1927

*Feb. 21.
*Mar. 8.

GUSTAVE ARMAND (DEFENDANT).....APPELLANT;

AND

FRED CARR AND KITTY CARR (PLAINTIFFS) .....
AND
ERNEST WILCOX (DEFENDANT).....
} RESPONDENTS.

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

Costs—Party and party costs—Appellant sued by respondents for damages caused through automobile collision—Appellant insured against liability—Insurer instructing solicitors to act in suit on appellant's behalf—Right of successful appellant to recover costs from respondents.

Plaintiffs sued A. (the appellant) for damages for injuries suffered through an automobile collision. Judgment against A. by the Appellate Division, Ont., was reversed by this Court, which allowed A.'s appeal with costs ([1926] S.C.R. 575). The Registrar declined to tax costs to A., on the ground that the solicitors, who nominally acted for him in carrying on the appeal, were not in fact retained by him or on his behalf, but were employed by an insurance company, which had insured A. against liability, to defend the action and to prosecute the appeal to this Court, and that A. was under no personal liability to such solicitors for the costs of the appeal, and was, therefore, not in a position to claim indemnification by plaintiffs for such costs. A. appealed.

Held, A. should recover his costs from plaintiffs; on the evidence, the insurer instructed its solicitors to defend the action on behalf of A., who, from the course of the proceedings, must have employed the solicitors or sanctioned their carrying on of his defence, so as to become personally liable for their costs, unless there was an agreement binding on the solicitors excluding such liability; no such agreement was established; the fact that there was an obligation by the insurer to pay the solicitors' costs, and that the solicitors would naturally apply in the first instance to the insurer, as being ultimately liable to pay the costs by reason of A.'s right of indemnification against it, would not exclude A.'s liability.

Adams v. *London Improved Motor Coach Builders Ltd.,* [1921] 1 K.B. 495, applied; *Rex* v. *Archbishop of Canterbury,* [1903] 1 K.B. 289, at 295, referred to; *Ryan* v. *McGregor,* 58 Ont. L.R. 213, unless distinguishable from the present decision, and so far as inconsistent therewith, overruled.

APPEAL by the defendant Armand from a ruling of the Registrar holding him not entitled to recover from the

PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

plaintiffs the costs of the appeal to this Court awarded him by the judgment of this Court (1).

The plaintiffs sued Armand and Wilcox for damages for injuries suffered by the plaintiffs through an automobile collision. The trial judge held Wilcox alone to blame. The Appellate Division of the Supreme Court of Ontario held Armand jointly liable with Wilcox (2). Armand appealed to the Supreme Court of Canada, who allowed his appeal with costs (1).

The grounds taken by the Registrar for declining to tax Armand's costs, and the circumstances of the case bearing on the question now to be decided, are sufficiently stated in the judgment now reported, and are indicated in the above head-note.

A. C. Heighington for the appellant.

D. O. Cameron for the respondents Carr.

The judgment of the court was delivered by

ANGLIN C.J.C.—The appellant Armand appeals from a ruling of the Registrar holding him not entitled to recover from the respondents the costs of the appeal to this court awarded him by the judgment reported in [1926] S.C.R., at p. 575.

The ground taken by the Registrar for declining to tax these costs to the appellant is that the solicitors, who nominally acted for him in carrying on the appeal, were not in fact retained by him or on his behalf, but were employed by the British Traders' Insurance Company (with whom the appellant was insured) to defend the action brought against him and to prosecute the appeal to this court, and that the appellant was under no personal liability to such solicitors for the costs of the appeal and was, therefore, not in a position to claim indemnification by the respondents for such costs; and *Ryan* v. *McGregor* (3), is cited in support of these conclusions.

Upon careful consideration of all the material before us, we are satisfied that the insurance company instructed its own solicitors to defend the action not on its behalf but

(1) [1926] S.C.R. 575. (2) (1925) 28 Ont. W.N. 310.
(3) (1925) 58 Ont. L.R. 213.

1927

ARMAND v. CARR.

Anglin C.J.C.

on behalf of the appellant, thus implementing its obligation "to defend in the name and on behalf of the insured any civil actions, etc." The solicitors so instructed entered an appearance in which they style themselves "solicitors for the defendant" (the appellant). For so doing his authority was necessary and was undoubtedly obtained. Their character as defendant's solicitors they maintained throughout the litigation in which, from time to time, the appellant personally took part by making affidavits, giving evidence, executing a bond, etc. From this course of conduct his employment of the solicitors who appeared on his behalf, or his sanctioning their carrying on his defence, is the only proper inference; and whether it should be taken that the insurance company, in instructing its solicitors to defend the action, etc., acted as agent for the defendant, or that he personally so employed the solicitors, their retainer as his solicitors in a manner binding upon him admits of no doubt. Such retainer or employment carries with it personal liability of the defendant (appellant) for the costs reasonably incurred by the solicitors pursuant to it, unless there was a contract or agreement binding on the solicitors excluding such liability. In that connection the Registrar says:

> I have reviewed the evidence and my conclusion is that Armand, when he came in to sign the necessary papers in connection with this appeal, did not expect he would be called upon personally to pay any costs * * *.
>
> The language used by the taxing officer in *Ryan* v. *McGregor* (1) referred to in my reasons is applicable in this case, viz: "I think that there was at least an implied agreement to the effect that the cost of defending the action should be assumed and paid by the company, and that the defendant should be under no liability with respect thereto."
>
> I do not say that if the insurance company failed to pay the costs, and Armand had the means of paying the same, that the solicitors would have been unable on the facts of this case to collect the same from Armand. I do not think it necessary for the purpose of my judgment to make any finding as to this.

This is obviously not a definite finding that there was an agreement relieving the defendant-appellant of all liability to his solicitors such as must be established by the respondent-plaintiffs, if they would on that ground avoid payment of party and party costs to the successful appellant. *Adams* v. *London Improved Motor Coach Builders, Ltd.* (2).

(1) (1925) 58 Ont. L.R. 213.

(2) [1921] 1 K.B. 495.

The evidence is not very definite or very precise. In our opinion it clearly falls short of establishing any agreement binding on the solicitors that they should not in any event look for payment of their costs to the appellant. No doubt there was an obligation on the part of the insurance company to pay the defendant's solicitors their reasonable costs. Adapting to the circumstances of the present case the language of Atkin L.J. in the *Adams case* (1), at page 504: Nevertheless there is nothing inconsistent in that obligation co-existing with an obligation on the part of the defendant to remunerate the solicitors. Naturally, as a matter of business, the solicitors would, we have no doubt, apply in the first instance to the insurance company, as being the persons ultimately liable to pay the costs as between all parties—that is to say, the persons who would have to indemnify the defendant against the costs. But that does not exclude the liability of the insured, and it seems to us not in the least to affect the position that the client may be liable although there may be a third person to indemnify the client. It appears to us that that state of things would account for the whole of the evidence that was given. But we feel satisfied of this: that upon the direct evidence in the case it would be wrong to draw the conclusion that there was an express bargain that the defendant was not to be liable to the solicitors for the costs incurred; and, quite apart from the express evidence that no such arrangement was made, it appears to us that there was no evidence given on behalf of the respondents that an express arrangement to that effect had in fact been made.

Upon the facts in evidence the appellant's right to recover from the respondents the costs of his appeal awarded to him by the judgment of this court cannot, we think, be denied. The decision in *Adams* v. *London Improved Motor Coach Builders, Ltd.* (1), is directly in point and conclusive in his favour. See, too, the judgment of Romer L.J., at p. 295, in *Rex* v. *Archbishop of Canterbury* (2).

In so far as the decision in *Ryan* v. *McGregor* (3) may not be consistent with this conclusion we are unable to

(1) [1921] 1 K.B. 495. (2) [1903] 1 K.B. 289.
(3) (1925) 58 Ont. L.R. 213.

1927

ARMAND v. CARR.

Anglin C.J.C.

follow it. That case, however, may perhaps be distinguishable on the ground that the court there regarded the finding of fact of the taxing officer as definitely negativing any retainer of the solicitors by the defendant and as not open to review because of the circumstances under which the matter came before the court.

The appeal will, accordingly, be allowed with costs, including the costs of and incidental to the application before the Registrar.

Appeal allowed with costs.

Solicitors for the appellants: *Symons, Heighington & Shaver.*

Solicitor for the respondents Carr: *D. O. Cameron.*