



3-1-1979

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Recommended Citation

Harriet S. Sugar, *Civil Procedure -- New Rules for an Old Game: North Carolina Compulsory Counterclaim Provision Applies in Divorce Suits*, 57 N.C. L. REV. 439 (1979).

Available at: <http://scholarship.law.unc.edu/nclr/vol57/iss3/6>

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NOTES

Civil Procedure—New Rules for an Old Game: North Carolina Compulsory Counterclaim Provision Applies in Divorce Suits

Piecemeal litigation has been a prevalent feature in divorce actions. Adverse parties filing similar claims in separate counties, racing to judgment in hopes of barring the other's claim, is a common pattern in marital disputes.¹ Traditionally, the doctrine of abatement, which requires that an action initiated during the pendency of a prior action be dismissed if the two are sufficiently similar, provided a way to dispose of unnecessary litigation. In divorce actions, however, the doctrine has been narrowly applied.² In contrast, employment of a compulsory counterclaim theory could prevent unnecessary litigation in circumstances in which strict application of abatement would not. Thus, it was anticipated that the adoption of a compulsory counterclaim rule as part of the North Carolina Rules of Civil Procedure³ could alter the procedures once followed in divorce suits.⁴ In *Gardner v. Gardner*,⁵ the North Carolina Supreme Court made this change clear by holding that counterclaims for divorce, with one narrow exception, are compulsory counterclaims within the meaning of rule 13(a).⁶

In *Gardner*, a wife sued for alimony and divorce on the ground that her husband had abandoned her when he moved out of the marital home.⁷ Shortly before the husband was required to answer, his own

1. See, e.g., *Fullwood v. Fullwood*, 270 N.C. 421, 154 S.E.2d 473 (1967); *Beeson v. Beeson*, 246 N.C. 330, 98 S.E.2d 17 (1957); *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952); *Cook v. Cook*, 159 N.C. 46, 74 S.E. 639 (1912); *McLeod v. McLeod*, 1 N.C. App. 396, 161 S.E.2d 635 (1968).

2. E.g., *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952).

3. N.C. GEN. STAT. § 1A-1 (1969).

4. See *McCarley v. McCarley*, 289 N.C. 109, 114, 221 S.E.2d 490, 494 (1976) (dictum); 2 R. LEE, NORTH CAROLINA FAMILY LAW §144 (3d ed. Supp. 1976) (author suggests new rules of civil procedure may alter prior case law).

5. 294 N.C. 172, 240 S.E.2d 399 (1978).

6. *Id.* at 181, 240 S.E.2d at 406. N.C.R. Civ. P. 13(a) provides:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

- (1) At the time the action was commenced the claim was the subject of another pending action, or
- (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

7. 294 N.C. at 174, 240 S.E.2d at 401; see N.C. GEN. STAT. § 50-16.2(4), -7(1) (1976). The wife prayed initially for alimony without divorce. She later amended her complaint to state a

claim for absolute divorce based on the one-year statutory separation period⁸ accrued.⁹ While his wife's action was pending, the husband filed his divorce claim in another county.¹⁰ The wife, relying on both abatement and compulsory counterclaim theories, moved that her husband's action be dismissed or stayed until her own action could be determined.¹¹ The court denied her motions,¹² and the court of appeals denied her writ of certiorari.¹³

On appeal,¹⁴ the North Carolina Supreme Court decided for the wife.¹⁵ The court held, based on the compulsory counterclaim rule,¹⁶ that the husband's claim for divorce was a compulsory counterclaim in the wife's suit.¹⁷ The governing rule, 13(a), makes counterclaims arising out of the same transaction or occurrence as the plaintiff's claim

claim for alimony and divorce from bed and board, a judicial separation of husband and wife that can be nullified by resumption of marital relations. 294 N.C. at 174, 240 S.E.2d at 401.

8. See N.C. GEN. STAT. § 50-6 (Supp. 1977).

9. See 294 N.C. at 174, 240 S.E.2d at 401-02. N.C.R. Civ. P. 12(a)(1) provides in part: "A defendant shall serve his answer within 30 days after service of the summons and complaint upon him." The summons and complaint in the wife's action were served on the husband on May 17, 1976. His claim accrued on May 28, 1976, one year after he had left home. Brief for Appellant at 2.

10. 294 N.C. at 174, 240 S.E.2d at 402. The wife filed her claim in Wayne County one day after she moved there from the Johnston County residence she and her husband had maintained for many years. Before filing his independent action, the husband moved to transfer the wife's action to Johnston County, where he still lived, on the basis of improper venue. The motion was denied. While appeal of the motion was pending, the husband moved to transfer the wife's action on *forum non conveniens* grounds. *Id.* at 173-74, 240 S.E.2d at 401.

11. *Id.* at 174-76, 240 S.E.2d at 402-03.

12. *Id.* at 174, 240 S.E.2d at 402. Petitioner's motions were heard and denied in Johnston County District Court. Petitioner filed for a writ of certiorari in the court of appeals requesting review of the order. Brief for Appellant at 3.

13. Brief for Appellant at 4.

14. The North Carolina Supreme Court ordered that petitioner's writ for discretionary review under N.C. GEN. STAT. § 7A-31 (Cum. Supp. 1977) be allowed. Brief for Appellant at 4. The court emphasized that it took the case not because the appellate court had abused its discretion, but "because we desired to address the important and novel questions relating to the applicability of the compulsory counterclaim provisions . . . for the guidance of the bench and bar." 294 N.C. at 173, 240 S.E.2d at 401.

15. 294 N.C. at 181, 240 S.E.2d at 406.

16. The wife had abandoned her reliance on the abatement theory. *Id.* at 175-76, 240 S.E.2d at 402-03. Her husband, however, contended that the abatement theory and the prior case law based on it were still good law. *Id.* at 175, 240 S.E.2d at 402; see Brief for Appellee at 4-12. While the court hinted that abatement might still be a viable doctrine, its adoption of the compulsory counterclaim procedures appears to negate the use of the doctrine in a *Gardner* context.

17. Relying on the premise that his wife's amendment should not relate back and thus her action should be considered one for alimony without divorce, the husband argued that N. C. GEN. STAT. § 50-16.8 (1969) made his claim merely permissive. Brief for Appellee at 7. The statute provides in part: "The procedure in actions for alimony . . . shall be as in other civil actions except as provided in this section." It also provides that actions for alimony may be filed as counterclaims in divorce actions and actions for divorce may be filed as counterclaims in alimony without divorce proceedings. The court, while failing throughout its opinion to distinguish between the wife's original and amended claim, pointed out that the statute was enacted in 1955 at a

compulsory in the plaintiff's suit. The court also held that when a claim that is compulsory in a prior pending suit is filed separately, the claim should be either stayed or dismissed with leave to file in the first suit.¹⁸ Although the compulsory counterclaim rule does not specify this result,¹⁹ the court thought its holding necessary to promote the rule's policies of avoiding wasteful litigation and inconsistent results.

The court further stated that if the second claim were filed after final judgment in the first action, the claim would not be barred by the compulsory counterclaim rule.²⁰ It emphasized that this limitation was consistent with a policy courts have strongly adhered to—that of maintaining the marital ties. A spouse undesirous of pursuing a divorce is not forced to do so by the institution of a related action by the other spouse, yet remains free to change his mind later.²¹

Prior to North Carolina's adoption of the rules of civil procedure, there was no compulsory counterclaim rule.²² Rather, any claim arising out of the same transaction as the plaintiff's claim was permitted to be filed either as a counterclaim²³ or in a separate suit.²⁴ When a claim

time when there was no compulsory counterclaim concept and counterclaims for alimony in actions for divorce were not allowed. Having placed the statute in its historical context, the court reasoned it would not undermine the legislative intent to superimpose rule 13(a) on the statute and make the counterclaim compulsory. 294 N.C. at 178, 240 S.E.2d at 404.

18. 294 N.C. at 177, 240 S.E.2d at 403 (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1409, 1418 (1971)).

19. See note 6 *supra*. See also 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1418 (1971). The authors point out:

Although it is well established that a party is barred from suing on a claim that should have been pleaded as a compulsory counterclaim in a prior action, one closely related question remains unsettled. What would prevent a party who does not want to assert his claim as a compulsory counterclaim in a suit instituted by his opponent from bringing an independent action on that claim while the first action still is pending?

20. 294 N.C. at 181, 240 S.E.2d at 406. The court noted, however, that the doctrine of res judicata may operate to bar a subsequent claim. *Id.* at 181 n.7, 240 S.E.2d at 406 n.7.

21. *Id.* at 181, 240 S.E.2d at 405-06. As one court noted, there is a paucity of case law on the effect of the compulsory counterclaim provisions on divorce actions. *Stolar v. Stolar*, 359 A.2d 597, 598 n.2 (D.C. Cir. 1976). The *Gardner* court, in carving out this exception to the counterclaim rule, relied on *Moats v. Moats*, 168 Colo. 120, 450 P.2d 64 (1969), which pointed out that without the exception, the rule would interfere with substantive rights. *Id.* at 125, 450 P.2d at 66. Other courts have reached differing conclusions on the effects of the rule. In *Stolar*, rule 13(a) was applied to bar a claim for absolute divorce on the ground that the claim should have been filed as a counterclaim in an earlier unsuccessful divorce suit filed by the other spouse. 359 A.2d at 599. On the other hand, the Missouri Supreme Court has stated in dictum that notwithstanding the compulsory counterclaim rule, a defendant still has a choice of asserting a divorce claim in a separate suit. *State ex rel. Fawkes v. Bland*, 357 Mo. 634, 645, 210 S.W.2d 31, 36 (1948).

22. W. SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 13-2 (1975).

23. *Id.* The former statutory provision relating to counterclaims, CODE OF CIVIL PROCEDURE § 101 (1868) (formerly codified at N.C. GEN. STAT. § 1-137 (1953)) (repealed 1970), also permitted as counterclaims all contract actions.

24. *E.g.*, *Union Trust v. McKinne*, 179 N.C. 328, 102 S.E. 385 (1920).

was filed separately during the pendency of a prior related action, the doctrine of abatement was often invoked by the original plaintiff to force dismissal of the second suit.²⁵ Like the compulsory counterclaim rule, the doctrine is designed to avoid multiple actions and inconsistent results.²⁶

The doctrine, however, has grave weaknesses. It is applied only when both actions are filed in North Carolina.²⁷ Moreover, some courts refuse to apply it in divorce actions,²⁸ producing wasteful litigation and confusion. Further, the doctrine requires dismissal of the second divorce action only if the plaintiff in that action can obtain the same relief by counterclaiming in the first and if his claim would be defeated by a judgment in favor of the plaintiff in the first suit.²⁹ This

25. See, e.g., *McDowell v. Blythe Bros.*, 236 N.C. 396, 72 S.E.2d 860 (1952). The conditions for abating an action because of the pendency of a prior action are traditionally that the two be substantially identical in parties, subject matter, issues involved, and relief demanded. *Whitehurst v. Hinton*, 230 N.C. 16, 22, 51 S.E.2d 899, 903 (1949).

26. *Reece v. Reece*, 231 N.C. 321, 322, 56 S.E.2d 641, 642 (1949).

27. Historically, the doctrine of abatement has not required dismissal of an action filed in one state while a related action is pending in another. See *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964). Courts, however, have sometimes made discretionary determinations that the second action should be stayed pending the outcome of the first. See *Acorn v. Jones Knitting Corp.*, 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971).

28. In *Beeson v. Beeson*, 246 N.C. 330, 98 S.E.2d 17 (1957), the court allowed an alimony without divorce action filed subsequent to an absolute divorce action to proceed independently. While the abatement doctrine was argued strenuously on appeal, Brief for Appellant at 4-7; Brief for Appellee at 2-3, the court omitted any reference to it. Instead, it reasoned from a recent statutory change that for the first time allowed a wife to counterclaim in her husband's divorce action. 246 N.C. at 332, 98 S.E.2d at 18. This change, according to the court, gives a wife a choice of asserting her claim in either a pending or a separate suit. *Id.*; see 36 N.C.L. REV. 203 (1958). In *Fullwood v. Fullwood*, 270 N.C. 421, 154 S.E.2d 473 (1967), the *Beeson* fact situation was reversed and both claims were again allowed to proceed independently. While mentioning in dictum the abatement theory, the *Fullwood* court permitted the second action to proceed because the husband's claim for absolute divorce based on the statutory separation period had not accrued in time for him to assert it in his wife's prior suit. *Id.* at 423, 154 S.E.2d at 475. Although the *Fullwood* result would appear to be the same after *Gardner*, see note 45 and accompanying text *infra*, the vitality of *Beeson* is less certain. The *Gardner* court's superimposition of the compulsory counterclaim provision on the statute that allows counterclaims for alimony in divorce suits (and counterclaims for divorce in alimony suits), see note 17 *supra*, appears to change the *Beeson* result. This conclusion is complicated, however, because the statute specifically allows the alimony claim to be filed either separately or as a cross action, while it states merely that cross actions for divorce "shall be allowable" in alimony suits. Since the *Gardner* opinion, which dealt with the latter situation, concentrated on the entire statute in holding the former filing option mandatory, it is likely that the section allowing alimony claims to be filed separately will be held only to cover situations in which there is no previously filed divorce claim. If so, then *Beeson* is no longer controlling.

29. The requirements for abatement in the divorce context were enunciated most clearly in *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952). The court held that the ordinary test for determining whether an action should be abated is not applicable when "the parties to the prior action appear in the subsequent action in reverse order, and the plaintiff in the second action, as defendant in the first, has failed to plead a counterclaim or cross demand for the same cause of action." *Id.* at 85, 68 S.E.2d at 798. In such a case, the law devises a special test. *Id.* at 86, 68

test, based on principles of *res judicata*,³⁰ is so restrictive that the second action has rarely been dismissed.³¹

The *Gardner* decision has done away with the confusing procedures and wasteful results dictated by prior case law. The abatement approach, with its emphasis on whether *res judicata* would necessarily bar a subsequent claim, is now replaced by a simpler approach that focuses on the common factual bases of the related claims. Because application of the abatement doctrine is so laden with rules and exceptions that related claims are often permitted to proceed independently,³² the new approach is an important step in the direction of

S.E.2d at 799. The fact situation the *Cameron* court was referring to was and is obviously a pattern common to divorce actions.

30. The term "res judicata" is used to encompass the doctrines of bar, merger and collateral estoppel. See F. JAMES, CIVIL PROCEDURE 532 (2d ed. 1977).

31. The adverse effects of the special application of the abatement theory in the divorce context were illustrated in *Cook v. Cook*, 159 N.C. 46, 74 S.E. 639 (1912), in which a husband filed an action for divorce based on a 10 year separation period and his wife subsequently initiated a separate suit for a limited divorce on the ground of abandonment. A divided court allowed the wife's action to proceed, reasoning that to force her to bring her claim in the prior action would be particularly inappropriate in a marital context "where a party may not desire to presently seek affirmative relief, in the hope that a different course would more likely lead to a reconciliation." *Id.* at 50, 74 S.E. at 641. Further, since the substantive law at the time allowed an absolute divorce based on the statutory separation period irrespective of fault, the court concluded that the issues to be determined in the husband's action would not be the same as those in the wife's abandonment claim and thus doctrines of former adjudication would pose no bar to her action. The dissent recognized the need to adjudicate divorce actions in one proceeding and the practical problems inherent in the majority's result. It pointed out the obvious: had the husband been granted an absolute divorce prior to the entry of judgment in the wife's action, her claim for divorce, absolute or limited and regardless of the grounds, would have necessarily been barred. *Id.* at 52, 74 S.E. at 642 (Clark, C.J., dissenting).

In *McLeod v. McLeod*, 1 N.C. App. 396, 161 S.E.2d 635 (1968), the court held that an alimony without divorce action would not abate a subsequently filed claim for absolute divorce because a judgment on the merits in the first action would not bar the second. *Id.* at 398, 161 S.E.2d at 636. While technically this was true, *McLeod* demonstrated the ineffectiveness of the *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 769 (1952), test in protecting against needless litigation time and expense. See note 29 *supra*.

The other prong of the *Cameron* text—that the plaintiff in the second action be able to obtain the same relief in the first—coupled with peculiar laws governing alimony, also produced unnecessary litigation. Until 1967, a dependent spouse could not secure alimony and an absolute divorce at the same time. 2 R. LEE, *supra* note 4, § 135. Her only means of preserving alimony was by first initiating an action for alimony and later an action for divorce. A prior alimony decree would survive a divorce judgment granted either spouse. *Id.* § 135, at 51-55 (1963). Because before 1955 a wife could only file an alimony action in a separate proceeding, it followed that, under the abatement test, a wife's action for alimony without divorce could proceed independently of her husband's prior divorce suit. *Reece v. Reece*, 231 N.C. 321, 322-23, 56 S.E.2d 641, 642-43 (1949).

32. For example, the doctrine of collateral estoppel operates to make conclusive a prior determination of an issue of fact in a subsequent proceeding if the issue was actually litigated in the first action. Some courts require the common issue to have been an essential element or ultimate fact in both actions, *King v. Chase*, 15 N.H. 9 (1844); others apply the doctrine to an evidentiary fact in the first or second if certain factors exist, *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944).

effective use of court time. Furthermore, by creating a narrow exception when the second claim is filed after judgment in the first, the court demonstrated it will not allow procedural policies to interfere with the substantive policy of maintaining the marital bonds.³³

The *Gardner* opinion, however, leaves room for disregard of these procedural aims in allowing judges an apparently unrestricted option to stay, as well as dismiss, a separately filed claim that is a compulsory counterclaim in a prior pending suit. Under the prior procedure, the abatement doctrine was applied to require dismissal of the second action as a matter of law.³⁴ By appearing to permit in all circumstances the alternative of a stay, the court is sanctioning a second suit after judgment in the first, which would defeat the efficiency goals of the compulsory counterclaim rule.³⁵ The emphasis throughout *Gardner* on avoiding wasteful litigation and circuity of action, however, suggests that it may be necessary to confine those situations in which a stay might be appropriate.

The *Gardner* court, unfortunately, failed to provide any standards. In giving courts the options of stay and dismissal, it cited various federal court decisions, some of which have stayed and others of which have dismissed the compulsory counterclaim filed as a separate suit.³⁶ These courts, in general, also provide little guidance concerning when a stay might be appropriate.

One justification for granting a stay of the second action could be to protect the second plaintiff's choice of forum. Although courts rarely

33. For a discussion of treatment of this issue by other state courts, see note 21 *supra*. In certain statutory areas, the federal courts have found substantive policies to outweigh the procedural policies behind rule 13(a). See 6 C. WRIGHT & A. MILLER, *supra* note 19, § 1412. For example, in *Local 11, Int'l Bd. of Elec. Workers v. G.P. Thompson Elec., Inc.*, 363 F.2d 181 (9th Cir. 1966), the court refused to require grievances pending in arbitration to be pleaded as compulsory counterclaims in actions brought on grievances outside the scope of arbitration because to do so would be contrary to a national labor policy that encourages arbitration. *Id.* at 185.

34. *W.S. Boyd Sales Co. v. Seymour*, 255 N.C. 714, 122 S.E.2d 605 (1961).

35. A total eclipse of the rule's goals would be avoided because a stay would still eliminate the races to judgment that existed in the past. Moreover, collateral estoppel will preclude litigation in the second suit of issues actually decided in the first. Furthermore, *res judicata* could, it seems, operate to foreclose many of these second suits since it precludes a suit between the same parties on a claim that has been previously litigated between them. Yet, because the compulsory counterclaim and *res judicata* doctrines serve many of the same policies, it may be inconsistent to allow a compulsory counterclaim to be stayed and then to say later that *res judicata* requires it to be barred.

36. 294 N.C. at 177, 240 S.E.2d at 403.

give forum protection much consideration,³⁷ federal courts have in general been more sympathetic to the idea when it appears that forum shopping alone motivated the original plaintiff's forum choice.³⁸ Indeed, forum protection may often justify a stay in a divorce controversy because the substantive law governing divorce claims enables one spouse easily to thwart the other's choice of forum. A typical scenario follows: The wife's claim for alimony without divorce or for limited divorce on the ground of abandonment arises as soon as the husband leaves home; the husband, however, must wait until the one-year separation period expires before his absolute divorce claim accrues. By a timely filing of her claims so that her spouse's claim accrues prior to his deadline for answering, the wife can force her husband's compulsory counterclaim³⁹ and defeat his forum choice. The husband, to protect his forum preference, must ask for transfer of venue in his wife's action and/or, according to *Gardner*, file his claim independently and petition for a stay. A stay pending the outcome of the wife's action may therefore be justified to protect the husband's forum preference.

A stay would be particularly well justified when there is additional evidence that "forum thwarting" motivated the choice of situs in the first suit as, for example, when the wife files suit in one jurisdiction the day after she moves there from another jurisdiction in which she and her husband have lived for many years.⁴⁰ Indeed, there may be other special reasons for staying the second action. Absent undue prejudice, however, the ease with which litigants can travel between courts within the same state coupled with the advantages of consolidating litigation should be weighed heavily in determining the limits of *Gardner's* license to stay claims that are compulsory counterclaims in prior pending suits.

The application of the counterclaim rule to circumstances different from *Gardner* is uncertain. In *Gardner*, because both claims were based on the separation that occurred when the husband left home,⁴¹

37. Judicial protocol requires that when two courts of competent jurisdiction entertain related actions, the court in which the first action was brought should be given priority. *McDowell v. Blythe Bros.*, 236 N.C. 396, 72 S.E.2d 860 (1952).

38. See *Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 424 n.4 (2d Cir. 1965); *Leonard F. Fellman Co. v. Smith-Corona Marchant Inc.*, 27 F.R.D. 263 (E.D. Pa. 1961).

39. The husband's counterclaim will not be forced, of course, if he avails himself of the counterclaim exception and files suit only after judgment on his wife's claim. Clearly, however, in many circumstances central issues in the second suit will be precluded by the doctrine of collateral estoppel.

40. The situation in *Gardner* was a good example of this problem of "forum thwarting." See note 10 *supra*.

41. 294 N.C. at 176, 240 S.E.2d at 403.

they were characterized as arising out of the "same transaction or occurrence" and thus deemed compulsory. However, a divorce claim based on adultery, for example, may not be held to arise out of the same factual circumstances as one based on mental cruelty.⁴² Another requirement of a compulsory counterclaim is that it be a claim "which at the time of serving the pleading, the pleader has against any opposing party."⁴³ While in *Gardner* the husband's claim for divorce arose before the time he was required to answer in his wife's suit,⁴⁴ this definition requires that when the claim arises afterwards, both actions may proceed independently.⁴⁵

The scope of the counterclaim exception created by the court for circumstances in which the second claim is filed after judgment in the first also remains uncertain. In *Gardner*, the husband's claim was for a complete divorce.⁴⁶ Had he filed it after judgment in his wife's action, the court said, the compulsory counterclaim rule would not bar its prosecution because of the policy of protecting the marital bonds.⁴⁷ If the court's reasoning is carried further, counterclaims for alimony without divorce or for any remedy less than a complete severance of the marital ties could be barred if not asserted in the first action, because requiring their assertion if available may not be held to offend the policy that led the court to limit its holding.⁴⁸ Nevertheless, a counterclaim for a limited divorce may prove sufficiently offensive to the policy favoring marriage to trigger the exception.

Finally, the employment of *Gardner's* counterclaim rule when one of the two actions is filed outside North Carolina is also unclear. It seems certain that when the North Carolina action is filed last, North Carolina courts no longer have the discretion to continue proceeding as

42. The issue of the compulsory nature of the claim may be largely academic because a number of grounds are normally stated in a divorce claim, one of which is abandonment. In fact, in *Gardner*, abandonment was one of numerous grounds, *id.* at 174, 240 S.E.2d at 401, yet the court focused solely on abandonment in holding that both claims were part of the same occurrence, *id.* at 176, 240 S.E.2d at 403.

43. N.C.R. Civ. P. 13(a), *quoted in* note 6 *supra*.

44. *See* note 9 *supra*.

45. The same result was reached in *Fullwood v. Fullwood*, 270 N.C. 421, 154 S.E.2d 473 (1967), *discussed in* note 28 *supra*, prior to the enactment of the rules of procedure. Of course, as has been pointed out, a wife could avoid this situation by a timely filing of her claim.

46. 294 N.C. at 173, 240 S.E.2d at 402.

47. *Id.* at 181, 240 S.E.2d at 406.

48. A recent statutory change, however, requires a court to ensure that all support and alimony claims, if existent, have been adjudicated before it grants an absolute divorce based on the statutory separation period. N.C. GEN. STAT. § 50-6 (Supp. 1977).

they did under the abatement doctrine,⁴⁹ but are required either to dismiss or to stay the claim.⁵⁰ What other jurisdictions will do when they entertain the second action remains to be seen. A refusal to dismiss or stay the second claim when it is a compulsory counterclaim in the North Carolina suit is arguably a violation of the Constitution's full faith and credit clause,⁵¹ which requires states to honor the public acts and judicial proceedings of other states absent a strong state policy dictating otherwise.⁵² The compulsory counterclaim rule in general has, however, met with problems in interstate actions,⁵³ with states invoking this exception and refusing to honor the rules of other states on the ground that they are protecting their own citizens.⁵⁴ Until the United States Supreme Court rules on the status of compulsory counterclaims in interstate actions, races to judgment will continue when similar actions are filed in separate states.

The *Gardner* result was a logical implementation of the policy underlying the rules of procedure of avoiding wasteful litigation and inconsistent results. The new practice that the court prescribed is a needed amendment of the old, but the court did not go far enough in effectuating the rules' aims. Instead, it left the question whether to stay or dismiss the second claim wholly to the discretion of trial judges, permitting possible frustration of the rules' intent. Many other questions, though not squarely presented in *Gardner*, are also certain to arise—questions such as the appropriate solution in interstate actions, the compulsory nature of a claim for less than a complete divorce, and the reach of the "transaction or occurrence" test. The courts must now

49. See note 27 *supra*.

50. There is nothing in *Gardner* to suggest that the compulsory counterclaim rule does not cross state lines. However, because the court did note that the substantive law governing abatement is not necessarily abrogated, 294 N.C. at 175 n.5, 240 S.E.2d at 402 n.5, it is possible that courts will continue to use the old procedure.

51. U.S. CONST. art. IV, § 1.

52. This clause "does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved." *Hughes v. Fetter*, 341 U.S. 609, 611 (1951).

53. See *Kennedy, Counterclaims Under Federal Rule 13*, 11 HOUS. L. REV. 255, 280-83 (1974).

54. Of course a foreign court in a *Gardner* situation could also contend that giving effect to North Carolina's compulsory counterclaim rule deprives its citizens of substantive rights because the substantive divorce law of North Carolina does not afford them much protection. See *Vestal, Reactive Litigation*, 47 IOWA L. REV. 11, 20-21, 24 (1961).

pick up where *Gardner* left off and resolve these issues consistent with the purpose of the compulsory counterclaim rule.

HARRIET S. SUGAR

Criminal Law—*State v. Looney*: Defendants' Need for Court-Ordered Psychiatric Evaluations of Witnesses' Credibility Outweighed by Witnesses' Right to Privacy

A growing number of states have held that in criminal trials judges have the discretion to order a psychiatric examination of a key prosecution witness when there is evidence the examination may disclose an abnormal mental condition bearing on credibility.¹ In a case of first impression, however, the North Carolina Supreme Court in *State v. Looney*² refused to join this growing body of jurisdictions recognizing such discretion in the trial court. Without expressly deciding whether the trial judge lacked the inherent authority to order a witness to submit to a psychiatric exam, the supreme court strongly suggested that under present North Carolina criminal procedure the trial judge should not order such an examination of a witness in the absence of specific statutory guidelines provided by the North Carolina legislature.³ The *Looney* court then concluded that, even if the trial court could properly have granted defendant's motion for a court-ordered exam, denial of the motion under the circumstances of the *Looney* case was not an abuse of discretion.⁴

On December 30, 1974, the mutilated body of defendant Looney's wife was discovered in the Looney home.⁵ Subsequent investigation of

1. For a recent case evidencing the trend toward sanctioning court-ordered psychiatric exams, see *Forbes v. State*, 559 S.W.2d 318, 321 (Tenn. 1977). For a collection of cases on the subject, see Annot., 18 A.L.R.3d 1433 (1968). Federal courts trying criminal cases also have the authority to order a government witness to submit to a psychiatric examination in order to probe the witness' credibility. See, e.g., *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1973).

2. 294 N.C. 1, 240 S.E.2d 612 (1978).

3. *Id.* at 28, 240 S.E.2d at 627.

4. *Id.*

5. Record at 22. The police officials involved in the case and the pathologist who performed an autopsy on the body later testified under cross-examination that the case was the most, or one of the most, brutal homicides they had encountered. *Id.* at 22, 25, 31, 34. The decedent received several blows and stabs that independently would have been fatal. *Id.* at 34. The body showed evidence of more than 60 severe wounds. *Id.* at 32. In support of his motion for a psychiatric