NOTES

CONSENT DISMISSAL OF PROCEEDINGS BROUGHT TO OBTAIN ADJUDICATION OF CORPORATE INSOLVENCY.—Parties to a litigation are generally permitted to adjust their differences[1] and to agree to a consent dismissal of the court proceedings.[2] If the litigants are conciliatory, why compel them to be antagonistic? It is of interest, therefore, to note the recent case of *Auburn Button Works, Inc.* v. *Perryman Electric Co., Inc.*[3] and to consider the principles expressed therein which motivated the court in refusing to permit a consent dismissal of proceedings instituted pursuant to the provisions of the New Jersey Corporation Act,[4] wherein a creditor sought an adjudication of insolvency against a corporation and the appointment of a statutory receiver. The issue was squarely raised. The complainant filed the usual verified bill of complaint and obtained the usual order to show cause. Shortly thereafter, and prior to the return day of the order to show cause, the complainant and defendant adjusted their differences by a proposed payment of the former's claim. Complainant thereupon moved to dismiss the proceedings.[5] The defendant joined in the motion.[6] The court denied both motions, and directed a thorough investigation into the affairs of the corporation, an investigation conducted apparently by litigants who had expressly disavowed any inclination to conduct one. It should also be

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[1] Some settlements require court approval—*e.g.*, proceedings brought in behalf of infants, although great weight is given to the judgment of the interested parties.

[2] The question usually is as to whether the plaintiff or complainant can discontinue without the consent of the defendant. As is well known, plaintiffs in law actions, where no counterclaim has been filed, have wide latitude in this regard (in this state). Bauman v. Whiteley, 57 N.J.L. 487, 31 Atl. 982 (Sup. Ct. 1895); Malone v. Erie R.R. Co., 90 N.J.L. 350, 101 Atl. 415, (Sup. Ct. 1917); 3 Comp. Stat. (1910), p. 4103, section 160. Is the same rule applicable in Chancery? See Street v. Harris, 93 N.J.Eq. 83, 115 Atl. 209 (Ch. 1921), *aff'd.* per curiam 93 N.J.Eq. 503, 116 Atl. 926 (E&A 1921). Consider also Rules of the Court of Chancery, Rule 115.

[3] 107 N.J.Eq. 554, 154 Atl. 1 (Ch. 1931).

[4] General Corporation Act, section 65, 1 Comp. Stat. (1910), p. 1640, as amended by Laws of 1912, chap. 300, p. 535, section 1, as amended by Laws of 1931, chap. 221, p. 545. Consider also sections 64 to 86, as amended.

[5] As the proceeding is not one to collect a debt, the complainant cannot be compelled to accept payment and to discontinue the suit. Long v. Lambertville Co., 103 N.J.Eq. 179, 142 Atl. 651 (Ch. 1928). Our concern is only with those situations where both parties agree to a dismissal.

[6] Arguably, complainant should not be permitted to dismiss, where the defendant opposes such a termination. Defendant may desire a completer vindication than a voluntary abandonment of the litigation. Defendant may desire an investigation. Consider Ex Parte Welsh, 93 N.J.Eq. 303, 116 Atl. 23 (Ch. 1922)—in a habeas corpus proceeding for custody of children, Vice Chancellor Backes refused to permit a discontinuance by the petitioner, where the respondent opposed it. It is submitted that if both parties had consented to the dismissal (in the Welsh case), an order to that effect would have been entered.

noted that no other creditor or stockholder had intervened[7] and that no decree or adjudication of any nature had been entered.[8] The belief is here expressed that, upon analysis, the conclusion becomes irresistible that the decision of the court in the *Perryman Electric Co.* case is not sound. The ensuing analysis includes a consideration of the authorities cited by the court, a reference to the cases in other jurisdictions, and a discussion of the underlying principles.

To support the pronouncement that the proceedings could not be withdrawn or dismissed by consent of the parties, the court refers to four cases. One of these is *Pierce* v. *Old Dominion Copper Mining & Smelting Co.*[9] The citing of this case must be attributed to the frailties of the human equation. The learned Vice-Chancellor in the course of his profound discussion in the *Pierce* case expressly states, in language which cannot be misread, that this statutory action prior to decree can be discontinued by the parties.[10] The court refers to *Liss* v. *Security Finance Co.*[21] In this case, a receiver had been appointed, an adjudication of insolvency had been entered, notices had gone out to creditors and stockholders, and strenuous opposition to the discontinuance of the suit had arisen.[12] The case is therefore patently distinguishable from the one under discussion. The same can be said of *Rawnsley* v. *Trenton Mutual Life Insurance Co.*[13] No intimation can be found in the latter

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[7] The status of the intervenor is simple. He is a co-complainant. And of course litigation cannot be discontinued without the consent of all complainants. If the court is correct in the Perryman Electric Co. case, the query arises as to whether intervention in the suit is at all necessary.

[8] After decree, it can be said that all creditors and stockholders are parties. Upon the consent of *all* of the said parties, the court in its discretion should permit a termination of the proceedings; although Section 69 of the General Corporation Act may militate against this.

[9] 67 N.J.Eq. 399, 58 Atl. 319 (Ch. 1904).

[10] "It is well settled that when the decree has passed, disabling the corporation and establishing the conditions under which a distribution of assets will follow through a receiver, if there are any assets, the power of the particular stockholder or creditor who instituted the proceedings to control the decree is gone.

"This statutory action, as in suits brought by a creditor on behalf of himself and other creditors who may come into the suit, prior to decree, undoubtedly has so far the character of all actions, strictly *inter partes,* that the creditor may discontinue it at any time provided no other creditor has been allowed to intervene." *Supra* note 9.

[11] Opinion by Chancellor Walker. By the Chancellor's order not to be published in the official or unofficial reports.

[12] The opinion starts in these words: "On application to discharge receivers, dismiss bill, etc. In the above stated cause a bill for an injunction and receiver was verified by the complainant and filed. Consent, in form at least, was given on behalf of the company for the appointment of a statutory receiver." Again, " * * * it was adjudged that the company was thereby declared to be insolvent and not able to resume its business within a short time with safety to the public and its creditors and advantage to its stockholders." Also " * * * affidavits of such mailing in accordance with the order was duly filed giving a list of the stockholders and creditors of the company to whom the mailing was made."

[13] 9 N.J.Eq. 95, (Ch. 1852).

case that parties cannot discontinue a suit of this nature prior to decree; in fact, there was no need for such a statement, in view of the bitterness of the litigation. The fourth case cited by the court is *Naspo* v. *Summit Sweets Shoppe, Inc.*[14] It is apparent from a reading of the opinion in this case[15] that the defendant admitted its insolvency, and that the complainant did not consent to the payment of his small claim and the dismissal of the suit.[16] In short, a consideration of the four cases cited by the court leaves one unconvinced of the soundness of the opinion.

A reference to the authorities in other jurisdictions is helpful. There are numerous instances of class bills,[17] where the complainant sues, not only on behalf of himself, but also on behalf of others who desire to come in and share in the expense of the litigation. The overwhelming weight of authority is to the effect that the parties to such an action can abandon, compromise or discontinue the action at their pleasure, provided no other party has intervened, and provided no judgment or decree has been entered.[18] Most of the cases assert that the complainant is *dominus litis*[19]—inferring that if he desires to discontinue, he does not require the assent of the defendant. The complainant assumes the burden of the litigation only insofar as his interests require. The complainant acts at his own expense and on his own initiative.

Two reasons are assigned by the court for its attitude militating

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[14] 106 N.J.Eq. 49, 150 Atl. 199, (Ch. 1930).

[15] The opinion in this case is by the same Vice Chancellor who decided the Perryman Electric Co. case. It may be said, therefore, to lose somewhat its efficacy as a precedent.

[16] Naspo v. Summit Sweets Shoppe, Inc.—Chancery Docket 78-258. On motion pending appeal, all proceedings were stayed, and the appointment of receiver vacated—all within a week of the Vice Chancellor's order. Subsequently a receiver was appointed in another suit, Philadelphia Dairy Products v. Summit Sweets Shoppe, Inc.—Chancery Docket 80-384. The appeal in the Naspo case was then dropped.

[17] Section 65 of the Corporation Act, referred to in footnote 4, permits the suit to be brought by a creditor or stockholder. The statute is silent as to the bill being a class bill. Such has been its construction however, and an undoubtedly correct construction—see Ranwsley v. Trenton Mutual Life Insurance Co., *supra;* Pierce v. Old Dominion Copper Mining and Smelting Co., *supra.*

[18] Hirshfeld v. Fitzgerald, 157 N.Y. 166, 51 N.E. 997 (1898) and the numerous cases cited therein, particularly the English cases. See also Bernheim v. Wallace, 217 S.W. 916 (Ky. 1920), 8 A.L.R. 938, 5 POMEROY EQUITY JURISPRUDENCE (4th ed.) section 2315; and also the notes in 46 L.R.A. 839, and in 8 A.L.R. 950.

[19] "As I understand it, the plaintiff has filed a bill in such a manner as that he is *dominus litis,* and there is nothing upon the face of the bill, as far as I can make out, which shows that he might not, if he pleases, dismiss the bill immediately. * * * it is a suit over which he has complete dominion, and it is a suit in which, as I understand, he is not entitled to a decree of course, as in a creditor's suit, but it is a bill which, if a decree is made, may turn out for the benefit of others besides himself. But upon the face of the bill the plaintiff is the only person with whom the defendants can deal, and then they make an application to stop it. I do not see why the defendants are not at liberty to make a common application in this as in another suit." Scarth v. Chadwick, 14 Jur. 300, 19 L.J. Ch. n.s. 327.

against a consent dismissal of the bill of complaint. The first consists of an admonition that the Court of Chancery cannot be used as a collection agency. The same talk about a collection agency may be found in the *Summit Sweets Shoppe case.*[20] If the Vice-Chancellor meant that the Court of Chancery should not be used as a tribunal whereby the creditor could collect an indebtedness due him, he disregarded the fact that the Court of Chancery is a civil tribunal to which resort can often be had to enforce the performance of contracts, including the collection of debts.[21] Of course, the legislature did not enact this legislation as a method whereby creditors could collect debts due them. It is best, however, to view these matters objectively.[22] Creditors vary in their aggressiveness. Creditors, who institute attachment proceedings, foreclosure suits, mechanics' lien actions, replevin suits, or who distrain under landlord and tenant acts, are generally *personae non gratae* to the debtors. To criticize creditors who use Section 65 of the Corporation Act to collect claims is one thing. To use such criticism as a reason for denying to parties *sui juris,* the right to agree to a discontinuance of pending litigation is another thing. It would appear to be an unnecessary comment by the court when the debtor does not raise the point.

The second reason assigned by the court in the *Perryman Electric Co.* case is more meritorious, but likewise, upon analysis, unconvincing.[23] The bill of complaint, it is said, is filed not only for the benefit of the complainant, but also for the benefit of all creditors and stockholders of the defendant company, and the public at large. The complainant is seeking not only redress for his particular private grievances but also the advancement of the public welfare. This involves the thought that the moment the bill is filed, the creditors and stockholders and the public become parties to the litigation. It may be conceded that such a thought is tenable—but if it is, the court, on an application to discontinue prior to decree, should require the giving of notice to all of the creditors and stockholders of the defendant corporation.[24] To appoint a master and

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[20] Cited *supra.*

[21] The most popular actions in the Court of Chancery today are undoubtedly mortgage foreclosure suits. In these suits mortgagees use the court as a debt collecting tribunal.

[22] It has been held that the motive of the complainant in instituting suit is immaterial. Bull v. International Power Co., 84 N.J.Eq. 6, 92 Atl. 796 (Ch. 1914) *aff'd,* 85 N.J.Eq. 206, 96 Atl. 364 (E&A 1915).

[23] The writer of the note in 17 CORNELL LAW QUARTERLY, 140, apparently concludes that the decision in Auburn Button Works v. Perryman Electric Co. is correct. As hereinafter stated, there is no warrant in the statute for that note writer's statement to the effect that all creditors and stockholders have a substantial interest in the suit the moment he bill is filed. This interest arises upon adjudication. As the court puts it in Bernheimer v. Wallace, *supra* note 18: "The party so suing or defending for a class unrepresented except by him brings the class into court, and may take them out when he goes, if he goes out before there has been an adjudication of the rights of the class."

[24] A statute could be passed requiring corporations to file forthwith upon the filing of the bill of complaint a verified list of creditors and stockholders. The wisdom of such a statute may be doubted.

to entrust litigation to litigants who have expressly disavowed any inclination to conduct it, as the court did in the case under discussion, would appear to be the wrong way to handle the situation.[25] In view of the fact that the Corporation Act contains no provision as to the giving of notice to creditors and stockholders where a dismissal prior to decree is contemplated,[26] action of the court requiring the giving of such notice would be a species of judicial legislation. The courts should take statutes as they find them.[27] The truth of the matter is that the public interest arises upon adjudication—not prior thereto. The protection of the public at large from corporate fraud and imposition can best be left to other agencies. It has not yet been demonstrated that these agencies are so impotent that our Vice-Chancellors must adopt any such paternal-

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[25] Reference is made to Gillette Safety Razor Co., a corporation, v. Sinder's Cut Rate Stores, Chancery Docket 89-315. In this case the complainant filed an innocuous verified bill of complaint, basing its case upon the defendant's failure to meet several checks given for merchandise. The defendant filed affidavits attempting to explain the failure to pay the checks and portraying its own solvency in a laudatory fashion. On the return day of the order to show cause both parties announced to the court that a settlement had been effected by the proposed payment of the complainant's claim in full and payment of a small counsel fee. The court, following its own decision in the Perryman Electric case refused to consider the proposition of settlement, and prepared its own order stating fully the facts hereinbefore stated, and appointing a master to investigate the affairs of the corporation, pursuant to Ch. 207, Laws of 1919. The master conducted a hearing at which neither the complainant nor its solicitor appeared. On the testimony presented by the defendant corporation, the master reported that the corporation was solvent. It is difficult to comprehend the protection afforded to other creditors and stockholders in an *ex parte* investigation of this nature. The bill was, of course, dismissed. It may safely be said that none of the other creditors had any knowledge that such a bill had been filed, or the disposition thereof.

[26] Reference is here made to the National Bankruptcy Act of 1898 as amended. Dismissal by consent or otherwise is not permissible, except on notice to parties in interest. Section 59-g reads as follows: "A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."

[27] Hirshfeld v. Fitzgerald, *supra* note 18: "It is now contended that the action brought by the plaintiff was representative, and on behalf of all the creditors of the bank, and that in bringing the action he became a quasi trustee for the other creditors, and that he could not settle or discontinue the action. This question is of great importance, and should receive careful thought and study; for, if the appellants are correct in their contention, stockholders in an action of this character have only to buy out or settle with the plaintiff to defeat a recovery against them. The courts, however, are not responsible for the statute. Our duty is to construe, and not to make, it."

istic attitude as the court did in the *Perryman Electric Co.* case.[28] It would seem, therefore, that the court should treat these actions, brought under Section 65 of the Corporation Act in the same manner as other equity actions and permit, as a matter of course, consent discontinuances prior to decree.[29]

ENFORCEMENT OF ZONING ORDINANCE IN EQUITY—In *Srager* v. *Mintz*[1] the New Jersey Court of Errors and Appeals has laid down the rule that a court of equity will not, at the suit of a private complainant, enforce a municipal zoning ordinance unless the violation complained of shall in itself constitute a common law nuisance, without regard to the ordinance. While it must be admitted that the decisions, within New Jersey and in other jurisdictions, are not in accord, the very marked tendency of the courts throughout the country—and in New Jersey as well,—has been to sustain the jurisdiction of equity.

Thus in *Gaston* v. *Ackerman*[2] it was held that an owner of land in a residential zone had a sufficient status to review the action of a board of appeals in granting a permit to erect an apartment house on the same street and in the same zone on the ground that "the prosecutor has such a *property interest*[3] as entitled him to raise the question as to the right of the board of appeals to grant the building permit."

Again in *Stokes* v. *Jenkins*[4] the court held in a case where side-line provisions of a zoning ordinance had been violated, that a neighboring property owner might have recourse to equity to enjoin a breach of the zoning ordinance. The opinion emphasized the reciprocal liabilities and privileges set up by the ordinance, referred to the injunctive relief provided in the zoning enabling act[5] in respect of municipalities and reasoned from general principles already well established to the effect that legislation which altered the relations between individual members of the community might give rise to new individual rights though pri-

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[28] It is of interest to note that subsequent to the finding in the reported Perryman Electric Co. case to the effect that the corporation was not insolvent, a suit was instituted by another creditor, receivers appointed, and a condition of hopeless insolvency discovered. This matter is still pending, and it is now clear that creditors will receive only a small percentage of their claims. Engineering Co., a corporation, v. Perryman Electric Co., Chancery Docket 86-615.

[29] There certainly can be no urgent public policy in the commencement of these actions. Chap. 221, Laws of 1931 restricts stockholders in the commencement of an action of this nature. A stockholder or stockholders commencing the suit must have at least ten per cent of the outstanding stock. Our courts have frequently held that in the exercise of their discretion, decrees adjudicating insolvency and appointing receivers should not be entered, except in very clear cases. Greenbaum v. Lafayette & Broad Realty Corp., 96 N.J.Eq. 317, 124 Atl. 775 (E&A 1924); Kelly v. Kelly-Springfield Tire Co., 106 N.J.Eq. 545, 152 Atl. 166, (Ch. 1930).

[1] 109 N.J.Eq. 544 (E.&A. 1932).

[2] 6 N.J. Misc. 696, 142 Atl. 546 (Sup. Ct. 1928).

[3] Italics ours.

[4] 107 N.J.Eq. 318 (Ch. 1930).

[5] P.L. 1928, 696.