

MIDDLETON, J., IN CHAMBERS.

NOVEMBER 11TH, 1918.

SUTTER v. SUTTER.

Security for Costs—Plaintiff out of Ontario—Counterclaim—Onus—Defendant Regarded as Attacking Party.

Appeal by the plaintiff from an order of a Local Judge refusing to set aside an order requiring the plaintiff to give security for the defendant's costs of the action. The plaintiff lived in Manitoba.

H. H. Davis, for the plaintiff.

J. H. Spence, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff was the wife of the defendant; certain land stood in the plaintiff's name; the defendant claimed it as his own, alleging that the deed was taken in the plaintiff's name by her fraud and contrivance.

The husband and wife having separated, he retained possession of the land; she sued to recover possession; and he counterclaimed to have the deed reformed or for the value of improvements.

The learned Judge said that, in this situation, the onus was on the defendant, and in substance he was plaintiff. If the action was dismissed, the plaintiff might still set down the counterclaim for trial. The defendant must prosecute the counterclaim, for he could not well leave the title in his wife, and it would be idle to have two trials.

Because the onus was on the defendant, and he was in substance plaintiff, the appeal should be allowed and the order for security for costs vacated; costs to the plaintiff in the cause.