ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Starling.

RA'MJI MORA'RJI (ORIGINAL DEFENDANT), APPELLANT, *v.* J. E. ELLIS AND THE STANDARD OIL COMPANY OF NEW YORK (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1895. *September 20.*

Costs—Decree—Assignment of decree pending appeal—Assignee of decree made respondent to appeal—Decree reversed in appeal—Liability of assignee for costs of hearing in lower Court.

The Standard Oil Company and one Ellis sued the defendant for damages. The lower Court found that there was no privity of contract between the company and the defendant, and dismissed the suit of the company (plaintiff No. 1) with costs, but passed a decree for Ellis (plaintiff No. 2) with costs. The defendant appealed in the first instance making Ellis (plaintiff No. 1) the sole respondent. The company, however, gave the defendant (appellant) notice that the decree obtained by Ellis had been assigned to them. Whereupon he (the appellant) obtained leave to make the company party-respondents as assignees of the decree from Ellis. The company objected to be made respondents. The appeal Court reversed the decree of the lower Court and dismissed the suit, and the question arose whether the company could be made liable for the general costs of the hearing in the lower Court.

Held, that the company were liable only for the costs of the appeal in which they had taken an active part, but not for the general costs of hearing in the lower Court, except so far as the suit was their suit. *Ellis* was liable for the costs throughout. The appellant (defendant) was not entitled, by bringing the company on the record against their will, to obtain an additional security for the costs already incurred in the lower Court.

The assignee of a decree who is made respondent in an appeal from it, and taken no steps actively to support it, ought not to be ordered to pay costs.

THE Standard Oil Company of New York (plaintiff No. 1) had a branch in Bombay and imported oil. Ellis (plaintiff No. 2) was a broker and commission agent, who obtained orders for the company and for others from native dealers.

This suit was brought by the company and Ellis against the defendant (appellant) to recover damages for his non-acceptance of five hundred barrels of oil, for which, it was alleged, he gave Ellis (plaintiff No. 2) an indent, in August, 1893, requesting him, or his agents, to purchase it for him. The plaint stated that Ellis accordingly ordered from the company (as the defendant intended) the said oil, but when it arrived, the defendant refused to take

*Suit, No. 91 of 1894; Appeal No. 852.

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delivery, repudiated the indent, and denied that he ever gave the order.

The plaint contained the following clause:—

"9. To avoid any technical defence the plaintiff John Edward Ellis has joined with the said company as a plaintiff in this suit. The plaintiffs submit that the plaintiff company is entitled to recover from the defendant the said damages, or, in the alternative, that the said second plaintiff is so entitled. The second plaintiff is willing that the said plaintiff company should recover the said damages."

The lower Court found that there was no privity of contract between the Standard Oil Company (plaintiff No. 1) and the defendant; that they had sold the oil to the commission agent Ellis (plaintiff No. 2) and not to his correspondent (the defendant).

In his judgment the Judge (Candy, J.) said:—

"I now come to the question, who can recover from the defendant No. 1—the Standard Oil Company or Ellis? Admittedly both cannot, nor can there be a decree in the alternative. Ellis is the only man who can recover from the defendant. The correspondence recorded in the case shows that there was no privity between the Oil Company and Rámji Morárji. The Oil Company who supplied the oil to the commission agent (Ellis) sold to him and not to his correspondent. 'There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brick-maker who supplies the bricks to a person building a house and the owner of that house' (Per Blackburn, J., in *Ireland* v. *Livingston* (1)."

The lower Court accordingly dismissed the suit of the company with costs, but passed a decree for Ellis (plaintiff No. 2) for Rs. 8,892 with costs.

The defendant appealed, in the first instance making Ellis the sole respondent. On the 1st August, 1894, the Standard Oil Company gave the defendant notice that the decree obtained by Ellis had been assigned to them. Thereupon (on 31st August, 1894) the defendant obtained leave to make the company party-respondents as assignees of the decree from Ellis.

The Appeal Court reversed the lower Court's decree with costs and dismissed the suit. In speaking to the minutes of the decree, the question arose whether the Standard Oil Company could be made liable for the general costs of the hearing in the lower Court.

(1) L. R., 5 Eng. and Ir. Ap., 395 at p. 408.

Inverarity for the Standard Oil Company :—We cannot dispute our liability for the costs of the appeal; but we contend that we are not liable for the general costs of the hearing in the lower Court. The decree of the lower Court has dismissed our suit with costs, and, of course, we must pay these costs so far as it was our suit. But for the costs of the suit in so far as it was Ellis' suit we are not liable. In the lower Court, Ellis succeeded and got a decree against the defendant. We have bought that decree, and it has been assigned to us as purchasers. We are in the same position as a complete outsider would occupy who bought the decree. He could not be held liable for the costs of the decree which he bought from the decree holder. The cost of obtaining it is probably taken into account in fixing the price paid for it. The point is, therefore, to be considered as if we had not been parties at all. The Court has no jurisdiction to make persons not parties pay costs—*Rám Coomár* v. *Chunder Canto*[1]. That is a strong case, for the Court thought that the person whom it refused to fix with costs had such an interest that he ought to have been a party. Here we had no interest. The Court found that to be so, and dismissed our suit, while it gave Ellis a decree. The defendant contended that we were not a proper party, and had no claim against him, and succeeded in his contention.

Macpherson (Acting Advocate General) for the defendant (appellant) :—The company ought to be made liable for the whole of the costs in the lower Court. The company has been the really active party in the litigation. The suit against us, so far as it was their suit, was dismissed with costs. We could not appeal against that order as to costs; but Ellis got a decree against us, and we appealed against that decree. The company took over that decree and were made respondents as assignees. An assignee by operation of law is liable to costs *ab initio*. A person who voluntarily makes himself assignee is *a fortiori* similarly liable—*Watson* v. *Holliday*[2]; *Borneman* v. *Wilson*[3]; *Harland* v. *Garbutt*[4]; *Boynton* v. *Boynton*[5]. An appeal is part of a suit—

(1) 2 App. Cas., 186; see p. 212.
(2) 20 Ch. D., 780 at p. 785.
(3) 23 Ch. D., 53 at p. 55.
(4) Weekly Notes for 1881, p. 8.
(5) 4 App. Cas., 733—5.

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Bachubái v. *Shámji Jádowji*[1]. He referred to sections 372 and 582 of the Civil Procedure Code (Act XIV of 1882).

Inverarity in reply:—The cases cited are distinguishable. First, in each case the party made liable for costs took the initiative and applied to be made a party. We did not do that; we objected to be made a party to the appeal, and it was done against our will. Secondly the trustee in bankruptcy in one case and the executor in the other represented the whole interest of the party for whose costs they were made liable. But we do not represent Ellis. The buyer of an article does not represent the seller, or accept his liabilities. Nor does the buyer of a claim such as this. Once our suit was dismissed we stood in the position of a mere outsider so far as Ellis' suit was concerned, and this Court has no power to make us pay the costs for which he alone is liable.

FARRAN, C. J.:—The question which we have to consider is as to the liability of the assignee of a decree in favour of a plaintiff to pay the costs of suit in the event of the decree being reversed.

We agree with the argument of Mr. Inverarity that (except possibly in a very extreme and exceptional case) a person assisting the plaintiff is not liable in respect of, and cannot be ordered to pay, costs unless he is made a party to the suit—*Hayward* v. *Giffard*[2]; *Rám Coomár* v. *Chunder Canto*[3]. Now, in the present case the Standard Oil Company having originally, under section 26 of the Civil Procedure Code (Act XIV of 1882) been wrongly made party-plaintiffs to the suit, were by the decree dismissed from it, and were ordered to pay the costs of the defendant occasioned by their having been so joined.

From this order of dismissal there has been no appeal. Their liability to pay the general costs of the suit must, we think, under these circumstances, be determined as if not having been joined as plaintiffs originally, they had been for the first time made parties respondents, by reason of having taken an assignment of the decree.

(1) I. L. R., 9 Bom., 536 at p. 551. (2) 4 M. and W., p. 191.
(3) 2 App. Cas., 186; see p. 212.

It appears, from the correspondence which has been read, that they did not consent to be made respondents; but they took no steps to have the *ex-parte* order, making them respondents, set aside, and they have since actively supported the decree, which has been reversed in appeal. That is their position.

It has been contended that under section 582 of the Civil Procedure Code the Court had no power to make them respondents in consequence of the assignment of the decree to them; but that contention is opposed to the ruling in *Rájárám* v. *Jibái*[1] which shows that under section 372 they were liable to be made respondents without calling in aid the provisions of section 582, and cannot be supported. We must take it that the company have been properly made respondents.

Now, it is a well-settled rule that executors and trustees in bankruptcy and others suing in *autre droit* are liable for costs as though they were suing in their own right, and when, pending a suit, they come in as plaintiffs in lieu of original plaintiffs and adopt the proceedings, they become liable personally for the costs *ab initio*. See the earlier cases collected in *Cook* v. *Hathway*[2] and see *Watson* v. *Holliday*[3]; *Borneman* v. *Wilson*[4]; *Boynton* v. *Boynton*[5]; Daniel's Chancery Practice, p. 1175 (6th Ed.).

It cannot, we think, be doubted that an assignee of a claim in suit, who in virtue of his assignment is made a party to the suit as plaintiff before decree, is liable to have the same rule as to costs applied to him. *Seear* v. *Lawson*[6] is an instance of a person acquiring an interest in the subject-matter of the suit by assignment so being made a party. It shows that such parties are treated just as an executor coming in after the death of his testator or a trustee in bankruptcy coming in after adjudication would be treated, and we cannot doubt that the same rule as to costs would be applied to them. We have not been referred to, nor have we found a case in which the assignee of a decree has been made respondent, or in which his liability to costs has been dealt with. We think that, on principle, the Court has jurisdiction to make such an assignee liable for the costs of the suit *ab*

(1) I. L. R., 9 Bom., 151.
(2) L. R., 8 Eq., 612.
(3) 20 Ch. D., 780 at p. 785.
(4) 28 Ch. D., 53 at p. 55.
(5) 4 App. Cas., 733—5.
(6) 16 Ch. D., 121.

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initio, if he is made a respondent at his own desire in lieu of the original plaintiff, or if, having been so made a respondent *ex parte*, he actively supports the decree. In principle we can see no difference between his case and that of the trustee in bankruptcy who actively supports an erroneous decree in favour of the bankrupt. Admitting, however, the jurisdiction, we think that the assignee of a decree, who is made respondent in an appeal from it, and takes no step actively to support it, ought not to be ordered to pay costs. A person who takes an assignment of a decree already made takes a completely legitimate security, and ought not, we think, as a rule, to be subjected thereby to liability for the costs of the litigation which led up to it, even though the defendant succeed in getting him made *in invitum* a party respondent.

In the present case the assignee company have taken an active part in the appeal, though they have been brought upon the record against their consent. It is admitted that they may properly be ordered to pay the appellant's costs of the appeal, but it is argued that they ought not to be ordered to pay the costs incurred in the Court below. There is this difference between this case before us and that of an executor or trustee coming in and supporting the decree, that here the original plaintiff is still retained upon the record, and that the assignee company are only added as an additional security for costs already incurred or for those to be incurred in the appeal. We have felt great doubt upon the subject, but, on the whole, we think the defendant is not entitled, by bringing the assignee company upon the record against their will, to obtain an additional security for the costs which have been already incurred in the Division Court. The decree will, therefore, be drawn up making the Standard Oil Company liable only for the appellant's costs of appeal and Ellis liable for the costs throughout. The costs of speaking to the minutes will be borne by the parties respectively.

Attorneys for the appellants (defendants) :—Messrs. *Chalk, Walker and Smetham.*

Attorneys for the respondent (The Oil Company) :—Messrs. *Ardesar, Hormasji and Dinsha.*