ARNOLISA *et al.* *v.* DISSAN *et al.*

C. R., Matara, 5,061.

1900.
September 17.

Civil Procedure Code, s. 12—Action for an undivided share—Joinder of co-owners as plaintiffs.

Section 12 of the Civil Procedure Code is intended to apply to a case of a mere trespasser, and not to apply to a case where one co-owner excludes another co-owner from possession.

Semble, per BONSER, C.J.—Section 12 is confined to a possessory suit.

IN this case six plaintiffs sued three defendants, averring that they (the plaintiffs) were owners respectively of $\frac{99}{16800}$, $\frac{99}{24000}$, $\frac{4}{3750}$, $\frac{4}{1500}$, $\frac{99}{24000}$, and $\frac{1}{1680}$ parts of two lands, and that the first, second, third, and fourth plaintiffs were further entitled to $\frac{3}{2800}$, $\frac{3}{400}$, $\frac{1}{750}$, and $\frac{1}{300}$, parts "of the planters' half share of the old plantations of the said lands." The devolution of title by inheritance in regard to each of the six plaintiffs was also set forth. Prescriptive possession was alleged, as also ouster by defendants who were alleged to be also entitled to certain shares. Plaintiffs prayed that they may be declared entitled to the said shares.

The defendants claimed the lands also by inheritance and prescriptive possession.

The Commissioner made a decree in accordance with the plaintiffs' prayer.

Defendants appealed.

Maartensz, for appellants.

Pieris, for plaintiffs, respondent.

BONSER, C.J.—

This appeal raises a question as to the meaning of section 12 of the Civil Procedure Code.

Six persons who claim to be entitled to various shares in a garden brought an action against three persons who were co-owners and who it was alleged had excluded them from the enjoyment of their shares of the premises. The interests of the parties have become very much subdivided, so much so that the denominator of some of the fractions claimed by the plaintiffs was 16800.

In 1879 it was decided by this Court by PHEAR, C.J., and BERWICK, A.J. (in a case reported in *2 S. C. C. 148*), that an action of this sort could not be maintained unless the co-sharers were made parties to it, and that, while it might be competent to one of several co-owners to bring an action against a mere transgressor

1900.
September 17.
BONSER, C.J.

who interfered with his possession without joining the other co-owners as co-plaintiffs, it was not competent, where the defendant was not a mere trespasser, but was a co-owner, to maintain such an action in the absence of some of the co-owners.

In 1886 that decision was followed by a majority of this Court (*7 S. C. C. 109*).

In 1889 the Civil Procedure Code was passed, and section 12 deals with this question and provides " that where two or more " persons are entitled to the possession of immovable property as " joint tenants or tenants in common, one or more of them may " maintain an action in respect of his or their undivided shares in " the property *in any case where such an action might be main-* " *tained by all.*" Now that seems to be intended to apply to a case of a mere trespasser, and not to apply to a case where one co-owner excludes another co-owner, because in that case the action could not be maintained by all, for a man could not sue himself.

It is unnecessary to decide whether section 12 has reference to a petitory action, or whether it is not confined to a possessory action. The words " entitled to the possession of immovable property " rather point to the restriction to a possessory action, otherwise the words " the possession " are surplusage.

It is quite clear that section 12 does not repeal the practice as laid down by this Court in the judgments to which I have referred, and I therefore am of opinion that the present action is not maintainable in its present form, and it should be sent back to the Court of Requests in order that the other co-owners may be joined as plaintiffs, or, if they decline to become co-plaintiffs, that they may be made defendants and a partition prayed. Costs to abide the event of the action.