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males may find themselves prosecuted for crimes heretofore unknown.³⁸ On the other hand, there is strong argument in favor of its use. The individual right of citizens to be free from fear and apprehension of injury by such offensive and threatening conduct as displayed in the principal case deserves the protection of the state. Through the use of such a rule, a gap in the criminal law has effectively been closed. A definitive statute might bring more certainty to a field of the law where certainty is of the utmost importance.

FREDERICK C. MEEKINS

Domestic Relations—Procedure—Abatement of Actions by Pendency of Prior Actions

The question as to whether a pending action in the alimony-divorce area will abate a subsequent independent action in the same area with the parties reversed has again been passed on by the North Carolina Supreme Court in the case of *Beeson v. Beeson*.¹

The court initially held in *Cook v. Cook*² that where the husband commenced proceedings for absolute divorce and the wife thereafter sued for divorce from bed and board in separate proceedings and during pendency of the husband's prior suit, the former action did not abate the latter. This decision seems to indicate that although a divorce action, either absolute or from bed and board, may be brought as a counterclaim, such is not mandatory. Later, however, the court in *Cameron v. Cameron*³ held that whether the first action abated the second depended upon certain well established tests.

The facts in the *Cameron* case were substantially as follows: The wife sued for divorce from bed and board alleging abandonment. While this suit was pending, the husband instituted an independent action in a different county for absolute divorce on the grounds of two years separation.⁴ The wife pleaded the pendency of her action in abatement of the husband's subsequent suit. Her plea was sustained by the Supreme Court. After stating the general rule to be that a subsequent action is not abatable on the ground that the plaintiff therein might obtain the same relief by a counterclaim or cross demand in a prior suit pending against him, the court pointed out that this general rule is not applicable where the cause of action asserted by the plaintiff in the second action is essentially a part of the first action and will necessarily be

³⁸ *A Survey of the Decisions of the North Carolina Supreme Court for the Spring and Fall terms of 1953*, 32 N.C.L. REV. 379, 425 (1954). Cf. Notes, 13 U. DET. L.J. 227 (1950), 11 ROCKY MT. L. REV. 104 (1939).

¹ 246 N.C. 330, 98 S.E.2d 17 (1957).

² 159 N.C. 47, 74 S.E.2d 639 (1912).

³ 235 N.C. 82, 68 S.E.2d 796 (1952).

⁴ N.C. GEN. STAT. § 50-6 (1950).

adjudicated by the judgment in the first action. In such cases, the court continued, the law devises a special test of identity of parties and causes and holds that the pendency of the prior action abates the subsequent action when, and only when, two conditions concur: "(1) the plaintiff in the second action can obtain the same relief by a counterclaim or cross demand in the prior action pending against him; and (2) a judgment on the merits in favor of the opposing party in the prior action will operate as a bar to the plaintiff's prosecution of the subsequent action."⁵ The court concluded that since the husband could counterclaim for divorce in the wife's prior action⁶ and since if the wife satisfied her allegation of abandonment the husband's subsequent action for divorce on grounds of two years separation would necessarily be barred,⁷ the husband's counterclaim must be considered as mandatory.

Although the factual situation in the *Cameron* case is converse to that of *Cook v. Cook*, in that it was the wife who commenced the first action in the *Cameron* case, it would certainly seem that if the *Cameron* tests were applied to facts similar to those in the *Cook* case the wife's counterclaim would likewise be compulsory, for she, too, may counterclaim in the husband's prior suit,⁸ and the husband's absolute divorce decree would necessarily bar all subsequent alimony proceedings.⁹ In fact, the court in the *Cameron* case so intimated.¹⁰

⁵ 235 N.C. 82, 86, 68 S.E.2d 796, 799 (1952). *Accord*, *Brothers v. Bell Bakeries, Inc.*, 231 N.C. 428, 57 S.E.2d 317 (1950); *Smith-Dwiggins v. Parkway Bus Co.*, 230 N.C. 234, 52 S.E.2d 892 (1949); *Johnson v. Smith*, 215 N.C. 322, 1 S.E.2d 834 (1939); *Brown v. Polk*, 201 N.C. 375, 160 S.E. 357 (1931); *Murchison Nat'l Bank v. Broadhurst*, 197 N.C. 365, 148 S.E. 452 (1929); *Harris v. Johnson*, 65 N.C. 478 (1871). For cases in accord with the *Cameron* case, see *Hill v. Hill Spinning Co.*, 244 N.C. 554, 94 S.E.2d 677 (1956); *McDowell v. Blythe Bros. Co.*, 236 N.C. 396, 72 S.E.2d 860 (1952).

⁶ *Lockhart v. Lockhart*, 223 N.C. 559, 27 S.E.2d 444 (1943); *Ellis v. Ellis*, 190 N.C. 418, 130 S.E. 7 (1925). It is now possible for the husband to counterclaim in the wife's alimony without divorce action under N.C. GEN. STAT. § 50-16 (Supp. 1955).

⁷ *Pharr v. Pharr*, 223 N.C. 115, 25 S.E.2d 471 (1943); *Byers v. Byers*, 223 N.C. 85, 25 S.E.2d 466 (1943); *Brown v. Brown*, 213 N.C. 347, 196 S.E. 333 (1938); *Parker v. Parker*, 210 N.C. 264, 186 S.E. 346 (1936); *Reynolds v. Reynolds*, 208 N.C. 428, 181 S.E. 338 (1935).

⁸ "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, or she may set up such cause of action as a cross action in any suit for divorce, either absolute or from bed and board; and the husband may seek a decree of divorce, either absolute or from bed and board, in any action brought by his wife under this section . . ." N.C. GEN. STAT. § 50-16 (Supp. 1955).

⁹ "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law . . . provided further, that except in case of divorce obtained with personal service on the wife, either within or without the

Nevertheless, the court in *Beeson v. Beeson* excluded actions for alimony arising under G.S. § 50-16 subsequent to the husband's divorce proceedings from compulsory counterclaim treatment. Although *Cameron v. Cameron* was extensively argued before the court by both parties on appeal,¹¹ the *Beeson* decision completely omits any mention thereof. G.S. § 50-16 states: "[T]he wife may institute an action in superior court . . . or she may set up such action as a cross action . . ."¹² The court reasoned that the wife's counterclaim could not be considered as mandatory since she was given an election by the statute either to sue independently or to counterclaim in her husband's prior suit. Had the court desired to hold otherwise it could have drawn strong support from the case of *Reece v. Reece*.¹³

Although this statutory construction seems susceptible to honest criticism from the standpoint of pleadings and procedure, in that it prevents application of the *Cameron* tests, the final result does seem to be consistent with existing general policy throughout the country today that the duty of support should continue notwithstanding termination of the marriage contract, excluding, of course, cases of the wife's misconduct.¹⁴

In North Carolina absolute divorce and alimony cannot be obtained by the wife at the same time.¹⁵ An alimony decree will survive an absolute divorce, however, if obtained prior thereto¹⁶ unless the divorce is obtained in an action instituted by the wife on the grounds of two years separation or is granted to the husband on the grounds of the wife's adultery.¹⁷ Hence, unless the female spouse obtains her alimony decree or settlement prior to the final divorce decree her claim for future sup-

State, upon the grounds of the wife's adultery and except in case of divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period, a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment for absolute divorce." N.C. GEN. STAT. § 50-11 (Supp. 1955). See *Hobbs v. Hobbs*, 218 N.C. 468, 11 S.E.2d 311 (1940); *Bidwell v. Bidwell*, 139 N.C. 402, 52 S.E. 55 (1905).

¹⁰ 235 N.C. 82, 87, 68 S.E.2d 796, 800 (1952).

¹¹ Brief for Appellant, pp. 4, 7, *Beeson v. Beeson*, 246 N.C. 330, 98 S.E.2d 17 (1957); Brief for Appellee, *id.* at pp. 2, 3.

¹² N.C. GEN. STAT. § 50-16 (Supp. 1955).

¹³ 231 N.C. 321, 56 S.E.2d 641 (1949). The husband sued for absolute divorce and the wife thereafter sued for alimony without divorce in an independent action during pendency of the husband's action. The court held that the first action did not abate the second, for under the court's interpretation of G.S. § 50-16 at that time the wife could not counterclaim for alimony, but was required to sue independently. Since the court based its decision on the fact that the alimony without divorce action had to be brought as an independent action at that time, the intimation is that the pendency of the prior action would abate the subsequent alimony without divorce action if the subsequent action could be brought as a counterclaim. By amendment to G.S. § 50-16, the alimony without divorce action may now be brought as a cross action. N.C. GEN. STAT. § 50-16 (Supp. 1955).

¹⁴ See Note, 31 N.C.L. REV. 482 (1953).

¹⁵ See note 9 *supra*.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

port will be forever barred. Therefore, the wife who has valid grounds for absolute divorce is forced to bring suit for alimony before suing for divorce if she desires both. The effect of the *Beeson* decision, then, is clearly consistent with general policy for it enhances the wife's chances of getting an alimony decree before final adjudication of her husband's divorce action. Nevertheless, it is true that *Beeson* does violence to the equally sound principles of avoiding piecemeal litigation and of preventing a multiplicity of suits which frequently result in conflicting verdicts based upon substantially the same evidence.¹⁸

It is unlikely that the *Beeson* case will undermine *Cameron v. Cameron*, since the two cases are factually distinguishable. Furthermore the *Beeson* decision is based upon a statutory interpretation of G.S. § 50-16. The decision adds further weight to the contention that North Carolina should amend its divorce laws in order to permit a wife who has valid grounds for divorce to obtain her absolute divorce and alimony by either suing for both in the same action or by means of a counterclaim in any action instituted by her husband.¹⁹

JAMES N. GOLDING

Evidence—Opinion Testimony of Speed

In *Fleming v. Twiggs*,¹ the North Carolina Supreme Court held that a witness's testimony that the defendant's car was traveling seventy miles per hour when it struck the plaintiff was inadmissible because the witness had not had sufficient opportunity to form an opinion of probative value. The witness had heard the sound of brakes and looked back to see defendant's car just before it struck the deceased. She then turned her head away so as not to see the accident. The court stated: "When a witness has had no reasonable opportunity to judge speed of an automobile, it is error to permit him to testify in regard thereto."²

The above language was quoted from *State v. Becker*,³ where the witness testified that she had first seen the car that struck her when it was fifteen feet away, and that it was going fifty-five miles per hour. There was other undisputed evidence that the car stopped twenty-five feet after it hit the witness. The court rejected the estimate of speed, saying that it would have been a physical impossibility for the defendant to have stopped his car in so short a distance if at the time in question it was traveling at such a rate of speed. However, this was a criminal action, requiring proof beyond a reasonable doubt, and not only was

¹⁸ *Emry v. Chappell*, 148 N.C. 327, 330, 62 S.E. 411, 412 (1908).

¹⁹ See note 14 *supra*.

¹ 244 N.C. 666, 94 S.E.2d 821 (1956).

² *Id.* at 669, 94 S.E.2d at 824.

³ 241 N.C. 321, 327, 85 S.E.2d 327, 331 (1955).