Present: Pereira J. and Ennis J. 1915.

THE KING *v.* WIJETUNGA.

67—D. C. (Crim.) Chilaw, 3,165.

Penal Code ss. 190 and 196—False averment in affidavit filed by judgment-debtor in application to have order substituting plaintiff vacated—Is affidavit a declaration which a Court was "bound or authorized by law to receive"?—Civil Procedure Code, ss. 373 and 437—Affidavit affirmed before a Justice of the Peace in a district in which affirmant did not reside.

A plaintiff assigned his interest to one S. who got himself substituted as plaintiff after due notice to the accused. who was judgment-debtor in the case. Thereafter the accused filed an affidavit, in which he made the false averment that he had not been served with notice, and moved, by way of summary procedure under chapter XXIV of the Civil Procedure Code, that the order of substitution be vacated. The accused was prosecuted under sections 196 and 190 of the Penal Code.

Held, that the affidavit was a declaration which the Court was "bound or authorized by law to receive," and that the accused was properly convicted under the said sections.

Section 373 of the Civil Procedure Code was intended to provide for applications to the Court generally, and not to "every application to the Court of summary procedure."

PEREIRA J.—The words "within the local limits of whose jurisdiction he is at the time residing" (in section 437 of the Civil Procedure Code) refer only to "Commissioner," the requirement intended being that in the case of a Commissioner to administer oaths, appointed by the Supreme Court under section 20 of the Courts Ordinance, he should at the time of administering the oath referred to in section 437 of the Code be resident within the local limits of the jurisdiction of the Court in which the affidavit is intended to be used.

An affidavit sworn before a Justice of the Peace for the district of Negombo by a person not resident within the limits of the district is not invalid by reason of section 437 of the Civil Procedure Code.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for the accused, appellant.

Obeyesekere, C.C., for the Crown.

Cur. adv. vult.

May 21, 1915. PEREIRA J.—

In this case the accused has been convicted of having, in a declaration subscribed by him, which a court of justice was bound or

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authorized by law to receive, made a statement which was false, and which he knew or believed to be false, touching a point material to the object for which the declaration was made or used, an offence punishable under sections 196 and 190 of the Penal Code.

The accused was the judgment-debtor in case No. 4,564 of the District Court of Chilaw, in which one Marikida was plaintiff. Marikida assigned her interest in the case to Saparamadu, and the latter had himself substituted as plaintiff in the case. This was done with notice to the accused. The return to the notice showed that it had been duly served on the accused on November 28, 1913. On February 12, 1914, the accused moved to vacate the order of substitution on the ground that he had no notice of the intended application for it. His motion was supported by an affidavit dated January 14, 1914, which is the declaration referred to above. In this affidavit he stated that he had not been served with the notice referred to above on November 28, 1913, and this is the false statement referred to in the indictment. It may here be mentioned that the accused instituted his proceedings to vacate the order of substitution as a proceeding in summary procedure under chapter XXIV of the Civil Procedure Code.

Now, the first objection taken by the applicant's counsel is that the affidavit did not comply with the requirements of section 437 of the Civil Procedure Code, and it was therefore not an affidavit which the District Court of Chilaw was bound or authorized by law to receive. It is contended that under section 437 an affidavit could only be sworn to before a Court or a Justice of the Peace or a Commissioner to administer oaths by a person who at the time of the swearing actually resides within the local limits of the jurisdiction of such Court, Justice of the Peace, or Commissioner, but that the affidavit in question was sworn to by the accused before a Justice of the Peace for the district of Negombo when at the time the accused was not resident within the district. I cannot accede to this contention. The words of the section are that the affidavit may be sworn to " by the person professing to take the statement embodied in the affidavit before any Court or Justice of the Peace or Commissioner to administer oaths within the local limits of whose jurisdiction he is at the time residing." I think that these last words—" within the local limits of whose jurisdiction he is at the time residing "—refer only to " Commissioner," the requirement intended being that in the case of a Commissioner to administer oaths, appointed by the Supreme Court under section 20 of the Courts Ordinance, he should at the time of administering the oath referred to in section 437 of the Code be resident within the local limits of the jurisdiction of the Court in which the affidavit is intended to be used. The concluding portion of section 437, in which there is no reference to Commissioners, but only to the Court or a Justice of the Peace, supports this view.

The next and perhaps more important objection is that the District Judge of Chilaw was not bound or authorized by law to receive an affidavit at all in the circumstances in which the affidavit in question was tendered to him.

The Court was bound by law to receive it *if it can be shown that* the accused was entitled to file it in Court. He in fact filed it with and in support of his application to vacate the order of substitution referred to above. Now, section 91 of the Civil Procedure Code lightly touches on the question as to how applications to the Court should be made, but fuller provision is made on the subject in chapter XXIV. Section 373 of that chapter speaks of " every application to the Court, or action, of summary procedure," but it has been contended for the appellant that these words mean (1) every application to the Court of summary procedure, and (2) every action of summary procedure, and that summary procedure under this chapter could be resorted to only when resort to summary procedure is expressly permitted by the Code (see section 8). But it may here be noted that section 8 refers only to " actions of summary procedure," and not to " applications of summary procedure." However, the above contention is supported by the punctuation of the clause cited above; but I think that the punctuation is a mere printer's error, and that what was intended was to provide for applications to the Court generally and for actions in summary procedure. Section 375 speaks of the application being instituted in the course of, or as incidental to, a pending action " whether of regular or summary procedure." In this view the accused was under section 376 entitled to file his affidavit with his application in case No. 4,564 of the District Court of Chilaw, and the Court was hence bound or authorized by law to receive it.

On the facts of the case I am in entire agreement with the District Judge in his finding that the statement made by the accused in his affidavit that he had not been served with the notice of the application for substitution is false.

For these reasons I think that the appeal should be dismissed.

ENNIS J.—

The accused-appellant has been charged and convicted under sections 190 and 196 of the Penal Code for making a false statement in an affidavit used in the District Court of Chilaw on an application in a civil suit to set aside an order for substitution.

Section 190 prescribes the punishment for giving false evidence in a judicial proceeding, and section 196 prescribes punishment in the same manner for a false statement made in any declaration made or subscribed by any person which a court of justice or any public servant or other person is bound or authorized to receive.

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The point reserved for the decision of two Judges is whether the Court was bound or authorized to receive the affidavit which contained the alleged false statement. The argument for the appellant was as follows:—

Section 6 of the Civil Procedure Code enacts that every application for relief or remedy obtainable through the exercise of the Court's power or authority constitutes an action; section 7 that the procedure in an action may be either regular or summary; and section 8 that every action shall be by regular procedure, unless the Code especially provides that it may be taken by summary procedure. Section 373 in Part II. of the Code, which is headed "Of Summary Procedure," provides that "every application to the Court, or action, of summary procedure" shall be by petition, &c., and section 376 specially provides for the proof of facts by affidavit to the petition. Section 179 in chapter XIX., Part I., of the Code, headed respectively "Of the Trial of Actions in General," provides that the Court may "at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit"; while section 91 in the same part enacts:—

> Every application made to the Court in the course of the action incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his advocate or proctor, and a memorandum in writing of such motion shall be at the same time delivered to the Court. In the Court of Requests such application may be made orally by the applicant in person and then reduced into writing by the Court in accordance with the rules of summary procedure hereinafter prescribed.

It is urged that sections 373 and 376 do not provide for the use of affidavits with every application to the Court, but to "every application of summary procedure." The comma after the word "action" in section 373 supports this contention. It was next urged that as the Court makes special provision for certain applications to be by way of summary procedure, *e.g.*, sections 306, 524, and 537, it is only in such cases that affidavits can be filed with the petition. Then, as to regular procedure, it was urged that section 179 related to "actions" as distinct from applications incidental to actions, for which latter a special provision is made in section 91. I have set out above section 91 in full, because the crux of the argument is in the omission in that section to provide for the proof of fact by affidavit, and the wording of the section shows that a distinction is drawn between applications of summary procedure and other applications, the latter part having made special provision for applications in the Courts of Requests to follow the rule of summary procedure. It is urged that in the absence of any express provision with regard to affidavits, in an application such as that made by the accused-appellant in this case, the Court could not supply the omission, and was not bound or authorized to receive an affidavit.

and the accused could not be convicted under section 196 of the Penal Code even if the affidavit contained a false statement.

I am not in accord with the contention for the appellant. Section 91 makes no provision for the hearing of applications under it—an omission which it is conceded the Court can supply. If the Court can supply this omission, it must also supply the procedure on the hearing, and the procedure laid down in Part I. for actions in general would apply, *i.e.*, the Court could at any time order proof of fact by affidavit. As the affidavit in this case was read, it is to be presumed the Court so ordered it, although it is not so specially recorded. It has been the practice of the Court for years when hearing miscellaneous applications to allow the proof of fact by affidavit, and section 4 of the Code expressly enacts that "in every case in which no provision is made by this Ordinance, the procedure and practice hitherto in force shall be followed," &c. I am, however, not prepared to accede to the contention that there is any omission in the Code in this respect. The Code defines an action as a proceeding for the prevention or redress of a wrong. It seems to me that an application is such a proceeding. The Code specially provides for the hearing of certain applications by way of summary procedure, *e.g.*, sections 306, 524, and 537, and thereby treats an application as an action within the scope of section 8. If this be so, section 8 prescribes the procedure for applications for which the Code does not specially provide for the adoption of summary procedure, *i.e.*, it is to follow the regular procedure. I am so strongly of this view, that I consider the comma after the word "action" in section 373 is a mistake, and that it was intended in that section to make special provision for every application to the Court being by way of summary procedure, otherwise the words "every application to the Court" in this section would be redundant. This view is supported by the acknowledged practice of the Courts. I would answer the question reserved in the affirmative.

Appeal dismissed.