ALBERT LUND (PLAINTIFF) .....APPELLANT;

AND

HARRINGTON WALKER (DEFENDANT)..RESPONDENT.

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*May 22.
*June 12.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Appeal—Right of—Order "made with the consent of parties" (Judicature Act, Ont., R.S.O., 1927, c. 88, s. 23)—Exclusion of evidence at trial—New trial.

In the course of a trial (and after the trial judge had ruled out certain evidence which plaintiff was offering) plaintiff's counsel expressed a wish to have the record withdrawn on plaintiff undertaking to pay costs. In the course of the discussion which followed, defendant's counsel remarked "I cannot consent to anything but the dismissal with costs" (which was all defendant could get if successful in the action), but his attitude throughout was against defendant being a party to any settlement, his insistence being on dismissal with costs as a matter of right. The trial judge endorsed the record: "This action is dismissed with costs," and added, as requested by plaintiff's counsel, "by consent of the plaintiff." Defendant's counsel then asked for and got permission to take out his exhibits. The formal judgment recited: "and the plaintiff by his counsel consenting," but was silent as to consent by defendant.

Held (Anglin C.J.C. and Cannon J. dissenting): The judgment was not an order "made with the consent of parties," within the meaning of s. 23 of the Ontario *Judicature Act*, R.S.O., 1927, c. 88, and plaintiff was not precluded by that section from appealing from the judgment. Judgment of the Appellate Division, Ont., on this point (65 Ont. L.R. 53) sustained.

A judgment by consent within s. 23 is a judgment determining an issue between parties to the litigation with the consent of the parties to the issue so determined. It is only when the "parties" consent that the right of appeal is taken away. It is not for the court to extend

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

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the scope of the section so as to deprive a litigant of a right to appeal unless he comes within the express language of the Act.

Per Anglin C.J.C. and Cannon J. (dissenting): The judgment was a consent judgment. Defendant's counsel must be taken to have consented to it, having regard to its effect, and to what took place in the discussion at the trial. The authority of counsel to consent may be assumed; it would not have been competent for the Appellate Division (nor for this Court) to pass upon that question; the fact that the judgment of the trial court had been formally completed distinguishes this case from *Shepherd* v. *Robinson,* [1919] 1 K.B. 474, and *Neale* v. *Gordon Lennox,* [1902] A.C. 465, and similar cases; once a final judgment by consent has been formally drawn up, signed, sealed and entered, as here, unless by agreement of the parties, it may be set aside only in a fresh action brought for that purpose; especially must that be so where such an issue as consent or no consent must be decided on controversial evidence. (*Harrison* v. *Rumsey,* 2 Vesey Sr. 488; *Ainsworth* v. *Wilding,* [1896] 1 Ch. 673; *Firm of R.M.K. R.M.* v. *Firm of M.R.M. V.L.,* [1926] A.C. 761, at 771; *Kemp-Welch* v. *Kemp-Welch et al.,* [1912] P. 82; *Kinch* v. *Walcott,* [1929] A.C. 482, cited). The fact that the judgment does not show on its face the explicit consent of the defendant (who got by it all he could get in the action), or the fact that his consent was not formally given, does not prevent its being a consent judgment. (*Hadida* v. *Fordham,* 10 T.L.R. 139; *Holt* v. *Jesse,* 3 Ch. D. 177, and other cases referred to). The statement, as to what constitutes consent, in Daniell's Chancery Practice, 8th Ed., p. 1110, discussed and explained in the light of the cases there cited (*Davis* v. *Chanter,* 2 Phillips, 545; *Aldam* v. *Brown,* [1890] W.N. 116; *Hadida* v. *Fordham, supra*); Annual Practice (1929) at p. 2141, (1930) at p. 2139, (1931) at p. 2139, also referred to and discussed in this connection.

Held further (unanimously) that, on the merits (which were argued, subject to determination of the other question), there should be a new trial, as one of the grounds on which the trial judge ruled out certain evidence was clearly wrong and would have the effect of preventing the plaintiff (who had other witnesses yet to be called) from offering further evidence on matters on which he was entitled to adduce evidence; under all the circumstances, plaintiff should be given an opportunity to place all his evidence before the court. Judgment of the Appellate Division, Ont., on this question (38 Ont. W.N. 122) reversed.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario, which, while holding that the judgment of Logie J. dismissing the action was not an order "made with the consent of parties" within the meaning of s. 23 of the Ontario *Judicature Act,* R.S.O., 1927, c. 88, and therefore that the plaintiff was not precluded by that section from bringing his appeal (1), yet held that, on the merits, the plaintiff's appeal should, as against the present respondent, be dismissed (2).

(1) (1930) 65 Ont. L.R. 53. (2) (1930) 38 Ont. W.N. 122.

In the action, the plaintiff claimed (*inter alia*) a declaration that the defendant Walker (the present respondent) was a trustee for the plaintiff of certain shares of stock in a company, and that the sale and transfer of the said shares made by plaintiff to said defendant was null and void and that the same be cancelled. The issues now in question arose out of certain proceedings at the trial. These are described in the judgments now reported, and are indicated in the above head-note; and the discussion leading up to the pronouncement of the judgment at the trial is quoted in full in the Court below, when dealing with the question of whether or not the judgment at trial was a "consent judgment" (1). The trial judge endorsed the record: "By consent of the plaintiff this action is dismissed with costs." The formal judgment at trial (which is also quoted in the Court below (2)), dismissing the action with costs, contained the recital: "and the plaintiff by his counsel consenting," but was silent as to consent by defendant.

By the judgment of the Supreme Court of Canada, now reported, the plaintiff's appeal was allowed, and a new trial ordered; the costs of the abortive trial to be in the discretion of the judge who will preside at the new trial, and the costs of the appeal to this Court and in the Appellate Division to be costs to the appellant in the cause. Anglin C.J.C. and Cannon J. dissented, on the ground that the judgment at trial was a consent judgment and therefore non-appealable.

W. N. Tilley K.C. for the appellant.

Glyn Osler K.C. for the respondent.

The judgment of the majority of the court (Newcombe, Rinfret and Smith JJ.) was delivered by

SMITH J.—The (defendant) respondent Walker, when holding appellant's 250 shares in the capital stock of Hiram Walker & Sons, Limited (also a defendant in the action) in trust to sell or dispose of them in the same way as he should dispose of his own in a contemplated sale of the

(1) See 65 Ont. L.R. 53, at 61-62. (per Riddell J.A., dissenting on the point there dealt with).

(2) See 65 Ont. L.R. 53, at 60 (per Riddell J.A., dissenting on the point there dealt with).

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business of the company, bought the shares himself. The fiduciary relationship existing between the parties imposed on the respondent the duty of making full disclosure of all facts within his knowledge, unknown to the appellant, affecting the value of the shares.

The appellant was a director of the company residing in England, and the respondent was also a director and the president of the company. The appellant brought this action to have the sale of his 250 shares to respondent set aside on the ground that in his absence and without his knowledge some assets of the company had been concealed and not accounted for, and others transferred to the respondent, his brother and others, at less than their value, and that products of the company had been sold at a low price and resold at a profit, the respondent sharing in these profits; all of which transactions, it is alleged, affected the value of the shares.

At the trial the appellant's counsel called as a witness one Nash, a member of a firm of chartered accountants that had, on behalf of the Dominion Government, investigated the affairs of the company. He declined to give evidence as to the affairs of the company, because the Department of Customs and Excise objected on the ground of public interest to the disclosure of information obtained in this way. After considerable discussion, the learned trial judge gave his final and decisive ruling, as follows: " I refuse it on two grounds: first, that it is against public policy, secondly, that we are not here enquiring into the private affairs of the company, which has been definitely stayed by an order of the Master. Next witness." Counsel for appellant had pointed out that he was offering this evidence in support of the allegation in the pleadings of wrongful dealings with the property and assets of the company not disclosed to him by respondent.

The first ground for the ruling, that is, public policy, affected only the particular witness Nash, but the second ground applies to all witnesses that might be called because the allegations of non-disclosure could only be proved by going into the private affairs of the company. The ruling therefore effectively prevented the appellant from offering further evidence of alleged wrongful dealing with the company property and assets, and was clearly wrong.

At the conclusion of the argument before us, the Chief Justice intimated that a new trial would be ordered unless it should be determined that the appellant had no right of appeal because the judgment was a consent judgment within the meaning of section 23 of the *Judicature Act*, which point was reserved.

For the reasons stated by Mr. Justice Masten (1), concurred in by the Chief Justice and Orde and Fisher, JJ.A., I am of opinion that it was not a consent judgment within the meaning of section 23, which reads as follows:—

> No order of the High Court Division or of a Judge thereof made with the consent of parties shall be subject to appeal, and no order of the High Court Division or of a Judge thereof as to costs only which by law are left to the discretion of the Court shall be subject to appeal on the ground that the discretion was wrongly exercised, or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the court or judge making the order.

Counsel for the appellant asked for a judgment by consent, but counsel for respondent absolutely refused to be a party to a consent judgment, and protested to the end against such a judgment. He stood out to the last for what he claimed as his client's right, namely, a dismissal of the action, with costs, on the merits. Charges had been made in the pleadings against the defendant, and what Mr. Osler evidently desired was a vindication of his client, not by a consent judgment, but by a dismissal of the action by the Court on the merits.

The learned trial judge endorsed the record as follows: "This action is dismissed with costs." Then the learned judge said to plaintiff's counsel, "If you like, I will add the words 'by consent of the plaintiff'"; and plaintiff's counsel replied, "That is what I ask, my Lord." His Lordship remarked, "Well, there is no harm in that that I see," and added the words "By consent of the plaintiff," to the endorsement. It was clearly a consent by one party only.

A judgment by consent within the meaning of the section is a judgment determining an issue between parties to the litigation with the consent of the parties to the issue so determined. The word "parties" is in the plural, and, as Mr. Justice Masten points out, it is only when the "parties" consent that the right of appeal is taken away. It is not for the court to extend the scope of the section so

(1) (1930) 65 Ont. L.R. 53, at 54-57.

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as to deprive a litigant of the right which he has to appeal unless he comes within the express language of the statute as it stands.

While the above result is arrived at without regard to the affidavits filed, it may be noted that these affidavits were to the effect that the judgment entered was not in fact by consent of the plaintiff.

There must be a new trial, in the terms set out in the reasons of the Chief Justice.

The judgment of Anglin C.J.C. and Cannon J. (dissenting) was delivered by

ANGLIN C.J.C.—The plaintiff appeals from the affirmance by the Second Appellate Divisional Court (Ontario) (1) of the judgment entered at the trial of this action (in so far as it affects the defendant Harrington E. Walker) which dismissed the action with costs "by consent of the plaintiff." In so far as this judgment might operate in favour of the other defendants, Hiram Walker & Sons, Limited and C. W. Isaacs, as to whom the action had been stayed by orders competently made, and who were, therefore, not before the learned trial judge, it was pronounced *per incuriam;* and the necessary correction was made by the Appellate Court, so that the action stands as against these two defendants, and the judgment dismissing it is now confined in its operation to the defendant Harrington E. Walker.

The judgment in favour of Harrington E. Walker was attacked on two grounds,—

First, that it was not a "consent judgment" within the meaning of Section 23 of the Ontario *Judicature Act* (R.S.O., 1927, c. 88) and,

Second, that the consent, on which the order purported to have been made, was given by his counsel contrary to the plaintiff's express instructions.

(1) (1930) 38 Ont. W.N. 122. See also 65 Ont. L.R. 53, overruling the preliminary objection by respondent that the judgment at trial was a consent judgment.

In dealing with the first point, the authority of counsel to consent may be assumed. Indeed, I more than doubt the competency of the Appellate Divisional Court to have passed upon that question—which indeed, it did not do. The fact that the judgment of the trial court had been formally completed distinguishes this case from *Shepherd* v. *Robinson* (1), and *Neale* v. *Gordon Lennox* (2). In the former case, the order had not been drawn up; and, in the latter, before the order was drawn up, steps had been taken to set it aside, as appears from the statement of facts, at p. 467 of the report. In *Neale* v. *Gordon Lennox* (3), Lord Lindley pointed out that, before the order had been drawn up,

> one of the parties interested discovers that it is made without her consent at all, and not only without her consent, but in spite of her express instructions. * * * Unfortunately the plaintiff here wishing to get rid of the order drew it up with the view of getting it set aside, and in form this is an application, not to prevent the drawing up of the order, but to have it set aside; but that is mere form—mere machinery.

As pointed out by the Earl of Halsbury, L.C. (at the foot of p. 469), in effect, in that case, the defendant sought the assistance of the court to enforce the order—

> The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on;

and it was *à-propos* of that fact that Lord Lindley said (p. 473),

> It would be absolutely wrong, to my mind, for the Court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the Court never would have dreamt of making if the Court had known the facts.

In a number of other similar cases, i.e., where the judgment has not actually been completed by signature, sealing and entry, the court has dealt with it, although it appeared to have been pronounced by consent, and has set it aside on the ground that, in reality, it was not a consent judgment.

But, once a final judgment by consent has been formally drawn up, signed, sealed and entered, as here, unless by agreement of the parties, it may be set aside only in a fresh action brought for that purpose; especially must that be so where such an issue as consent or no consent must be

(1) [1919] 1 K.B. 474. (2) [1902] A.C. 465.
(3) [1902] A.C. 465, at 473.

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decided on controversial evidence. (*Harrison* v. *Rumsey* (1); *Ainsworth* v. *Wilding* (2); *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.* (3); *Kemp-Welch* v. *Kemp-Welch et al.* (4); *Kinch* v. *Walcott* (5). Of course, in an action brought for that purpose, a judgment based upon consent, though formally completed, may be set aside on any ground which would suffice to set aside an agreement between the parties in the terms of such judgment, including mistake. (*Wilding* v. *Sanderson* (6); *Hickman* v. *Berens* (7); *Lewis's* v. *Lewis* (8)). Many other authorities might be cited for this proposition.

Proceeding, therefore, on the assumption that counsel had the usual authority to give the consent in question, the other ground of attack must be considered; and I am quite prepared to concede that it was entirely within the jurisdiction of the Appellate Divisional Court to deal with that aspect of the appeal before it, but regret to find myself unable to concur in its conclusion thereupon.

In the first place, the judgment in question gave to the defendant all he could possibly expect in the action,—all he could possibly be entitled to, viz., a dismissal with costs, which he asked for impliedly, if not expressly, in his statement of defence. It is not at all surprising to find his counsel (Mr. Osler), in the course of the brief discussion, which resulted in the entry of the judgment in question, saying:

> Mr. OSLER: I cannot consent to anything but the dismissal with costs.
>
> Mr. GRANT (who appeared for the plaintiff): Well, I will consent to a dismissal with costs, if we can't get any other terms.

Mr. Osler, it is true, subsequently stated that he did not wish his client to be put in the position of appearing to consent to anything, because his consent might later be used against him as implying a desire, on his part, to be rid, at any cost, of the action and of the charges involved in it rather than have them publicly tried; Mr. Walker's attitude was quite the reverse. But, from a perusal of the short conversation which ensued between counsel and the presiding judge, I am entirely satisfied that he (Mr. Osler) never intended to withdraw from the position he took when

(1) (1752) 2 Vesey Sr., 488.
(2) [1896] 1 Ch. 673.
(3) [1926] A.C. 761, at 771.
(4) [1912] P. 82.
(5) [1929] A.C. 482.
(6) [1897] 2 Ch. 534.
(7) [1895] 2 Ch. 638.
(8) (1890) 45 Ch. D. 281.

he said, " I cannot consent to anything but the dismissal with costs," thus, impliedly, stating to the court, " I am prepared to consent to that order being made," which was immediately followed by the statement of Mr. Grant, above quoted, " Well, I will consent to a dismissal with costs, if we can't get any other terms." Eventually (and this was the only departure from the judgment " dismissing the action with costs " *simpliciter*, to which Mr. Osler had certainly consented—a departure pressed for to the point of insistence by Mr. Grant), the learned judge merely added to his minute of the judgment, at Mr. Grant's specific request, the words, " by consent of the plaintiff," observing at the same time, " Well, there is no harm in that that I see." Whereupon Mr. Osler, apparently acquiescing in that view and accepting the order, said, " My Lord, may we have our exhibits out "—and he took his exhibits out shortly afterwards. If the judgment then pronounced be not a consent judgment binding on the plaintiff, I do not understand what a consent judgment is.

To say it is not a consent judgment because it does not show on its face the explicit consent of the defendant, who got by it all he could possibly ask for in the action, seems to me to ignore the authorities, to the effect that the form of a judgment is not necessarily binding upon the court and may be gone behind for the purpose of ascertaining the true facts, in order to determine whether or not there actually was a " consent judgment," when that question is properly raised before the court. These authorities are, amongst others, *Neale* v. *Gordon Lennox* (1); *Michel* v. *Mutch* (2), and *Darley* (*Trustee of Baines*) v. *Tulley* (3).

If a plaintiff, having (as occurred here) by his counsel, apparently clothed with authority to do so, consented to a judgment dismissing his action with costs (that being the greatest relief the defendant could get, and there being no counterclaim, nor any issue in the action other than one of liability of the defendant to the plaintiff) can, nevertheless, solemnly come into court and be heard to say that he has not consented to the judgment, and that it is not binding on him as a consent judgment, although, on the face of it, it purports to have been made by his consent, the obser-

(1) [1902] A.C. 465. (2) (1886) 54 L.T. Rep. 45.
(3) (1923) 155 L.T. Jo. 128.

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vation of the Vice-Chancellor in *Holt* v. *Jesse* (1) would seem to me to be very much in point, when he said: That is tantamount to giving

> a general licence to parties to come to this Court and deliberately to give their consent, and afterwards at their will and pleasure come and undo what they did inside the Court, because on a future day they find they do not like it.

It does strike me as rather absurd to ask that, in order to make a judgment a consent judgment, assent to its terms by the party in whose favour that judgment is pronounced (which accords to him, as it does, everything he could expect to get in the action) should necessarily be formally given or should appear on the face of the judgment. *Hadida* v. *Fordham* (2), and *Holt* v. *Jesse* (3), I may refer to as two cases, amongst the many I have examined, in which the orders on their face appeared to show consent only by the party adversely affected by them. Thus, in *Hadida* v. *Fordham* (2) which, the reporter says, "illustrates the danger of giving an undertaking in place of allowing a hostile order for an injunction to be made in case of a possible appeal," the only reference to consent in the order was to be found in the fact that "the defendants' counsel submitted to give an undertaking not to use" a certain word objected to by the plaintiff. An appeal from the order was taken by the defendant. The appeal, however, was summarily dismissed, the view expressed by the Court of Appeal being that the order, except so far as costs were concerned (as to which there had been a trial), amounted to a consent order; and there could be no appeal from a consent order.

In *Holt* v. *Jesse* (3), an application was made to the judge who had pronounced it to discharge an order to which a consent had been given by counsel, in the presence of, and with the sanction of his client to its terms, which included the following: "the defendant, by his counsel, submitting to account." In disposing of the motion the Vice-Chancellor said that "under those circumstances, the order was treated as a consent order." The motion to discharge it was, accordingly, refused, notwithstanding the fact that, before the order had been drawn up or entered, the client

(1) (1876) 3 Ch. D. 177, at 184. (2) (1893) 10 T.L.R. 139.
(3) (1876) 3 Ch. D. 177.

had changed his mind and withdrawn his consent. In neither case is there anything in the report of the case to indicate that any consent had been given by counsel for the plaintiff, in whose favour the order had gone, to its being made in the form it took. No doubt, upon further search, other similar instances could be found in the reports; but these two would seem to suffice for the present. (See also *Levi* v. *Taylor* (1).)

Accordingly, the consent of the party against whom the judgment, now before us, is made would seem to be all that is necessary. Yet, it is the very party who so consented, who is here seeking to appeal, after having given his consent. As put by Riddell J.A. (2),

> Influenced, rightly or wrongly, by the strenuous pressure of the plaintiff through his counsel, the Judge finally directed that the judgment should go dismissing the action by the consent of the plaintiff.

To quote the language of Lord Cottenham in *Davis* v. *Chanter* (3), such a party should be told: "You complain of the court having done what you asked it to do." In my opinion, upon that fact becoming apparent, he should not be further heard.

For these reasons, I am, with deference, of the opinion that the judgment in question was really a "consent judgment" within the meaning of the language of Section 23 of the Ontario *Judicature Act*, and that the court has no jurisdiction to set it aside, except in a fresh action brought for that purpose. It follows, in my opinion, that the appeal now before this court should be dismissed with costs.

To appreciate the distinction between the preposition "with," in the context in which it is found in Section 23 of the Ontario *Judicature Act*, and the prepositions "on" and "upon," in a like context, made by Mr. Justice Riddell, with the utmost respect for that very able judge, requires a subtlety and finesse of intellect of which I freely confess myself incapable.

The following passage, however, from the judgment of the learned judge who wrote for the majority on this question appears to call for some further observation. We find him saying (4):

(1) (1903) 116 L.T.Jo. 64.
(2) 65 Ont. L.R., at 63.
(3) (1848) 2 Phillips 545, at 547.
(4) 65 Ont. L.R. 53, Masten J.A., at 56.

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(Section 31 of the Judicature Act of 1925). "No appeal shall lie, without the leave of the Court or Judge making the order, from an order of the High Court or any Judge thereof made with the consent of the parties."

Referring to that provision, it is said in Daniell's Chancery Practice, 8th Ed., p. 1110: "To constitute consent there must be a bargain between the parties, and not a mere acceptance of the order offered." In the Annual Practice of 1929, at p. 2141, the result of the cases is expressed in identically the same terms, and in support of the statement there is quoted the following cases: *Davis* v. *Chanter* (1); *Aldam* v. *Brown* (2); *Hadida* v. *Fordham and Sons Ltd.* (3). I have perused and considered these cases, and they appear to me to bear out the conclusion expressed in the text books.

It is true that, in Daniell's Chancery Practice, 8th Ed., p. 1110, the language quoted is found. The significance of the passage, however, can best be ascertained by looking at the authorities cited in support of it which are those mentioned by the learned judge. It is obvious that the author meant no more than this, that, where an election is offered to a party by the court, his acceptance of an order, couched in what he regards as the least onerous of alternative terms proposed, does not amount to an acquiescence in, or consent to, those terms. Thus, in *Davis* v. *Chanter* (4), Lord Cottenham, then Lord Chancellor, said that

An order that a cause shall stand over with liberty to amend by adding parties is as much an adjudication as far as it goes as any other. The Court says, I cannot give you relief unless you do a certain thing. Is the plaintiff to ask the Court to dismiss the bill? If so, what is he to say when he comes here on appeal? He would be told, you complain of the Court having done what you asked it to do.

And the order was held not to be binding as a consent order upon the appellant merely because he had accepted an alternative offered him by the court.

The next case referred to is *Aldam* v. *Brown* (5). In this case the plaintiff was offered the alternative of having an account and enquiry taken, or having his action dismissed. The report reads,

The plaintiff elected to take this account and enquiry rather than have the action dismissed. The judgment, after the usual reference to the pleadings, evidence and argument, proceeded: "And the plaintiff by his counsel accepting an enquiry and account in the form hereinafter directed, this Court doth order, etc." The plaintiff appealed.

The Court of Appeal held that an appeal would lie because the order could not be looked upon as a consent order, the

(1) (1848) 2 Phillips 545.
(2) [1890] Weekly Notes, 116.
(3) (1893) 10 T.L.R. 139.
(4) (1848) 2 Phillips 545, at 547 (reported below in 15 Sim. 93).
(5) [1890] W.N. 116.

plaintiff having merely taken the less objectionable alternative offered him by the court.

The third case cited is *Hadida* v. *Fordham* (1), above referred to, where the order, against which the defendant appealed, stated his submission to give an undertaking not to use a word objected to by the plaintiff. Far from being an authority for the appellant, in the present instance, as I read the report of this case, it is distinctly against him, the court having there dismissed the appeal on the ground that the appellant (defendant), by submitting to the undertaking, as he did, had given his consent to the order made and could not be heard to object to it on appeal.

When, however, I look at the reference in the Annual Practice (1929), p. 2141, I find the passage relied on by the learned judge reads as follows:

> To constitute consent, there must be a bargain between the parties, not mere acceptance by the appellant of an order offered by the court.

The same words are to be found in the Annual Practice for 1930 and for 1931, at p. 2139 in each volume. It is, perhaps, significant that the first case cited by Daniell in his book is not referred to, reference being made merely to *Aldam* v. *Brown* (2) and *Hadida* v. *Fordham* (1). Here, the case is not one of *mere acceptance by the appellant of an order offered by the court,* but rather there was pressure by his counsel at the trial amounting to insistence, yielded to by the learned judge, to give the very judgment which he pronounced.

I understand, however, that the majority of my brethren take the opposite view on the aspect of the case now under consideration and are prepared to hold that, because the formal consent of the defendant does not appear on the face of the order, and because his counsel took the stand that he did not wish it to appear that he was consenting for the reason above stated, although immediately upon the judgment being pronounced he asked and got permission to withdraw his exhibits from the court (a permission on which he acted), that the judgment formally entered, dismissing this action "by consent of the plaintiff," cannot be regarded as a "consent judgment" within the meaning of section 23 of the Ontario *Judicature Act,* and that

(1) (1893) 10 T.L.R. 139. (2) [1890] W.N. 116.

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the plaintiff is not bound thereby, but is entirely at liberty to appeal therefrom.

Having regard to this conclusion of the majority, it is unnecessary for me to express any opinion on the further point discussed as to the proper construction of section 23, i.e., as to whether or not the concluding phrase thereof applies only to its immediate antecedent, viz., a discretionary order dealing with costs, or whether its application extends to the whole section, so as to enable "the court or judge making" an order by consent to give leave to appeal therefrom. Were I required to pass upon that question, I should be inclined to take the view expressed by Mr. Justice Riddell, viz., that the proper construction of this clause, as it now stands, in the statute is that leave to appeal of the court or a judge making the order may be given only where the order, so far as sought to be appealed from, deals merely with costs, and may not be given where, as here, the "judgment by consent" deals with the substance of the action.

Moreover, although that learned judge refrained from determining whether or not the appeal should be stayed to ascertain whether the appellant could obtain the leave of the trial judge to appeal, I have no hesitation whatever in saying, that, in my opinion, any such application should be refused, having regard to the improbability and, possibly, the impropriety of the trial judge,

after yielding to the urgent pressure of the plaintiff and against the will of the defendant, and directing the judgment to be entered as the plaintiff wished it in a form against which the defendant protested to the last, then, on the request of the party who had induced him to direct judgment to be entered as on his consent, giving leave to him to appeal from the judgment he had asked for. * * * This would savor of absurdity and great unfairness to the party upon whom the judgment was, at the instance of the appealing party, forced.

As to the question of whether counsel for the plaintiff had, or had not, authority to consent to the order made by the trial judge, and as to the effect of lack of such authority, then unknown to counsel for the defendant (Mr. Osler, at the request of the court, on his responsibility as counsel, informed us that he was quite unaware of any limitation placed upon the authority of plaintiff's counsel to give the consent at the time it was given, and, for my part, I entirely accept Mr. Osler's statement), it is also unnecessary, and would probably be improper, for me to ex-

press any view, having regard to my opinion above stated, that it would not have been competent for the Appellate Divisional Court to deal with that matter and, therefore, cannot be competent for us here to pass upon it. But, reference may be had to *Shepherd* v. *Robinson* (1) as a late and a very satisfactory exposition of the law upon this aspect of the case.

Subject to the question as to whether the judgment pronounced at the trial of this action should, or should not, be regarded as a "consent judgment" and, as such, non-appealable—the question first taken up and on which judgment was reserved,—the appeal was argued by counsel on its merits.

It would appear that the plaintiff had some seven or eight additional witnesses, whom he had not yet called, when he was surprised by a ruling of the learned trial judge to the effect that, as the action had been stayed as against the defendant company, and that company was not represented at the trial, it would not be competent for the plaintiff to enquire into its private affairs in its absence, although those affairs were directly involved in, and formed the basis of, allegations made by the plaintiff against the defendant who was before the court and it was necessary to enquire into them, as the plaintiff claimed, in order that he should establish his case. This ruling was given while a witness, one Nash, was under examination-in-chief, and upon objection by counsel for the defendant to a question about certain shipments of goods alleged to have been made by the company through the Canadian National Railway Company. This ruling having been made and briefly discussed, Mr. Grant and Mr. Osler had a conference, after which Mr. Grant announced to the court,

We have arranged that matter, my Lord. I wish my friend would consent to our withdrawing the record on our undertaking to pay costs.

Whereupon a short discussion ensued as to the terms in which the judgment would be pronounced:

Mr. OSLER: I have explained to my friend that my client could not be party to any settlement of this action.

His LORDSHIP: Well, by consent action dismissed with costs.

Mr. OSLER: Not by consent, my Lord.

Mr. GRANT: I am consenting.

His LORDSHIP: *Have you finished your case?*

(1) [1919] 1 K.B. 474.

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Mr. GRANT: *Yes, my Lord.*
His LORDSHIP: Then I will dismiss it with costs.
Mr. GRANT: No, no, I don't want that, my Lord.

As will be seen, Mr. Grant's affirmative answer to his Lordship's question, "Have you finished your case?" was given upon the basis of a judgment going in the terms to which he was consenting. Yet, this observation is relied upon by the Appellate Court as a statement that he deliberately declined to call any further witnesses. To say that this was a deliberate election by counsel to abandon calling the further witnesses he had in court seems to us to be a misconception of his position. The circumstances render the decision in *Judson* v. *McQuain* (1), cited by Riddell J.A., quite inapplicable. No doubt, where the sole ground on which a new trial is asked is that, although the party seeking it has had a full opportunity to give evidence himself at the trial, he had deliberately refrained from doing so, that affords

> no ground for a new trial—to allow the defendant to have another chance of convincing another jury in another way would violate all principles of fair play.

Such was the holding in *Judson* v. *McQuain* (1). But there, the circumstances were entirely different from those of the case now before us. Counsel there deliberately decided to call no witnesses and thus to have the advantage of the last address to the jury. The client stood by and did not object.

> The fact that counsel has not called any witnesses for the defence is no ground for a new trial, whether this was due to his yielding to the advice of others, as in *Brown* v. *Sheppard* (2) (Burns J., calls this a "novel ground for applying for a new trial," but we have progressed since his day); or to the fact that he rested his defence on what appeared from the evidence of the plaintiff, as in *Young* v. *Moodie* (3); or to relying upon the weakness of the plaintiff's evidence and desiring to have the last word to the jury, as in *Hurrell* v. *Simpson* (4)—even though the Court should be dissatisfied with the verdict (5).

With the utmost respect for the learned trial judge, his ruling that all evidence bearing upon the affairs of the company must, in its absence, be excluded, was erroneous, and was largely the cause of the subsequent trouble in this action. An answer to the question put to the witness might involve a disclosure by him of facts ascertained when he

(1) (1923) 53 Ont. L.R. 348.
(2) (1856) 13 U.C.R. 178.
(3) (1857) 6 U.C.C.P. 244.
(4) (1862) 22 U.C.R. 65.
(5) *Judson* v. *McQuain*, (1923) 53 Ont. L.R. 348, at 350.

examined the books of Hiram Walker & Sons, Limited, on behalf of the Crown, in order to prepare evidence to be given before a Royal Commission. It was, no doubt, objectionable on two perfectly distinct grounds:—

First. It was really an attempt to put in secondary evidence as to what the books show.

Second. It was contrary to public policy to permit such enquiry to be made of the witness.

The latter ground appears to have been taken by the learned judge as well as that now found to have been wrong, but the former ground does not seem to have been taken by either counsel or court, Mr. Osler having simply said, "I object to that question."

In our opinion, under all the circumstances, the plaintiff should be given an opportunity to place all his evidence before the court. To quote language used by Armour C.J., in the case of *Murphy* v. *G.T.R. Co.* (1), "The case should go back, not for a new trial, but to be tried." Unfortunately, it will be impossible for the parties to avail themselves of the evidence already in the record and thus to avoid the expense of taking it again, because that would involve sending the case back to the same judge who heard that evidence and who alone is in a position to pass upon the credibility thereof. Mr. Tilley, of counsel for the plaintiff, objects to that course being taken and, as is within his right, wishes that the new trial shall take place before another judge. As is customary in this court where a new trial is ordered, we refrain from further discussion on the merits. Accordingly, as was intimated by this court at the hearing of the present appeal, it will be allowed and the judgment dismissing the action vacated and, in substitution, an order made directing a new trial of this action; the costs of the abortive trial to be in the discretion of the judge who shall preside at the new trial, and the costs of the appeal to this court and in the court of appeal to be costs to the plaintiff in the cause.

Appeal allowed; new trial ordered.

Solicitors for the appellant: *Winnett, Morehead & Co.*

Solicitors for the respondent: *Blake, Lash, Anglin & Cassels.*

(1) Queen's Bench Division, Ont., 27th May, 1889, not reported.