1895.
June 18 and July 8.

SITHAMBARAPPILLAI *v.* VINASITAMBY *et al.*

D. C., Jaffna, 24,691.

Rei vindicatio—*Alternative decree for delivery of articles or payment of their value—Action of detinue—Civil Procedure Code, ss. 191, 320, and 321.*

Where, in an action raised for specific delivery of certain articles wrongfully detained, or for payment of their value, defendant admitted possession of some of the articles and claimed a certain sum of money from the plaintiff on a separate account, and the Court decreed that defendant do return to the plaintiff the articles admitted by him, or pay plaintiff their value, and that defendant do further pay plaintiff Rs. 25·50, being the difference between the value of certain articles claimed by plaintiff and the amount found to be due by plaintiff to defendant—

Held, that such a decree was unworkable and irregular.

Held, also, that in an action *rei vindicatio* for recovery of specific movable property, an alternative decree for payment of its value is bad.

The English action of detinue is inconsistent with sections 320 and 321 of the Civil Procedure Code, and section 191 does not authorize the alternative form of decree entered.

THE plaintiff complained that certain jewels and other goods belonging to the estate of his deceased wife, specifically described and valued in the schedule annexed to the plaint, were wrongfully detained by the defendants, and he prayed that "the "defendants be decreed to restore and deliver to the plaintiff, as "administrator of his deceased wife, the several jewellery, goods, "and chattels declared in the schedule marked A, or to pay the "plaintiff, as such administrator, the sum of Rs. 985 if such "possession cannot be had."

The defendants admitted plaintiff's right to six out of the nineteen jewels named in the plaint, and claimed payment of Rs. 165, being medical and funeral expenses they had incurred on account of the deceased.

The District Judge found that plaintiff was entitled to receive not only the six articles admitted by the defendants, but three others also, which latter were valued at Rs. 25·50. He further found that defendants had made good their claim for funeral expenses for Rs. 49·46, but not for medical expenses.

Plaintiff appealed.

Sampayo (with him *Pereira* and *Senáthi Rája*), for appellant.

Rámanáthan, S.-G. (with him *Dornhorst* and *Bawa*), for defendants respondent.

The case was argued on the merits on 18th June, 1895, and judgment reserved.

On a subsequent day their Lordships desired to hear counsel on the form of the decree entered by the District Judge, which ran as follows :—

It is decreed that the defendants do return to the plaintiff the following articles described in plaintiff's list A, and which defendants admit they are in possession of, viz., article No. 1, táli, worth Rs. 234 ; article No. 3, a pair of thódu, worth Rs. 50, &c. .... or pay plaintiff the value of each such article.

It is also decreed that the defendants do pay to plaintiff Rs. 25·50, the difference between the value of articles Nos. 2, 6, and 8 described in the plaintiff's list A, and Rs. 49·46 the funeral expenses incurred by the defendants.

Parties will bear their own costs.

BONSER, C.J. —What authority is there for an alternative decree for specific delivery of the articles named, or payment of their value, in an action like the present, which is *rei vindicatio?* Such a decree appears to be inconsistent with sections 320–322 of the Civil Procedure Code.

Sampayo referred to section 191 of the Ceylon Civil Procedure Code and 208 of the Indian Procedure Code.

BONSER, C.J.—But there is no provision in our Code to give effect to section 191, whereas in the Indian Code there is provision to give effect to section 208. It seems to me that section 191 and sections 320–322 of our Code are inconsistent, and that section 191 has been inserted inadvertently.

Rámanáthan.—The words of section 191 are imperative : "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." Plaintiff prayed for such a decree, and the District Judge decreed accordingly. Our Courts have long been used to such alternative decrees in cases of *detinue.* In *D. C., Mátara, 33,573*, decided on the 24th February, 1885, BURNSIDE, C.J., recognized such decrees. So WITHERS, J.,

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in *C. R., Avisáwélla, 4,116, Civil Minutes, 4th December, 1894.* The Civil Procedure Code, section 191, simply conserved the law in existence at the time the Code was enacted. [BONSER, C.J.—But, how will you give effect to such a decree in view of sections 320–322?] If the alternative decree appears on the face of the writ, the Fiscal will not enforce specific delivery in the event of the execution-debtor refusing to deliver, but will enforce the decree for the value of the articles as a money decree. By this means section 191 may be worked harmoniously with sections 320–322.

Cur. adv. vult.

8th July 1895. BONSER, C.J.—

We had this case placed in the paper for further argument with regard to the form of the decree, and after hearing the Solicitor-General and Mr. Sampayo, I am of opinion that this decree must be amended by inserting the three articles of jewellery, Nos. 2, 6, and 8, in the plaintiff's list amongst the things to be given up, and also by ordering the plaintiff to pay the defendant the amount found due for funeral expenses. The Judge has, for what reason I know not, assumed that the defendant will not give up these three articles, and has set off their value against the funeral expenses, giving judgment only for the balance. That is an unworkable form of decree, because, if the Fiscal seizes the articles or the defendant gives them up, then there is no order on the plaintiff to pay the amount which the Court has found to be due to the defendants on account of the funeral expenses. Moreover, the words "or pay the plaintiff the value of each article" must be struck out, for this is an action for the recovery of specific movable property, and sections 320 and 321 of the Civil Procedure Code lay down clearly what is to be done under such a decree. A difficulty has been raised by the provision of section 191 of the Civil Procedure Code that "when the action is for movable pro-"perty, 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," which is apparently inconsistent with the provisions of sections 320 and 321, but, in my opinion, whatever section 191 means, it does not authorize such a decree as was made in this case. The decree follows the form of judgment in the old English action of detinue, which gave the person detaining the goods the option of giving them up or keeping them on paying their value. That was a very imperfect form of relief, and it was found necessary to amend it subsequently by the Common Law Procedure Act. It was suggested by the Solicitor-General that the effect of section 191 is to recognize and approve the introduction into the colony of the English action of detinue; but the words

of that section are quite insufficient for that purpose ; it does not say that the decree is to state the amount of money which is to be paid as an alternative if the defendant declines to give up the things and wishes to keep them. It is the amount to be paid if delivery cannot be had, *i.e.*, if the Fiscal under his warrant is unable to get the things back, if they have gone out of his jurisdiction, or have ceased to exist, or there is any other equally valid reason. These words lend no colour to the suggestion that the defendant is at liberty to say, "I will keep the things, and you "cannot take them from me if I submit to pay the amount found "due." So, whatever be the effect of section 191, it, in my opinion, does not justify the decree made in this case.

The decree should be amended in the way I have pointed out, leaving it to be executed in the manner pointed out by sections 320, 321, and 322 of the Civil Procedure Code.

At present it is unnecessary to determine what is the effect of the valuation ordered to be made under section 191. If section 191 is inconsistent with section 322, the latter is later, and must govern. But that question will only arise when the decree is executed, and the delivery of the goods cannot be effected.

BROWNE, A.J., agreed.

[See *Sheik Ali v. Carimjee Jafferjee*, reported below.]