1925

Mar. 7.

BETWEEN:

W. J. ROWE ET AL.....PLAINTIFFS;

AND

H. S. THOMAS.....DEFENDANT.

Practice—Security for costs—Patents—Conflicting applications.

Plaintiffs and defendant each applied for a patent of invention in the Patent Office, and the Commissioner having declared there was conflict, plaintiffs brought action before this court to have the matter of this conflict decided and to have it declared who was the first inventor.

Held: that, as in such an action each party is seeking affirmative relief and as such each party is as much plaintiff as the other, therefore, the defendant becoming quasi plaintiff, if he resides out of the jurisdiction may be ordered to give security for the plaintiffs' costs.

APPLICATION by plaintiffs for an order that defendant give security for costs of the plaintiffs.

Ottawa, March 6, 1925.

Application now heard before the Honourable Mr. Justice Audette in Chambers.

1924

ROWE ET AL v. THOMAS.

Livius Percy Sherwood for plaintiffs.

R. S. Smart for the defendant.

The facts are stated in the reasons handed down.

AUDETTE J., now this 7th March, 1925, delivered judgment.

This is a case of conflicting applications for a patent of invention, wherein the plaintiffs have taken,—under the provisions of section 22 of the Patent Act—proceedings in this court, instead of going to arbitration, for the determination of the conflict.

The statement of claim and the statement of defence are both filed and the plaintiffs now make an application for an order directing the defendant to give security for the plaintiffs' costs.

There is no hard and fast rule as to what are the circumstances under which an order for security for costs should be given (25 Hals. 515). And it is well recognized that in ordinary actions a defendant is not to be compelled to give security for costs, because as a general rule he is compelled to litigate.

However, the substantial and not the nominal position of the parties must be looked at carefully before arriving at any conclusion. Indeed in some cases, when the defendant becomes quasi a plaintiff, as in replevin, and he resides abroad, he may be compelled to find security for costs, as was ordered in *Selby* v. *Cruchley* (1). The defendant may also be compelled to give security in an interpleader issue. Chitty's Arch. Practice, 14 ed. 398. In *La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (2) both parties being resident out of the jurisdiction, both were ordered to give security for costs, in an application for the rectification of the register of trade-marks.

If the present plaintiffs had not, by being more diligent, instituted this action, the defendant might have done so himself and become plaintiff, while claiming absolutely what he is now claiming by his defence. The defendant's position to-day cannot, under any principle, be distinguished from an ordinary plaintiff; he is, alike the present plaintiffs, seeking affirmative relief by his plea. Each party in the present action is as much plaintiff as the other

(1) [1820] 1 B. & B. 505.

(2) [1891] 3 Ch. 451 at 458.

and each is asking to be declared the first and true inventor of the invention in question and that a patent issue therefor.

See also *Canadian International Mercantile Agency* v. *International Mercantile Agency* (1); *Sinclair* v. *Campbell* (2); *Williams* v. *Crosling* (3); *Knickerbocker Trust Co.* v. *Webster* (4).

Therefore, it is hereby ordered that the defendant do, within four weeks from the service of this order, give security on his behalf in the sum of $400 to answer the plaintiffs' costs of the action, and that all proceedings be in the meantime stayed.

Ordered accordingly.