1927
June 27.

ENERGINE REFINING AND MANUFACTURING COMPANY ..... } PETITIONER;

AND

DAVID IRVING .....RESPONDENT;

AND

THE ENERGINE MANUFACTURING COMPANY LTD. ..... } OBJECTING PARTY.

Practice—Security for costs—Application to register trade-mark—Objecting Party

Held, that a petitioner in a proceeding before this Court for an order entitling him to register a trade-mark, is a plaintiff, and when residing abroad may be compelled to give security for costs. That security may be demanded by an "objecting party" contesting petitioner's right to the registration aforesaid.

Application by objecting party for an order compelling the petitioner to give security for its costs.

The application was heard before the Registrar of the Court.

R. S. Smart, K.C., for objecting party.

J. Genest for petitioner.

THE REGISTRAR, this 29th June, 1927, delivered judgment.

This was an application for an order for security for costs by the objecting party herein, an order for security having already been granted to the respondent herein.

That the granting of an order for security for costs is a matter of discretion vested in the court is apparent from the books of practice. In the case of *Denier* v. *Marks* (1), Meredith C.J., refers to it in these words:

The large discretion which is vested in the Court in the making or withholding of an order for security for costs.

One of the salient grounds for granting an order for security is the fact that the plaintiff is resident abroad without assets here.

In re *Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Company* (2), Jessel M.R., said:

The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be

(1) (1899) 18 Ont. P.R. 465, at p. 468.

(2) (1876) 2 Ch. D. 531.

1927

ENERGINE REFINING AND MFG. CO. v. IRVING.

effectually made against him if unsuccessful, is by the rules of court compelled to give security for costs. That is a perfectly well established and perfectly reasonable principle.

In The Annual Practice, 1927, at page 1367, it is stated:

> The ordinary ground on which security is ordered is residence abroad; and subject to the exceptions hereinafter mentioned, the rule is inflexible.

It is established by the affidavit of Mr. Gordon, read on this application, and it further appears by the petition filed in this case that the petitioner is a foreign corporation. It is objected on behalf of the petitioner first, that the objecting party comes into court in the character of a plaintiff, and that therefore he should not be allowed to obtain an order for security against the ostensible plaintiff here. I cannot see my way to accede to this contention. The petitioner is undoubtedly a plaintiff seeking to assert a right against the rest of the world; and if his right can only be maintained by subordinating the rights of third parties in the subject matter of the petition, and such third parties are invited by him by means of a notice published as required by the rules of court to dispute his right to register the trade-mark in question in these proceedings, such third parties are undoubtedly entitled to become objecting parties. Secondly, the petitioner objects to the order going on the ground that there may be many other persons to come in as objecting parties in this one proceeding, and that the plaintiff would be embarrassed in his right if he had to respond repeated applications for security by objecting parties. I find a sufficient answer to this contention in Morgan & Wurtzburg on Costs (Second Edition 1882), at page 22. It is there stated in the marginal caption to one of the paragraphs that: "Each defendant is entitled to separate security." In the text the case of *Ogborne* v. *Bartlett* (Beames on Costs, App. IX) is referred to where the assignees of a bankrupt, on being made defendants, were allowed security though the defendant (the bankrupt) had previously obtained it. The present case before me is closely in line with *Ogborne* v. *Bartlett (supra)* because I have already granted an order for security for costs on behalf of the respondent, David Irving.

My view of the second contention by the petitioner's solicitor is further supported by the remarks of Jessel M.R., *In re Percy & Kelly Nickel, Cobalt, and Chrome Iron Min-*

ing Company (supra) at page 532. The learned Master of the Rolls said:—

The petitioner who presents a petition of this kind knows that by the Act of Parliament any shareholders may appear to oppose it.

It will be observed that in the case last cited the proceedings were instituted by a petition under an Act of Parliament. In the case before me the proceedings were instituted by a petition under the Trade-Marks Act and the Rules of Court. So that the remarks of the learned Master of the Rolls are peculiarly applicable here. There is another of his observations on page 532 that re-enforces the applicability of the case before him in respect of the facts of the case before me. He says:—

Nor does it make any difference if, as is the case here, the party who appears is not named as a respondent or served.

In the case before me David Irving was named by the petitioner as a respondent; and the objecting party comes in only in response to the notice published as required by the rules of the Court in case of an application to register a trade-mark. (See Annual Practice, 1927, at p. 1369).

The case of *In re Hurters Trade Mark* (1) before North J., seems to be conclusive of the right of the objecting party in the case before me to obtain an order for security. There, Hurter, a foreigner, resident out of the jurisdiction, had taken out a summons under the Trade-Mark Act for the registration of a mark. This summons was opposed by the Appollinaris Company, a company within the jurisdiction. The Appollinaris Company applied to North J., in Chambers, for an order that Hurter should give security for the company's costs of the opposition, and that until the security be given, Hurter should not be allowed to take any further proceeding in the matter. The order for security was made against Hurter.

The application of *The Energine Manufacturing Company,* the objecting party herein, for an order for security for costs to be furnished by the petitioner is granted. The security must be furnished within thirty days from the service of this order upon the petitioner's solicitors. All proceedings in the matter will be stayed until such security is furnished.

Costs of and incidental to this application to be costs in the cause. *Judgment accordingly.*

(1) (1887) W.N. 71.