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Notes and Comments

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Federal Income Taxation—Deferral of Prepaid Income

In *American Auto Ass'n v. United States,*[1] the United States Supreme Court held that a taxpayer on the accrual basis may not defer prepaid membership dues over the period of membership, but must include such receipts as income in the year of receipt. The Association received membership dues for a twelve month period, payable in advance. Membership commenced or might be renewed in any month of the year. For many years, the Association had employed an accrual method of accounting and the calendar year as its taxable year.[2] The dues were treated on the Associations' books of account as income received ratably over the twelve month membership period. In the year of receipt the Association reported as income only that portion of the dues applicable to the calendar year during which the dues were collected. The balance was recognized as income in the ensuing calendar year.[3]

The Commissioner, acting pursuant to section 41 of the Internal Revenue Code of 1939,[4] rejected the Associations' method of accounting and substituted a method of his own. He claimed that the Associations' method did not properly reflect its income for tax purposes. Section 41 required a taxpayer to compute his income on an annual basis in accordance with the method of accounting which he regularly employed, but provided that if no method was regularly used, or if the method used did not clearly reflect income, the computation would be made in accordance with such method as in the opinion of the Commissioner clearly reflected his income. Section 42 of the Internal Revenue Code of 1939[5] required all items of income to be included in the gross income for the taxable year in which they were received by the taxpayer, unless, under section 41, they were to be properly accounted for as of a different period.

When sections 41 and 42 are read together, it seems clear that

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[1] 367 U.S. 687 (1961).

[2] The Association had used the accrual method since 1932.

[3] During the years of 1952 and 1953, the Association reported as income one-twelfth of the dues received for each month of membership occurring in the year of receipt.

[4] 53 Stat. 24 (now INT. REV. CODE OF 1954, § 446).

[5] 53 Stat. 24 (now INT. REV. CODE OF 1954, § 451).

the Commissioner is given no discretion to reject a taxpayer's regularly employed accounting method so long as it clearly reflects his income. Therefore, the critical question to be determined in a case such as the present one is whether the taxpayer's method clearly reflects income. But in the principal case the Court seems to have brushed aside this question and proceeded to decide when the income in question should be reported for tax purposes without regard to the taxpayer's accounting system or accepted accounting practice.

In disallowing the deferral of income, the Commissioner has traditionally taken the position that such a method is in conflict with the "claim of right" doctrine. This doctrine was first announced in *North American Oil Consol. v. Burnet.*[6] The Court in that case said,

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

The cases relying on this doctrine, with the exception of *Automobile Club of Michigan v. Commissioner,*[7] have dealt with *earned* rather than *unearned* income, and the only question was when this earned income should be reported for tax purposes.[8] The case announcing the doctrine had nothing to do with the determination of whether a method of accounting was valid or invalid and it should have no weight in deciding a case of the present type.

Four circuits have held that the claim of right doctrine may not be used to compel a taxpayer to report unearned income in the year of receipt. The tenth circuit held, in *Beacon Publishing Co. v. Commissioner,*[9] that a magazine publisher could defer prepaid subscription income over the duration of the subscription period. In 1956

[6] 286 U.S. 417 (1932).
[7] 353 U.S. 180 (1957).
[8] In the case announcing the claim of right doctrine, there was no dispute but that the income was already earned. No case was found, except *Automobile Club of Michigan,* in which the Supreme Court relied on the doctrine to reject a taxpayer's method of accounting, and it is not clear that it was relied on in that case.
[9] 218 F.2d 697 (10th Cir. 1955). INT. REV. CODE OF 1954, § 455, now provides that publishers may defer prepaid subscription income when the subscription period extends beyond the taxable year of receipt.

the fifth circuit had occasion to decide whether prepaid income from contracts to service heating furnaces sold by the taxpayer must be reported in the year of receipt. That court found, in *Schuessler v. Commissioner*,[10] that the accrual method of accounting more accurately portrayed the taxpayer's income than the one selected by the Commissioner because it matched income against expenses of the period in which the income was earned and was incident to earning that income, rather than against expenses of the period in which the income was received and without regard to when the income was earned. More recently, the second circuit held, in *Bressner Radio, Inc. v. Commissioner*,[11] that prepaid income from television servicing contracts could be deferred over the length of the obligation to furnish service. In 1960 the eighth circuit, in *Schlude v. Commissioner*,[12] held that a taxpayer who operated a dancing school could defer prepaid tuition over the period of instruction covered by the contract where the obligation to furnish instruction extended beyond the taxable year of receipt. In upholding the taxpayers deferral, all four circuits noted that the taxpayer was deferring unearned income until a period in which it could be matched with expenses incurred incident to earning the income.[13] Since this is the objective to be achieved by any sound accrual accounting system, it seems that these courts were on sound footing.

In the present case the government had successfully relied upon the claim of right doctrine in the Court of Claims.[14] Upon appeal to the Supreme Court, the government switched its argument to the annual accounting requirement found in section 41 of the Internal Revenue Code of 1939.[15]

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[10] 230 F.2d 722 (5th Cir. 1956).

[11] 267 F.2d 520 (2d Cir. 1959).

[12] 283 F.2d 234 (8th Cir. 1960), *rev'd per curiam*, 367 U.S. 911 (1961). The reversal was based upon the decision in the principal case.

[13] The Association had a more difficult task in proving its system of accounting properly matched future expenses with deferred income than did the taxpayers in these cases. Substantially all services provided by the Association were performed only on demand and were not limited to any fixed dates, but were performed at any time requested by its members.

[14] 181 F. Supp. 255 (Ct. Cl. 1960). The government did not rely on the claim of right doctrine probably because four circuits had previously denied that such ground may be used as a basis to deny a taxpayer the right to defer prepayments. The Second, Fifth, Eighth and Tenth Circuit Courts of Appeal had previously held that the claim of right doctrine had no application in determining *when* to report prepaid unearned income, and allowed accrual basis taxpayers to defer unearned income in accordance with their regularly employed method of accounting.

[15] 53 Stat. 24 (now INT. REV. CODE OF 1954, § 446).

The annual accounting requirement demands that neither income nor deduction items be accelerated or postponed from one year to another in order to reflect the long-term economic result of a particular transaction or group of transactions. However, as noted by the dissent, most of the cases relied upon by the government as a basis for this argument, involved cash basis taxpayers and none of the decisions cited pertain to deferred reporting of wholly unearned income.[16] Apparently this interpretation of the annual accounting requirement stems from a rule laid down by the Tax Court in *Automobile Club of New York*[17] to the effect that, "an item of income cannot accrue for tax purposes *after* it has in fact been received subject to the unrestricted use by the taxpayer."

The Supreme Court in the principal case did not base its decision solely upon the annual accounting requirement. It seems to have placed considerable weight on the fact that the Internal Revenue Code of 1954, as originally passed, contained specific provisions allowing taxpayers to defer unearned, prepaid income to a tax period later than that of receipt,[18] and to accrue expenses and deduct them in the period during which they actually became due.[19] The Supreme Court said that section 452 of the Internal Revenue Code of 1954, was not merely a statement of prior existing law, but that it was the first specific acceptance of the deferral of prepaid, unearned income for tax purposes. It further said that this provision was contrary to existing law, and that its repeal was an indication that Congress intended to restore the law to its status prior to the enactment of this section and not to allow this type deferral. As the income in question was for 1952 and 1953, it seems that action taken by Congress in 1954 and 1955 should have no bearing on the decision in the present case. The Court did not mention section 446 of the Internal Revenue Code of 1954 which specifically recognizes the accrual method of accounting as acceptable for computing income for tax purposes.

[16] In Burnet v. Sanford & Brooks Co., 282 U.S. 359 (1931), the Court took note that the taxpayer had not attempted to take advantage of the accrual method under which system the treatment in question would have been allowed. In Security Mills Flour Co. v. Commissioner, 321 U.S. 281 (1944), the taxpayer had not applied consistently either a cash or accrual method; Brown v. Helvering, 291 U.S. 193 (1934), involved an attempt by an accrual basis taxpayer to accrue an expense that was highly contingent.

[17] 32 T.C. 906, 913 (1959). (Emphasis is by the court.)

[18] INT. REV. CODE OF 1954, ch. 1, § 452, 68A Stat. 152.

[19] INT. REV. CODE OF 1954, ch. 1, § 462, 68A Stat. 158.

The Supreme Court also placed some reliance on *Automobile Club of Michigan.* In that case the sixth circuit relied on the claim of right doctrine in affirming the Commissioner's disallowance of the taxpayer's deferral of prepaid membership dues. The Supreme Court did not specifically rely on the doctrine, but said, in affirming the circuit court in that case, that the taxpayer's method of accounting was "purely artificial" so far as the record before the Court showed. Apparently this was because there was no proof that the Automobile Club's method of accounting properly matched income with the expenses incurred which were incident to the earning of the income. This would seem to indicate that the Supreme Court would be willing to allow a taxpayer to defer income if he could show that his method of accounting clearly reflected income. In the instant case, there was expert accounting testimony that supported the Association's method, and the hearing commissioner found that the taxpayer's method clearly reflected income,[20] yet the Supreme Court still refused to allow the deferral.

The courts have been, until recently, more favorable to the accrual basis taxpayer who accrued expenses and deducted them in a period prior to the tax period in which they were actually paid. This situation is analogous to the deferral of unearned income and it was also controlled by section 41 of the Internal Revenue Code of 1939. An early case in which the Supreme Court considered this problem is *United States v. Anderson.*[21] That case involved an accrual basis taxpayer who attempted to deduct munitions taxes in the taxable period during which they actually were assesed and became due. The basis of the tax was sales made by the taxpayer in the previous tax period. The Court held that the taxes accrued as the sales were made and could not be deducted in the following period because the true income could not have been determined without deducting from gross income for the year the total cost and expenses attributable to the production of that income during the year. In construing sections 12(a) and 13(d) of the Revenue Act of 1916,[22] which were similar to section 41 of the Internal Revenue Code of 1939, the Court said of the purpose of the act,

> It was to enable taxpayers to keep their books and make their returns according to scientific accounting principles, by charg-

[20] American Auto. Ass'n v. United States, 367 U.S. 687, 693 n.5 (1961).
[21] 269 U.S. 422 (1926).
[22] REV. ACT OF 1916, ch. 463, §§ 12(a) & 13(d), 39 Stat. 767, 771.

> ing against income earned during the taxable period, the expenses incurred in and properly attributable to the process of earning income during that period; and indeed, to require the tax return to be made on that basis, if the taxpayer failed or was unable to make the return on a strict receipts and disbursements basis.
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> The appellee's true income for 1916 could not have been determined without deducting from its gross income for the year the total cost and expenses attributable to the production of that income during the year.[23]

The Court there held that the tax must be deducted in 1916 or not at all. It said that this was true regardless of the fact that the tax was assessed and paid in 1917, since it was based on sales made in 1916, and that it made no difference that the taxpayer did not know until the assessment the amount of the munitions tax.

If a taxpayer's books are to clearly reflect his income, as required by section 41 of the Internal Revenue Code of 1939, he must record and report his expenses and income according to the same method of accounting. Therefore, if a taxpayer is required to deduct expenses only in the year of accrual, it seems that he should be required to recognize his income only in the year during which it is earned. But the Supreme Court seems to have a double standard in requiring an expense to be accrued and deducted regardless of whether it has been paid, and at the same time refusing to allow a deferral of prepaid income. It follows that a taxpayer may be required to keep two different sets of books, one for income tax purposes, and another for reporting to stockholders and governmental agencies. The Tax Court in *National Airlines, Inc.*[24] recognized that the requirement of keeping two different sets of books may constitute a hardship on the taxpayer, but that court said the remedy was not to be furnished by the judiciary.

Congress has in effect overruled the decision in the present case as applied to certain membership organizations which are organized without capital stock. In 1961 Congress passed a statute[25] which allows qualified organizations to spread prepaid membership dues income ratably over the period during which there is a liability to

[23] 269 U.S. at 440.
[24] 9 T.C. 159, 162 (1947).
[25] INT. REV. CODE OF 1954, § 456.

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.

ROBERT L. GUNN

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).

should be absolutely liable on the ground that public policy demands that he stand as an insurer of any injury resulting from the operation of an extrahazardous activity.

As a practical matter, it is generally agreed that an action of trespass may be maintained where rocks and debris are thrown upon the plaintiff's land[1] or against his person[2] by blasting. The majority of jurisdictions,[3] recently joined by South Carolina[4] and West Virginia,[5] also impose liability, irrespective of negligence, when the plaintiff's domain is damaged by concussion waves and ground vibrations.[6] A minority of states,[7] however, require proof of negli-

[1] *E.g.*, Asheville Constr. Co. v. Southern Ry., 19 F.2d 32 (4th Cir. 1927); Adams & Sullivan v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917); Hay v. Cohoes Co., 2 N.Y. 159 (1849). *Contra,* requiring proof of negligence, Bennett v. Texas-Illinois Gas Pipeline Co., 113 F. Supp. 788 (E.D. Ark. 1953); Cashin v. Northern Pac. Ry., 96 Mont. 92, 28 P.2d 862 (1934); Thompson v. Green Mountain Power Corp., 120 Vt. 478, 144 A.2d 786 (1958).

[2] *E.g.*, Welz v. Manzillo, 113 Conn. 674, 155 Atl. 841 (1931); Sullivan v. Dunham, 161 N.Y. 290, 55 N.E. 923 (1900); Wells v. Knight, 32 R.I. 432, 80 Atl. 16 (1911). *Contra,* requiring negligence, Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892).

[3] California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wisconsin.

[4] Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960), discussed in Note, 10 CATHOLIC U.L. REV. 98 (1961). In the only other blasting case in South Carolina, the court found sufficient evidence of negligence to carry the case to the jury. Harris v. Simon, 32 S.C. 593, 10 S.E. 1076 (1890). In a later case involving vibration damage caused by pile driving, the court said the *Harris* case apparently required proof of negligence in the blasting cases. Momeier v. Koebig, 220 S.C. 124, 129, 66 S.E.2d 465, 467 (1951). The court in *Wallace* said that since the sole concern of the *Harris* appeal was the sufficiency of negligence, the case was distinguishable, no negligence being alleged here, and dismissed the reference to the *Harris* rule in the *Momeier* decision as dictum. 237 S.C. at 355, 117 S.E.2d at 361-62.

[5] Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622 (W. Va. 1961). Adoption of the rule of absolute liability by the West Virginia court was largely predetermined by two federal decisions. Fairfax Inn, Inc. v. Sunnyhill Mining Co., 97 F. Supp. 991 (N.D. W. Va. 1951); Britton v. Harrison Constr. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); and earlier state cases containing strong undertones of strict liability. Wigal v. City of Parkersburg, 74 W. Va. 25, 81 S.E. 554 (1914); Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S.E. 126 (1911).

[6] *E.g.*, Fairfax Inn, Inc. v. Sunnyhill Mining Co., *supra* note 5; Garden of the Gods Village v. Hellman, 133 Colo. 286, 294 P.2d 597 (1956); Central Exploration Co. v. Gray, 219 Miss. 757, 70 So. 2d 33 (1954); Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958). See generally Annot., 20 A.L.R.2d 1372 (1951); RESTATEMENT, TORTS §§ 519-20 (1938).

[7] Alabama, Arkansas, Kansas, Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, New York, and Texas.

gence[8] in the latter situation unless a nuisance is shown.[9]

Courts imposing absolute liability rely upon one or all of the following theories: (1) air waves or ground vibrations constitute trespass;[10] (2) one who carries on an ultrahazardous activity must be held absolutely responsible because of the possibility of risk;[11] (3) one must not use his property so as to injure that of another;[12] (4) these cases fall within the rule of *Rylands v. Fletcher;*[13] or (5)

[8] *E.g.,* Ledbetter-Johnson v. Hawkins, 267 Ala. 458, 103 So. 2d 748 (1958); Cratty v. Samuel Aceto & Co., 151 Me. 126, 116 A.2d 623 (1955); Dalton v. Demos Bros. Gen. Contractors, Inc., 334 Mass. 377, 135 N.E.2d 646 (1956); Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893).

[9] Central Iron & Coal Co. v. Vandenheuk, 147 Ala. 546, 41 So. 145 (1906) (rock quarry); Benton v. Kerman, 127 N.J. Eq. 434, 13 A.2d 825 (Ct. Ch. 1940) (rock quarry); Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944) (rock quarry), *rehearing denied,* 294 N.Y. 654, 60 N.E.2d 385 (1945).

[10] "One [vibration or concussion] is as much a trespass as the other [rock or debris]." Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622, 626 (W. Va. 1961). See also Johnson v. Kansas City Terminal R.R., 182 Mo. App. 349, 170 S.W. 456 (1914); Hickey v. McCabe & Bihler, 30 R.I. 346, 75 Atl. 404 (1910).

[11] The theory is that by engaging in the ultrahazardous activity, the defendant necessarily exposes others to danger. A possibility of risk arises from the dangerous character of the enterprise, which the defendant should assume because he has introduced it into the community. Fairfax Inn, Inc. v. Sunnyhill Mining Co., 97 F. Supp. 991 (N.D. W. Va. 1951); Britton v. Harrison Constr. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 79 A.2d 591 (1951). It should be noted, however, that the risk here is not necessarily an unreasonable one giving rise to a likelihood or probability of injury, *i.e.,* negligence. The reasonably prudent man would proceed with the blasting, but stand as an insurer of any consequences resulting from its dangerous nature. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT § 15 (1951); ELDREDGE, MODERN TORT PROBLEMS 40 (1941); 2 HARPER & JAMES, TORTS § 14.7 (1956); HOLMES, THE COMMON LAW 154 (1881); RESTATEMENT, TORTS § 520(a), comment *a* (1938).

The above cases further state the generally accepted idea that even absolute liability must be based upon some foreseeability of harm. See RESTATEMENT, TORTS § 519 (1938). This foreseeability qualification to absolute liability led Dean Prosser to conclude that the better rule would be to impose absolute liability in urban or densely populated areas and require proof of negligence in rural or relatively uninhabited localities. PROSSER, TORTS § 59 (2d ed. 1955). This is apparently the law in California. See Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (Dist. Ct. App. 1950). Several other cases have also discussed this dual concept. See particularly Boonville Collieries Corp. v. Reynolds, 163 N.E. 627 (Ind. App. Ct. 1960) (reversing judgment for failure to allege nature of surroundings).

[12] McGrath v. Basich Bros. Constr. Co., 7 Cal. App. 2d 573, 46 P.2d 981 (Dist. Ct. App. 1935); Louden v. City of Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914); Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960). See also BIGELOW, TORTS 466 (8th ed. 1907); Annot., 20 A.L.R.2d 1372, 1374 (1951).

[13] "We think that the true rule of law is, that the person who for his own

a nuisance is found.[14]

The minority of jurisdictions reply that (1) concussion or vibration damage is merely consequential, less than a physical invasion of the plaintiff's premises, and therefore the action is properly and historically one of trespass on the case as opposed to trespass;[15] (2) one has a right to the fullest reasonable use of his property, and blasting is a lawful and reasonable use;[16] and (3) public policy demands proof of negligence.[17]

It should be manifest that this distinction drawn between rock-debris and concussion-vibration damage is unsound and that the basis of liability should not turn upon the form of the force producing the injury. Both emanate from the same source and oftentimes damage caused by sudden vacuums in the air or waves through the earth is much greater than that resulting from rocks passing

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purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape . . . ." Fletcher v. Rylands, L.R. 1 Ex. 265, 279 (1866), *aff'd,* Rylands v. Fletcher, L.R. 3 H.L. 330, 339-40 (1868). The rule has been applied to the explosion of stored combustibles. Exner v. Sherman Power Constr. Co., 54 F.2d 510 (2d Cir. 1931); Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co., 60 Ohio St. 560, 54 N.E. 528 (1899); and to blasting. Miles v. Forest Rock Granite Co., 34 L.T.R. 500 (K.B. 1918); Britton v. Harrison Constr. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395 (1886). See PROSSER, *The Principle of Rylands v. Fletcher,* in SELECTED TOPICS ON THE LAW OF TORTS 135 (1953).

[14] *E.g.,* Longtin v. Persell, 30 Mont. 306, 76 Pac. 699 (1904); Beecher v. Dull, 294 Pa. 17, 143 Atl. 498 (1928); Gossett v. Southern Ry., 115 Tenn. 376, 89 S.W. 737 (1905).

[15] *E.g.,* Ledbetter-Johnson v. Hawkins, 267 Ala. 458, 103 So. 2d 748 (1958); Dalton v. Demos Bros. Gen. Contractors, Inc., 334 Mass. 377, 135 N.E.2d 646 (1956); Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893). *Contra,* Exner v. Sherman Power Constr. Co., 54 F.2d 510, 514 (2d Cir. 1931); Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 570, 79 A.2d 591, 595 (1951): "The old technical rules of common-law pleading with their finespun distinctions between forms of action no longer obtain." See also 2 HARPER & JAMES, TORTS § 14.7 (1956); PROSSER, TORTS § 59 (2d ed. 1955); RESTATEMENT, TORTS § 158, comment *h* (1938).

[16] Reynolds v. W. H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); Booth v. Rome, W. & O. Terminal R.R., *supra* note 15. The absolute liability decisions agree with this proposition, but require one who carries on such activities to assume the risk of all consequences resulting therefrom.

[17] *E.g.,* Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 35 N.E. 592 (1893), reasoning that the rule of strict liability impedes the development and improvement of property. *Contra,* Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 569, 79 A.2d 591, 595 (1951): "Considerations of public policy do not require immunity from liability for damages caused by concussion or vibration any more than from liability for damages caused by flying debris."

through the plaintiff's roof. As the absolute liability decisions often state, the distinction is nothing more than a holdover of the difference recognized at common law between the actions of trespass and trespass on the case although forms of action are now abolished under modern code pleading.[18]

Although the blasting problem has arisen in North Carolina no less than a dozen times,[19] beginning with *Blackwell v. Lynchburg & D. R.R.*[20] seventy years ago, the court has never explicitly said that proof of negligence is essential to recovery or that the theory of absolute liability is unavailable.[21] It is true that in the prior

[18] See note 15 *supra.*

[19] Sparks v. Tennessee Mineral Products Corp., 212 N.C. 211, 193 S.E. 31 (1937); Greer v. Callahan Constr. Co., 190 N.C. 632, 130 S.E. 739 (1925); Cobb v. Atlantic Coast Line Ry., 175 N.C. 130, 95 S.E. 92 (1918); Wiggins v. Hiawassee Valley Ry., 171 N.C. 773, 89 S.E. 18 (1916); Arthur v. Henry, 157 N.C. 438, 73 S.E. 211 (1911); Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911); Hunter v. Southern Ry., 152 N.C. 682, 68 S.E. 237 (1910); Settle v. Southern Ry., 150 N.C. 643, 64 S.E. 759 (1909); Kimberly v. Howland, 143 N.C. 399, 55 S.E. 778 (1906); Watkins v. Kaolin Mfg. Co., 131 N.C. 536, 42 S.E. 983 (1902); Gates v. Latta, 117 N.C. 189, 23 S.E. 173 (1895).

[20] 111 N.C. 151, 16 S.E. 12 (1892). Plaintiff's intestate, who had granted an easement to defendant railroad, was struck and killed by a flying rock while standing in his yard some distance from where defendant contractors were blasting. The court affirmed a judgment for plaintiff, holding the contractors negligent in failing to cover the blast or to give timely notice thereof. Other cases have required a showing of negligence where blasting is conducted on an easement granted by plaintiff on the theory that he is compensated for all reasonable, necessary and natural incidents of the work contemplated when he accepts the consideration. This acceptance bars his right to proceed in trespass. Gordon v. Elmore, 71 W. Va. 195, 76 S.E. 344 (1912); Watts v. Norfolk & W. R.R., 39 W. Va. 196, 19 S.E. 521 (1894). The North Carolina court in *Blackwell* said: "[T]he prudent use of such an agency [blasting] . . . is always deemed to have been in contemplation when the damage was assessed for the right of way, as a necessity incident to the privilege. But where damage is done to the land of the owner adjacent to that within the condemned boundary, *if it result from managing or handling explosive material carelessly or unskillfully . . . the corporation is answerable in a new action.* . . . We do not think that the privilege of throwing stones through the air two hundred or more yards and beyond the right of way . . . passes . . . as a necessary incident to the easement." 111 N.C. at 153-55, 16 S.E. at 14-15. (Emphasis added.) Although the court did not expressly say that an action in trespass could not be maintained, it seems clear from the above that after the condemnation proceeding the defendant could only be held answerable on a charge of negligence. The *Blackwell* case has been repeatedly cited in later decisions, none of which involved easements, as supporting the requirement of negligence. The distinction, once laid down, was apparently overlooked in subsequent cases. See, *e.g.*, Sparks v. Tennessee Mineral Products Corp., 212 N.C. 211, 193 S.E. 31 (1937). See also language in Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911), which implies that if plaintiff had not consented to the use of a quarry, he might have proceeded in trespass.

[21] There is no statute directly in point, but N.C. GEN. STAT. § 14-284.1

cases involving damage caused by rock and debris[22] as well as in the single opinion dealing with concussion and vibration,[23] the court, without exception,[24] has proceeded upon negligence.[25] The explanation apparently lies in the fact that the court simply followed the theory of plaintiffs' pleadings and proof. It would be refreshing to see the next plaintiff's attorney phrase his complaint in terms of absolute liability, or at least plead in the alternative with negligence, and put it to the test of demurrer or a motion to strike.

In projecting upon the possibility that North Carolina will join the majority of states applying absolute liability to all blasting, it will be seen that the court has already taken a preliminary step in this direction. Because of the dangerous character of the enterprise, one who desires to carry on blasting activities may not escape liability through an independent contractor[26] or, as held in one case, a lessee.[27] It has also been held that not ordinary care but a high degree of diligence is required of one conducting blasting operations.[28] How-

(c) (1953), concerning the sale and storage of explosives, provides: "All persons having dynamite or other powerful explosives in their possession or under their control shall at all times keep such explosives in a safe and secure manner . . . ." *Quaere* whether this language points to any basis of liability for damage caused by blasting?

[22] *E.g.*, Hunter v. Southern Ry., 152 N.C. 682, 68 S.E. 237 (1910); Kimberly v. Howland, 143 N.C. 399, 55 S.E. 778 (1906).

[23] Settle v. Southern Ry., 150 N.C. 643, 64 S.E. 759 (1909).

[24] However, in a federal case arising in North Carolina involving injury to plaintiff's railroad bed by rock and debris, it was held that: "There can be no doubt . . . that where one . . . throws rock or debris on the property of another, he is liable for the damage done, on the principle that he is guilty of trespass, and quite irrespective of the question of his negligence." Asheville Constr. Co. v. Southern Ry., 19 F.2d 32, 34 (4th Cir. 1927).

[25] The court has, however, expressed doubt as to whether proof of negligence is necessary. Wiggins v. Hiawassee Valley Ry., 171 N.C. 773, 775, 89 S.E. 18, 19 (1916): "We are of opinion that there is abundant proof of negligence (even if proof of negligence be necessary where such a trespass is committed upon the property and rights of another) to justify the submission of the issues to the jury"; Arthur v. Henry, 157 N.C. 393, 402, 73 S.E. 206, 210 (1911): "The plaintiff was entitled to recover damages, if the defendant threw stones upon his land without his consent, and if he consented to the use of the quarry [operated on defendant's adjoining tract], he could also recover if the work was negligently done."

[26] Greer v. Callahan Constr. Co., 190 N.C. 632, 130 S.E. 737 (1925); Hunter v. Southern Ry., 152 N.C. 682, 68 S.E. 237 (1910).

[27] Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911).

[28] Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906). Other cases, not directly involving blasting but concerning the use of explosives in general, have stated the standard to be the highest or utmost care. Stephens v. Blackwood Lumber Co., 191 N.C. 23, 131 S.E. 314 (1926); Barnett v. Cliffside Mills, 167 N.C. 576, 83 S.E. 826 (1914); Wood v. McCabe & Co., 151 N.C. 457, 66 S.E. 433 (1909). See Note, 39 N.C.L. REV. 294 (1961), which submits that there is only one standard of care and no degrees thereof.

ever, if the rule should emerge that proof of negligence is the preferable theory, it seems feasible that the plaintiff injured by blasting should be afforded the benefit of the rule of *res ipsa loquitur*.[29] Our court has invoked the rule in cases involving explosions other than by blasting,[30] and there is substantial authority supporting its application in concussion-vibration cases in other jurisdictions.[31]

Should North Carolina adopt the rule of absolute liability, it can fairly be predicted that the rule will not be reached through the avenue of ancient reasoning derived from the common law action of trespass *quare clausum fregit* that trespass to land subjects the defendant to liability regardless of fault. This is so not only because North Carolina in the past has proceeded on the theory of negligence rather than trespass even in cases of rock-debris invasion, but also because recent decisions indicate that this timeworn proposition is no longer the law in this jurisdiction.[32] In a very real sense, the

[29] "When the thing [which causes injury] is shown to be under the management of the defendant . . . and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 601, 159 Eng. Rep. 665, 667 (Ex. 1865), quoted with approval in Harris v. Mangum, 183 N.C. 235, 238, 111 S.E. 177, 178 (1922).

[30] Howard v. Texas Co., 205 N.C. 20, 168 S.E. 832 (1933) (filling station); Harris v. Mangum, 183 N.C. 235, 111 S.E. 177 (1922) (boiler); Modlin v. Simmons, 183 N.C. 63, 110 S.E. 661 (1922) (automobile); Newton v. Texas Co., 180 N.C. 561, 105 S.E. 433 (1920) (gasoline storage plant).

[31] Vattilana v. George & Lynch, Inc., 154 A.2d 565 (Del. Super. Ct. 1959); Marlowe Constr. Co. v. Jacobs, 302 S.W.2d 612 (Ky. Ct. App. 1957); Hoyt v. Amerada Petroleum Corp., 69 So. 2d 546 (La. Ct. App. 1953); Cratty v. Samuel Aceto & Co., 151 Me. 126, 116 A.2d 623 (1955); McKay v. Kelly, 229 S.W.2d 117 (Tex. Civ. App. 1950).

[32] For the modern proposition that strict liability for trespass to land derived from the common law action of trespass *quare clausum fregit* is outmoded and that proof of negligence should be required where defendant's act is unintentional, see PROSSER, TORTS § 13 (2d ed. 1955); RESTATEMENT, TORTS § 166 (1938). This seems to be the law in North Carolina. In Newsom v. Anderson, 24 N.C. 42 (1841), action in trespass *quare clausum fregit* was held proper where defendant felled a tree, the top thereof falling on plaintiff's land; trespass *vi et armis* was held applicable where defendant, who was beating a drum in the highway, caused plaintiff's team to run away. Loubz v. Hafner, 12 N.C. 185 (1827). *But see* a later case denying recovery where defendant's automobile left the road and crashed into plaintiff's building. Finding the accident unavoidable, the court cited both of the above cases, saying: "Neither shows unavoidable accident or sudden emergency *but damage resulting from negligence.* It must also be remembered that forms of action have been abolished . . . ." Smith v. Pate, 246 N.C. 63, 66, 97 S.E.2d 457, 459 (1957). (Emphasis added.) For a recent case to the same effect on substantially the same facts, see Schloss v. Hallman, 255 N.C. 686, 122 S.E.2d 513 (1961), discussed in 40 N.C.L. REV. 586 (1962).

past and present state of the law prevents North Carolina from reaching the somewhat embarrassing position of the minority rule of applying two rules in the same jurisdiction through an adherence to common law reasoning, *i.e.*, that unlike rock and debris, concussion waves and earth vibrations are not direct applications of force constituting trespass to land.

A quick reading of the decisions imposing absolute liability for concussion and vibration damage could possibly lead to the conclusion that the rule is based upon an extension of the common law theory of strict liability for trespass to land, *i.e.*, that air waves and ground vibrations are physical invasions equivalent to rock and debris;[33] and that, therefore, the door is closed to the adoption of the rule in North Carolina. A careful investigation of the cases, however, reveals that absolute liability is really a rule founded upon public policy which could easily be adopted by our court[34] upon the reasoning that the extrahazardous nature of blasting demands that the defendant stand as an insurer of the possibility of injury, which, in many instances, cannot be eliminated by the greatest of care.[35]

JOHN BRYAN WHITLEY

Torts—Family Purpose Doctrine—Application to Other Instrumentalities

The family purpose doctrine has been applied by a minority of jurisdictions in cases involving the negligent operation of automobiles furnished for the use and enjoyment of the family.[1] *Grindstaff*

[33] *E.g.*, Beckstrom v. Hawaiian Dredging Co., 42 Hawaii 353 (1958); Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960); Brown v. L. S. Lunder Constr. Co., 240 Wis. 122, 2 N.W.2d 859 (1942).

[34] Recently the North Carolina Supreme Court quoted and applied RESTATEMENT, TORTS § 166 (1938), which provides: "Except where the actor is engaged in an extrahazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest." Schloss v. Hallman, 255 N.C. 686, 691, 122 S.E.2d 513, 517 (1961). *Quaere* whether the court will apply this rule to a non-negligent and unintentional explosion and hold absolute liability?

[35] *E.g.*, Fairfax Inn, Inc. v. Sunnyhill Mining Co., 97 F. Supp. 991 (N.D. W. Va. 1951); Britton v. Harrison Constr. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); Whitman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 79 A.2d 591 (1951).

[1] *E.g.*, Durso v. A. D. Cozzolino, Inc., 128 Conn. 24, 20 A.2d 392 (1942); Wells v. Lockhart, 258 Ky. 698, 81 S.W.2d 5 (1935); Linch v. Dobson, 108 Neb. 632, 188 N.W. 227 (1922).

v. Watts[2] raised the question whether it applied to cases involving the operation of motorboats. A minor child ran his father's motorboat into a boat in which plaintiff was riding. Plaintiff brought action against both father and son for injuries received when he was thrown into the water and struck by the boat. Both defendants moved for nonsuit at the close of plaintiff's evidence. The father's motion was sustained, but the son's was denied. Plaintiff appealed the granting of the father's motion, the sole question being whether the family purpose doctrine applied. The North Carolina Supreme Court held that it did not apply.

It was noted that the family purpose doctrine developed as an instrument of social policy to afford greater protection for motorists in this country. Growing numbers of motor vehicles on our highways and the ever increasing loss of life and property demanded protection. Liability imposed by conventional principles of agency was thought to be inadequate.[3]

Although the court was aware of the "marked increase in the use of motor-boats in recent years"[4] and that "danger to life, limb and property from their use proportionately increased,"[5] it felt that in the absence of legislative action, the family purpose doctrine should not be extended to instrumentalities other than motor vehicles operating on public highways.

All other jurisdictions which have been faced with the problem of extending the doctrine to other instrumentalities are in accord with this decision.[6] Two courts have refused to apply the doctrine to bicycles negligently ridden by minor children on the ground that bicycles did not create an alarming social problem like that created

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[2] 254 N.C. 568, 119 S.E.2d 784 (1961).
[3] See Note, 38 N.C.L. REV. 249 (1960).
[4] 254 N.C. at 574, 119 S.E.2d at 784.
[5] *Ibid.*
[6] Meinhardt v. Vaughn, 159 Tenn. 272, 17 S.W.2d 5 (1929), discussed in Notes, 43 HARV. L. REV. 133 (1929); 8 TENN. L. REV. 44 (1929). This case was cited by the court in the principle case as extending the family purpose doctrine to motorcycles. The trial court did apply the doctrine. However, on appeal the Tennessee Supreme Court said it was not necessary to apply it because a conventional principal and agent relationship existed.

Two cases, Lashbrook v. Patten, 62 Ky. 317 (1864), and Schaefer v. Osterbrink, 67 Wis. 495, 30 N.W. 922 (1886), have been cited as applying the family purpose doctrine to horse drawn vehicles before the days of automobiles. However, in both of these cases a conventional master and servant relationship can be found. See Foster v. Farra, 117 Ore. 286, 298, 243 Pac. 778, 782 (1926); Note, 6 So. CAL. L. REV. 340, 342 (1933).

by automobiles.[7] Minnesota is the only jurisdiction, other than North Carolina, in which the question of the application of the doctrine to motorboats had been raised.[8] The court in the principle case quoted from the Minnesota case and relied upon the reasoning of that decision. The Minnesota court stated:

> Considering the wide expanse of the water surface of our lakes and rivers and the comparatively small number of motorboats thereon, which do not move in lanes or proscribed routes, a situation is not presented justifying, much less requiring as a matter of public policy, the extension of the family car doctrine to cover them.[9]

The family purpose doctrine is an extension of the principle of respondeat superior and is not founded on the idea that automobiles are inherently dangerous instrumentalities.[10] The theory of the doctrine is that some member of the family has made it his "business" to provide an automobile for the use of himself and other members of the family. Therefore, when a member of the family uses the family car for his own purpose it is held that his purpose is the "business" of the one furnishing the automobile.[11] Logically, if "business" is to be defined so broadly, the nature of the instrumentality should be immaterial, and the doctrine should apply to any instrumentality furnished to members of the family for their use and convenience. Many courts have utilized this reasoning in refusing to adopt the family purpose doctrine. One court, referring to the Minnesota motorboat case, stated:

> Minnesota says that a son driving the family car for his own pleasure is the agent of the father. . . . But the son is not

[7] Pflugmacher v. Thomas, 34 Wash. 2d 687, 209 P.2d 443 (1949); Calhoun v. Pair, 197 Ga. 703, 30 S.E.2d 180 (1944).

[8] Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37 (1932), discussed in Notes, 16 MINN. L. REV. 870 (1932); 31 MICH. L. REV. 132 (1932); 6 So. CAL. L. REV. 340 (1933).

[9] 185 Minn. at 360, 241 N.W. at 38.

[10] Elliott v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951); Robertson v. Aldridge, 185 N.C. 292, 116 S.E. 742 (1923); Note, 38 N.C.L. REV. 249 (1960).

[11] In reaching such a conclusion the court in Watkins v. Clark, 103 Kan. 629, 176 Pac. 131 (1918), said: "The deduction was facilitated by employment of the fine art of definition—putting into the definition of the term 'business' the attributes necessary to bolster up liability. So, if daughter took her friend riding, she might think she was out purely for the pleasure of herself and her friend, but she was mistaken; she was conducting father's 'business' as his 'agent.'" *Id.* at 631, 176 Pac. at 131.

> the agent of the father if it is a motorboat instead of an automobile, even though the motorboat be furnished for the pleasure of the son. When one considers contradictions such as this, it becomes apparent that the Family Purpose Doctrine is not as much an extension of the principles of master and servant as an attempt to fix liability on one able to meet it.[12]

Perhaps it would have been better if liability under the doctrine had never been based on the theory of agency. If the courts had frankly stated that public policy required the adoption of the doctrine, they would not be haunted today by the inconsistency of their logic when refusing to apply the doctrine to new instrumentalities. But since social and economic considerations do not require an extension of the doctrine to motorboats, it is submitted that the decision of the North Carolina court in the principal case is correct.

However, it appears inconsistent to insist on legislative action before extending the doctrine to other instrumentalities in light of the fact that the doctrine was first adopted by the court.[13] The court did not require such action when it was faced with the great social impact brought about by the advent and ever increasing use of the automobile. Certainly, if the social and economic demands, once presented by the automobile, should call for an extension of the doctrine to other instrumentalities, the court should not fail to heed this call.

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Wills—Anti-Lapse Statutes—Adopted Children as Issue

In *Headen v. Jackson*[1] testatrix bequeathed all her property, which consisted solely of personalty, to her four children and her granddaughter, share and share alike. One of the children predeceased testatrix and left as her only survivor an adopted child.

After the testatrix's death the question arose whether the adopted child could be substituted as beneficiary in his mother's place and thereby prevent any lapse of the bequest. In a declaratory judgment action to determine the adopted child's rights, the lower court

[12] Sare v. Stetz, 67 Wyo. 55, 74-75, 214 P.2d 486, 493 (1950), citing Note, 16 NOTRE DAME LAW. 394, 396 (1941).

[13] The court in the principle case stated: "In this State [the doctrine] is not the result of legislative action, but is a rule of law adopted by the Court." 254 N.C. at 571, 119 S.E.2d at 787.

[1] 255 N.C. 157, 120 S.E.2d 598 (1961).

concluded that the child was not an "issue" within the meaning of G.S. § 31-42.1[2] which provides,

> Unless a contrary intent is indicated by the will, where a legacy of any interest in personal property not terminable at or before death of the legatee is given to a legatee who predeceases the testator, such legacy does not lapse but passes to such *issue* of the legatee as survive the testator in all cases where the legatee is issue of the testator or would have been a distributee of the testator if the legatee had survived the testator and there had been no will.

On appeal the supreme court held that the adopted child was an "issue" within the meaning of the statute; therefore, the gift to his mother did not lapse.[3] In reaching this decision the court relied primarily upon the portion of the adoption statute which reads, "An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents . . . ."[4]

The court set out a clear test[5] by which the rights of adopted children should be governed and adhered to the plain-meaning rule,[6]

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[2] N.C. GEN. STAT. § 31-42.1 (Supp. 1961). (Emphasis added.)

[3] The majority of the court seems to have misconstrued the provisions of G.S. § 31-42.1 which provide that there should be no lapse if the bequest was to child or other issue of the testator, or if the legatee would have been a distributee had the testator died intestate. In its opinion, the court indicated that even if the adopted child did not come within the term issue he could still take the share bequeathed his mother because he would have been a distributee of the testator had the testator died intestate. A careful reading of the statute discloses that this provision is applicable only to the original legatee and not to the person to be substituted. This fact was pointed out by the dissent.

[4] N.C. GEN. STAT. § 48-23(a) (Supp. 1961).

[5] "Whatever the problem is concerning an adopted child, his standing and his legal rights can be measured by this clear test: 'What would his standing and his rights be if he had been born to his adoptive parents at the time of the adoption?' If lawyers and courts will look to this plain language of the statute, and avoid making exceptions not made in this statutory statement, persons adopting children in North Carolina can legally realize what they have hoped for, namely that the child they adopt will become their child, theirs fully, just as if he had been born to them, and without any exceptions and qualifications imposed by law to thwart their purpose." *A Survey of Statutory Changes in North Carolina in 1955,* 33 N.C.L. REV. 521, 522 (1955), quoted with approval in the principal case. 255 N.C. at 159, 120 S.E.2d at 599-600.

[6] "[I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it

in concluding that the statute left no room for interpretation other than that the adopted child was meant to be included within the term "issue" as found in the statute.

The result reached by our court was certainly salutary and it does not appear to be out of line with what other jurisdictions have done when faced with the same problem. A review of those jurisdictions having the term "issue" in their anti-lapse statutes indicates that four have allowed the adopted child to be included;[7] three have not;[8] and in twelve the question has never arisen.[9] Thus, the *Headen* case aligns North Carolina with the majority of those jurisdictions which have decided this precise question.

This interpretation also seems to be in accord with the general view today that an adopted child should be included within the terms child,[10] descendant,[11] or heir,[12] found in anti-lapse statutes.

For many years, however, the view was that the adopted child

must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202-03 (1819).

[7] Flynn v. Bredbeck, 147 Ohio St. 49, 68 N.E.2d 75 (1946); Industrial Trust Co. v. Taylor, 69 R.I. 153, 32 A.2d 269 (1943); Craft v. Blass, 8 Tenn. App. 498 (1928); *In re* Holcombe's Estate, 259 Wis. 642, 49 N.W.2d 914 (1951).

[8] McLeod v. Andrews, 303 Ky. 46, 196 S.W.2d 473 (Ct. App. 1946); Arnold v. Helmer, 327 Mass. 722, 100 N.E.2d 886 (1951); *In re* Russell's Estate, 284 Pa. 164, 130 Atl. 319 (1925).

[9] Colorado, Connecticut, Delaware, Georgia, Kansas, Michigan, Minnesota, Nebraska, South Carolina, Vermont, Virginia and West Virginia.

[10] Dean v. Smith, 195 Ark. 614, 113 S.W.2d 485 (1938); *In re* McEwan's Estate, 128 N.J. Eq. 140, 15 A.2d 340 (Prerogative Ct. 1940); Smallwood v. Smallwood, 121 N.J. Eq. 126, 186 Atl. 775 (Ct. Ch. 1936); *In re* Carleton's Will, 3 Misc. 2d 677, 151 N.Y.S.2d 338 (Surr. Ct. 1956); *In re* Horvath's Estate, 155 Misc. 734, 279 N.Y. Supp. 189 (Surr. Ct. 1935); *In re* Foster's Estate, 108 Misc. 604, 177 N.Y. Supp. 827 (Surr. Ct. 1919). *Contra,* Crawford v. Arends, 351 Mo. 1100, 176 S.W.2d 1 (1943); *In re* Martin's Will, 133 Misc. 80, 230 N.Y. Supp. 873 (Surr. Ct. 1928), holding the adopted child did not qualify; however, in the case of *In re* Walter's Estate, 270 N.Y. 201, 200 N.E. 786 (1936), the court said that the holding was inconsistent with its views and did not meet its approval. See generally Mechem, *Some Problems Arising Under Anti-Lapse Statutes,* 19 IOWA L. REV. 1, 5-6 (1933).

[11] *In re* Tibbetts' Estate, 48 Cal. App. 2d 177, 119 P.2d 368 (Dist. Ct. App. 1941); *In re* Moore's Estate, 7 Cal. App. 2d 722, 47 P.2d 533 (Dist. Ct. App. 1935); *In re* Harmount's Estate, 336 Ill. App. 322, 83 N.E.2d 756 (1949); Warren v. Prescott, 84 Me. 483, 24 Atl. 948 (1892); Hoellinger v. Molzhon, 77 N.D. 108, 41 N.W.2d 217 (1950); *In re* Buell's Estate, 167 Ore. 295, 117 P.2d 832 (1941); See generally Annot., 19 A.L.R.2d 1159 (1951). *Contra,* Raunch v. Metz, 212 S.W. 357 (Mo. 1919).

[12] Clark v. Clark, 76 N.H. 551, 85 Atl. 758 (1913).

should not be included within any of these terms.[13] The principal reason for the earlier result seems to have been the concept that adoption created a kinship only between the parties; therefore, the adopted child could not inherit from the collateral relatives of the adoptive parents.[14] Some courts, however, refused to adopt this rationale on the ground that this limitation on the child's inheritance was applicable only to intestacy.[15] Others concluded that the child did not seek to take by representation, but rather by the anti-lapse statute itself which created in the child an original right to take.[16]

If successful in meeting the limited inheritance argument, a court construing the term issue would perhaps be confronted with the problem that the blood relationship, which the term seems to connote, cannot be artificially created by statute.[17] The jurisdictions[18] which now include the adopted child within the term issue appear to have

[13] See Gammons v. Gammons, 212 Mass. 454, 99 N.E. 95 (1912) (issue); Raunch v. Metz, 212 S.W. 357 (Mo. 1919) (lineal descendants); *In re* Martin's Will, 133 Misc. 80, 230 N.Y. Supp. 734 (Surr. Ct.), *aff'd*, 224 App. Div. 873, 230 N.Y. Supp. 873 (1928) (child); Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898) (issue); *In re* Russell's Estate, 284 Pa. 164, 130 Atl. 319 (1925) (issue).

[14] This argument would no longer appear to be tenable under modern adoption statutes, which have equated the adopted and natural child with respect to the lineal and collateral relatives of the adoptive parents. For an excellent comparative study of inheritance rights of adopted children in all American jurisdictions, see Note, 25 BROOKLYN L. REV. 231, 242-46 (1959). See generally for the North Carolina view Hanft, *Thwarting Adoptions*, 19 N.C.L. REV. 127, 149-51 (1941).

[15] *In re* Moore's Estate, 7 Cal. App. 2d 722, 47 P.2d 533 (Dist. Ct. App. 1935) (lineal descendants); *In re* Foster's Estate, 108 Misc. 604, 177 N.Y. Supp. 827 (Surr. Ct. 1919) (child or descendant). *Contra, In re* Russell's Estate, 284 Pa. 164, 130 Atl. 319 (1925) (issue). The court here held that because the decedent had died testate, the status conferred upon the adopted child under intestate circumstances could not be used to bring the child within the term "issue" in the anti-lapse statute.

[16] *In re* Harmount's Estate, 336 Ill. App. 322, 83 N.E.2d 756 (1949) (descendant); Warren v. Prescott, 84 Me. 483, 24 Atl. 948 (1892) (lineal descendants); Hoellinger v. Molzhon, 77 N.D. 108, 41 N.W.2d 217 (1950) (lineal descendant).

[17] Crawford v. Arends, 351 Mo. 1100, 176 S.W.2d 1 (1943) (lineal descendants); Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898) (issue). The dissenting opinion in the *Headen* case argued that "issue" in its ordinary meaning meant a blood relationship existed. *Accord,* Barton v. Campbell, 245 N.C. 395, 95 S.E.2d 914 (1957); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953).

[18] Flynn v. Bredbeck, 147 Ohio St. 49, 68 N.E.2d 75 (1946), *overruling* Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898), which has arisen under an earlier adoption statute; Harrison v. Hillegas, 13 Ohio Op. 523 (P. Ct. 1939); Graves v. Graves, 155 N.E.2d 540 (Ohio P. Ct. 1956); Industrial Trust Co. v. Taylor, 69 R.I. 153, 32 A.2d 269 (1943); Craft v. Blass, 8 Tenn. App. 498 (1928); *In re* Holcombe's Estates, 259 Wis. 642, 49 N.W.2d 914 (1951).

abandoned strict adherence to the common law contruction of that term. Evidently they have concluded that legislatures have power to fix the legal status of individuals and the manner in which they shall be treated with respect to the devolution of property.

Taking cognizance of the legislature's power in this respect, courts faced with the question of the inclusion of adopted children under anti-lapse statutes have relied upon adoption statutes to determine what status has been bestowed upon such children. Once status has been determined, the courts then look to the anti-lapse statute to determine if the child has the status required by that statute. If it is determined that the adoption statute equates the natural and adopted child in all respects, the courts conclude that the adopted child must be allowed the same privilege of being substituted for the predeceasing beneficiary as would a natural child.[19] Courts following this procedure to determine an adopted child's rights to substitution necessarily consider legislative intent. In so doing, however, they do not limit their investigation solely to the intent behind the use of the particular term in the anti-lapse statute. Rather they construe the legislative intent in the adoption statute in conjunction with the use of the particular term used in the anti-lapse statute to determine what individuals were intended to be included therein.[20]

The majority in the *Headen* case adhered to the above approach by first determining the adopted child's status under the adoption statute and applying this determination to the anti-lapse statute. Thus, the court refused to draw an arbitrary line of distinction between the adopted and natural child when the legislature's express language was to the effect that no discrimination should exist. This type of judicial attitude would seem to be clearly in accord with the legislative intent evidenced in the adoption statute;[21] the purpose of adoption was to give the adoptive parents a child that would be a duplicate in all respects to a child which perhaps they

[19] *E.g.*, Flynn v. Bredbeck, 147 Ohio St. 49, 68 N.E.2d 75 (1946); Industrial Trust Co. v. Taylor, *supra* note 18; *In re* Holcombe's Estate, *supra* note 18. *Contra*, Arnold v. Helmer, 327 Mass. 722, 100 N.E.2d 886 (1951); Gammons v. Gammons, 212 Mass 454, 99 N.E. 95 (1912); *In re* Russell's Estate, 284 Pa. 164, 130 Atl. 319 (1925). These cases were decided on the basis that the adoption created a relation solely between the parties to the adoption or that the adoption statute did not sufficiently spell out that the adopted and natural child were to be equals in all respects.

[20] *Cf.* Craft v. Blass, 8 Tenn. App. 498 (1928) (the two statutes being *in pari materia* must be read together).

[21] N.C. GEN. STAT. § 48-23 (Supp. 1961).

could not naturally bear. This desired equivalence cannot be achieved if the courts draw a line of distinction between the adopted and natural child in the present situation.

It is hoped that the court will continue to apply the test set out in the *Headen* case whenever the rights of an adopted child are in question.[22] However, in order to eliminate any further need for judicial interpretation on the subject, it is submitted that the legislature incorporate this test into the adoption statute.

Such action would be a clear indication that the legislature intended to include an adopted child within the term issue whenever used by it in any statute. It is doubtful whether the court would force this construction of the term when found in a will.[23] Fear of trespassing on the testator's intent would be a logical basis for refusing to construe the term to include an adopted child in such case. If this fear be a deterrent, there are yet two other alternatives which might solve the problem.

The simplest of the two would be to replace the term "issue," now in the anti-lapse statute, with the term "child." It would appear that the problem could be solved by this change in view of the express language in the present adoption statute to the effect that the relation of parent and child is created by the adoption,[24] and recent cases holding that an adopted child comes within the term

[22] Notwithstanding the fact that the decision in the *Headen* case was five to two, the dissenting Justices argued that past decisions of the court had concluded that as far as defining the term issue in will cases the term meant lawfully begotten heirs only. *Accord,* Barton v. Campbell, 245 N.C. 395, 95 S.E.2d 914 (1957); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953). They further argued that since there had been a recent change in the adoption statutes but no corresponding change in the anti-lapse statute the legislature had not intended the adopted child to be allowed the benefit of the latter.

[23] In view of relatively late cases holding that the term issue in a will does not include an adopted child, Barton v. Campbell, *supra* note 22, and Bradford v. Johnson, *supra* note 22, it seems doubtful that the *Headen* decision will affect the term in will cases. In both of the above cases the court concluded that, as found in a will, the term issue in its natural and ordinary meaning meant lawfully begotten heirs of the body and that, notwithstanding the fact an adopted child could inherit by, through and from its adoptive parents, adoption could create only a legal relation and not one by blood. The *Headen* case dealt solely with the legislative intent behind the term in a statute and was in no way concerned with the intent of a testator. In an analogous situation the Wisconsin Supreme Court, having previously held that an adopted child came within the term issue as used in the anti-lapse statute, *In re* Holcombe's Estate, 259 Wis. 642, 49 N.W.2d 914 (1951), refused to include an adopted child within the same term found in a will. *In re* Breese's Estate, 7 Wis. 2d 422, 96 N.W.2d 712 (1959).

[24] N.C. GEN. STAT. § 48-23(a) (Supp. 1961).

children found in a will.[25] Alternatively, an amendment could be made to the present anti-lapse statute which would provide that an adopted child is to be considered within the term "issue" as used therein. In making such a change, the legislature would merely indulge the presumption that the testator would have desired the adopted child to receive equal treatment with the natural child of the original beneficiary. In view of the fact that the anti-lapse statute has as its basis a legislative presumption[26] that the testator would have made provision for the predeceasing beneficiary's issue had he known of the beneficiary's death, indulgence of this further presumption would not appear to be out of line with what has already been done.

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[25] *E.g.*, Bullock v. Bullock, 251 N.C. 559, 111 S.E.2d 837 (1960); Wachovia Bank & Trust Co. v. Green, 239 N.C. 612, 80 S.E.2d 771 (1954).

[26] "These statutes are said to be based upon the presumption that testator would have made provision for certain relatives of the deceased beneficiary, if his intention [*sic*] had been called to the death of the beneficiary, and he had had the opportunity to make such provision." 4 PAGE, WILLS § 1422, at 176 (Lifetime ed. 1941).