

THE LATEST DECISION ON INSURANCE COMPANIES AND COSTS.

In Volume IV. of the *CANADIAN BAR REVIEW* (p. 225) the writer outlined the situation in regard to "Insurance Companies and Costs," having especial regard to the decision in *Ryan v. McGregor*,¹ which was adverse to the right of an insurance company to collect costs where the company had successfully defended the insured. Probably it will not be convenient to the reader to turn back to the volume quoted and, therefore, it will be necessary to refer briefly to the decision in that case and the grounds thereof.

Briefly, the facts in that case were that the defendant was insured against damages for negligence and solicitors were retained by an insurance company to defend him in accordance with the company's obligations under the policy. On the defence being successful and the defendant awarded costs the plaintiff refused to pay them on the ground that costs were awarded as an indemnity only and that where the defendant had not incurred any liability for his defence he could not collect costs. The Taxing Officer gave effect to that reasoning and the case eventually reached the Court of Appeal which gave a decision adversely to the defendant and the insurance company.²

In the Court of Appeal the English decisions of *Adams v. London Improved Motor Coach Builders, Limited*,³ and *Rex v. Archbishop of Canterbury*,⁴ were discussed but the court preferred to follow the previous Canadian decisions there cited and particularly *Walker v. Gurney-Tilden*,⁵ and held that the finding of the Taxing Officer should be sustained. In the previous article it was suggested that the finding of the Taxing Officer was not sufficient and that the principle of agency suggested in the *Adams* case was applicable. The argument was that where a litigant was defended by solicitors nominated as in that case by his Labour Union, nevertheless the solicitors were so instructed by the Union as agents of the member of the Union as it had undertaken to bring or defend actions on behalf of its members. It was urged that this principle could be applied to the obligation of an assurance company to defend the assured under the terms of its policy. However, the Court of Appeal refused

¹ 29 O.W.N. 263.

² 58 O.L.R. 213; [1926] 1 D.L.R. 476.

³ [1921] 1 K.B. 495, at p. 504.

⁴ [1903] 1 K.B. 289.

⁵ (1899) 19 Ont. P.R. 12.

to apply that principle, holding that the insurance company was obliged, under its policy, to defend and that it was defending the action by its own solicitors though with the consent and approval of the defendant.

The decision in the *Adams* case in effect is that the solicitor on the record is entitled to tax any costs awarded to his client unless the litigant opposing the taxation of costs satisfies the court that there was an agreement binding on such solicitor that he should not in any event look to his client for his costs. (See *Adams v. London Improved Motor Coach Builders, Limited*, (*supra*)). The previous article went on to point out that it had been hoped that where a case was referred to the Appellate Division under the Judicature Act in view of conflicting decisions an appellant would still have the right to review a finding of fact, especially where, as in the *Ryan* case, it was based only on affidavits filed on the taxation and cross-examination thereon, but the court followed the finding of the Taxing Officer without reviewing same owing to the case being referred as above stated. The finding of the Taxing Officer was as follows:—

"I think that . . . there was at least an implied agreement . . . to the effect that the costs of defending the action should be assumed and paid by the company and that . . . the defendants should be under no liability with respect thereto. I am satisfied that it was only upon this understanding that the defendants were induced to forego the privilege of being represented by their own solicitors, and I do not 'believe' that there is even the most remote chance of their even being asked to pay the costs in question."

This, of course, did not go the length required in the *Adams* case, but the court did not make that distinction but held that there was no liability on the defendant because it thought the Canadian cases enunciating the principle that costs were an indemnity only, should be followed in preference to the English cases and that the principle was applicable on the finding of the Taxing Officer. The question was thus settled in so far as insurance companies were concerned, limited, of course, to any similar set of facts. It was felt, however, that insurance companies were nearly always within such a vague definition as that of the Taxing Officer in that case, and therefore, that the companies were in effect precluded from recovery of costs awarded to an assured.

Fortunately for insurance companies the question came up later in a case of *Carr v. Armand* in which the writer happened to defend as solicitor for an insurance company whose obligation was exactly

the same as that of the company in *Ryan v. McGregor*, (*supra*). On the defendant succeeding in the Supreme Court of Canada, *Armand v. Carr*,⁶ it was attempted to tax the costs awarded to the defendant but the Registrar of the Supreme Court ruled that Armand was not entitled to recover those costs from the respondents as his solicitors of record were in reality employed by an insurance company which was bound to defend the action by its policy and that the facts which were proved thus came within the decision in *Ryan v. McGregor*, (*supra*). An appeal was taken by Armand from this decision to the full court pursuant to an order of the Chief Justice of Canada, made in view of the importance of the question in these days of multifarious insurance. The question was argued and judgment reserved. Judgment has now been handed out and is reported.⁷ Briefly the decision is that the insurance company instructed its own solicitors to defend the action, not on its behalf but on behalf of the appellant Armand, thus implementing its obligation under its policy to defend "in the name and on behalf of the insured any civil actions, etc." This was adopting the principle of agency enunciated in the *Adams* case. The court points out that the action was defended and the appeal to the Supreme Court of Canada taken in the name of the assured and adds that "for so doing the Appellant's authority was necessary and was undoubtedly obtained." The court does not expressly decide the case on the ground that the insurance company instructed its solicitors to defend the action as agents for the appellant under the obligation in its policy, or because the appellant (defendant) employed the solicitors. It did find, however, that "their retainer as his solicitors in a manner binding upon him admits of no doubt. Such retainer or employment carried with it personal liability of the defendants for the costs reasonably incurred by the solicitors pursuant to it unless there was a contract or agreement binding upon the solicitors excluding such liability," citing *Adams v. London Improved Motor Coach Builders, Limited*, (*supra*). The court found there was no agreement that the defendant should not be liable for costs and, therefore, defendant was entitled to tax costs against the unsuccessful plaintiff.

The court referred very briefly to *Ryan v. McGregor*, (*supra*), as follows:—

"In so far as the decision in *Ryan v. McGregor* may not be consistent with this conclusion, we are unable to follow it. That case, however, may

⁶ [1926] S.C.R. 575; [1926] 3 D.L.R. 592.

⁷ (1927) 60 O.L.R. 293; [1927] 2 D.L.R. 720.

perhaps be distinguishable on the ground that the Court there regarded the finding of fact of the Taxing Officer as definitely negating 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 result of this decision is that not only can insurance companies collect costs where such companies engage in litigation on behalf of an assured, but also any solicitor of record in any case whatever until it is shown that such solicitor agreed that he should not look to his client for any costs. The onus of establishing such an agreement is on the party opposing the collection of costs duly awarded.

It should also be pointed out that before the decision in *Carr v. Armand*, was announced or before it was even ascertained that that question might be determined by the Supreme Court of Canada the question had been taken up by the Ontario Legislature with the result that at the last Session the following amendment to the Ontario Insurance Act was passed:—

"When an action is brought against any person in respect of any matter against which he has been insured and the insurer conducts the defence, if the insurer at any time before the statement of defence is filed, files a notice in the office in which the proceedings are being carried on stating that it is defending the action on behalf of the defendant, the judge shall, if costs are awarded against the plaintiff, direct the same to be paid to the insurer and, if costs are awarded to the plaintiff, direct the same to be paid by the insurer. The notice shall form part of the record but the fact that the defendant is insured shall not be communicated to the jury during the course of the trial." 17 Geo. V. cap. 59, s. 4.

The decision of the Supreme Court obtains throughout Canada and perhaps puts the matter on a broader basis than the above legislation.

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