SHEIK ALI *v.* CARIMJEE JAFFERJEE.

1895.
June 25 and July 9.

D. C., Colombo, 4,850.

Rei vindicatio—*Form of decree—Detinue—Civil Procedure Code, ss. 191, 320–322.*

Though in an action of detinue decree for delivery of the articles claimed or payment of their value is admissible, yet such an alternative decree is not regular in an action *rei vindicatio*, the question of compensation arising only when it is ascertained that the property could not be restored, and the amount of compensation being dependent on the conduct of the defendant.

Per BONSER, C.J.—Sections 320–322 of the Civil Procedure Code seem to be in accordance with the Roman-Dutch Law and practice, and section 191 should be disregarded as being inconsistent with the later portions of the Code.

Sithambarappillai v. Vinasitamby (*ante*, page 114) followed.

IN this action plaintiff prayed that the defendant may be ordered to deliver to him three cases of tortoise-shells belonging to the plaintiff and wrongfully detained by the defendant, or to pay to the plaintiff the value thereof. He prayed also for damages.

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Defendant claimed the goods as his own, but the District Judge entered a decree for plaintiff for the return of the cases, "and in "default of delivery the defendant do pay to the plaintiff the value "thereof, namely, the sum of Rs. 9,000," and Rs. 900 as damages.

On appeal, *Layard, A.-G.* (with him *Dornhorst, Morgan, Dumbleton*, and *Van Langenberg*), appeared for the defendant appellant.

Ramanathan, S.-G. (with him *Sampayo* and *Senáthi Rája*), for plaintiff respondent.

The Supreme Court affirmed the judgment of the Court below on the merits, but amended the decree by striking out the words "and in default of delivery the defendant do pay to the plaintiff "the value thereof, namely, the sum of Rs. 9,000."

Cur. adv. vult.

9th July, 1895. BONSER, C.J.—

The plaintiff is entitled to a decree for the delivery up of these goods.

I observe that the decree, after ordering the delivery of the three chests, proceeds thus: "and in default of delivery the defendant do "pay to the plaintiff the value thereof, namely, the sum of Rs. 9,000." As we held yesterday in the Jaffna jewel case (*Sithambarappillai v. Vinasitamby*, reported *ante*, p. 114), this is not a correct form of decree, for it gives the defendant the option of delivering the goods or paying their value. This is in accordance with the English practice in actions of detinue, but it does not appear to be proper in an action *rei vindicatio*. The object of that action is to recover the specific property. Sections 320–322 of the Civil Procedure Code show how a decree for a specific movable is to be executed. The Court will issue on the plaintiff's application a writ in form No. 62 in the second schedule. Armed with this writ the Fiscal is to seize the movable if the judgment-debtor does not deliver it up on demand. If the Fiscal is unable to execute this writ he makes a return to the Court accordingly, and then the Court, on the application of the plaintiff, will order a second writ to issue for seizure and sale of the judgment-debtor's property, or a warrant of arrest of his body, or both. The amount of money for which the second writ is to issue is to be "the amount of pecuni-"ary loss, as nearly as the Court can estimate it, which is occasioned "to the judgment-creditor by reason of the judgment-debtor's "default in making delivery, and which the Court shall award by "way of compensation to the judgment-creditor *by the order* "*directing the writ to issue.*"

It will be seen that this gives no option to the judgment-debtor to retain the goods on paying the value. The Fiscal is to do his best to obtain delivery of the goods, and it is only in the event of

his being unable to obtain such delivery that compensation is to be awarded to the plaintiff, and this compensation is not to be awarded by the decree, but by the order which directs the second writ to issue.

This procedure is in accordance with the Roman-Dutch practice (Voet VI., 1, 30–34).

A difficulty is raised, however, by section 191 of the Civil Procedure Code, which provides that "when the action is for "movable property, if the decree be for the delivery of such "property, it shall also state the amount of money to be paid as an "alternative if delivery cannot be had." But the words "if deli- "very cannot be had" do not afford any foundation for such a decree as was made in the present case. They cannot be read as though they were "if the defendant declines to give up the "property."

The explanation is probably this: section 191 is taken bodily from the Indian Civil Procedure Code, being there section 208, whereas sections 320–322 have no counterpart in the Indian Code.

Even according to the English practice there should have been a finding as to the value of each chest. For the defendant might have made away with one of them and be willing to give up the others. But I am inclined to think that section 191 must be disregarded as being inconsistent with the later portions of the Ordinance, and inapplicable to an action *rei vindicatio*.

The procedure laid down in sections 320–322 seems to be in accordance with the Roman-Dutch Law and practice, according to which the question of compensation would only be assessed after it had been ascertained that the property could not be restored. *Verum si ex adverso rei restituendæ facultatem reus non habeat videndum an dolo ac culpâ ejus an casu id contigerit* (Voet VI., 1, 32). The amount of compensation varied according to the conduct of the defendant, for, as Voet goes on to state, if the defendant had ceased to possess *dolo*, he must pay the value sworn to by the plaintiff; whereas if he was guilty only of *culpâ* he paid the actual value, not the value *ex affectione vindicantis*. If the loss were accidental in some cases he would not be liable to make good the value.

The decree therefore should be varied by striking out the words to which I have referred.

Form No. 62 gives no direction as to levying the costs of the action, but there is no reason why a separate writ should not be issued for the damages and costs, together with the writ for delivery.

BROWNE, A.J., concurred.