

affecting the right of withdrawal, has not as yet been established by litigation, but as with the statutes and decisions discussed herein such validity will undoubtedly be established under a proper exercise of police power.

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Newark, N. J.

CONSENT DISMISSAL OF APPEAL UPON SETTLEMENT BY THE PARTIES—It is the frequently reiterated policy of the courts to look with favor upon the amicable settlement of claims by litigants, thus obviating the necessity of action by the courts.¹ That it is a wise policy will hardly be controverted; nor will it be contended that it should be entirely unrestrained in its application. Thus, settlements effected on behalf of infants or others not *sui juris* must be made under the scrutiny of the court. However, there can be little doubt that a settlement concurred in by all interested parties, they being competent, and its validity impeached by none, should be given full force and effect.

Little difficulty is experienced when the settlement or compromise is made before the matter has been submitted to a judicial tribunal for adjudication. If the parties make their compromise after suit begun, but before judgment or decree, there is little doubt of their ability to have the action dismissed by their concerted withdrawal.² Is their joint power of control over the litigation lost after an appeal has been taken from the judgment of the lower court and has been argued before the appellate court? If the parties, at this state of the proceedings, before the opinion of the court has been rendered, effect a settlement, may the court disregard the desire of both parties to withdraw the case, and dis-

so held in trust shall not be disbursed or credited to the share accounts until the further order of the Commissioner of Banking and Insurance.

"(b) Payments not in excess of \$50. in any month to any one member may be made where such member in the opinion of the Board of Directors is in extreme necessitous circumstances but the total of such payments to any member shall not exceed 25% of the dues paid in by such member upon his shares and standing to his credit upon the books of the Association on the day and date of this order.

"(c) The Association may grant share loans in lieu of such payments in such extreme necessitous cases but not to exceed the amounts hereinbefore limited.

"4. No member shall have a right to sue your Association to recover the withdrawal or maturity value of the shares so long as your Association complies with this and subsequent orders of the Commissioner of Banking and Insurance."

¹ 12 C. J. 336, 337; 5 R. C. L. 878 §. 3.

² This right may be limited in the case of so-called "class bills" after the intervention of third parties. For a discussion of that and related questions see I MERCER BEASLEY L. REV. 2, p. 71, *Consent Dismissal of Proceedings Brought to Obtain Adjudication of Corporate Insolvency*. We are concerned only with a situation in which all the parties in interest have consented to the dismissal.

miss the appeal, delivering its opinion notwithstanding?³

"The necessary requisite to appellate jurisdiction is the existence of an actual controversy; therefore, it is not within the power of the court to decide abstract or hypothetical questions which are disconnected from the gravity of actual relief, or from the determination of which no practical result will follow."⁴ Such questions are commonly denominated "moot questions". The Supreme Court of the United States has frequently declared that it will not, for it cannot, try cases in which the subject matter has become moot for any reason.⁵ It has consequently dismissed numerous appeals upon the ground that the questions had become moot and were therefore no longer a subject appropriate for judicial action.⁶ This even in cases where the matter had vital importance as a guide for future conduct, and where all parties concerned desired that the court decide the matter.⁷

³ The case of *Bernheim v. Wallace*, 217 S. W. 916 (Ct. of App., Ky., 1920), 8 A. L. R. 938, goes to the extent of saying that even after litigation has been brought to the court of last resort and there has been a final judgment by that court determining the rights of the parties, accompanied by directions to the lower court, the parties may settle the matters at issue and may disregard in whole or in part the directions of the court.

⁴ *Caldwell v. Loveless*, 17 Ala. App. 381; 85 So. 307 (Ct. of App. 1920).

⁵ In *California v. San Pablo*, 149 U. S. 308, 314; 13 Sup. Ct. 876; 37 L. ed. 747, (Sup. Ct. 1893), the court, citing numerous cases said, "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. *But the court is not empowered to decide moot questions, or abstract propositions, or to declare for the government of future cases, principles of law which cannot affect the result as to the thing in issue in the case before it.* No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty, of the court in this regard." (Italics ours.)

⁶ *United States of America v. Hamburg-Amerikanische Packet-fahrt-Actien Gesellschaft*, 239 U. S. 466, 36 Sup. Ct. 212; 60 L. Ed. 381 (Sup. Ct. 1916), was an action to prevent the execution of an agreement alleged to be in violation of the Anti-trust Act. After the appeal had been taken, the entrance of the United States into the World War rendered impossible the fulfillment of the agreement. The appeal was dismissed as being moot. It was futilely contended that in view of the character of the questions and the possibility that at the end of the war the parties might resume their asserted illegal combination, the court should decide the controversy in order that by operation of the rule to be established, any future attempted renewal would be impossible. See also *Dakota Coal Co. v. Fraser*, 267 Fed. 130, (C.C.A., 8th Dist. 1920). As a result of a coal strike the Governor of North Dakota directed the adjutant general to take over and operate the mines. Plaintiff filed a complaint alleging a violation of the due process clause of the Constitution and asked for a preliminary restraint, which was denied. An appeal was taken to this court which the defendant successfully had dismissed for the reason that the subject matter had become moot—the adjutant general having redelivered possession of the mines. See the cases cited therein.

⁷ *Barker Co. v. Painters' Union*, 281 U. S. 462, (C.C.A. (3rd Dist.) N.J. 1930) was a bill to enjoin a trade union from calling a strike. As a result of a preliminary restraint, the men returned to work and finished the job. Although both

One manner in which the question in a case can become moot is by the act of both parties, as where a case is settled or compromised.⁸ As stated in *Mills v. Green*,⁹ "If the parties pending an appeal compromise and settle, there is nothing left for the judgment of the court to operate upon and the court when advised of the situation will not do the futile thing of determining what the litigants have already settled." Decisions of the same tenor and effect abound in the reports of nearly all states.¹⁰ An analysis of the various cases reveals that this limitation which confines courts to decision of "live" and controverted issues, is based not only upon reasons of expediency but also upon a finding that judicial jurisdiction and power extend only over actually controverted cases in which the parties express opposing interests. The function of courts is not primarily to declare the law, but rather to decide cases presented to them for decision. Only when in the process of such action may the court's declaration of the law applicable to that particular set of facts have weight as a precedent for future decisions.¹¹

Despite the prevalence and general acceptance of this doctrine, the late Chancellor Walker undertook to render an opinion upon a conceded hypothetical question, in no way related to pending litigation.¹² Learning of intended legislation, which would remove from the Chancellor the power to appoint Vice Chancellors, the Chancellor of his own motion, wrote and caused to be published an opinion¹³ that the contemplated legislation would be unconstitutional since the Constitution of New Jersey gave to the Chancellor the sole power to appoint Vice Chancellors. He manifested his opinion that a constitutional amendment would be required to validly effectuate the proposed change. The rendering of this opinion was more objectionable than are ordinary advisory opinions for it was rendered without having been requested and dealt with a subject in which the Chancellor had a direct interest.

parties wished the court, on appeal, to decide the merits, the court refused, asserting a lack of power to do so.

⁸ 3 C. J. 361; *Belknap v. Hunt*, 20 Ariz. 148; 177 Pac. 932. (Sup. Ct. 1919); *Mills v. Green*, 159 U. S. 651; 16 Sup. Ct. 132; 40 L. ed. 293, (Sup. Ct. 1895).

⁹ *Supra*, Note 8.

¹⁰ The language used in *Ficklen v. City of Danville*, 132 S. E. 705, (Special Ct. of App. Va. 1926), is exemplary of that used by other state courts. "Courts pass upon concrete cases, and not abstract propositions of law, and ought not to depart from the universal rule that the duties and power of courts are limited to the determination of rights actually controverted in the particular cases before them. See also *Trammel v. Kirk*, 278 S. W. 739, (Kan. City Ct. of App. 1926); *State ex. rel. v. People's Ice Co.*, 246 Mo. 168; 151 S. W. 101, (Sup. Ct. 1912); *North Carolina Automotive Trade Ass'n. v. Doughton*, 135 S. E. 131 (N. C. Sup. Ct. 1926); *General Petroleum Corp. v. Beilby*, 2 Pac (2d) 797 (California) (Sup. Ct. 1931); *Law v. Lubbock National Bank*, 21 S. W. (2d) 92 (Tex. Ct. of Civil App. 1929).

¹¹ See Note 5, *supra*.

¹² In re Vice Chancellors, 105 N.J. Eq. 759; 148 Atl. 570 (Ch. 1930).

¹³ So called for want of a better name. Of course, where the practice of rendering advisory opinions is expressly authorized by statute, as in Massachusetts, their validity is unquestioned.

Another indication in the cases of New Jersey of the failure of a court to realize the limitations upon its power may be found in the very recent case of *Camden Securities Co. v. Azoff*.¹⁴ The matter was not in issue but was determined by the court with the expressed purpose of clarifying the point for the future guidance of counsel. Suit had been brought to foreclose a mortgage and an appeal was taken from the decision of the Court of Chancery to the Court of Errors and Appeals. After the appeal had been argued, but before the opinion had been rendered, the parties entered into an amicable settlement of their differences and notified the court of this by letter, meanwhile entering a consent order of affirmance of the lower court's decree. The court ignored the settlement and rendered its opinion on the merits, affirming the lower court, and in conclusion censured counsel for their procedure in the matter. The court declared that an "appeal is at all times directly under the control of the court and not to be terminated in any way without the order, permission or sanction of the court indicated, either by the filing of an opinion, or by the action of the court on a motion which brings the matter up for action." This may be considered a correct statement of the desired procedure, but fails to take due consideration of the ability of the parties to render moot their case by effectuating a settlement. The court's criticism of counsel¹⁵ seems without warrant. In a similar case in a foreign jurisdiction, a more judicial temperament was revealed.¹⁶ In the *Azoff* case, the court ignored the point completely and rested its result upon a case which does not sustain its utterance. Stating that "there are cases, particularly in equity, where the court will not permit a settlement tainted by fraud, or undue influence or otherwise deemed improper," the court cited as authority the case of *Warker v. Warker*,¹⁷ in which the court refused to permit a settlement where the complainant was an aged woman. But this holding was sub-

¹⁴ 112 N.J. Eq. 270; 164 Atl. 398 (E. & A. 1933).

¹⁵ *Supra* note 14, at page 278.

¹⁶ *Georgia Casualty Co. v. Darnell*, 259 S. W. 918, (Court of Civil Appeals of 4th Sup. Judicial Dist. Texas 1924) (where, if counsel had acted promptly when the case was settled, notice of settlement would have reached the court before the case was submitted to a judge to write an opinion), the court speaking through Justice Powell said,

"We desire to request counsel for parties to any and all cases pending in the Supreme Court to notify the court immediately of any settlement or adjustment of a case which renders it moot. This request is particularly applicable where a cause is under submission or about to be submitted. Such action by counsel will save the court much time. We are sure the lawyers themselves will agree that this court has no time for decision of moot questions." and further, at page 919,

"*We have no censure for counsel* but appeal to the lawyers to co-operate to have the time of the court which is all too busy with live questions to spend its time in the consideration of cases already settled." (italics ours)

¹⁷ 102 N. J. Eq. 382; 140 Atl. 889 (Ch. 1928) affirmed 103 N. J. Eq. 379; 143 Atl. 921, (E. & A., 1928).

quently modified,¹⁸ the court deciding that unless legal steps to declare the woman incompetent were taken, she might compromise and settle her case without interference by the court. In the *Azoff* case, the court appears to have disallowed the settlement because of the existence of fraud in the original transaction between the parties, while the cases indicate that the fraud which will vitiate a settlement must appear in the settlement itself.

Where attorneys for both parties, with full knowledge of the facts, ask to discontinue an action, the court should permit them to do so.¹⁹ The fact that the court deems the matter of importance and for that reason desires to have the opinion on the files of the court²⁰ should not render ineffective the efforts of the parties to adjust their differences. In fact, it is urged that the character and importance of the question involved does not give to the court the power to render opinions on moot questions.²¹ It should be noted that the rendition of declaratory judgments does not constitute the decision of moot cases.²²

It is true that the action of the court should concur in the procedure of dismissing a suit which has become moot by reason of compromise and settlement. Because of the fact that not every kind of action is capable of settlement without the interposition of the Court, the notice of settlement and consequent discontinuance cannot *ex proprio vigore* operate to deprive the court of jurisdiction.²³ A judicial function is necessarily exercised whenever parties seek to withdraw a suit once commenced.²⁴ But when the court has received notice of the desired discontinuance, based upon a settlement, the court should confine itself to an examination of the case to find if it is of the type susceptible of settlement. If the answer is in the affirmative, the court has no alternative but to grant the discontinuance. The court should not even

¹⁸ 106 N. J. Eq. 419; 151 Atl. 274 (Ch. 1930); affirmed 109 N. J. Eq. 106; 156 Atl. 647, (E. & A., 1931).

¹⁹ Dailey v. Northern N. Y. Utilities, 221 N. Y. Supp. 52; 129 Misc. Rep. 183. (Sup. Ct., 1927); Miller v. Miller, 332 Ill. 177; 163 N. E. 343, (Sup. Ct., 1928).

²⁰ This appears to be a reason assigned by the court in Camden Securities v. Azoff, *supra* Note 14, for its rejection of the consent dismissal.

²¹ California v. San Pablo, *supra* Note 5.

²² Kariher's Petition, 284 Pa. St. 455; 131 Atl. 265 (Sup. Ct. Pa. 1925). For an exposition of the nature and use of declaratory judgments see, THE UNIFORM ACT ON DECLARATORY JUDGMENTS, 34 HARVARD L. REV. 697, and DECLARATORY JUDGMENTS IN N. J., 2 MERCER BEASLEY L. REV. p. 1. See also, 28 YALE L. JOURNAL, 105; 31 COL. L. REV. 561; 5 MINN. L. REV. 172; 38 YALE L. JOURNAL 104; Willing v. Chicago Auditorium Ass'n., 277 U. S. 274; 48 S. Ct. 507; 72 L. Ed. 880 (1928).

²³ State ex rel. Ludwig, 106 Wis. 227; 82 N. W. 158 (Sup. Ct., 1900).

²⁴ "It is well settled that a plaintiff has no such complete control over his action as will enable him to discontinue it at will without action of the court and that the court may, in its discretion, deny the application for leave to discontinue if the rights of the defendant or of third parties or the public will be substantially prejudiced thereby." School District v. Clifcorn, 133 Wis. 465; 112 N. W. 1099 (Sup. Ct., 1907).

go into the merits of the settlement unless its validity is questioned by a party to it, or unless the court fears that the party may be imposed upon by reason of infirmity or other disability.

The formality of the notice of discontinuance is of small consequence, although an orderly procedure as indicated by the court in the *Azoff* case²⁵ would require that notice of the settlement be given to the court by a motion to dismiss the appeal. But cases in other jurisdictions indicate, that in their anxiety to refrain from deciding moot questions, the courts have considered even the most informal notice sufficient.²⁶

That our court of Errors and Appeals realizes that it is not essential that every consent dismissal be subjected to the actual scrutiny of the court, is indicated by its Rule 11,²⁷ which provides that consent dismissals may be filed with the Clerk when the court is not sitting for the hearing of arguments.

The conclusion becomes inescapable. Courts are not empowered to render decisions in cases which have become moot. Consequently, after appeal, on receipt of notice that the parties, without jeopardizing the rights of others and being *sui juris*, have settled their controversy, consenting to a dismissal of the appeal, the court should carry into effect the agreement by granting the dismissal of the appeal.

JURISDICTION OF THE COURT OF CHANCERY TO INVESTIGATE THE CONDUCT OF ITS OFFICERS.—By a recent opinion, filed by the Chancellor,¹ the jurisdiction of the Court of Chancery to conduct, through a master, an investigation into the practises of its officers in the conduct of receivership cases in that court was upheld, on the ground of the inher-

²⁵ *Supra*, Note 14.

²⁶ In *Wedekind v. Bell*, 26 Nev. 395; 69 P. 612; 99 Am. Rep. 704 (Sup. Ct., 1902) the case had been argued and submitted for decision, but before judgment was rendered the justices were informed that the controversy between the parties had been settled. The court issued citations to both attorneys requiring them to show cause why the appeal should not be dismissed as being moot. In *Haygood v. Stone*, 164 Ga. 732; 139 S. E. 426, (Sup. Ct., 1927) the parties informed the court by letter of their settlement. Upon receipt of the letter a rule was issued by the clerk to the appellate court calling attention of counsel to the letter and ordering them to show cause why the case should not be dismissed as being moot. No answer being made to the rule, the facts presented in the letter were presumed to be true, the issues were held to be moot and the appeal was dismissed.

²⁷ Rules of the Court of Errors and Appeals: 11. DISMISSAL OF CAUSE BY CONSENTS "Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and respondent in an appeal, shall at any time hereafter, when the court is not sitting for the hearing of arguments, by their respective attorneys or solicitors, who are entered as such on the record, sign and file with the clerk, an agreement in writing, directing the case to be dismissed, and specifying the terms on which it is to be dismissed, it shall be the duty of the clerk to enter a rule or order of dismissal and remit the cause to the court from which it has been removed." Promulgated Nov. Term, 1998, republished Nov. Term, 1907.

¹ In re: New Jersey State Bar Association, 112 N.J. Eq. 606 (Ch. 1933).