

HON. MR. JUSTICE RIDDELL.

OCTOBER 30TH, 1912.

CHAMBERS.

HOODLESS v. SMITH.

4 O. W. N. 190.

Parties — Joinder — Action for Damages to Land — Non-joinder of Joint-tenant as plaintiff.

Motion for an order dismissing action on the ground that plaintiff's wife was a joint tenant with him of the land in respect of which he sued as owner and that she had not been made a party plaintiff to the action. The action was against a grantee of the plaintiff's grantor to restrain him from breaking certain alleged covenants common to the lands of both plaintiff and defendant.

MONCK, Co.C.J., ordered that plaintiff's wife be joined as plaintiff within one week and if not action be dismissed with costs.

RIDDELL, J., varied above order by substituting for the clause providing for the dismissal of the action in default of amendment a clause providing that the action do not come on for trial unless and until the amendment be made.

Costs of order and appeal in cause on account of delay in moving. The circumstances of the case shew a most objectionable case of non-joinder, which would probably defeat the action if brought to trial.

Stafford v. London, 1 P. Wms. 428.

Nobels v. Jones, 28 W. R. 726, and

Lydall v. Martineau, 5 Ch. D. 780, referred to.

An appeal by the plaintiff from an order of HIS HONOUR JUDGE MONCK, at Hamilton.

J. G. O'Donoghue, for the plaintiff's motion.

E. D. Armour, K.C., for the defendants, contra.

HON. MR. JUSTICE RIDDELL:—The pleadings set up that one C. B. was the owner of a certain park lot which he laid out in 54 lots, registering the plan; he sold 35 of these to the C. L. Co., the company, in the deed, covenanting for themselves, their successors and assigns, not to build any building with the front wall within less than 6 feet from the line of S. street. The C. L. Company sold certain lots to A. M., who entered into similar covenants; A. M. sold these to "the plaintiff and his wife, K. H., as joint tenants and not as tenants in common," part of this property, and the plaintiff and his wife entered into similar covenants. A. M. sold thereafter to the defendant other parts and adjoining the property of the plaintiff and his wife, and they entered into similar covenants.

The defendant in April, 1912, commenced to excavate a cellar, and this to a depth below the plaintiff's brick house, and also out to the margin of Sophia street, and