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Amendment to the Civil Practice Act Relating to Counterclaims in Matrimonial Actions

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created a workable rule which will enable the courts of other jurisdictions to enforce the judgment without the necessity of interpreting for itself the law of New York on this subject.

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AMENDMENT TO THE CIVIL PRACTICE ACT RELATING TO COUNTERCLAIMS IN MATRIMONIAL ACTIONS.—In March, 1948, the legislature of New York enacted a bill [1] repealing Section 1168 of the Civil Practice Act [2] which read as follows:

> COUNTERCLAIM IN MATRIMONIAL ACTION. Where an action for divorce, separation or annulment is brought by either husband or wife, a cause of action for divorce, separation or annulment against the plaintiff and in favor of the defendant may be interposed in connection with a denial of the material allegations of the complaint, as a counterclaim.

The repeal of this section was recommended by the Judicial Council of the State of New York in furtherance of the Council's general policy to foster legislation which will effect the determination of as many controversies as possible in one action thus avoiding multiplicity of suits.[3] Section 266, Civil Practice Act, as amended in 1936, which defines counterclaims generally, is broad enough in terms to include the counterclaims referred to in Section 1168. However, the courts have construed Section 1168 to be a limitation on Section 266, as shall appear later, and as a result, counterclaims have been denied which should have been allowed.

Since under Section 266, as it originally stood, only such counterclaims were permissible as tended to defeat or diminish plaintiff's recovery,[4] it was necessary to enact Section 1168 which in its original form permitted counterclaims for divorce or separation in divorce or separation actions, so that a matrimonial counterclaim of a nature different from that in the complaint could properly be interposed. In 1936, in recognition of the general desirability of avoiding multiplicity of suits, the legislature repealed the old Section 266 and added the present section: [5]

> COUNTERCLAIM DEFINED. A counterclaim may be any cause of action in favor of the defendants or some of them against the plaintiffs or some of them, a person whom a plaintiff represents or a plaintiff and another person or persons alleged to be liable.

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[1] Laws of N. Y. 1948, c. 282.
[2] Laws of N. Y. 1937, c. 525.
[3] N. Y. JUDICIAL COUNCIL REPORT, LEGIS. DOC. No. 13, p. 20 (1946); N. Y. JUDICIAL COUNCIL REPORT, LEGIS. DOC. No. 2, p. 15 (1936); N. Y. JUDICIAL COUNCIL REPORT, LEGIS. DOC. No. 1, pp. 1, 44 (1935).
[4] N. Y. CODE OF CIVIL PROCEDURE § 501; Zawadsky v. Zawadsky, 169 Misc. 404, 7 N. Y. S. 2d 966 (Sup. Ct. 1938).
[5] Laws of N. Y. 1936, c. 324.

The purpose of this section is to permit parties to litigate between themselves any and all claims which each may possess or acquire against the other up to the time of trial.[6] This section is limited by Rule 109 of the Rules of Civil Practice and Sections 267 to 271, Civil Practice Act, none of which concern us here, and Section 262, Civil Practice Act,[7] which was amended at the same time that Section 266 was rewritten. Section 262 is designed as a safeguard against unjust or unwise counterclaims, giving the courts discretion to dismiss without prejudice when they deem advisable.

These sections concerning counterclaims are of course also restricted by the common law requirements as to counterclaims generally, namely that counterclaims must state allegations sufficient to state a cause of action,[8] and that they must be affirmatively pleaded as such or will be deemed by the courts to be defenses only.[9]

Prior to the amendment of Sections 266 and 1168, the courts had refused to allow a counterclaim for separation in an action for annulment. It was held in *Sorenson v. Sorenson*[10] that there was no statutory authority for such proceeding. The court there stated its further opinion that the actions were inconsistent since a separation assumes a marriage while an annulment assumes no legal marriage. After the amendment of Section 266 it would appear that the statutory authority for such counterclaim would be no longer lacking under Section 266, as Section 1168, as it then existed, provided only for counterclaims in divorce and separation actions. In view of its later construction, however, it is possible that the courts may have held that the legislature intended to limit all matrimonial counterclaims to those available under Section 1168. However this may be, the question seems not to have been judicially determined. And in 1937, in order to resolve any potential misconstruction, Section 1168 was amended so as to include counterclaims for annulment in divorce, separation and annulment suits and vice versa.[11]

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[6] Bricken Const. Corp. v. Cushman, 163 Misc. 371, 297 N. Y. Supp. 194 (Sup. Ct. 1937).

[7] Laws of N. Y. 1936, c. 324. The part of Section 262 which is pertinent here reads: A defendant may set forth in his answer as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable; *provided that the court may in its discretion, whenever the interests of justice require, order severance of the action or separate trials, or strike out the counterclaim without prejudice to the bringing of another action. Where defendant deems himself entitled to an affirmative judgment by reason of a counterclaim interposed by him he must demand the judgment in his answer.* (Matter in italics was added in 1936.)

[8] Crouch v. Crouch, 193 App. Div. 221, 183 N. Y. Supp. 657 (2d Dep't 1920); PRASHKER, NEW YORK PRACTICE § 176 (1947).

[9] Bates v. Rosekrans, 37 N. Y. 409 (1867); Dolgoff v. Schnitzer, 209 App. Div. 511, 205 N. Y. Supp. 11 (1st Dep't 1924).

[10] 122 Misc. 196, 202 N. Y. Supp. 620 (Sup. Ct. 1924), *aff'd*, 219 App. Div. 344, 220 N. Y. Supp. 242 (2d Dep't 1927).

[11] Laws of N. Y. 1937, c. 525.

As a result of the failure to repeal Section 1168 when Section 266 was changed and Section 262 enlarged, the courts have generally construed Section 1168 as a limitation on Section 266. In *Zawadsky v. Zawadsky,*[12] in dismissing a counterclaim for separation in an action for a declaratory judgment that no valid marriage was contracted but that the children were nevertheless legitimate, the Supreme Court said: "Although . . . Section 266 in its present form is broad enough to permit matrimonial counterclaims in actions which are not matrimonial in character, Section 1168, Civil Practice Act, provides for matrimonial counterclaims only 'where an action for divorce, separation or annulment is brought by either husband or wife.' If matrimonial counterclaims may, as the result of the amendment of Section 266, Civil Practice Act, be permitted in any action, regardless of its character, the provisions of Section 1168 would be entirely superfluous and the section would be utterly meaningless. That the failure to repeal Section 1168, Civil Practice Act, was not inadvertent on the part of the legislature is evidenced by the fact that a year after the amendment of Section 266, Civil Practice Act, the legislature amended Section 1168, Civil Practice Act, so as to permit counterclaims for annulment, the section having theretofore authorized only counterclaims for divorce and separation." [13]

This interpretation was adopted by the Appellate Division in 1946 in *White v. White* [14] which was an action for necessaries brought by the wife in which the husband counterclaimed for a separation on the ground of abandonment; and again in 1947 in *Dannenberger v. Dannenberger,*[15] where the husband sought to impress a trust upon realty acquired during coverture but held in the wife's name, the wife counterclaiming for a separation.

On the other hand, the courts have sometimes held actions for declaratory judgments to be matrimonial in nature, thus properly coming under Section 1168.[16] This view is not, however, in conflict with the limitation of Section 266 held to exist because of Section 1168. The only conflict among the cases, if it can be so called, is the determination as to whether or not the basis of the complaint is matrimonial in nature.

These cases are to be distinguished from *Saxon v. Saxon,*[17] an action for necessaries in which a counterclaim for conversion of personalty was interposed by the husband. Plaintiff, on motion to dismiss the counterclaim, contended that the limitation placed on Section 266 by Section 1168 should be so broadly construed as to

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[12] 169 Misc. 404, 7 N. Y. S. 2d 966 (Sup. Ct. 1938).
[13] *Id.* at 406, 407, 4 N. Y. S. 2d at 968.
[14] 271 App. Div. 581, 66 N. Y. S. 2d 273 (1st Dep't 1946).
[15] — Misc. —, 71 N. Y. S. 2d 785 (Sup. Ct. 1947).
[16] Antrones v. Antrones, — Misc. —, 58 N. Y. S. 2d 241 (Sup. Ct. 1945); Kiebler v. Kiebler, 170 Misc. 81, 9 N. Y. S. 2d 909 (Sup. Ct. 1939).
[17] 178 Misc. 781, 36 N. Y. S. 2d 488 (Sup. Ct. 1942).

exclude all suits between husband and wife based on matrimonial difficulties from the operative scope of Section 266. The court, in refusing to accept this view, said, "If it was the intention of the legislature to restrict counterclaims in actions between husband and wife to those mentioned in Section 1168, language expressing such an intention could readily have been employed and this is as much so with respect to new Section 266." [18] This is particularly so as remedial statutes should receive liberal construction.[19]

As a result of the limitation thus placed on Section 266 by Section 1168, certain counterclaims were denied which would have been otherwise valid under Section 266, resulting in a necessity for bringing separate suits. It is for this reason that, effective September 1, 1948, Section 1168 will be removed from the Civil Practice Act, and thereafter all matrimonial counterclaims will be brought directly under Section 266 as limited by Section 262.

ANNE G. KAFKA.

AMENDMENT TO SURROGATE'S COURT ACT RELATIVE TO CONVEYANCE OF REAL PROPERTY BY EXECUTOR OR ADMINISTRATOR TO HOLDER OF CONTRACT OF SALE MADE BY A DECEDENT.—Section 227 of the Surrogate's Court Act has been recently amended in order to facilitate the conveyance of real property of a decedent by his executor or administrator, pursuant to contracts of sale made by the decedent, without requiring court approval for such transfer, although the executor or administrator may seek such approval at his own option.[1] The section as amended now reads: [2]

> CONVEYANCE OF REAL PROPERTY BY EXECUTOR OR ADMINISTRATOR TO HOLDER OF CONTRACT OF SALE MADE BY A DECEDENT. Where a decedent dies seized of *real property* after he has made a contract for the conveyance thereof *remaining unexecuted at his death,* his executor, administrator, *or the successor of either,* may make a deed reciting said contract and conveying *such real property. The vendor's legal representative* or the vendee, *his legal representative, distributees, devisees* or assigns, may file a petition praying for the confirmation of *such conveyance,* or *in the case of a vendee, his legal representative, distributees, devisees or assigns,* for a decree that the same be made and delivered, or the *vendor's legal representative* may pray for the like

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[18] *Id.* at 782, 36 N. Y. S. 2d at 489.

[19] *In re* Greenberg's Estate, 261 N. Y. 474, 185 N. E. 704 (1933); Ginsberg Realty Co. v. Greenstein, 157 Misc. 148, 283 N. Y. Supp. 100 (Munic. Ct. 1935), *aff'd,* 158 Misc. 473, 286 N. Y. Supp. 33 (Sup. Ct. 1936).

[1] Laws of N. Y. 1948, c. 617.

[2] New matter is in italics. The section became effective September 1, 1948.