ALFRED K. HERRINGTON (*Plaintiff*) ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF HAMILTON (*Defendant*) ..... RESPONDENT.

1963

*May 21
May 27

MOTION TO QUASH

Practice and procedure—Pleadings—Partnership—Jurisdiction—Notice of appeal by one of two partners.

The City of Hamilton expropriated certain lands of which the appellant and his wife were owners as joint tenants and which formed part of the property of a partnership in which they were the only partners. One T was appointed receiver of all the assets of the partnership with power to manage the business of the partnership until the conclusion of the expropriation proceedings. The Ontario Municipal Board, which was appointed the sole arbitrator, fixed the compensation at $50,525. The husband, the wife and T appealed to ask that the compensation be increased. The appeal was dismissed. The husband alone decided to appeal to this Court, and served notice of appeal upon the solicitors for the City and the solicitor for his wife and T. The City moved to quash the appeal on the ground that the appellant had no status to maintain the appeal because a partner cannot sue alone to recover a debt due to the partnership.

Held: The motion to quash should be dismissed.

It may well be that the better practice would have been for the appellant to serve a notice of appeal on behalf of the partnership, in spite of the refusal of the other partner to take part in it. However, he has served notice of the appeal on all persons who were interested. What is of real importance is that all necessary parties should be made parties to the appeal. In this case it was of little significance whether the wife and T were described as appellants or respondents. The notice of appeal should therefore be amended to describe the wife and T as respondents and a copy of the order so directing should be served upon them.

*PRESENT: Taschereau C.J. and Cartwright, Abbott, Martland and Judson JJ.

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MOTION by the respondent to quash the appeal from a judgment of the Court of Appeal for Ontario for want of jurisdiction. Motion dismissed.

B. H. Kellock, for the motion.

R. F. Wilson, contra.

The judgment of the Court was delivered by

CARTWRIGHT J.:—On April 8, 1958, the City of Hamilton expropriated certain lands of which Alfred Herrington and Gisele Herrington, who are husband and wife, were the owners as joint tenants and which formed part of the property of a partnership in which they were the only partners.

Under the relevant statutory provisions the Ontario Municipal Board was appointed sole arbitrator to determine the compensation to be paid by the City. By order dated March 23, 1962, the Board fixed the compensation at $50,525.

Pursuant to a report of His Honour Judge Schwenger dated September 30, 1960, Samuel Taylor had been appointed Receiver of all the assets of the partnership with power to manage the business of the partnership until the final conclusion of the expropriation proceedings.

Alfred Herrington, Gisele Herrington and Taylor appealed to the Court of Appeal for Ontario from the award made by the Board asking that the compensation be increased. On January 9, 1963, this appeal was dismissed with costs.

Apparently Alfred Herrington decided to appeal to this Court while Gisele Herrington and Taylor decided not to appeal. By notice dated March 6, 1963, Gisele Herrington and Samuel Taylor changed their solicitors. On the same day the solicitors for Alfred Herrington served a notice of appeal to this Court, using the style of cause set out above and reading as follows:

> TAKE NOTICE that the Claimant, Alfred K. Herrington, appeals to the Supreme Court of Canada from the Order of the Court of Appeal of Ontario pronounced on the 9th day of January, 1963, and asks that the said Order be set aside or varied and that the amount of compensation awarded be increased, or in the alternative, that the matter be referred back to the Ontario Municipal Board for a new hearing.

This notice was directed to and served upon the solicitors for the City and the solicitor for Gisele Herrington and Samuel Taylor.

On March 8, 1963, an order was made by the Registrar of this Court approving the security given by the appellant.

Counsel for the City now moves to quash the appeal "on the ground that the appellant Alfred Herrington has no status to maintain this appeal". Counsel for Alfred Herrington opposes this motion and also moves:

> for an order extending the time for making application for leave to appeal and for leave to appeal to this Court from the Order of the Court of Appeal for Ontario dated the 9th day of January, 1963, dismissing the appeal of the Claimants from the Order of The Ontario Municipal Board dated the 23rd day of March, 1962, or for such further or other order as to this Honourable Court may seem just.

In support of the motion to quash, Mr. Kellock cited a number of cases holding that one partner cannot sue alone to recover a debt due to the partnership. In the earliest of these *Scott v. Godwin*[1], Eyre C.J. said at p. 73:

> I take it to have been solemnly adjudged in several cases, and to be the known received law, that one co-covenantee, one co-obligee, or one joint contractor by parol, cannot sue alone.

In *Kennedy, Ross and Velanoff v. Canadian General Insurance Co.*[2], all the members of a partnership had joined in an action on a policy issued to the partnership. The action was dismissed. One of the partners appealed to the Court of Appeal for Ontario in his own name. The appeal was quashed. Aylesworth J.A., who delivered the unanimous judgment of the Court, after pointing out that the policy was issued to and insured the partnership said, at pp. 688 and 689:

> There is no right of an individual partner either to sue upon such a claim or if judgment be given against the partnership in an action on such claim, individually and in his personal capacity to appeal from that judgment.

It is made clear, however, in the last paragraph of the reasons of the learned Justice of Appeal that the Court had offered to entertain an application by the appellant to regularize the proceedings; the offer was apparently disregarded. In the case at bar Mr. Wilson

[1] (1797), 1 Bos. & P. 67, 126 E.R. 782.
[2] (1960), 22 D.L.R. (2d) 687.

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makes such an application in case it should be found necessary.

It may well be that the better practice would have been for the appellant Alfred Herrington to serve a notice of appeal on behalf of the partnership, in spite of the refusal of the other partner to take part in an appeal; he has, however, served notice of the appeal on all persons who are interested. Had he not done so it would have been open to the Court, under Rule 50 (2), to direct that such parties respondent be added as might be necessary "to enable the Court effectually and completely to adjudicate upon and settle the question involved in the appeal". What is of real importance is that all necessary parties should be made parties to the appeal. In this case it is of little significance whether Gisele Herrington and Samuel Taylor are described as appellants or respondents, it is sufficient that they will be before the Court.

The notice of appeal should be amended to describe Gisele Herrington and Samuel Taylor as respondents and a copy of the order so directing should be served upon them; when this has been done the appeal will, in my opinion, be properly constituted, and the motion to quash should therefore be dismissed. The motion made on behalf of Alfred Herrington becomes unnecessary and should also be dismissed. I would reserve the costs of both motions to be disposed of by the Court hearing the appeal.

Motion to quash dismissed.