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Pleadings -- Cross-Claim for Contribution

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perform services. The period of such liability must extend beyond the year of receipt, but must not be in excess of three years. Those taxpayers who cannot qualify under this statute may still be able to defer reporting of prepaid unearned income by proving that there is a reasonable correlation between the income deferred and future expenses. Such a conclusion seems to be justified as the Supreme Court in the principal case placed considerable reliance upon the *Automobile Club of Michigan* case.

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Pleadings—Cross-Claim for Contribution

In *Greene v. Charlotte Chem. Labs., Inc.*,[1] plaintiff sued to recover damages for personal injuries, joining *A* and *B* as alleged joint tort-feasors. *A* filed a cross-claim against *B* setting up a plea for contribution. *B* moved to strike the cross-claim. The trial court allowed the motion. On appeal this was affirmed in a four to three decision.[2]

The most obvious and severe consequence of this decision is to preclude an original defendant in such an action from holding another original defendant in to defend against his contribution claim should plaintiff take a voluntary or suffer an involuntary nonsuit against him at any time prior to judgment.[3] It thereby adds yet another complexity to an already intricate and still evolving pattern of rules in our multiple party pleading practice.[4]

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[1] 254 N.C. 680, 120 S.E.2d 82 (1961).

[2] Justice Moore wrote the majority opinion in which Chief Justice Winborne, Justices Denny and Higgins concurred. Justice Bobbitt dissented, joined by Justices Parker and Rodman. Subsequently, in Bass v. Lee, 255 N.C. 73, 120 S.E.2d 570 (1961), the court reaffirmed this position with only Justice Bobbitt dissenting.

[3] This consequence was frankly recognized by the majority opinion which stated the question presented and answer in this form: "In an action against two defendants, as joint *tort-feasors,* may one defendant set up a plea for contribution against the co-defendant and thereby preclude dismissal of the co-defendant during the trial and before judgment. . . . The answer is 'No.'" 254 N.C. at 691, 120 S.E.2d at 90.

[4] See Brandis & Graham, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina,* 34 N.C.L. REV. 405, 419-22, 425-29 (1956); BRANDIS, *A Plea for Adoption by North Carolina of the Federal Joinder Rules,* 25 N.C.L. REV. 245, 260-68 (1947); BRANDIS, *Permissive Joinder of Parties and Causes in North Carolina,* 25 N.C.L. REV. 1 (1946). In these articles the authors review the decisions of the North Carolina Supreme Court in an effort to formulate the rules regarding multiple party pleading. From the cases discussed therein and more recent decisions of the court, the rules pertaining to cross-claim for contribution prior to *Greene* appear to be as follows: (a) Prior to the enactment of G.S. § 1-240

Bell v. Lacey,[5] the case relied upon by the majority,[6] seems clearly distinguishable.[7] Therein the objectionable cross-claim was for

(contribution statute) the rule was recognized that under G.S. § 1-222 a defendant, upon allegations of primary liability of his codefendant, could cross-claim against the codefendant and demand judgment over against him for the full amount recovered by plaintiff. Gregg v. City of Wilmington, 155 N.C. 18, 70 S.E. 1070 (1911). This rule was extended to allow joinder of a third party upon allegations of primary liability by the original defendant. Bowman v. City of Greensboro, 190 N.C. 611, 130 S.E. 502 (1925). (b) G.S. § 1-240 gives the joint tort-feasors the substantive right of contribution from each other and when sued alone, to have other joint tort-feasors made additional parties so that the contribution issue may be settled in one cause. (c) The original defendant must allege facts sufficient to indicate that *both* defendants are or may be liable to plaintiff and that plaintiff could claim rights against the party added by timely assertions. Thus where he alleges only that the negligence of another was the sole proximate cause of plaintiff's injuries, the cross-action against such other person will not be sustained. Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955). (d) An additional party may not be joined for contribution when his negligence would be attributable to plaintiff and bar plaintiff's action. Evans v. Johnson, 225 N.C. 238, 34 S.E.2d 73 (1945). (e) Where the original defendant has another joint tort-feasor joined for contribution, the joined party may cross-claim against the original defendant for damages for personal injuries arising out of the same accident. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957). But where both tort-feasors are sued jointly by plaintiff, neither may file a cross-claim for affirmative relief against his codefendant, even though the cross-claimant has a cross-claim for contribution filed against him by the codefendant. Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958). (f) Where two defendants are sued together as joint tort-feasors and one demurs successfully to the complaint and is dismissed from the action prior to trial, he may be made an additional party defendant by the remaining defendant under G.S. § 1-240. Canestrino v. Powell, 231 N.C. 190, 56 S.E.2d 566 (1949). (g) Where two defendants are sued together as joint tort-feasors, and plaintiff takes a voluntary nonsuit as to one during trial, he is ordered retained to answer to a cross-claim for contribution filed by the other defendant. Smith v. Kappas, 218 N.C. 758, 12 S.E.2d 693 (1941), same case on rehearing, 219 N.C. 850, 15 S.E.2d 375 (1941).

Greene overrules *Smith* without comment by the majority opinion, and applies instead the rule of *Bell* which involved a cross-claim for affirmative relief, not contribution. *Greene* also casts doubt upon the rule announced in *Canestrino*. (See text *infra*.) *Quaere:* Considering the rule in *Greene*, what results when plaintiff sues two defendants as joint tort-feasors, one demurs successfully and plaintiff fails to amend or appeal but defendant files no motion to dismiss the cause as to him, thus remaining a nominal party? May remaining defendant maintain a cross-claim for contribution here? See Webb v. Eggleston, 228 N.C. 574, 46 S.E.2d 700 (1948), where the court states that such inaction by the plaintiff will *work* a dismissal of the successful defendant, and Dudley v. Dudley, 250 N.C. 95, 107 S.E.2d 918 (1959), stating that defendant has a *right to move* for dismissal, which seems to suggest that dismissal is not automatic in such a case.

It is doubtful if *Greene* will upset any of the rules formulated under G.S. § 1-222 dealing with indemnity or primary and secondary liability.

[5] 248 N.C. 703, 104 S.E.2d 833 (1958).

[6] The court stated: "The question was definitely and clearly decided in *Bell v. Lacey* . . . ." 254 N.C. at 691, 120 S.E.2d at 90.

[7] This is the argument advanced by Justice Bobbitt in dissenting. He

affirmative relief rather than for contribution. Cross-claims for affirmative relief have consistently been forbidden on the basis that they present matter not "germane to plaintiff's cause of action,"[8] and on the kindred basis, apparently seen as a corollary, that "an original defendant . . . [cannot] compel the plaintiff to join issue with a defendant he has not elected to sue."[9] However justifiable under code pleading practice these propositions may be in application to cross-claims for affirmative relief,[10] they would appear inapplicable to a cross-claim for contribution.

Cross-claims for contribution between original and impleaded codefendants are of course widespread in practice and sanctioned by the court.[11] There is no suggestion that they might be prohibited by a requirement that they be germane to plaintiff's cause.[12] To the contrary, it is frequently pointed out that a defendant asserting such a claim must recover, if at all, upon the liability of his codefendant to him and not on the strength of the plaintiff's cause.[13]

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stated that *Bell* is not authority for the proposition that a defendant may not allege that his codefendant is a joint tort-feasor from whom he is entitled to contribution. It is interesting to note that the only cross-claim for contribution in *Bell* was not objected to by the plaintiff or the codefendant, or contested on appeal.

[8] Montgomery v. Blades, 217 N.C. 654, 656, 9 S.E.2d 397, 398 (1940). Apparently the cross-claim for affirmative relief was pleaded in contemplation of Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957), where a cross-claim for affirmative relief by a third party, joined by the original defendant for contribution, was allowed. Justice Bobbitt, in dissenting in *Greene,* stated that the court in *Bell* was simply refusing to extend this rule to a case where plaintiff sued both defendants.

[9] Bell v. Lacey, 248 N.C. 703, 705, 104 S.E.2d 833, 835 (1958). See also Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956); Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911 (1943). *Contra,* ARK. STAT. ANN. § 34-1007 (1947). This statute provides that upon joinder of the additional defendant, the plaintiff *shall* amend his pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against him had he been originally joined.

[10] Their applicability even here has not been consistently seen by the court which has held that an additional defendant, joined by an original defendant upon a cross-claim for contribution, may cross-claim against the original defendant for affirmative relief with no suggestion that such a cross-claim is not germane to plaintiff's cause. The cross-claim is held to be justified, over the objection of the original defendant, because he is responsible for the cross-claimant's presence in the case. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

[11] *E.g.,* Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957); Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943); Mangum v. Southern Ry., 210 N.C. 134, 185 S.E. 644 (1936).

[12] See cases cited note 11 *supra.*

[13] Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955); Canestrino v. Powell, 231 N.C. 190, 56 S.E.2d 566 (1949).

Thus the lack of relation of the contribution claim to the plaintiff's cause has consistently been emphasized rather than deplored where contribution is sought between original and impleaded codefendants.

The objection that the practice would allow an original defendant to *compel* a plaintiff to join issue with a defendant whom he has not elected to sue appears equally inapplicable to the contribution cross-claim.[14] There is nothing inherent in the assertion of such a cross-claim which would preclude a plaintiff from taking a voluntary nonsuit as to the other defendant at any time; nor which would compel him to proceed to trial against such codefendant in the first instance; nor, having done so, would compel him to introduce evidence, or press for judgment; nor, having secured judgment, would compel him to enforce it by execution.[15] Instead, upon nonsuit, either voluntary or involuntary, against such codefendant, the codefendant should then become defendant as to the cross-claim for contribution alone and retained in the action to meet the cross-claiming defendant's proof of this separate claim.[16]

In *Smith v. Kappas*,[17] decided in 1941 and neither discussed nor

[14] No statute or decision in North Carolina states that plaintiff shall allege a cause of action against a joint tort-feasor, joined for contribution by defendant; but quite the contrary, the principle is stated frequently that plaintiff may elect to sue all of the joint tort-feasors, or some of them and not others. Tarkington v. Rock Hill Printing & Finishing Co., 230 N.C. 354, 53 S.E.2d 269 (1949). The defendant, seeking to recover contribution, must do so on the strength of his own pleading and proof, not that of plaintiff. Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960). *Quaere:* What results, under *Greene,* when plaintiff sues one joint tort-feasor; the latter moves to add another as party defendant under a claim for contribution; plaintiff then seeks to amend his complaint so as to state a cause of action against both defendants? Should he be given leave to amend, and if so, will the cross-claim for contribution, pleaded prior to the amendment, be stricken under *Greene*? Under such procedure, if sustained, the plaintiff who does not wish to have contribution issues litigated in his cause is afforded a method to defeat the very purpose of G.S. § 1-240. Also, *Greene* may create an incentive by plaintiffs to sue all joint tort-feasors, then take a nonsuit as to one on trial, again rendering G.S. § 1-240 ineffective to accomplish the purpose for which it was intended, *i.e.,* to have the contribution issue settled in the same cause and avoid multiplicity of suits.

[15] This was indicated by the court in Mangum v. Southern Ry., 210 N.C. 134, 185 S.E. 644 (1936), wherein the court stated that the plaintiff cannot be affected by the procedure of original defendants bringing in another party as joint tort-feasor for contribution. Plaintiff has the right to prosecute his suit to final decision in his own way.

[16] See Greene v. Charlotte Chem. Labs., Inc., 254 N.C. 680, 696, 120 S.E.2d 82, 93 (1961), wherein Justice Bobbitt suggests the procedure to be followed in cases of the kind under discussion.

[17] 218 N.C. 758, 12 S.E.2d 693 (1941). On rehearing of this case it was found that the amended answer alleging the cross-claim for contribution against the excused defendant was not filed until after the verdict in plain-

cited in the majority opinion of *Greene,* the precise practice forbidden by *Greene* was directly sustained and successfully utilized to hold an original codefendant in, after voluntary nonsuit, to meet a cross-claim for contribution. Presumably, the trial bench and bar, until *Greene,* lived by *Smith.*

Besides imposing a new rule in the *Smith-Greene* procedural setting, *Greene* creates an anomaly when contrasted with another closely related procedural situation. In *Canestrino v. Powell,*[18] decided in 1949, plaintiff sued *A* and *B; B* successfully demurred to the complaint, and when plaintiff failed to amend or appeal, *B*'s motion to dismiss as to him was sustained. *A* then cross-claimed for contribution against *B,* and moved to have him brought back into the case. This motion was granted and the cross-claim sustained against *B*'s demurrer thereto,[19] despite the now final adjudication of *B*'s non-liability to the plaintiff. Thus, considering *Canestrino* and *Greene* together, an original defendant *may* bring back into the action for possible contribution an original codefendant who has successfully established his non-liability to plaintiff by demurrer. However, he cannot hold one in who, prior to any adjudication of his liability to plaintiff, challenges directly the cross-claim for contribution.[20]

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tiff's cause, nor did the remaining defendant request that the excused defendant be joined as a third party defendant under the contribution statute until after the verdict. Upon this discovery, the court overruled defendant's objection to plaintiff's voluntary nonsuit as to the codefendant. Smith v. Kappas, 219 N.C. 850, 15 S.E.2d 375 (1941).

[18] 231 N.C. 190, 56 S.E.2d 566 (1949).

[19] See Yandell v. National Fireproofing Corp., 239 N.C. 1, 79 S.E.2d 223 (1953), where the same procedure, as used in *Canestrino,* was used and expressly approved on appeal. In a comparable situation, a Pennsylvania court refused to dismiss the codefendant in the first instance, stating that it would be idle for the court to approve a discontinuance that could not stand. Its only effect would be to add to the procedural burdens of the defendant and subject him to unreasonable delay and expense. Dice v. Marsolino, 14 Pa. D. & C.2d 457 (C.P. of Fayette County 1958).

[20] The court in Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958), stated the general rule that if an original defendant avails himself of the provisions of the contribution statute, he cannot rely upon any liability of the party, whom he has brought in, to the original plaintiff, but must recover, if at all, upon the liability of such party to him. Thus the prerequisite for contribution is not action by the plaintiff against the joint tort-feasor but recovery by the plaintiff against the original defendant. Curiously enough in both *Bell* and *Greene* where the court emphasizes the rights of the plaintiff and attempts to protect his cause of action from interference by defendant's pleadings, the objections came, not from the plaintiff, but from the codefendant. With the exception of Bass v. Lee, 255 N.C. 73, 120 S.E.2d 570 (1961), where both the plaintiff and the defendant to the cross-claim

The practical alternative to the procedure forbidden in *Greene* is a separate action, which has distinct disadvantages. Often two jury trials are required where one would have sufficed. The claimant for contribution is forced to run the risk of losing testimony by death, lapse of memory, or removal of witnesses from the jurisdiction of the court. Further, these witnesses are often the same ones who testified in the original action and their inconvenience in being summoned again should be considered. All this leads to a delay in the recovery of contribution, increases the work load of the courts, multiplies the cost of litigation for the state as well as the parties to the issue of contribution. Also, the plaintiff may be compelled to wait longer for his money since a joint tort-feasor, when sued alone, may pay the recovery to a trustee until the issue of contribution is settled in the separate action.[21]

This and other anomalies, present in our multiple party practice, arise from the completely inadequate statutory basis upon which our court has had to construct, step by step, our rules in this area. North Carolina has no statute which prescribes the procedure for cross-claims between original defendants,[22] or with the impleading of new defendants.[23] Our contribution statute deals essentially with the substantive right to contribution. It also contains, however, ambiguously worded procedural provisions which clearly contemplate

objected, in each case discussed and cited herein the plaintiff has raised no objections to the cross-claim.

[21] N.C. GEN. STAT. § 1-240 (1953).

[22] Cross-claims, where appropriate, are deemed sanctioned by N.C. GEN. STAT. § 1-222 (1953), which reads: "1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves. 2. It may grant to the defendant any affirmative relief to which he may be entitled. . . ." Since this statute does not expressly state the nature of cross-claims allowable, the court has had to define them; hence the rule against cross-claims for affirmative relief.

[23] Impleading of new defendants, other than for contribution, *e.g.*, for indemnity, are likewise allowed under G.S. § 1-222. Here again the court has applied the no affirmative relief rule in the absence of specific provisions in the statute as to what may be the subject of a claim against an impleaded defendant, but claims for indemnity are held not to involve claims for affirmative relief in this context. Gregg v. City of Wilmington, 155 N.C. 18, 70 S.E. 1070 (1911). This is founded on the basis that a claim for indemnity relates to plaintiff's claim and is based upon an adjustment of it. Wright's Clothing Store v. Ellis Stone & Co., 233 N.C. 126, 63 S.E.2d 118 (1951). In the latter case the court recognized the principle that adjustment of plaintiff's claim by defendant's pleadings for indemnity against his codefendant springs from equity, apart from the statutory right of contribution or indemnity among joint tort-feasors. This principle implies that the court recognizes contribution as being "an adjustment of plaintiff's claim."

impleading new defendants for contribution, but not so clearly the type of cross-claim between original defendants forbidden by *Greene*.[24] Our court has thus been forced to use statutes ill-adapted to the necessities of multiple party litigation,[25] so that the results of specific decisions are frequently beyond criticism as interpretative of the ill-suited statute perforce utilized.[26] What is needed is a completely new set of statutes or court rules dealing specifically, and as such, with cross-claims between original parties and with impleading of new parties. Such statutes should define the extent to which each may be utilized for asserting claims for affirmative relief, for contribution, or for indemnity.[27] The Federal Rules of Civil Procedure approach the problem precisely in this direct manner and are couched in clear language which would avoid the constructional difficulties raised by our statutes.[28]

[24] N.C. GEN. STAT. § 1-240 (1953), after providing that each joint tort-feasor shall pay his proportionate share of the judgment, states: "[I]n the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant." The phrase "only one, or not all," as used here, should apply to the procedural aspect of third party practice and not to the substantive right of contribution nor its enforcement when third party practice is made unnecessary by plaintiff suing all of the joint tort-feasors. Most jurisdictions, which allow contribution, have separated the substantive rights and the procedural rules of enforcing it in their statutes. *E.g.*, ARK. STAT. ANN. §§ 34-1002, -1007 (1947), as amended, ARK. STAT. ANN. § 34-1002 (Supp. 1961); WIS. STAT. ANN. §§ 263.15, 272.59-.61 (1957). See also Northwest Motors, Inc. v. Creekmore, 229 Ark. 755, 318 S.W.2d 614 (1958); Rudolph v. Mundy, 226 Ark. 95, 288 S.W.2d 602 (1956). *But see* Camden v. St. Louis Pub. Serv. Co., 239 Mo. App. 1199, 206 S.W.2d 699 (1947).

[25] N.C. GEN. STAT. §§ 1-222, -240 (1953).

[26] See note 4 *supra*.

[27] See Brandis, *A Plea For Adoption By North Carolina Of The Federal Joinder Rules*, 25 N.C.L. REV. 245 (1947).

[28] FED. R. CIV. P. 13(g) provides: "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." FED. R. CIV. P. 13(h) provides: "When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action." FED. R. CIV. P. 14 sets out the procedure for third party practice.

Until such time as a new set of rules or statutes is adopted, however, the situation with respect to contribution pleading practice appears to be as follows:

(1) where the plaintiff sues some but not all of the joint tort-feasors, an original defendant may have the others joined upon a plea for contribution against them;[29]

(2) where the plaintiff sues all of the joint tort-feasors, but one or more successfully demurs to the complaint and the plaintiff fails to amend or appeal, the remaining defendants, assuming they have adequate time, may have the defendants, who were dismissed on demurrer, brought back into the action upon a plea for contribution;[30]

(3) where the plaintiff sues all of the joint tort-feasors, even though plaintiff takes a voluntary, or suffers an involuntary nonsuit as to one of them, the remaining defendants cannot preclude his dismissal by pleading a cross-claim for contribution, but are relegated to a separate action in order to settle the issue of contribution.[31]

HIRAM A. BERRY

Torts—Blasting—Basis of Liability: Negligence, Trespass or Absolute Liability

No less than twenty-five years have elapsed since the problem of damages caused by blasting operations has reached the North Carolina Supreme Court. During this period, however, much litigation has arisen in this area of tort law elsewhere in the country, and a reasonable prediction would be that the next case in North Carolina will result in a new development in the law of this state.

The prime question facing the courts in this field concerns the proper basis of liability for harm occasioned by the use of explosives in blasting. Theoretically, there are three theories open to those courts which remain uncommitted on this issue. They are: (1) recovery should always depend upon proof of negligence or fault; (2) the action should be one of trespass following the common law concept of strict liability for trespass to land; and (3) the defendant

[29] Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

[30] Yandell v. National Fireproofing Corp., 239 N.C. 1, 79 S.E.2d 223 (1953); Canestrino v. Powell, 231 N.C. 190, 56 S.E.2d 566 (1949).

[31] Bass v. Lee, 255 N.C. 73, 120 S.E.2d 570 (1961); Greene v. Charlotte Chem. Labs., Inc., 254 N.C. 680, 120 S.E.2d 82 (1961).