer* had abolished the new construction doctrine, but did say that before *Vollmer* there would be "some doubt" as to coverage because the causeway was physically removed from existing highways. The court stressed, however, the importance of "practical considerations rather than technical conceptions"[26] in determining coverage under the act. Since the work of the employees actually working on the causeway was "so directly and vitally related to the functioning of"[27] a facility of commerce, it was within the meaning of "engaged in commerce."

Regarding the workers building the field plant which was to be used to build concrete pillars and deck slabs used in the causeway, the court held that they were also "engaged in commerce." The basis of the holding was that the plant was built solely to facilitate the construction of the causeway, and as a practical matter, the employees building the plant were also building a causeway. The operation was an integral part of the whole project. The court recognized, however, that the mere fact that a new building is to be used for commerce when completed will not ordinarily be considered "in commerce" while being constructed.

In *Chambers Constr. Co. v. Mitchell*,[28] the employees were constructing a new water line which was to replace an existing line. When finished, it would furnish water for commerce purposes. The court held that the project fell within the text expounded in the *Vollmer* case and granted an injunction. In referring to the *Vollmer* case, the court refused to say that it abolished the new construction rule but stated: "In our opinion, the *Vollmer* decision infers that the 'new construction rule' is not applicable to the *repair or replacement of existing facilities.* This is not a change in the law."[29] The case is factually indistinguishable from the *Raymond* case. Thus, it will be observed that the fact situation which gave rise to the "new construction" doctrine, has now become an exception to it.[30]

An analysis of the circuit court cases following *Vollmer* indicate a

[26] See note 22 *supra.*
[27] *Ibid.*, and Archer v. Brown & Root, Inc., 241 F. 2d 663, 667 (5th Cir. 1957).
[28] 233 F. 2d 717 (8th Cir. 1956).
[29] *Id.* at 721; 7 LABOR LAW JOURNAL 514 (1956). In Mitchell v. Hodges Contracting Co., 238 F. 2d 380 (5th Cir. 1956), the employees were engaged in building a new plant which would house a carpeting business when completed. The court held that this was new construction, not within the act. In another aspect of the case, employees were engaged in constructing a new building which was to house a new television station and replace an existing radio station a mile away. The court held that the work was covered on the ground that it was an improvement of an existing facility (radio station). The plaintiff argued that the work should be covered, independent of the radio station, since the building was to house a new television station which would be addition to an existing national television network. The court refused to pass on this question.
[30] 7 LABOR LAW JOURNAL 514 (1956).

hesitancy to say that *Vollmer* abolished the "new construction" doctrine as the Supreme Court said it did in the *Gileo* case. However, the recent emphasis on "practical considerations" would lead to the conclusion that the new construction rule has been affected. Specifically, in the field of construction, the courts seem willing to label such things as existing national highway or railroad systems "facilities of commerce" and therefore, construction of additional roads or bridges, even though "new," are additions or improvements of an existing facility. This is but a broadening of the exception to the new construction rule and serves to substantially erode the rule itself.

Developments in this area have done little to clarify the status of the construction of a new building which is to be used to produce goods for commerce when completed. If the building is to serve as a supplementary part of an existing assembly line system of production, it would seem that the construction is covered, even though the new plant is physically removed from other plants in the operation. This is on the theory that in such case, the new building is but an improvement of an existing facility. However, if the building is to house a completely new business, it would seem that its construction is not covered, even though it will produce goods for commerce when completed.[31]

Shortly after the *Chambers* decision, the Administrator issued a new interpretative bulletin.[32] He now takes the view that:

> Coverage of any construction work depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is "new construction" nor the fact that it is physically separated from an existing covered plant, is determinative.[33]

However, construction of a new factory building to be used in commerce when completed, unless integrated with an existing facility, "will not ordinarily be considered covered."[34] This appears to affirm the views of the circuit courts. While the administrator's interpretations do not have the effect of law they are entitled to weight.[35] The question of whether the "new construction" doctrine is in fact abolished or still hangs on by a weakening thread will await a more positive statement from the United States Supreme Court.

BILLY F. MAREADY

[31] Mitchell v. Hodges Contracting Co., 238 F. 2d 380 (5th Cir. 1956).
[32] 29 C. F. R. §§ 776.22-776.30 (1956).
[33] 29 C. F. R. § 776.26 (1956).
[34] 29 C. F. R. § 776.27(c) (1956).
[35] Mabee v. White Plains Publishing Co., 327 U. S. 178 (1946); U. S. v. American Trucking Ass'ns, Inc., 310 U. S. 534 (1940).

Municipal Corporations—Tort Liabilty of Municipal Corporations

In *Glenn v. City of Raleigh*[1] the North Carolina Supreme Court has raised anew the question of whether the maintenance of a city park is a governmental or proprietary function. Plaintiff sought recovery for injuries sustained while picknicking in a park which is maintained and operated by the city for profit. While eating, he was struck on the head with a rock which was thrown from the ground by the blade of a rotary lawn mower being operated by a city employee in the park. The city's negligence was shown by the fact that the mower did not have a guard around the front of it and that the city knew of this defect. Testimony of the park maintenance superintendent showed that he had seen rocks thrown by a rotary mower travel ". . . maybe 50 feet before it hit the ground."[2] In the trial the defendant made a motion for nonsuit at the close of the evidence on the ground that the city was immune from suit since the maintenance of a park is a governmental function. The motion was overruled and defendant appealed, contending that the motion should have been granted. The supreme court granted a new trial because of errors in the instructions to the jury, but it did not answer the question of law[3] as to whether or not the maintenance of a park is a governmental function.

The rule is well settled[4] that a municipal corporation is immune from suit for negligence if performing a governmental function[5] but liable

[1] 246 N. C. 469, 98 S. E. 2d 913 (1957).

[2] *Id.* at 471, 98 S. E. 2d at 914.

[3] See Millar v. Town of Wilson, 222 N. C. 340, 23 S. E. 2d 770 (1942) (court answered question of whether governmental or proprietary function where case involved the question of whether or not defendant's demurrer should have been overruled); Hodges v. Charlotte, 214 N. C. 737, 200 S. E. 889 (1939) (plaintiff appealed from motion of nonsuit, court holding a governmental function); Lowe v. Gastonia, 211 N. C. 564, 191 S. E. 7 (1937) (question of whether a proprietary or governmental function raised by defendant's motion for nonsuit at end of plaintiff's evidence, court held proprietary function).

[4] Immunity for a municipality grew out of the ancient axiom, "The king can do no wrong." It has been followed in the common law jurisdictions and has come to apply to municipal corporations as well as to the state. It has been criticized by the text writers on the subject but the doctrine still appears to be strongly entrenched despite the efforts of some legislatures to restrict immunity. See Borchard, *Government Liability in Tort,* 34 YALE L. J. 1, 129, 229 (1924-25); Borchard, *Theories of Governmental Responsibility in Tort,* 36 YALE L. J. 1, 757, 1039 (1926-27); Borchard, *Theories of Governmental Responsibility in Tort,* 28 COLUM. L. REV. 577, 734 (1928); Fuller and Casner, *Municipal Tort Liability,* 54 HARV. L. REV. 437 (1941); Green, *Municipal Liability for Torts,* 38 ILL. L. REV. 355 (1944); Smith, *Municipal Tort Liability,* 48 MICH. L. REV. 41 (1949); Tooke, *Extension of Municipal Liability in Tort,* 19 VA. L. REV. 97 (1932). See articles collected in 9 LAW AND CONTEMP. PROB. 180-370 (1942).

[5] Densmore v. Birmingham, 223 Ala. 210, 135 So. 320 (1931); City of Phoenix v. Greer, 43 Ariz. 214, 29 P. 2d 1062 (1934); Prifty v. City of Waterbury, 133 Conn. 654, 54 A. 2d 260 (1947); Johnston v. Atlanta, 71 Ga. App. 552, 31 S. E. 2d 417 (1944); Lauxman v. Tisher, 213 Iowa 654, 239 N. W. 675 (1931); Wynkoop v. Hagerstown, 159 Md. 194, 150 Atl. 447 (1930); Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 722 (1917); Reynolds v. Nashua, 93 N. H. 28, 35 A. 2d 194 (1943);

if performing a proprietary function.[6] Recent decisions of nearly every state give a variety of expression in an effort to distinguish governmental functions from proprietary functions.[7] "The liability or non-liability of a municipality for its torts does not depend upon the nature of the tort, the relations existing between the city and the person injured, or whether the city was engaged in the management of tangible property but depends upon the capacity in which the city was acting at the time."[8] While many tests have been used to distinguish governmental from proprietary functions, the test used in the principal case ". . . is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is there is no liability, if it is not there is liability."[9]

Under this test, the question of whether or not a city derives revenue from its parks may have an effect as to the liability for negligence of its employees.[10] However, it has been held that the fact that a municipality has the authority to charge for the use of the park or its apparatus does not make the municipality liable unless the charges were in fact made.[11] Nor does the mere fact that a city makes an incidental charge for a small service rendered in connection with the park necessarily mean that the city is performing a proprietary function in the maintenance and operation of its parks.[12]

Augustine v. Brant, 249 N. Y. 198, 163 N. E. 732 (1928); Broome v. Charlotte, 208 N. C. 729, 182 S. E. 325 (1935); Zangerle v. City of Cleveland, 145 Ohio St. 347, 61 N. E. 2d 720 (1945); Wold v. City of Portland, 166 Ore. 455, 112 P. 2d 469 (1941); City of Houston v. Quionones, 142 Tex. 282, 177 S. W. 2d 259 (1944); Burton v. Salt Lake City, 69 Utah 186, 253 Pac. 443 (1926); Robb v. Milwaukee, 241 Wis. 432, 6 N. W. 2d 222 (1942). The duty to maintain streets and sidewalks in good repair has been generally held to be a corporate duty. Colorado City v. Liafe, 28 Colo. 468, 65 Pac. 630 (1901); Gatewood v. Frankfort, 170 Ky. 292, 185 S. W. 847 (1916); Warren v. Booneville, 151 Miss. 457, 118 So. 290 (1928); Millar v. Town of Wilson, 222 N. C. 340, 23 S. E. 2d 42 (1942); Radford v. Asheville, 219 N. C. 185, 13 S. E. 2d 256 (1941); Speas v. Greensboro, 204 N. C. 239, 167 S. E. 807 (1933); Bunch v. Edenton, 90 N. C. 431 (1884); Whiteside v. Benton County, 114 Wash. 463, 195 Pac. 519 (1921).

[6] Sanders v. Long Beach, 54 Cal. App. 2d 651, 129 P. 2d 511 (1942); Miami v. Oates, 152 Fla. 21, 10 So. 2d 721 (1942); Wray v. Independence, 150 Kan. 258, 92 P. 2d 84 (1939); Barker v. Santa Fe, 47 N. M. 85, 136 P. 2d 480 (1943); Honoman v. Philadelphia, 322 Pa. 535, 185 Atl. 750 (1936); Jensen c. Juul, 66 S. D. 1, 278 N. W. 6 (1938); Farmer v. Poultney School Dist., 113 Vt. 147, 30 A. 2d 89 (1943); Burson v. Bristol, 176 Va. 53, 10 S. E. 2d 541 (1940); Villalpando v. Cheyenne, 51 Wyo. 300, 65 P. 2d 1109 (1937).

[7] 18 McQUILLEN, MUNICIPAL CORPORATIONS § 53.29 (3d ed. 1950).

[8] Kokomo v. Loy, 185 Ind. 18, 23, 112 N. E. 994, 996 (1916).

[9] 246 N. C. at 476, 98 S. E. 2d at 918, quoting Bolster v. Lawrence, 225 Mass. 387, 390, 114 N. E. 722, 727 (1917).

[10] Carta v. Norwalk, 108 Conn. 697, 145 Atl. 158 (1929); Cornelisen v. Atlanta, 146 Ga. 416, 91 S. E. 415 (1917).

[11] Cornelisen v. Atlanta, 146 Ga. 416, 91 S. E. 415 (1917); Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 722 (1917); Caughlan v. Omaha, 103 Neb. 726, 174 N. W. 220 (1918); Blair v. Granger, 24 R. I. 17, 51 Atl. 1042 (1902).

[12] Hannon v. Waterbury, 106 Conn. 13, 136 Atl. 876 (1927) (small charge made for use of pool partially covering expense of maintenance); Jones v. Atlanta,

According to the majority view in this country, the maintenance of a public park is a governmental function and the city is not liable for injuries caused by the negligence of its employees unless such liability is imposed by statute.[13] The two basic reasons given for this rule are that parks protect the public health,[14] and that it would be contrary to public policy to impose liability.[15]

The minority view is that the municipality is exercising a proprietary function and must use ordinary care in maintaining the park and in making it reasonably safe for use.[16] The courts holding that liability is imposed upon a city have arrived at their conclusions for the following reasons: (a) a power is given to operate the parks and, by analogy to the liability imposed in the maintenance of streets, a duty is raised to exercise due care;[17] (b) since an individual has an implied invitation to visit a park, a duty arises to exercise reasonable care in keeping the premises safe;[18] (c) where a city has a duty cast upon it, either mandatory or permissive, it is exercising a proprietary function as long as the duty is not in nature governmental and as long as the particular activity could be carried on by an individual;[19] and (d) since many of the people in the parks and playgrounds are children of the poor whose

35 Ga. App. 370, 133 S. E. 512 (1926) (bather had to pay a charge of ten cents to use the pool). *But see* Pickett v. Jacksonville, 155 Fla. 439, 20 So. 2d 484 (1945) (court reversed sustaining of demurrer where declaration alleged negligence of city in operation of pool where deceased had paid for use of the pool); Burton v. Salt Lake City, 69 Utah 186, 253 Pac. 443 (1926) (city held acting in private capacity when admission charged for use of swimming pool).

[13] Epstein v. New Haven, 104 Conn. 283, 132 Atl. 467 (1926); Harvey v. Savannah, 59 Ga. App. 12, 199 S. E. 653 (1938); Lythell v. City of Waverly, 335 Ill. App. 397, 82 N. E. 2d 207 (1948); Hensley v. Gowrie, 203 Iowa 388, 212 N. W. 714 (1927); Hibbard v. Wichita, 98 Kan. 498, 159 Pac. 399 (1916); Board of Park Comm'rs v. Shanklin, 304 Ky. 43, 199 S. W. 2d 721 (1947); Hennessy v. Boston, 265 Mass. 559, 164 N. E. 470 (1929); Royston v. Charlotte, 278 Mich. 255, 270 N. W. 288 (1936); Emmons v. City of Virginia, 152 Minn. 295, 188 N. W. 561 (1922); Piasecny v. Manchester, 82 N. H. 458, 136 Atl. 357 (1926); Bisbing v. Asbury Park, 80 N. J. L. 416, 78 Atl. 196 (Ct. Err. & App. 1910); Stuver v. Auburn, 171 Wash. 76, 17 P. 2d 614 (1932); Nemet v. Kenosha, 169 Wis. 379, 172 N. W. 711 (1919).

[14] Heino v. Grand Rapids, 202 Mich. 363, 168 N. W. 512 (1918); Caughlan v. Omaha, 103 Neb. 726, 174 N. W. 220 (1919).

[15] Harvey v. Savannah, 59 Ga. App. 12, 199 S. E. 653 (1938); Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 722 (1917).

[16] Edwards v. San Diego, 126 Cal. App. 1, 14 P. 2d 119 (1932) (liability imposed by statute); Canon City v. Cox, 55 Colo. 264, 133 Pac. 1040 (1913); Kokomo v. Loy, 185 Ind. App. 18, 112 N. E. 994 (1916); Capp v. St. Louis, 251 Mo. 345, 158 S. W. 616 (1913); Augustine v. Brant, 249 N. Y. 198, 163 N. E. 732 (1928); City of Mangum v. Powell, 196 Okla. 306, 165 P. 2d 136 (1946); Miller v. Philadelphia, 345 Pa. 1, 25 A. 2d 185 (1942); Haithcock v. Columbia, 115 S. C. 29, 104 S. E. 335 (1920) (liability imposed by statute); Waco v. Branch, 117 Tex. 394, 5 S. W. 2d 498 (1928); Ashworth v. Clarksburg, 118 W. Va. 476, 190 S. E. 763 (1937).

[17] Kokomo v. Loy, 185 Ind. 18, 112 N. E. 994 (1916).

[18] Miller v. Philadelphia, 345 Pa. 1, 25 A. 2d 185 (1942).

[19] Van Dyke v. Utica, 196 N. Y. Supp. 277 (1922).

parents let them run free while they work, there is a duty upon the city to maintain reasonably safe premises.[20]

In North Carolina, a governmental function has been found in the collection of trash[21] and garbage,[22] the operation of an incinerator,[23] the transmission of electricity solely for street lighting,[24] the erection of a water tank,[25] police[26] and fire[27] protection, the maintenance of public buildings[28] and traffic light operation.[29] However, maintenance of an electric power line which ran to a consumer,[30] operation of a golf course[31] and maintenance of an airport[32] have all been held to be proprietary functions. Liability is imposed on municipalities for wrongful acts committed in maintenance of streets,[33] sidewalks,[34] and bridges.[35] This liability is imposed on the ground that that there is a duty to provide reasonably safe facilities, even though the functions are governmental. Liability for the failure to have reasonably comfortable jails is set out by constitutional provision,[36] but a city is not liable for the negligence of its jailers since it is in the exercise of a governmental function.[37]

The question of a city's liability for its negligence in the operation of a public park was left unanswered in an earlier North Carolina case[38] where the supreme court sustained the overruling of a demurrer. The

[20] Capp v. St. Louis, 251 Mo. 345, 158 S. W. 616 (1913).
[21] Snider v. High Point, 168 N. C. 608, 85 S. E. 15 (1915).
[22] James v. Charlotte, 183 N. C. 630, 112 S. E. 423 (1922) (although a small charge was made for the service, court held not a proprietary function).
[23] Scales v. Winston-Salem, 189 N. C. 469, 127 S. E. 543 (1925).
[24] Baker v. Lumberton, 239 N. C. 401, 79 S. E. 2d 886 (1953).
[25] McKinney v. High Point, 237 N. C. 66, 74 S. E. 2d 440 (1953) (dictum).
[26] Lewis v. Hunter, 212 N. C. 504, 193 S. E. 814 (1937); Hobbs v. City of Washington, 168 N. C. 293, 84 S. E. 391 (1915); McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187 (1900).
[27] Harrington v. Greenville, 159 N. C. 632, 75 S. E. 849 (1912); Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853 (1902).
[28] Pleasants v. Greensboro, 192 N. C. 820, 135 S. E. 321 (1926).
[29] Hamilton v. Hamlet, 238 N. C. 741, 78 S. E. 2d 770 (1953); Hodges v. Charlotte, 214 N. C. 737, 200 S. E. 889 (1939).
[30] Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342 (1906).
[31] Lowe v. Gastonia, 211 N. C. 564, 191 S. E. 7 (1937).
[32] Rhodes v. Asheville, 230 N. C. 134, 53 S. E. 2d 313 (1949).
[33] Millar v. Town of Wilson, 222 N. C. 340, 23 S. E. 2d 42 (1942). Speas v. Greensboro, 204 N. C. 239, 167 S. E. 807 (1933); Bunch v. Edenton, 90 N. C. 431 (1884).
[34] Radford v. Asheville, 219 N. C. 185, 13 S. E. 2d 256 (1941); Rollins v. Winston-Salem, 176 N. C. 411, 97 S. E. 211 (1918); Revis v. Raleigh, 150 N. C. 348, 63 S. E. 1049 (1909).
[35] Michaux v. Rocky Mount, 193 N. C. 550, 137 S. E. 663 (1927); Graham v. Charlotte, 186 N. C. 649, 120 S. E. 466 (1923).
[36] N. C. CONST. art. XI, § 6. See Coley v. Statesville, 121 N. C. 301, 28 S. E. 482 (1897); Shields v. Durham, 118 N. C. 450, 24 S. E. 794 (1896).
[37] Parks v. Princeton, 217 N. C. 361, 8 S. E. 2d 217 (1940); Nichols v. Town of Fountain, 165 N. C. 166, 80 S. E. 1059 (1914) (intoxicated man locked up in unconscious state, jail burned); Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695 (1898) (prisoner contracted illness due to improperly heated jail).
[38] White v. Charlotte, 209 N. C. 573, 183 S. E. 730 (1936), 14 N. C. L. REV. 388.

defendant's demurrer contended that the maintenance of a public park is a governmental function, but the court held that the facts alleged in the complaint were not sufficient to enable it to determine as a matter of law that the defendant was engaged in a governmental function. At a later appeal,[39] defendant's motion of nonsuit was affirmed on the ground that there was no evidence at the trial tending to show that plaintiff's intestate's death was caused by defendant's negligence. In this case the court said that if it was conceded that the operation of the park was a governmental function, ". . . it does not follow as a matter of law that defendants owed no duty to . . . exercise reasonable care to provide facilities which were reasonably safe, or that defendants would not be liable to plaintiff for a breach of such duty."[40]

In the principal case, the court intimated that the operation of the city park was a proprietary function. This idea was based on the fact that the city received a net revenue of over $18,000 for the fiscal year which it used for the capital maintenance of park area, building items, paying salaries, buying fuel, etc. Accordingly, the court reasoned that this might remove it from the category of incidental income and import such primary benefit to the city as to make this a proprietary function.[41] The court seems to be implying that it will use the pecuniary advantage test but it does not say how much revenue is necessary to produce sufficient pecuniary advantage on which to impose municipal liability. Perhaps the court would have been on sounder ground to have held that operation of public parks raises a duty on the city to exercise due care under the circumstances as it has held in the cases of streets and sidewalks.[42] This would eliminate the difficulty of applying the pecuniary advantage test and by a definite holding would let the bar and the courts know the North Carolina position as far as municipal liability for maintenance of parks is concerned.

KARL N. HILL, JR.

[39] White v. Charlotte, 211 N. C. 186, 189 S. E. 492 (1937).
[40] *Id.* at 188, 189 S. E. at 493.
[41] 246 N. C. at 477, 98 S. E. 2d at 919.
[42] 246 N. C. at 478, 98 S. E. 2d at 920. In the concurring opinion, Mr. Justice Denny took the view that municipalities may be liable in tort even if the city is engaged in a governmental function. He rejects the pecuniary advantage test used by the court, pointing out that the total receipts for Raleigh's two parks was not sufficient to operate all the parks. A recent Florida case, Hargrove v. Cocoa Beach, 96 So. 2d 130 (Fla. 1957), followed the reasoning of the concurring opinion. The court reversed its previous position and held that a muinicipal corporation is liable in tort for the negligence of a police officer under the doctrine of respondeat superior.

Trade Regulation—Stock Acquisition by Corporations—Application of Section Seven of the Clayton Act

Paragraph one of section seven of the Clayton Act,[1] before the 1950 amendment, provided:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

In the recent case of *United States v. E. I. du Pont de Nemours and Co.*,[2] the United States Supreme Court, in a four to two decision, gave the above section a broader interpretation than had previously been given it. First, the Court held that the section applied to a vertical acquisition, in this case the acquired company being a buyer of the acquiring company's products; and, secondly, that the effect of the acquisition upon commerce was to be determined at the time the suit was instituted, rather than at the time the stock acquisition took place.

Although the 1950 amendment to section seven clearly proscribes vertical acquisitions,[3] the Court's holding in the *du Pont* case that the section before amendment covered vertical acquisitions is not rendered moot, because paragraph five of the amended section exempts transactions which transpired prior to passage of the amendment. Because the effect of the acquisition is to be determined as of the time suit is brought, the interpretation of section seven as it was written prior to the amendment remains a live issue since an acquisition which was made between 1914 and 1950 may become illegal at some future time due to changing circumstances.

In the *du Pont* case, the government alleged as violating section seven of the Clayton Act purchases by the du Pont Company between 1918 and 1920 of more than twenty-three per cent of the outstanding stock of General Motors, a total investment of approximately $49,000,000.[4]

[1] 38 STAT. 731 (1914), 15 U. S. C. § 18 (1946).

[2] 353 U. S. 586 (1957).

[3] 64 STAT. 1125 (1950), 15 U. S. C. § 18 (1952), amending 38 STAT. 731 (1914), is in part as follows: "No corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where *in any line of commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." (Emphasis added.)

[4] The government alleged violations of §§ 1 and 2 of the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2 (1952), as amended, in addition to the alleged violation of § 7 of the Clayton Act.

The government conceded that the acquisition of General Motors stock by du Pont did not substantially lessen competition between the two companies and the amended complaint alleged only that the effect of du Pont's acquisition was ". . . to tend to create a monopoly in particular lines of commerce."[5] The Court reasoned that, since section seven was written in the disjunctive, it embraced three separate and distinct effects of a stock acquisition, citing *Aluminum Co. of America v. FTC*,[6] *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*,[7] and *United States v. New England Fish Exchange*.[8] In citing the *Aluminum* case, the Court relied on dictum because the court of appeals held that there was competition between the Aluminum Company of America and Rolling Mills Company, whose stock the Aluminum Company had acquired.[9] The *Fish Exchange* case is not directly in point because it was decided under paragraph two of section seven which applies to acquisitions by a company of the stock of two or more competitors,[10] although the wording of the two paragraphs is, for this purpose, identical. The *Ronald Fabrics* case is the only case which has been found to apply paragraph one of section seven to stock acquisitions where the acquiring and acquired companies were not in competition with each other. The *Ronald Fabrics* case was a private suit for treble damages by processor *A* against processor *B* which had bought supplier *C* and, by so doing, cut off *A* from his only source of supply.

During the thirty-five year period from the passage of the Clayton Act in 1914 until the commencement of the *du Pont* case in 1949, the Federal Trade Commission and the Justice Department, the agencies charged with enforcement of the act, had failed to bring a single case under section seven where there was no competition between the acquiring and acquired companies.[11] The failure of an administrative agency to invoke a purported power is a powerful indication that the power does not exist.[12] To lend force to the inference raised by the failure to so apply the statute for thirty-five years are statements by the FTC that interpret section seven as applicable to horizontal stock acquisi-

[5] 353 U.S. at 591. [6] 284 Fed. 401 (3d Cir. 1922).
[7] 1946 Trade Cas. ¶ 57514, at 58374 (S. D. N. Y.).
[8] 258 Fed. 732 (D. Mass. 1919).
[9] 284 Fed. at 407. [10] 258 Fed. at 746.
[11] Both the opinion of the Court (353 U.S. at 590) and the dissent (*id.* at 610) point this out.
[12] See FTC v. Bunte Bros., Inc., 312 U. S. 349, 351-52 (1941), where it was said, "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, *so want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.*" (Emphasis added.)

tions only.[13] Although no case has been uncovered which directly holds that section seven does not apply to vertical acquisitions of stock, in *International Shoe Co. v. FTC*,[14] it was held that section seven had not been violated because there was no substantial competition between the acquiring and acquired companies. In that opinion the Court said, "Obviously such acquisition will not produce the forbidden result if there is no pre-existing substantial competition to be affected."[15] In another case,[16] the complaint was dismissed upon a finding that no substantial competition existed either between the acquiring company and any of the acquired companies, or among the acquired companies. These cases appear significant in that they require, for a violation of section seven, competition between the acquired and the acquiring companies, something that does not exist between companies involved in a vertical acquisition.

As to the second point of the Court's decision, *viz.*, that the effect of the acquisition is to be determined as of the time suit is brought, it is noted that no authority was cited for that proposition. Prior to the *du Pont* case only one suit was brought invoking section seven where the acquisition had occurred more than three or four years before commencement of the suit.[17] In that case, a series of transactions was involved stretching from 1917 almost to the time the suit was begun, in 1948. Furthermore the suit was brought under the second paragraph of section seven of the Clayton Act, which applies to holding companies and makes illegal the acquisition of stock of two or more corporations ". . . where the effect of such acquistion, *or the use of such stock* . . . may be to substantially lessen competition between such corporations, or any of them . . . or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."[18] (Emphasis added.) The words, "or the use of such stock," seem to cover adequately a situation where the effect of the transaction upon commerce arises some time after the acquisition. The absence in paragraph one of section seven of the words, "or the use of such stock," might indicate that Congress did not intend that the effect of a stock acquisition prohibited thereby should be determined as of the time of suit.[19] To give

[13] FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS 168 (1955).
[14] 280 U. S. 291 (1930).
[15] *Id.* at 298. From the point of view of the *du Pont* holding, this is dictum, since in *International Shoe,* the allegation that the acquisition tended to create a monoploy was not pressed on appeal, thus giving the Court no occasion to decide whether such an effect as alleged required competition between the acquired and acquiring corporations to come within the statute.
[16] In the Matter of Austin, Nichols & Co., 9 F. T. C. 170 (1925).
[17] 353 U. S. at 610-11 (dissenting opinion). The lone case was Transamerica Corp. v. Board of Governors, 206 F. 2d 163 (3d Cir. 1953).
[18] 38 STAT. 731 (1914), 15 U. S. C. § 18 (1946).
[19] 353 U. S. at 620-21 (dissenting opinion).

to section seven the interpretation given to it by the Court in the *du Pont* case is to subject all companies acquiring stock in good faith to the hazard of having a legal transaction become illegal because of unforseeable developments,[20] an effect which Congress may be doubted to have intended.

ROGER A. HOOD

Trade Regulation—Unfair Competition—Dilution of Trade Marks

In *Esquire, Inc. v. Esquire Slipper Mfg. Co.*,[1] *Esquire* magazine sought to enjoin the defendant, a manufacturer of men's slippers, from using the word "Esquire" written in any manner whatsoever on its product, in its corporate name, or in its advertising. The plaintiff, in the words of the court, "seems almost to contend that the word 'Esquire,' except, usually abbreviated, as a form of address or title, as customarily used in addressing members of the bar, has as a practical matter disappeared from the English language except as the name of its magazine."[2] According to the opinion of the lower court in this case,[3] 5,000 persons in this country have adopted the word "Esquire" commercially, including barber shops, service stations, and cafes. Even before the plaintiff's trade-mark was registered, the name was registered for men's furnishings, pipes, toilet articles, watches, and writing paper. In the last few years, Esquire, Inc., has gone on an extended campaign to acquire exclusive rights for its mark. This campaign includes "friendly" letters, warnings of suit, and occasionally litigation. Apparently over 1,000 users of the word in unrelated fields have given up the mark under plaintiff's threats. The plaintiff has gone so far as to claim that it is protected against derivative words and that, therefore, "Squire's Home for Aged and Convalescent," "Squire Market," and "Squire Realty Co." are (or were) infringing on plaintiff's rights.[4]

Thus the question is squarely presented as to just how much protection the owner of a nationally advertised and nationally known mark is entitled to receive from users in unrelated or at best distantly related fields.

The plaintiff's hope for protection lies in an action for unfair competition of which trade-mark infringement is but a part.[5] Unfair competition is an expanding concept and in arriving at its present status has

[20] Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 220-21 (1953).

[1] 243 F. 2d 540 (1st Cir. 1957).
[2] *Id.* at 543.
[3] Esquire, Inc. v. Esquire Slipper Mfg. Co., 139 F. Supp. 228 (D. Mass. 1956).
[4] *Id.* at 231.
[5] Hanover Star Milling Co. v. Metcalf, 240 U. S. 403 (1916).

afforded relief under theories based on "simple" trade-mark infringement,[6] confusion of source,[7] and, more recently, confusion of sponsorship.[8] Under the modern "confusion doctrine" all that is required is that there be some reasonable likelihood that the buying public, through the defendant's use of the mark, will believe that the plaintiff has in some manner given its approval or endorsement, or a so-called "pat-on-the-back" to the defendant's product. No evidence of specific instances of confusion need be presented.[9] If this element of confusion is present, then the defendant may be enjoined from using the mark or required to take steps to prevent the confusion.[10]

It would seem that this protection would be enough to satisfy even

[6] "The owner of a trade-mark has the right, not only to its exclusive use on goods which he has manufactured, but also on goods which he may afterwards produce, if they belong to the same general class as those upon which he has been using the mark." William Waltke & Co. v. Geo. H. Schafer & Co., 263 Fed. 650, 651 (D. C. Cir. 1920) ("Lava" soap protected from "U-Lava" shaving cream). Other illustrative cases include: American Tobacco Co. v. Polacsek, 170 Fed. 117 (C. C. S. D. N. Y. 1909) (smoking and chewing tobacco vs. cigarettes); Church & Dwight Co. v. Russ, 99 Fed. 276 (C. C. D. Ind. 1900) (baking soda vs. baking powder); Jacob Ruppert v. Knickerbocker Food Specialty Co., 295 Fed. 381 (E. D. N. Y. 1923) (beer vs. malt syrup); Wilcox & White v. Leiser, 276 Fed. 445 (S. D. N. Y. 1918) ("self playing" musical instrument vs. phonographs); *cf.* Pabst Brewing Co. v. Decatur Brewing Co., 284 Fed. 110 (7th Cir. 1922), where the court held "Blue Ribbon" beer not infringed by the use of the name on malt extract primarily because of the inherent weakness of the mark.

[7] "The fundamental question in cases of unfair competition . . . is whether the public is being misled and deceived, so that a defendant is in effect taking the advantage of the good will and business reputation that a complainant has built up through service or advertising or in any manner regarded as lawful and proper." Anheuser-Busch v. Budweiser Malt Products Corp., 287 Fed. 243, 246 (S. D. N. Y. 1921). Other cases applying this theory include: John Walker & Sons v. Tampa Cigar Co., 197 F. 2d 72 (5th Cir. 1952) (whiskey vs. cigars—court said dismissal improper where there was a factual question whether or not the defendant's use might cause confusion as to source); Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407 (2d Cir. 1917) (self-rising flour vs. pancake syrup); Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73 (2d Cir. 1910) ("Keepclean" toilet brushes protected from "Sta-Clean" toothbrushes when packaged in the same manner); Aluminum Cooking Utensil Co. v. Sargoy Bros. & Co., 276 Fed. 447 (E. D. N. Y. 1921) ("Wearever" for aluminum cooking utensils protected from use on tin wash boilers); Van Zile v. Norub Mfg. Co., 228 Fed. 829 (E. D. N. Y. 1916) (mark used on a washing aid protected from use on a powder used as a germicide and cleanser).

[8] Hanson v. Triangle Publications, 163 F. 2d 74 (8th Cir. 1947), 26 N. C. L. REV. 424 (1948) ("Seventeen" magazine granted injunction against use of name on dresses for teen-age girls); Esquire, Inc. v. Maira, 101 F. Supp. 398 (M. D. Pa. 1951) (magazine granted injunction against use of name on men's clothing shop); Esquire, Inc. v. Esquire Bar, 37 F. Supp. 875 (S. D. Fla. 1941) (confusion was found in that defendant had printed the name in the same manner as the magazine, had used drawings containing plaintiff's "Esky," a bulbous eyed character, and had used layouts from plaintiff's magazine; without these elements the case would have been an interesting test for the "dilution theory"); Cornell University v. Messing Bakeries, Inc., 285 App. Div. 490, 138 N. Y. S. 2d 280 (3d Dep't), *aff'd mem.*, 309 N. Y. 722, 128 N. E. 2d 421 (1955), 6 SYRACUSE L. REV. 383, 41 CORNELL L. Q. 515 (1956) (Cornell University granted some relief from use of name on bread).

[9] La-Touraine Coffee Co. v. Lorraine Coffee Co., 157 F. 2d 115 (2d Cir. 1946).

[10] Cases cited notes 7 and 8 *supra.*

the most selfish. In the principal case, the court relied on this doctrine to enjoin the use of the word "Esquire" printed in "distinctive, disjointed script" (as in plaintiff's trade-mark) on the defendant's slippers. However, the doctrine was not broad enough to prevent defendant's use of the word in its corporate name, as demanded by plaintiff. Apparently the court felt that the use of this corporate name would not result in any type of confusion that would entitle plaintiff to protection.

Plaintiff had based its claim for this broad relief on the newest, most complete, and least understood available concept—the so-called "dilution theory."[11] The rationale of the doctrine is that a trade-mark possesses a certain amount of good will. This good will is acquired through the distinctiveness of the name and its association with the products of its owner. Therefore, the use of this trade-mark on any other products decreases its distinctiveness, dilutes its meaning, and harms the good will of the mark. If enough people use the mark, it will lose all its distinctiveness and be worthless. To prevent this from happening, the owner of the mark can stop anyone in any field, related or unrelated, from using the mark whether any "confusion" in its broadest sense is likely to result or not.[12] A strict application of this doctrine would obviously give plaintiff rights broader than those conferred by even the copyright or patent laws,[13] where protection is limited to a number of years.

In the principal case, plaintiff was able to point to a Massachusetts statute (Massachusetts law governed this portion of the case) which for all practical purposes declares the "dilution theory" to be part of the law of Massachusetts.[14] Still the court refused to give *Esquire* magazine

[11] See Schecter, *The Rational Basis of Trade-Mark Protection,* 40 HARV. L. REV. 813 (1927). This article is generally given credit for introducing the concept of trade-mark dilution to American jurisprudence. Although Mr. Schecter did not use the word "dilution," he did use such phrases as "whittling away," "dispersion," and "dissociation."

[12] See CALLMAN, UNFAIR COMPETITION AND TRADE-MARKS § 84.2 (2d ed. 1950).

[13] See Middleton, *Some Reflections on Dilution,* 42 TRADE-MARK REP. 175 (1952).

[14] "Likelihood of injury to business reputation or of dilution of the distinctive quality of a trade name or trade-mark shall be a ground for injunctive relief in cases of trade-mark infringement or unfair competition notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services." MASS. ANN. LAWS c. 110, § 7A (1954); See also GA. CODE ANN. § 106-115 (1956); ILL. ANN. STAT. c. 140, § 22 (Smith-Hurd Supp. 1956); N. Y. GEN. BUS. LAW § 368-C. Apparently the Georgia and Illinois courts have not yet construed the statute. However, both the Massachusetts and New York courts have balked at giving the broad relief apparently called for by the statute. For example, the Massachusetts court, in refusing to give an automobile dealer protection for the use of the word "Parkway," stated: "The word 'Parkway' having acquired no secondary meaning as designating the plaintiff's place of business, his rights are not enlarged by [the statute]. . . ." Mann v. Parkway Motor Sales, Inc., 324 Mass. 151, 157, 85 N. E. 2d 210, 214 (1949). The New York court in reference to the statute has stated that "when the precedents are examined carefully, they disclose that a plaintiff in order to prevail in an unfair

the broad relief requested.[15]

It appears that the "dilution theory" is turning out to be something less than the panacea hoped for by some. Courts tend to revert to the age-old classification of strong marks and weak marks.[16] A weak mark cannot be made strong no matter how hard the holder tries, and since it is already weak, it is already diluted and further dilution cannot be enjoined as no appreciable harm results.[17] While there is considerable dicta to the effect that a strong, fanciful mark such as "Kodak" would be entitled to protection from dilution,[18] there is no case that has justified a verdict on the "dilution theory" that could not have been justified under some branch of the "confusion doctrine."[19]

No "pure" dilution case involving a strong mark has been found.[20]

---

competition case must prove either (1) that defendant has acted unfairly in some manner, or (2) that defendant's activities have caused confusion or mistake, or are likely to cause confusion or mistake, with plaintiff's activities, in the minds of the public." Renofrab Process Corp. v. Renotex Corp., 158 N. Y. S. 2d 70, 76 (Sup. Ct. 1956). See Sterling Brewing, Inc. v. Cold Spring Brewing Co., 100 F. Supp. 412 (D. Mass. 1951); *cf.* Cornell University v. Messing Bakeries, Inc., 285 App. Div. 490, 138 N. Y. S. 2d 280 (3d Dep't), *aff'd mem.*, 309 N. Y. 722, 128 N. E. 2d 421 (1955).

[15] In explaining the dilution statute, the court said, "This statute might be read as requiring as a matter of law that in Massachusetts courts of equity in trademark infringement and unfair competition cases give the plaintiff injunctive relief no matter how weak the plaintiff's mark may be, against a defendant whose actions create any likelihood of dilution of whatever distinctive quality the plaintiff's mark may have. But so to read the statute would be to fly in the face of the general principle that courts are not to presume a legislative intention to rigidify the traditional flexible equity practice of granting or withholding injunctive relief in the exercise of sound judicial discretion. Thus, in the absence of clear mandatory words, we shall continue, until the Supreme Judicial Court of Massachusetts gives clear indication to the contrary, to construe the statute as only permissive. . . . That is to say, we think the statute was meant to accomplish no more than to permit injunctive relief in Massachusetts in suits for trademark infringement or unfair competition grounded on dilution of a plaintiff's mark as well as in such suits grounded on direct infringement." (Citations omitted.) 243 F. 2d at 544.

[16] "Names 'fanciful' in character are denominated 'strong.' These are designations which are generally not descriptive of the business, the persons involved, or the place of business or operation. 'Weak' marks are words of common speech and those descriptive of the locality or area where the services are performed or the article used or made." North American Airline System v. North American Aviation, 231 F. 2d 205, 209 (9th Cir. 1955).

[17] *Cf.* Dobeckmun Co. v. Boston Packaging Machinery Co., 139 F. Supp. 321 (D. Mass. 1956).

[18] Esquire, Inc. v. Esquire Slipper Mfg. Co., 243 F. 2d 540, 543 (1957); Dobeckmun Co. v. Boston Packaging Machinery Co., *supra* note 17, at 323.

[19] See *e.g.*, Food Fair Stores, Inc. v. Food Fair, Inc., 177 F. 2d 177 (1st Cir. 1949); Wertheimer v. Milliken, 123 F. Supp. 358 (S. D. N. Y. 1954); Libby, McNeil & Libby v. Libby, 103 F. Supp. 968 (D. Mass. 1952). In these cases the court based its decision on their "dilution statute," but confusion was obviously available if the court had chosen to rely on it (in two of the cases, super-markets adopted the name of a well-known national chain and in the other an individual bought old X-ray film from the army marked "not fit for use," and sold it under the brand name of the original manufacturer).

[20] In Tiffany & Co. v. Tiffany Productions, Inc., 147 Misc. 679, 264 N. Y. Supp. 459 (Sup. Ct. N. Y. County), *aff'd*, 237 App. Div. 801, 260 N. Y. Supp. 821 (1st

Perhaps this is because if there is no possible chance for confusion, the appropriator would gain little by the use of the mark. It is doubted that the use of the name "Kodak" would contribute much to the success of a bar and grill. The name "Aunt Jemima" might well be beneficial to the maker of a ready-made cake mix, but it would not be nearly so helpful to the maker of fountain pens. Also, the stronger the mark, the more likely it is that "confusion" in its broad sense will result from the use of the mark in unrelated fields. Thus where a strong mark is encroached upon, it is relatively easy for the courts to base a decision on "confusion," without having to rely on "dilution."[21]

On the other hand, a weak mark by virtue of its descriptive nature is useful to unrelated enterprises irrespective of any advantage to be gained by association with the user of the same or a similar mark. Thus "Eversharp" is equally appropriate for automatic pencils, knives, and lawnmowers, and could conceivably be used for all three without any confusion. In the absence of any confusion it is difficult to see that a prior user is entitled to protection. Unless the use creates confusion of some type, no one is gaining anything from the good will of another; and it would be difficult to describe the conduct of a later user as unfair.

It thus appears that holders of strong marks are amply protected by the "confusion doctrine," and that holders of weak marks are not entitled to protection under the "dilution theory."[22] The "dilution theory" may well prove useful in buttressing a weak "confusion" case, but at present it does not seem likely to create any far-reaching changes on its own. The statement of the court in the principal case that a trader cannot "pluck a word with favorable connotation for his goods or services out of the general vocabulary and appropriate it to his exclusive use no matter how much effort and money he may expend in the attempt"[23] seems likely to survive attack until present concepts are greatly expanded.

F. GORDON BATTLE, JR.

Dep't 1932), *aff'd*, 262 N. Y. 482, 188 N. E. 30 (1933), the well known New York jeweler obtained an injunction against the use of its name by a producer and distributor of motion pictures. The court in granting plaintiff an injunction discussed the fact that "the real injury was the gradual whittling away of the identity and hold upon the public mind of plaintiff's name," but evidence of public confusion was introduced and the court at least in part based its decision on the latter theory. In Philadelphia Storage Battery Co. v. Mindlin, 163 Misc. 52, 296 N. Y. Supp. 176 (Sup. Ct. 1937), the court in granting "Philco" radio an injunction against the use of its name for razor blades based its decision in part on "dilution," but stated that confusion was inevitable.

[21] See Wall v. Rolls-Royce of America, 4 F. 2d 333 (3d Cir. 1925); Alfred Dunhill of London v. Dunhill Shirt Shop, 3 F. Supp. 487 (S. D. N. Y. 1929); Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509 (6th Cir. 1924).

[22] *Cf.* G. B. Kent & Sons, Ltd. v. P. Lorillard Co., 114 F. Supp. 621 (S. D. N. Y. 1953), *aff'd per curiam*, 210 F. 2d 953 (2d Cir. 1954).

[23] 243 F. 2d at 543.

Workmen's Compensation—Injury from Blood Test Required by Public Regulation

In the case of *King v. Arthur*,[1] an unsuccessful attempt to draw blood from claimant-dairy worker's arm for a Wasserman test caused a draining lesion which incapacitated her for two months. Claimant's employer had ordered her, during working hours, to submit to the test at a specified clinic. No deduction from her pay was made for the time she was away from her work. A county health ordinance required dairy workers to submit to blood tests every six months. Employer-defendant was required to see that his employees took the test or his dairy would be subject to "immediate degrading, suspension of permit"[2] and he could be found guilty of a misdemeanor and upon conviction, subject to fine or imprisonment.[3] In denying compensation, the court reversed the deputy commissioner, the full commission, and the superior court.

The basis for the court's decision was that claimant, in submitting to the test, was obeying, not a requirement of the employer, but of the public. For this reason her injury did not "arise out of and in the course of the employment."[4] In deciding this question of first impression in North Carolina, the court relied primarily on the following two cases from other jurisdictions.

In *Krout v. J. L. Hudson Co.*,[5] claimant-factory worker's disablement followed a smallpox vaccination given by the board of health as part of a general anti-epidemic program. Defendant-employer had cooperated with the board by communicating its request for submission of all employees to the vaccinations and by excluding unvaccinated employees from the factory for a twenty-one day safety period. The court concluded that the injury, if traceable to the vaccination, arose, not out of the employment, but out of the active agency of the board which had requested claimant's submission to the vaccination for her own benefit as well as for the benefit of the general public. The *Krout* and

[1] 245 N. C. 599, 96 S. E. 2d 847 (1957).

[2] U. S. PUBLIC HEALTH SERVICE STANDARD MILK ORDINANCE AND CODE WITH REVISIONS UPWARD § 5 (adopted by the County Board of Health of Buncombe County).

[3] N. C. GEN. STAT. § 130-20 (1952).

[4] See Roberts v. U. S. O. Camp Shows, 91 Cal. App. 2d 884, 205 P. 2d 1116 (1949); Smith v. Brown Paper Mill Co., 152 So. 700 (La. App. 1934); Neudeck v. Ford Motor Co., 249 Mich. 690, 229 N. W. 438 (1930); Sanders v. Children's Aid Soc'y, 262 N. Y. 655, 188 N. E. 107 (1933); Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421, 188 N. E. 870 (1934); Alewine v. Tobin Quarries, Inc., 206 S. C. 103, 33 S. E. 2d 81 (1945); Texas Employers' Ins. Ass'n v. Mitchell, 27 S. W. 2d 600 (Tex. Civ. App. 1930). In these cases injury resulted from vaccinations or blood tests performed by the employer's physician or nurse. Compensation was allowed on a finding that the employer required the injection, even though it had been requested or recommended by the board of health.

[5] 200 Mich. 287, 166 N.W. 848 (1918).

King cases here differ, because in *King* claimant was not an intended beneficiary of the blood test.

In *Industrial Comm'n v. Messinger*,[6] a five to two decision, the facts were more nearly the same. The restauranteur-employer, under compulsion of law, directed waitress-claimant to obtain the blood test which caused the injury. Two significant differences appear in this case: a) claimant was not ordered to go to any particular place to have the test but rather went to a physician of her own choosing; and b) the test was made when claimant was off work. The basis for the majority's decision was the same as that of the court in the *King* case.

The differences mentioned tend to lessen the persuasiveness of the cited cases as authority for the holding of the court in the principal case. In support of the court's decision, however, lies the theory that the employer in implementing statutory requirements acts merely as the agent of the governing body.[7] For this reason, justice would seem to demand that he not be made to pay for resulting injuries as he would be if he had ordered the injury-producing act in the exercise of his unfettered discretion.[8] Also it might be argued that charging employers for injuries arising out of statutory requirements would tend to discourage ventures into heavily regulated areas of industry. But considering the circumstances of the principal case and the philosophy and purpose of the Workmen's Compensation Act, it is felt that the result reached in the *King* case is unduly harsh.[9]

Schneider has said that "an accident arises from the employment if it ensues from a risk reasonably incident to the employment"; he further states that the risk may be one only indirectly connected with the employment.[10] Our court has said the injury "must in some reasonable

[6] 116 Colo. 451, 181 P. 2d 816 (1947).

[7] See Texas Employers' Ins. Ass'n v. Mitchell, 27 S. W. 2d 600 (Tex. Civ. App. 1930).

[8] This argument is akin to that advanced in the old "compulsory pilot" cases. In these cases the issue was whether ship owners should be held liable under respondeat superior for collision damage caused by the negligence of pilots whom the ship masters were compelled by law to accept. The owners successfully contended that it was unjust to hold them since they were allowed no choice in the matter. Dampskibsselskabet Atalanta A/S v. United States, 31 F. 2d 961 (5th Cir. 1929); Homer Ramsdell Transp. Co. v. La Com. Gen. Transatlantique, 182 U. S. 406 (1901), 4 TUL. L. REV. 133 (1929). These cases presented a problem analogous to that of the principal case, *viz.*, what degree of public interference makes it proper to take the affected aspect of a business out of the business for the purpose of determining entrepreneur liability? The magnitude of public usurpation of the owners' control in the pilot cases is obviously far greater than that occasioned by the blood test ordinance of the principal case.

[9] A generally accepted rule applicable to all cases arising under workmen's compensation laws was set out in Alewine v. Tobin Quarries, Inc., 206 S. C. 103, 110, 33 S. E. 2d 81, 83-84 (1945); "[W]e must keep in mind the established rule that the Act should be given a liberal construction in furtherance of the purposes for which it was designed . . . ."

[10] 6 SCHNEIDER, WORKMEN'S COMPENSATION § 1542 (d) (1948).

sense spring from and be traceable to the employment."[11] The above language is considered especially pertinent to the circumstances surrounding claimant's injury in this case. She was required by the law and by her employer to submit to a blood test every six months. The reasons therefor make her injury "traceable" to the employment and the risk of such injury "reasonably incident" to her employment. The county, through the ordinance, did not seek to discover or prevent disease in dairy workers for the benefit of the workers. The purpose of the regulation was to minimize the possibility that dairies would endanger the health of those who drank their milk. Thus the relationship between the blood test and the employer's milk would seem to supply the requisite connection between the injury and the employment.

Another aspect of the case and one which courts have frequently turned to in deciding the compensation question is: Who benefited from the act which produced the injury?[12] In the *King* case, the blood test was required out of concern over the possibility that the employer's milk might become a disease carrier. The direct beneficiaries were the customers of dairymen who carried out the mandates of the ordinance. Any benefit realized by an employee from the test was only incidental to the purpose of the law. Two benefits accruing to the employer from a measure aimed at keeping his product free from disease germs are readily seen: freedom from lawsuits and uninterrupted production. It would seem that the order was at least "calculated to further . . . indirectly, the master's business"[13] and this is no less true because compelled by law.

The philosophy behind the Compensation Act would also seem to point to compensation in this case. That philosophy is that the financial burdens of industry-connected injuries should be added, like any other production expense, to the cost of a particular industry's product and paid for by the product's consumers.[14] The blood test submitted to by the claimant was an integral part of the process of putting wholesome milk in the hands of consumers. In accordance with the act's philosophy,

[11] Vause v. Vause Equipment Co., 233 N. C. 88, 92, 63 S. E. 2d 173, 176 (1951).

[12] In Hildebrand v. McDowell Furniture Co., 212 N. C. 100, 109, 193 S. E. 294, 301 (1937), it was said that the phrase "out of and in the course of the employment embraces . . . those accidents which happen to a servant while he is engaged in the discharge of some function or duty . . . which is calculated to further, directly or indirectly, the master's business."

[13] See note 12 *supra*.

[14] This philosophy was set out in Vause v. Vause Equipment Co., 233 N. C. 88, 92, 63 S. E. 2d 173, 176 (1951), quoting from Cox v. Kansas City Refining Co., 108 Kan. 320, 322, 195 Pac. 863, 865 (1921), as follows: "[T]he wear and tear of human beings in modern industry should be charged to the industry .... And while such compensation is presumably charged to the industry . . . eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products."

it might be contended that injury resulting therefrom should ultimately be paid for by the consumers regardless of what compelled this particular part of the process.

A search of the cases and other authorities has revealed no instance, with the exception of the *Krout, Messinger,* and *King* cases, where an employer has defended on the grounds that an order of his was in fact a public order; and, as shown, these three cases are confined to the area of needle injections of some sort. In view of the great amount of public regulation of industries, especially those in the food and drug field, a question is raised as to the infrequent use of the defense. The *King* case could induce greater reliance on it in the future. In North Carolina the regulation of dairies is left in large degree to local authorities[15] and state agencies.[16] Bakeries are regulated in greater detail by the legislature[17]—even to the point of prescribing when employees shall wash their hands.[18] Many of these regulations could conceivably result in employee injury. If a bakery worker scalds his hands while complying with the clean hands requirement, would a denial of compensation be upheld on the basis of the *King* decision?

If an employer chooses to engage in a business which by its nature requires public regulation to make the business safe for his customers and the public in general, it is felt that he, and ultimately his customers, should bear any extra expense occasioned by such regulation. For this reason it is hoped that the rule in the *King* case will be confined to its facts and will not be invoked to deny compensation in other cases where the employer's orders and public regulation coincide.

ROBERT W. KING, JR.

[15] N. C. GEN. STAT. § 130-19 (1952).
[16] N. C. GEN. STAT. § 106-267 (1952) (Board of Agriculture); N. C. GEN. STAT. § 130-4 (1952) (Board of Health); N. C. GEN. STAT. § 106-266.8(c) (Supp. 1955) (Milk Commission).
[17] See N. C. GEN. STAT. §§ 106-220 through 106-222 (1952).
[18] N. C. GEN. STAT. § 106-222 (1952).