FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Phear, Mr. Justice Markby, Mr. Justice Glover, Mr. Justice Ainslie, Mr. Justice Pontifex, Mr. Justice Birch, and Mr. Justice Morris.

1874
April 11.

THE QUEEN *v.* MAHOMED HOOMAYOON SHAW.*

Alternative Charge—Finding—False Evidence—Contradictory Statements—Criminal Procedure Code (Act X of 1872*), s.* 455*, Sch. iii—Penal Code (Act XLV of* 1860*), s.* 193.

Where a person was convicted of giving false evidence upon an alternative charge in the form given in Sch. iii of the Criminal Procedure Code, *Held*, by the majority of the Court (JACKSON and PHEAR, JJ., dissenting), that the conviction was good, notwithstanding the jury had not distinctly found which of the two statements charged was false.

Held, per JACKSON, J., that such a charge is bad, and further that an alternative finding upon such charge is invalid.

Held, per PHEAR, J., that, although a person may be lawfully tried upon such a charge, still the Court or jury must, for a conviction, find specifically which branch of the alternative is true.

THE question arising in this case was as to the validity of a conviction upon a charge of giving false evidence framed in the alternative. The matter was referred for the opinion of a Full Bench by Jackson and Mitter, JJ. The facts appear sufficiently in the observations made by the former Judge on referring the case.

JACKSON, J.—The offence of which the prisoner is convicted is stated in these words:—"That he did, on or about the 23rd day of January 1873, at Alipore, in the course of the trial of Tulsi Das Dutt and Mahomed Latif on a charge of cheating, state in evidence before Moulvi Abdul Latif, Deputy Magistrate at Alipore, that the greater part of the furnitures was sent by

* Criminal Appeal, No. 656 of 1873, against an order of the Officiating Additional Sessions Judge of the 24-Pergunnas, dated the 12th August 1873.

me to that house (*viz.*, the house at Chitpore), and a small portion by Belilios and Zahuruddin; and that he did, on or about the 13th day of February 1873, at Alipore, in the course of the trial of J. R. Belilios, Tulsi Das Dutt, and Mahomed Latif, in the same case of cheating, state in evidence before Moulvi Abdul Latif, Deputy Magistrate at Alipore, that Belilios never sent any furniture of his own or of any one else to that house (*viz.*, the house at Chitpore), nor was any of the furnitures in that house belonging to Belilios;"—and it is said that one of these two contradictory statements, the prisoner "either knew or believed to be false, or did not believe to be true, and that he has thereby committed an offence punishable under s. 193 of the Indian Penal Code." It is not found that one or the other of these statements is in fact false, or that either of such statements, if false, was intentionally given, but the conviction manifestly rests upon the simple circumstance that the two statements are contradictory one of the other. It has been contended that neither s. 193 or s. 72 of the Indian Penal Code, nor any provision of the Criminal Procedure Code of 1872, justifies such conviction. There is a ruling of the Full Bench in the case of *The Queen* v. *Musst. Zamiran* (1) which supports the conviction, but the authority of that decision has been questioned in several later cases, *viz.*, the case of *The Queen* v. *Mati Khowa* (2), the case of *The Queen* v. *Namal* (3), and the cases of *The Queen* v. *Soonder Mohoorie* (4), *The Queen* v. *Kalichurn Lahoree* (5), and *The Queen* v. *Bidu Noshyo* (6). For myself I feel bound to say that I

(1) B. L. R., Sup. Vol., 521.
(2) 3 B. L. R., A. Cr., 36.
(3) 4 B. L. R., A. Cr., 9.
(4) 9 W. R., Cr. Rul., 25.
(5) *Id.*, 54.
(6) *Before Justice Sir C. P. Hobhouse, Bart., and Mr. Justice Markby.*

The 24th June 1869.

THE QUEEN *v.* BIDU NOSHYO AND OTHERS.*

Alternative Finding—False Evidence—Contradictory Statements—Criminal Procedure Code (*Act XXV of* 1861), *s.* 381.

THE following judgments were delivered:—

HOBHOUSE, J.—I should have preferred in these cases that the Judge had come to a distinct finding on one or other of the alternative charges made against the prisoners, and that some attempt at least should have been made to obtain evidence upon one or other of the said charges before

* Criminal Appeals against orders of the Officiating Sessions Judge of Rungpore, dated the 1st February 1869.

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always entertained the contrary opinion. I expressed that opinion on the occasion of a case coming before the English Committee

judgment was given, and a finding arrived at in what is known as the alternative form.

I cannot tell from the records in these cases whether or not such evidence was available, but it seems at first sight that no attempt was made to procure it, and whether the alternative finding be legally good or not, it is certainly not in the interests of justice to be resorted to, until both the Committing Officer and the Sessions Judge are satisfied that no reliable evidence is procurable in support of one or other of the two charges.

It is quite certain, however, that we cannot now obtain any finding of the Judge on either of the charges separately, for he is no longer Judge of the district, nor can we expect after this lapse of time to obtain any satisfactory finding on a retrial.

I think, therefore, we must take the record as it stands, and decide upon that record as to the guilt or innocence of each one of the prisoners.

No. 66.

In this case the prisoners were each of them charged with giving false evidence in one or other of the following instances, *viz.*, either before the Magistrate in stating that a certain person was killed by one Eku, or before the Sessions Judge in stating that that certain person died of snake-bite.

They all pleaded guilty to the first charge.

The Judge and the assessors were equally unable to decide upon which one of the alternative charges, Gahori Mundul, one of the prisoners, was guilty; and so the Judge, concurring with the assessors, came to what is well known in our procedure as an alternative finding, to the effect that Gahori was guilty either of an offence under the first or under the second charge, and upon this finding the Judge sentenced the said prisoner to one year's rigorous imprisonment.

The Judge differing from the assessors thought himself able to decide that the rest of the prisoners before us were guilty of the charge of giving false evidence when they stated that the deceased died of snake-bite, and so he found them guilty under that charge, and sentenced each of them to three years' rigorous imprisonment. He relied entirely on "the evidence of the medical officer." That evidence was to the effect that, though the *post mortem* examination of the deceased showed no marks of snake-bite, and did show marks of violence such as to lead him to the opinion that the deceased died by strangulation, yet that some of the internal appearances of death by snake-bite would be like those of death by strangulation.

This evidence is not, in my judgment, sufficient evidence to warrant a conviction on the charge that the prisoners spoke falsely when they said that the deceased died of snake-bite; and I would therefore discharge the prisoners found guilty of this charge.

On the other hand, it is said that the first finding of the Judge is a legal finding within the meaning of the Full Bench decision in the case of *The Queen* v. *Musst. Zamiran* (*a*)

(*a*) B. L. R., Sup. Vol., 521.

of this Court in 1862, the papers of which case are appended to this record. It may be suggested that this reference is not

As I understand that ruling, an alternative finding to be a legal finding must proceed upon two statements absolutely contradictory the one of the other, and irreconcileable, and thereby necessarily one or other of them false. But in this case the two statements of Gahori are not of this nature. In the one, according to the charge, he simply says that Eku told him he had killed Methi, and in the other he says he had heard that Methi had died of snake-bite.

These two statements are clearly not of a nature to warrant an alternative finding, and I would therefore discharge Gahori also.

No. 64.

In this case the prisoner was charged as in case 66 alternatively with giving false evidence.

He pleaded guilty to the second charge: the Judge thought this plea a false plea; the assessors thought it a true plea.

But eventually the Judge, differing from the assessors, found the prisoner guilty in the alternative form, *viz.*, guilty either of the offence of giving false evidence before the Magistrate, or of that of giving false evidence before the Sessions Court, and the Judge then sentenced the prisoner to one year's rigorous imprisonment.

Before the Magistrate the prisoner positively swore he had seen the accused beating a man, so that he died; before the Sessions Court he as positively swore he had seen no such beating.

I am of opinion, therefore, that when the two statements to which the accused on the two several occasions deposed, were of the nature shown, the Judge was justified in his finding—see the Full Bench ruling I have above quoted,—and I would therefore uphold this conviction.

No. 68.

In this case the prisoners were committed to the Sessions on the alternative charge of having given false evidence either in stating that a certain deceased person was killed by a particular person, or in stating that that deceased person committed suicide.

The prisoners pleaded guilty to the first charge.

The Judge and the assessors were equally unable to say which statement was false and which true; and the Judge, therefore, concurring with the assessors, came to a finding in the alternative form, *viz.*, to the effect that the accused were guilty either of an offence before the Magistrate or of an offence before the Sessions Court, and the Judge sentenced each one of the prisoners to one year's rigorous imprisonment.

I have read most carefully and more than once the so-called contradictory depositions on which the prisoners have been convicted and sentenced, and I find that none of the prisoners said before the Magistrate that the accused had killed the deceased. On the contrary one of them distinctly said she had not seen the accused do so. Neither did they say before the Judge that they had seen the deceased commit suicide. They spoke as from hearsay only.

I am of opinion, therefore, for the reasons given in No. 66 that the conviction of these prisoners is bad in law, and I would discharge them.

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necessary, inasmuch as the decision of the Full Bench is partly based on the terms of s. 381 of the old Code of Criminal Proce-

No. 67.

In this case the alternative charge was of the offence of false evidence either in stating that one Kalimuddin killed a deceased person, or in stating that one Shukti killed the same deceased person.

The prisoners pleaded guilty to the first charge.

The Court concurring with the assessors found the prisoners guilty in the alternative form, *viz.*, that they had given false evidence either in their respective statements before the Magistrate, or in their respective statements before the Sessions Court, and the Court sentenced each of the prisoners to two years' rigorous imprisonment.

In the case of the prisoner Patu, she swore before the Magistrate that one Kalimuddin had killed the deceased, and before the Sessions Court that one Shukti did so. But in making this latter statement, we do not know whether she was speaking as from her own knowledge or not, and the statements are not either of them necessarily untrue nor even contradictory, for it is possible that both may have been true, for both Shukti and Kalimuddin may have together killed the deceased, and we must give every doubt in favor of the deceased.

In the case of the prisoner Ono, she did distinctly say before the Magistrate that she saw the accused kill the deceased, but before the Sessions Court she did not say that she saw Shukti kill the deceased. On the contrary she spoke of this from hearsay only.

In neither case, therefore, are the two contradictory statements sufficient to warrant an alternative finding, and both prisoners, therefore, should, I think, be discharged.

No. 65.

In this case the alternative charge was that the prisoners gave false evidence either in stating that a certain person killed the deceased, or that the deceased committed suicide.

The prisoners pleaded guilty to the first charge.

The Court concurring with the assessors came to the following finding, *viz.*, to the effect that the prisoners were guilty either of having given false evidence before the Magistrate or before the Sessions Court, and the Court sentenced the prisoners to one year's rigorous imprisonment.

There is no doubt that before the Magistrate the prisoners did distinctly swear that they saw the accused kill the deceased. But before the Sessions Court when they spoke of the suicide of the deceased, they did so from hearsay only.

I think therefore that in this case there were no such contradictory statements as to warrant an alternative verdict, and I would therefore discharge both prisoners.

MARKBY, J.—I think it would be impossible to find a series of cases more strongly illustrating than these the extreme danger of resorting to alternative findings.

The cases before us comprise fourteen convictions for perjury. Thirteen persons, male and female, some very young, have been convicted and sentenced to various terms of imprisonment; one woman having been convicted twice. The prisoners have even been six months in jail under

dure, which is no longer in force, but I think it cannot be denied that, if the reasoning of Sir Barnes Peacock in that case is

sentence. The cases, although arising out of facts originally unconnected, present features of remarkable similarity. All the prisoners gave evidence in the first instance before the Magistrate against persons who were accused on various occasions of having committed crimes of great violence, all or nearly all amounting to homicide. From the mass of papers before me, I have not been able to ascertain in how many different cases the prisoners were called as witnesses, but there were certainly several such cases, and these cases were not apparently in any way connected.

All the prisoners when they appeared as witnesses before the Magistrate gave evidence unfavorable to the persons then under accusation.

All the prisoners when they appeared as witnesses before the Sessions Judge gave evidence favorable to these same persons.

All the prisoners now adhere to their second statement, and all make the same defence, namely, that their first statement was a false statement made under compulsion put upon them by the Police.

I gather from the judgment of the Sessions Judge that in all the cases he was strongly inclined to believe that the first statement was the true one; that he thought the charge of ill-treatment made against the Police was unfounded; and that even, if true, it did not amount to a defence, because the prisoners were not in fear of instant death when they made their first statement.

I infer, however, that he had not finally made up his mind on these points, because he does not act upon this view which would lead to a conviction of all the prisoners on the charge of giving false evidence before the Magistrate: in all the cases but one he convicts the prisoners of having given false evidence either before the Magistrate or before the Sessions Judge.

When these cases came before Hobhouse, J., and myself on the first occasion, we thought that s. 381 of the Code of Criminal Procedure which gives power, when it is doubtful under which of two sections the offence falls, to come to a finding in the alternative form, did not apply to cases where the two charges are, as in this case, under the same section; we thought, therefore, that an alternative finding was not legal, and sent the cases back in order that the Sessions Judge might come to a legal finding. As however the Judge had, in the meantime, left the country, that order could not be complied with.

We must, therefore, deal with the cases as they stand.

I have had the advantage of reading the judgment which Hobhouse, J., will deliver in this case, and for the reasons he has so fully pointed out the convictions of seven out of these thirteen prisoners must fail (*a*); because the statements made in each case on the two occasions, though conflicting in the sense of one being favorable, and the other unfavorable to the person accused, are not so absolutely

(*a*) The names of these seven prisoners were given in the margin of the judgment as follows:—Culi Awrat, Beni Awrat, Feli Awrat, Patu Awrat, Ono Awrat, Solim Awrat, and Gour.

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carried to its full extent, it will also hold good under the new Code of Criminal Procedure. It is also pointed out that Sch. iii,

contradictory, that it is impossible that both should be true. It is of course plain that before a prisoner can be convicted of perjury on the ground that he has made two contradictory statements without ascertaining which of the two is true, and which is false, every presumption in favor of the possible reconciliation of the statements must be made. On that ground therefore, apart from all other considerations, the convictions of these prisoners must be quashed.

With regard to the five prisoners, Shinduri, Yendi, Punchma, Kishur, and Bhurru, who have been convicted of giving false evidence before the Magistrate, I do not find upon the record the evidence upon which the Sessions Judge relies as satisfying him that the statements on this occasion were false. He relies on the opinion of the medical officer and on something which passed before the Magistrate in an enquiry which took place on the spot. But neither the medical officer nor the Magistrate were called upon this trial, nor do I find any note by the Judge that the medical officer's deposition before the Judge was put in. There is nothing whatever, therefore, to support the finding against these five prisoners. But further, as Hobhouse, J., points out, even if the deposition of the medical officer may be looked at, it does not negative the statement of these prisoners before the Judge that the death in question occurred from snake-bite. The convictions of these five prisoners must, therefore, also be quashed.

The remaining case is that of Bidu Noshyo. He is a lad of fifteen. He maintains like the rest, that the story told to the Magistrate was the untrue one, and that it was made in consequence of threats by the Police.

The opinions of the assessors in this case are not as fully recorded by the Judge as required by s. 324 of the Code of Criminal Procedure, but I gather that, whereas the Judge thought the statement made on the second occasion was the false one, the assessors thought that was true, and that the statement made on the first occasion was false.

Now, apart from all questions of law, I consider that it was absolutely necessary clearly to ascertain in this case which of these two views was right. If the view of the assessors was right, then it seems to me extremely probable that the rest of the boy's assertion is true, namely, that he made his first statement under the influence of the Police; and if he did so it seems to me almost a perversion of language to call the making of this false statement a crime. It may be that in strictness of law it is so, but it is a crime which I should visit with no punishment.

An investigation which leaves it uncertain whether a crime has been committed which requires a year's rigorous imprisonment, or a crime which requires no punishment at all, whether legal or not, is to my mind highly unsatisfactory; and I am unable to affirm a conviction founded upon such an investigation.

Upon this view of the case, therefore, and differing as regards this prisoner with much regret from Hobhouse, J., I would quash this conviction also.

This being so, and all the convictions being disposed of on the merits,

annexed to the Procedure Code, contains the form of an alternative charge under s. 193, and from this it may be supposed that the intention of the Legislature was to make a conviction in that form perfectly good. As at present advised, I think this is not so, and on all considerations I think this matter should be referred to a Full Bench for an authoritative ruling.

Mr. *Jackson* for the prisoner.—The charge, finding, and conviction in this case are bad. Sch. iii of the Criminal Procedure Code contains a form of charge like the present one, but that form is inconsistent with the body of the Code. Before the passing of the new Code, an alternative charge was not allowed by the law; see *The Queen* v. *Palany Chetty* (1), although in that case a conviction upon such a charge was held to be good; but the construction there put by the Court upon s. 242 of the old Code, and which they stated was supported by reference to the whole enactment, was obviously wrong, as is apparent if this section be taken in conjunction with the two preceding ones. The power to frame a charge in the alterna-

the point of law, whether the alternative finding is legal when the two charges are under the same section does not strictly arise. But as a judgment on this point has already been delivered by us, I would say that the words of the section seemed to me so clear that I could not understand, nor did I understand, that the Full Bench decision in the case of *The Queen* v. *Musst. Zamiran* (*a*) turned upon this point. As regards my interpretation of the Full Bench decision, I am inclined now to think that I was wrong. But as regards my interpretation of the law, with the very greatest respect for the Judges who took part in that decision, I still think I am right.

It is indeed a matter of regret that there should be any difference of opinion on such a point. But so far as any expression of the opinions of Judges of this Court may serve as a guide to the Courts of original or inferior appellate jurisdiction, I think that no inconvenience ought to follow. It is clearly the right course to follow the decision of a Full Bench rather than that of a single Judge.

I wish to repeat, however, that in my opinion this case most strongly shows how careful Judges ought to be in using the powers which s. 381 confers upon them. I believe every one would agree that that section was only intended as a last resort, when it became impossible to ascertain the truth.

The convictions of all thirteen prisoners will be reversed, and the prisoners released.

(1) 4 Mad. H. C. Rep., 51.

(*a*) B. L. R., Sup. Vol., 521.

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tive was first given by s. 455 of the new Code, but the only cases in which such a charge is allowable are indicated by the Illustration to the section, *viz.*, cases in which the facts being clearly found it is doubtful on those facts what provision of the law applies; and this view is borne out by other provisions of the criminal law.

But even if it be held that the present charge is a good charge under Sch. iii, it is submitted that an alternative finding is inadmissible. There must be a separate charge for every distinct offence; Criminal Procedure Code, s. 452. When it is doubtful of which of several offences specified in the judgment the accused is guilty, he is to be punished for the offence for which the lowest punishment is provided; Penal Code, s. 72. The jury are to decide which view of the facts is true; Criminal Procedure Code, s. 257; and it is clear from the Illustration to the section that, in the case of an alternative charge for murder or culpable homicide, an alternative finding that the accused had been guilty of one or the other would not be permitted. S. 263 enacts that the jury shall return a verdict on all the charges; if, therefore, in the present case, instead of a charge framed in the alternative separate charges had been drawn up,—and this is a matter wholly in the option of the officer who draws up the charge,—the jury would have been bound to come to a distinct finding on each charge. Had the alternative charge been compulsory, the argument that the Legislature, when providing for an alternative charge, meant an alternative finding to follow, would no doubt have some force; but as it is, it would seem that the Legislature intended to deprive juries of the power of returning alternative findings in cases in which there might be separate charges or heads of charge,—a power which it had been decided they possessed under the old Criminal Procedure Code, Act XXV of 1861; see *The Queen* v. *Palany Chetty* (1) and *The Queen* v. *Musst. Zamiran* (2). Where the trial is with assessors, not only the finding, but the reasons for that finding are to be specified in the judgment; Criminal Procedure Code, s. 464. Again, whereas s. 55 of the former Code, following the English rule, enacted

(1) 4 Mad. H. C. Rep., 51. (2) B. L. R., Sup. Vol., 521.

that "a person who has once been tried for an offence, and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence," the corresponding section, 460, of the new Code provides that he "shall not be liable to be tried again on the same facts for the same offence." It is evident that this provision would be a dead letter, unless the facts had been distinctly found on the previous trial: for instance, it would be impossible to plead a conviction upon an alternative finding in a case like the present in bar of a trial for perjury committed by making the first statement. Neither the case of *The Queen* v. *Palany Chetty* (1), nor the Calcutta Full Bench decision in *The Queen* v. *Musst. Zamiran* (2), meets this difficulty, which Abbott, C.J., in *The King* v. *Harris* (3), describes as a most material objection, *viz.*, that the defendant might be twice convicted and punished for perjury if the alternative finding were admissible. The object of the trial is to solve the question whether false evidence has in fact been given, but if the two depositions only are put in, and no other evidence offered, and the alternative finding allowed, the question remains unsolved. Moreover, if such a finding be good, proof of intention is unnecessary; the intention clearly cannot be inferred, as it might be where the jury finds that one statement is false.

Up to the present time the decisions in this Court on this subject have been conflicting; see *The Queen* v. *Musst. Zamiran* (2), *The Queen* v. *Bidu Noshyo* (4), *The Queen* v. *Mati Khowa* (5), and *The Queen* v. *Kola* (6).

The *Advocate-General*, offg. (Mr. *Paul*) for the Crown.—The jury have clearly found the accused guilty of giving false evidence. In summing up the Judge told them:—"Before you can find him guilty, you must be satisfied that he made one or other of the statements contained in the charge knowing that such statement was false, and intending deliberately to make a false statement." [JACKSON, J.—That is no part of the referring order.] It corresponds with the wording of the order. The question whether a conviction under s. 193 of the Penal Code for giving false evidence can be based on two statements,

(1) 4 Mad. H. C. Rep., 51.
(2) B. L. R., Sup. Vol., 521.
(3) 5 B. & A., 926; at p. 940.
(4) *Ante*, p. 325.
(5) 3 B. L. R., A. Cr., 36.
(6) 4 B. L. R., A. Cr., 4.

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diametrically opposed to each other, can be best determined by reference to the law of this country before the passing of the Penal Code. That law, it is submitted, was exactly the same as the English law before the decision in *The King* v. *Harris* (1). That case turned upon a purely technical rule of English law: whereas in this country it would be open for a person who had been convicted upon a charge like the present one to plead in bar of a second trial, "I was convicted on a charge including the one now made of giving false evidence on the trial of *A.*" [JACKSON, J.—How would it be if the two statements were made, one in the course of a criminal trial, and the other in a civil proceeding?] That could only affect the degree of certainty. The Penal and Criminal Procedure Code do away with the necessity of proving which of the two statements is false. The contradictory nature of the statements is in itself proof that one or the other is false—*The Queen* v. *Ross* (2). The new Criminal Procedure Code, Sch. iii., legalizes a charge framed in the alternative; and *Place* v. *Potts* (3) shows that, when the Legislature has legalized a form of declaration, such form is not demurrable. [PHEAR, J.—The form given in Sch. iii would not apply to statements made in two different Courts, it is only with respect to statements made on the preliminary enquiry and on the trial.] That is just the present case. Then if the offence is well described in the charge, both the finding and conviction upon the charge are valid. In *The Queen* v. *Narain Doss* (4), a conviction on an alternative charge was held good. The words "view of the facts," in s. 257 of the Criminal Procedure Code, refer to the views respectively taken by the prosecutor and the accused as to the guilt or innocence of the latter. There is no conflict of cases on the point. In *The Queen* v. *Mati Khowa* (5) and *The Queen* v. *Kola* (6), the statements were not necessarily contradictory, and in all the cases decided in *The Queen* v. *Bidu Noshyo* (7), both statements might have been true.

Mr. *Jackson* in reply.

Cur. adv. vult.

(1) 5 B. & A., 926; see Beaufort's Criminal Digest, p. 932, § 4443.
(2) 6 Mad. H. C. Rep., 342.
(3) 8 Exch., 705.
(4) 1 W. R., Cr. Rul., 15.
(5) 3 B. L. R., A. Cr., 36.
(6) 4 B. L. R., A. Cr., 4.
(7) *Ante*, p. 325.

The following judgments were delivered by the Full Bench :— 1874

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MORRIS, J. (BIRCH, J., concurring).—I think it sufficient to say upon this reference that, in my opinion, the conviction arrived at by the jury upon two charges framed in the alternative form, according to the model given in Sch. iii of the Criminal Procedure Code, is good in law. It seems to me that the two statements embodied in each charge, which were made by this prisoner, must be taken together, and that when so taken together, they comprehend the specific offence of intentionally giving false evidence in a stage of a judicial proceeding. It is possible that each of the statements, and not one of them merely, was in itself false, and that taken singly, each might have afforded good ground for a distinct charge of an offence under s. 193 of the Penal Code. But this course was not followed; the simpler course allowed by the law was adopted of framing a charge containing two contradictory statements of such a nature that the two, when taken in combination, disclosed the specific offence of intentionally giving false evidence. It must be matter of evidence whether the contradictory statements contained in the charge are *per se* so irreconcileable that one of them is necessarily false, and also that the prisoner in making them intentionally spoke falsely in regard to one of them. This it is the province of the jury or Court to determine, and, in the present instance, the jury had no difficulty in arriving at such a determination. It seems clear that the new Code of Criminal Procedure has expressly contemplated, and indeed provided for, this result. When s. 442 provides that the charge may be in the form given in the 3rd Schedule, and when the 3rd Schedule gives an alternative form of charge in these words,—"That you, on or about (such a date and place), in the course of the inquiry into (such a matter) and before (such an officer), stated in evidence (such and such words); and that you, on or about (such another date and place), in the course of the trial of (so and so), before (such an officer), stated in evidence (such and such other words), one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code," I can-

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not but hold that, if those statements are radically contradictory one of the other, so that the contradiction involves of necessity a falsehood, and it be proved that the deponent uttered them, and that he by so doing deliberately intended to speak falsely, the substantive offence of intentionally giving false evidence in a stage of a judicial proceeding is thereby established, and no need exists to determine by distinct evidence which one of the two statements is absolutely false. No doubt, strictly speaking, this form of charge is not an alternative charge in the sense contemplated by s. 455 of the Criminal Procedure Code. This is not a case where two or more offences are disclosed by the single act or set of acts committed, or rather alleged to have been committed, by the accused, and it is doubtful what particular offence in law can be found on the facts proved; but the alternative consists in this, that of two statements made by the accused one or other of them, it does not matter which, inasmuch as the two involve an absolute contradiction, must be of such a nature that the person making it either knew or believed it to be false, or did not believe it to be true. It is, as already said, expressly to meet this particular kind of offence that Sch. iii contains a specific form described as a form for "alternative charges on s. 193" of the Indian Penal Code. If it were intended that the jury or Court should find which of the two statements set out in the charge was false, not only would this form be cumbrous and unmeaning as an alternative form, but the force of the two contradictory statements in combination would be entirely lost, so as to enable such jury or Court to determine that the accused knew or believed one of the statements to be false, or did not believe it to be true, and that he thereby committed an offence under s. 193 of the Indian Penal Code.

AINSLIE, J.—I am also of opinion that the conviction on a charge framed in the form given in the 3rd Schedule of Act X of 1872 is good, although it may not declare which of the two statements set out in the charge is false. By s. 442 of the Act, a charge in that particular form is declared to be a good and valid charge. If it is a good charge to try a man on, it appears

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to me to follow of necessity that it must be a good charge to convict him on; and there is nothing in s. 461 which requires that the circumstances which constitute the offence should be set out in the conviction. It appears to me that this is not a case which comes under the second part of the section which refers to offences punishable under different sections, or parts of a section, of the Penal Code, but that it falls under the first part of s. 461. If the Court comes to the conclusion that the accused person must of necessity have given false evidence, it is sufficient, under the first part of s. 461, to state in the conviction that he has given false evidence, and is therefore punishable under s. 193 of the Penal Code.

MARKBY, J.—I am of opinion that a conviction in the form in which this prisoner has been convicted upon a charge in the same form is good in law.

It appears to me that this is a case to which the 2nd clause of s. 461 has no application. The offence of which the prisoner has been convicted is giving false evidence, and the section of the Penal Code under which he has been convicted is s. 193. There is no necessity, therefore, for resorting to the alternative given in the 2nd clause of s. 461, and it need not be further considered.

Nor does it appear to me that s. 455 has any application either. There was not in this case "a single act or set of acts of such a nature that it was doubtful which of several offences the facts which could be proved would constitute." The facts which could be proved even if they are to be treated as a single set of acts, could only constitute the offence of giving false evidence under s. 193, and no other.

The only question which it appears to me that we have to consider in this case is whether a charge in this form is sufficient. If it is sufficient, then it appears to me to follow as a matter of course that a conviction which follows the words of the charge must be good also. And whatever might otherwise be my own opinion in the matter, I think we are precluded from saying that this is not a good charge, seeing that it is in the very form given by the 3rd Schedule, and the Act provides (s. 442) that the charge may be in the form therein given.

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It is said that the Legislature will thus, by the form in which they have drawn the charge, have altered the definition of the offence of giving false evidence as given under the Penal Code, which was not their intention. I am not sure that this is the effect of what has been done. But even if it is so, the Legislature must, I think, be taken to have been aware, when they laid down these forms authoritatively, that the form in which a charge is laid does affect materially the evidence which is necessary to support it, and that by changing the evidence which is necessary to support a conviction for an offence, the nature of the offence itself may sometimes be changed. I think there could not be here any accidental omission or oversight. This form of charge must have been given to meet this very case. I think, therefore, I am bound to consider this to be a good charge, and to apply to it the usual rule which I understand to be this, that a charge is proved when all the material averments in it are proved. Here the finding is that all the averments are true: and a conviction in these terms is certainly a good conviction, though I should have thought it equally good if it had merely been that the prisoner was guilty of giving false evidence, as that would have been equivalent to a finding that the charge as laid was proved.

PHEAR, J.—The matter before us entirely depends upon the right construction to be placed upon certain portions of the existing Criminal Procedure Code, and if, in considering the question which has been put to us in this reference, we were restricted from travelling beyond the limits of the actual text of that Code, I think I should be led without difficulty to the opinion that the verdict of the jury ought not merely to find that the one or the other branch of the alternative charge made against the prisoner in the present case is true, but ought to specify which of the two branches is true.

The charge is a statement, express and implied (ss. 439 and 440), of the facts which the prosecution undertakes to establish by evidence against the accused, and several sections of the Code are directed to enacting that it shall generally be precise, single, and unambiguous.

The prosecution may (with certain limitation) at one and the

same trial offer to the jury several views of the facts, either of one, so to speak, criminal occurrence, or of several criminal occurrences, according to which views the prisoner's conduct in each occurrence amounts to the commission of a corresponding offence (ss. 452, 453, 454, and 455). If there are several views of the same occurrence, then the offence varies with the section or part of a section, within which the particular view brings it: if they are views of several occurrences, then the corresponding offences may fall within the same section. And it is important in reference to a Full Bench decision which will be presently mentioned to bear this distinction in mind.

These several views of the facts should generally be exhibited in a succession of distinct charges (s. 454); but (in the case at any rate of their being only alternative statements of one criminal occurrence) they may be put in the shape of an alternative charge (s. 455 explained by the Illustration).

And whether alternative views of the facts of one criminal occurrence are exhibited in a series of charges, or in one alternative charge, if the Court is doubtful which is established by the evidence, it must expressly say so, and in that event will pass judgment in the alternative according to s. 72 of the Penal Code (para. 2, s. 461). In all other cases it would seem, at least inferentially, the Court must pass judgment separately on the view of facts involved in each charge.

The duty of the jury as a part of the Court is also, plainly, to decide which of the several views of facts presented to it for consideration by the prosecution is true (s. 257), and to say specifically as to the view of facts exhibited in each charge whether it is true or not (s. 263). There is no relief from this obligation to come to an express finding with regard to each alleged view or set of facts, except that which is by implication given in para. 2, s. 461, just referred to, and that paragraph applies, as it seems to me, only to cases where the several sets of facts are the alternative representations of one criminal occurrence.

But the alternative views of facts stated in the charge which is now under our consideration are not alternative views of one criminal occurrence; they represent two entirely distinct criminal

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occurrences: the one being to the effect that the accused, on the 23rd January 1873, at Alipore, in the course of a trial of two persons on a charge of cheating before Moulvi Abdul Latif, stated in evidence, &c., which statement he, at the time of making it, knew to be false, &c.; the other that the accused, on the 13th February 1873, in the course of the trial of these same two persons, together with a third person on the same charge before the same Magistrate, stated in evidence, &c., which statement, &c. And, therefore, if the scope and spirit of ss. 455 and 461, para. 2, are that which I have above described, this case does not fall within either of them. In other words, there does not appear to be in the text of the Criminal Procedure Code any warrant for an alternative charge of this kind, or for an alternative finding of these two substantively different sets (or views) of facts, whether exhibited in an alternative charge or in two separate charges. Consequently, if the text alone of the Code were consulted, it would not, as I understand it, support the conviction which is before us.

And this is not a matter of mere technical regularity; it very closely touches upon the right and satisfactory administration of justice. Obviously, it might be of the greatest possible moment to the persons who were being tried before the Magistrate on the 23rd January and 13th February, that it should be distinctly established in the case now before us which of the two statements alleged to have been made by the present accused on those two days respectively, was false. And, therefore, a procedure which would enable the prosecution in the present case to procure a conviction of the accused in the alternative, without troubling itself to go the length of establishing the falsehood of the one statement or the other, might work a serious grievance to those persons. Again, the present accused person himself by an alternative conviction is deprived of the advantage which he ought to have in the event of a material witness to the falsity of one of the statements being convicted of perjury.

If, also, the prosecution is not under a legal obligation to establish the falsity of either statement, then it is plain that it may launch its case upon the bare evidence that the two alleged statements were respectively made, and then leave the prisoner

to satisfy the Court as best he can that neither of them was false. This is the course which is most usually taken, and I do not hesitate to say that it is generally most unfair. The contradiction between the two statements is seldom absolute, though there is commonly enough opposition in them to lead a not over and scrutinizing jury to presume it; and the contradiction being arrived at, the falsity, again, is presumed in spite of anything which the prisoner may say in the dock. Convictions of this character are most unsatisfactory and do very little to meet any real mischief. Yet the temptation to the public prosecutor to seek them is so great, that in this country perjury is hardly ever attacked in any other way. Deliberate perjury, persisted in, is not often the subject of prosecution in the mofussil Courts. Several other considerations of public importance might be brought forward, but it seems to be sufficiently plain, without more, that perjury is the one offence of all others in the Penal Code which calls for precision and unambiguousness of statement in the charge and in the judicial finding.

Thus it appears to me that the construction of the text of the Criminal Procedure Code, taken by itself, which I have arrived at, accords with the expediency of the matter, and that thereby its reasonableness is in some degree supported.

However, when we pass on from the text of the Criminal Procedure Code to the forms of charges in Sch. iii appended to the Code, which are prescribed for adoption by s. 442, we find the last of them runs as follows :—

"That you, or on about the day of , at , in the course of the inquiry into , before , stated in evidence that " ", and that you, on or about the day of , at , in the course of the trial of , before , stated in evidence that " " , one of which statements you either knew or believed to be false, or did not believe to be true, and thereby, &c."

Now, inasmuch as an alternative charge is only referable to s. 455, the fact that the Legislature has authorized this form, seems to show that s. 455 was intended to extend, as it well may, beyond its Illustration, that is to say, to the alternative allegation of different occurrences, at any rate in the particular case

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which is covered by this form. And it has been argued from the form itself that the finding of the jury and the judgment of the Court may, when such an alternative charge as this is preferred, be in the alternative. But s. 461, para. 2, certainly does not here apply, and it is difficult to see how the distinct provisions of s. 257 can be escaped.

The Full Bench ruling, in the case of *The Queen* v. *Musst. Zamiran* (1), decided that, under the late Criminal Procedure Code, there might be an alternative finding, as well in a case in which the evidence proves the commission of one of two offences falling within the same section of the Penal Code and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two sections of the Penal Code and it is doubtful which of two sections is applicable. This ruling, if it could be adopted now, would therefore support the finding in the present case. The reasoning, however, by which it was arrived at depended upon two sections of the old Code, which are not present in the new Code. The first of these sections was s. 242, which, so far as it is now necessary to quote it, ran thus:—"When it appears to the Magistrate that the facts whch can be established in evidence show the commission of one of two or more offences falling within the same section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads charging each of such offences." This was held to justify the framing a charge containing two heads, apparently similar in substance to that which is under our consideration. And although this section, 242, of the old Code is not repeated in the new Code, its substitute being the present s. 455, yet, so far as concerns the case before us, the double-headed charge may be said to be justified by the last form of Sch. iii. Thus we are under the existing Code, as well as under the old, carried over the first steps towards the Full Bench conclusion. And the double-headed charge of two offences having been in this way arrived at, the Full Bench made its second step upon the footing of s. 382, cl. 5, which authorized the jury to find in the

(1) B. L. R., Sup. Vol., 521.

alternative upon a double-headed charge. But there is no equivalent to this in the present Code. The jury are now bound to find which view of the facts is true (s. 257), subject only, as beforementioned, to such qualification as is to be found in s. 461, para. 2, which appears to be purposely so framed as to exclude an alternative finding of two offences falling under the same undivided section of the Penal Code. It is carefully worded so as to cover the cases belonging to the first part of the old s. 242, but omits those of the second part, among which the Full Bench case and the present case come.

It was thrown out during the argument in this case that the "view of the facts," with regard to which the jury are by s. 257 called upon to decide whether it is true or not, is in a double-headed charge the, so to speak, entire alternative view expressed in the charge. But this does not accord with the natural meaning of the words. An alternative charge of the kind for which this construction of the sentence is especially wanted, puts forward two views of the facts which are inconsistent with each other, and which might, if the prosecution had so chosen, been made the subject of a separate charge: either the accused told the truth on the first occasion and falsehood on the second, or *vice versâ*.

It has been said that the prosecution, by alleging in the charge that the accused stated this on the first occasion and stated that on the second, and that one of these two statements was false, presents but one view of the facts to the jury. But it appears to me plain that this is not correct. The true effect of the charge is to put forward in a concise form at least two perfectly distinct views of facts, always inconsistent with each other, in those cases for which the ambiguous conviction is most zealously demanded, namely, in those cases where it is assumed to be patent on the face of the two statements that, if either one of them is true, the other must be false. And the very reason for thus putting forward two views is that the prosecution cannot venture to assert which view is true. When, then, the Legislature says that it is the duty of the jury to decide which view of the facts is true, it can hardly mean that, in the event of two inconsistent views being in

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this way simultaneously offered to the jury, with the implied admission on the part of the prosecution that it cannot say which is true, it is enough if the jury finds that either the one or the other is true. Moreover, if the authorization of a double-headed or alternative charge, by the force of implication alone, authorized a general finding on the evidence that such a charge was made out in one or other of its branches, then it is difficult to see why the express provisions of s. 461, para. 2, were enacted in reference to one class only of double-headed or multiform-headed charges; for they could hardly have been intended merely to introduce s. 72 of the Penal Code into the Criminal Procedure Code. Plainly, by the spirit of s. 455, if not by its words, charges which might under its provisions be put in the alternative, but which are nevertheless left to stand separately, may be dealt with by the Court as if they had been presented in the alternative, and if it is a consequence of an alternative charge that the Court is relieved from the obligation to find which head of it is true, then it seems to follow that s. 461, para. 2, is partial and superfluous.

At first I was disposed to think that the Legislature, by introducing into Sch. iii the alternative form applicable to the present case, indirectly, if not expressly, intimated its acceptance of the Full Bench ruling in the case of *The Queen* v. *Musst. Zamiran* (1), and virtually incorporated the law enunciated by it in the new Act, and this would probably have been so, if the new Act did not substantially differ from the old Act in the particulars which furnished the foundation for the Full Bench decision. But I have already pointed out that these particulars are absent from the new Act. The reasoning by which the late Chief Justice arrived at the conclusion in that case could not be supported upon the basis of the present Act. It appearing then that the Legislature, when passing the new Act, entirely removed the foundation on which the ruling of the Full Bench was placed, we cannot safely infer from the introduction of the alternative form of charge alone, which answered at most to the first part only of that ruling, that the entire ruling was intended to be enacted.

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On the whole, then, though I admit not without great hesitation, I have reached the opinion that under the existing Criminal Procedure Code while, no doubt, an accused person may be lawfully tried upon an alternative or double-headed charge, such as that which is brought before us in this reference, still the Court or jury must, for a conviction, find specifically which branch of the alternative or head of charge is true.

JACKSON, J.—Having given to the very important question raised in this case the best consideration in my power, I come to the conclusion to which I first inclined that the finding and conviction are insufficient.

No one can feel a stronger respect than I do for the opinion of Sir Barnes Peacock in such a matter as this, and no one can be more averse to disturbing settled rules of law, but I feel it, for reasons which I shall state in the sequel, to be a duty still more imperative than that of respecting decisions, to express my dissent from a ruling which I think in effect adds to the Penal Code an offence not defined by the Legislature.

It seems to me that neither s. 242 of the repealed Code, nor s. 455 of the present Code of Criminal Procedure (apart from the form in Sch. iii to which I shall presently advert) warranted the exhibition of a charge like that before us, and my persuasion is yet stronger that nothing, at all events in the existing Code, which is the material question, justifies a finding and conviction in such terms.

It is not requisite now that I should give at any length my reasons for dissenting from the Full Bench decision which is based upon repealed enactments; but I may say that, while I admit the latter clause of the old s. 242 to embrace charges of false evidence based upon statements given at different times, contradictory of each other, I conceive the Legislature to have had in view in framing that section the uncertainty as to which of the offences would be proved, and therefore to have contemplated the necessity of proving one or other statement to be false and therefore to amount to an offence, and that it did not sanction the mere entangling of the accused in a logical snare from which, as a matter of reason, he could not escape. As far, more-

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over, as the words of the Code went, the charges would have, it seems to me, to be exhibited seriatim, and not alternatively.

But I find no provision in the Code of 1872 replacing the latter portion of s. 242. On the other hand the Legislature seeing, it may be, the dangerous ambiguity of that clause, has recast the whole section, and dropping the last clause entirely, has put the other into new words, which seem to admit of no misinterpretation; for while the charge, alternative as to fact, but identical as to offence, is excluded, the many-headed charge arising when several distinct offences are comprised in one section (as in s. 382, Indian Penal Code) is preserved in the Schedule. S. 452 provides "that there must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately except in the cases hereinafter excepted." The only exceptions to this rule are contained in ss. 453 and 454, and I do not find that the present case falls within either of them. Further, s. 440 declares that "the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give notice to the accused person of the matter with which he is charged;" and s. 441 goes on to declare that, "when the nature of the case is such that the particulars mentioned in ss. 439 and 440 do not give sufficient notice to the accused person of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the offence was committed as will be sufficient for that purpose." One of the Illustrations to this section, (*c*), is to this effect:—"*A* is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by *A*, which is alleged to be false." There is nothing in the text of the Criminal Procedure Code which qualifies these clear provisions in the case of perjury.

Giving false evidence in a stage of a judicial proceeding by stating falsely before the Magistrate, &c., &c., is a distinct offence. Giving false evidence in a stage of a judicial proceeding by stating falsely before the Court of Session is also a distinct offence. Would it be a compliance with the sections I have

quoted to put these distinct offences into one charge, and to allege that *A* had either given false evidence at a certain time and place against *X* by saying so and so, or given false evidence at a certain other time and place against the Queen, by saying something else? I think it would not.

But we are told that a charge, if not in accordance with these sections, is expressly authorised by the 3rd Schedule, which no doubt may be read as part of s. 442, having been removed to the end of the Act merely for the sake of convenience to avoid interruption of the sense. The section says :— "The charge may be in the form given in the 3rd Schedule to this Act, or to the like effect;" and where a form so given seems to be directly at variance with precise rules contained in the Code itself, I prefer to stand by the rules.

But the composition of the Schedule, and in particular the place allotted to this very form of charge with the wording of it, appear to me to indicate that it has suffered from one of the inadvertencies almost unavoidable in the preparation of so long and intricate an Act. The 3rd Schedule is divided into two parts: I. Charges with one head; II. Charges with two or more heads.

On the first I need not observe. The second is framed to answer the purposes of s. 455 in the same way that s. 243 of the repealed Code was subservient to s. 242.

But while those two sections used in common the expression "heads of charge," it is disused in s. 455 ("in the alternative," being employed instead) and appears only in the Schedule, where, on the other hand, the term "alternative" does not appear except to denote the peculiar form under s. 193, Indian Penal Code, which, however, is a matter quite different from what is spoken of as alternative in s. 455. And curiously enough the Schedule gives no form of charge upon the most obvious and usual alternative case, *viz.*, that of doubt between the offence of theft and that of criminal breach of trust. On the other hand, a variety of charges with more than one head are supplied, which have been rendered useless by s. 456 or s. 457. For instance, why need a Magistrate now draw up several heads of charge against an accused for murder, culpable homicide, grievous hurt, and so forth, when, upon a charge of murder or of culpable

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homicide, a conviction for any offence of the same nature, but inferior in degree, may follow?

The form called "alternative charges on s. 193," comes also into this division, though it is not a charge with several heads at all, but something entirely distinct, and, as I think, not warranted by any section of the Code at all.

I pause here to remark that the old Code provided forms of conviction, the present Code does not. And while the old Code, setting out forms of charge with several heads for doubtful cases, provided alternative forms of conviction, the new Code gives in the Schedule several many-headed charges, and one alternative charge.

Having said this I return to the wording of this charge. It does not run,—that you, on or about the
intentionally gave false evidence by stating ,
and thereby committed ;
or that you, on or about ,
intentionally gave ,
and thereby committed ;
but—"that you, on or about the , stated in evidence
, and on or about , stated ,
one of which statements you either knew or believed to be false, &c., and thereby committed an offence."

That is to say, the offence is made to consist of having made first the one statement, afterwards the other, one of them being false, though the Magistrate has not been able to determine, perhaps not taken the trouble to inquire, which.

Now, besides that the offence here stated is not that defined by the Penal Code, and required to be set out by the Criminal Procedure Code, namely, the intentional making of a particular false statement, but simply the making of two statements at different times, one or other of them being known to be false, it will be observed that, so far as this form of charge goes, the two statements need not be contradictory one of the other. Also that in fact the two statements, though contradictory, may both be false, and not one only. As for instance, if the witness swore on the preliminary enquiry that he had seen the accused without provocation strike the deceased a blow with a club,

such statement being prompted by enmity, and afterwards on the trial swore that he had not seen the accused strike the deceased at all, this latter statement being brought about by the receipt of a large bribe, the fact being that the witness had seen the accused, when irritated by the foulest insult, strike the deceased a blow with his fist, which blow, contrary to probability, produced death.

It appears to me, therefore, that the form in question is neither consistent with the positive provisions of the Code as to charges, nor sufficient for the purposes which it seems to contemplate.

One may indeed suspect that it was framed to meet, not the definition of any offence as contained in the Penal Code, but either the ruling of the Full Bench in *The Queen* v. *Musst. Zamiran* (1), or the exposition of the law of perjury promulgated by the Nizamut Adawlut in their Circular Order No. 126 of volume III, and No. 10 of volume IV (2). In the first mentioned Circular Order that Court directed (overruling a previous reported decision of two Judges, of whom one was the illustrious Colebrooke) that, where a prisoner was arraigned for perjury on two contradictory statements, it would not be necessary to prove the falsity of either. In the second Circular Order they prescribed a form of charge, which at all events had the merit of being exact and complete according to the views which the Court at that time entertained.

It may be observed that the establishment of perjury by contradictory statements is taken from the Mahomedan law, as expounded by the law officers of the Sudder Court in an elaborate opinion printed in No. 656 of the Constructions (the passage will be found at page 21 of the 2nd volume, 4th edition). The Sudder Judges, however, in adopting it annexed to it an important qualification, *viz.*, that the contradiction should be on a point material to the issue of the case. This restriction, in accordance with the present law as to giving false evidence, would be and is held unnecessary, so that the charge before us

(1) B. L. R., Sup. Vol., 521.

(2) See Carrau's N. A. Circular Orders, 340 & 422.

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is going beyond Sudder practice, and is in fact pure Mahomedan law of the Muftis.

We are not concerned at present with the enquiry whether the law should be so, but have only to consider whether it is so or not.

I have hitherto discussed the matter with reference to the charge, and I now turn to the conviction, upon which I found arguments, which appear to me conclusive of the matter.

In the first place it may be well to state what, in my view, according to the Code of Criminal Procedure, is the bearing which the charge has upon the conviction. The charge I take to be, first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him, and of which he will have to clear himself; second, it is an information to the Court, which is to try the accused of the matters to which evidence is to be directed. And by the forms and illustrations provided, the Legislature no doubt indicates what in certain instances it deems to be a sufficient compliance with the rules which it has laid down.

Thus it may be that the framers of the law intended to furnish, in reference to s. 193 of the Penal Code, a convenient and suitable form in which an accusation founded on contradictory, and probably false, statements might be exhibited, though it seems to me that the intention has not been successfully carried out. But precise and positive rules apply to the conviction, and a judgment of conviction which is not in conformity with those rules is bad in law.

S. 461½ declares that "the judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the section of the Indian Penal Code under which he is convicted; or if it be doubtful under which of two sections, or under which of two parts of the same section, such offence falls, the Court shall distinctly express the same and pass judgment in the alternative." The accused cannot be convicted of matter not contained in the charge except as provided in ss. 456 and 457, but however loosely the charge may have been framed, the conviction must be precise except in the particular cases, now

very accurately defined, where the law allows an alternative judgment.

If the trial in a Court of Session is held with the aid of assessors, the Judge with whom the decision rests must record "the point or points for determination, the finding thereupon, and the reasons for the finding" (s. 464). If the trial is by jury, a partition of functions takes place, and it is the duty not of the Court, but of the jury "to decide which view of the facts is true" (s. 257), and it must appear in the Judge's record of the heads of his charge to them that the proper point or points for determination have been laid before the jury. And therefore I think it clear that, when the prisoner is charged with having given false evidence in making this statement or that, the finding must be express;—

1*st.*—Because an alternative finding will not satisfy the requirements of s. 461.

2*nd.*—Because there is no other warrant for any kind of alternative finding.

3*rd.*—Because a bare finding that he has given false evidence will not suffice; for the definition of false evidence in s. 191, Indian Penal Code, demands the making of some statement which is false, and by s. 441, Code of Criminal Procedure, Illustration (*c*), the particular statement must be set out, whereas the jury here has not found that either statement is false.

4*th.*—If it be a question raised in the charge which of the two contradictory statements is false (if only one be charged as false), then it would seem that the jury, as having the duty of deciding which view of the facts is true, must find that this or that statement is proved to be false, or that both are found, or that neither is found to be false.

And it seems to me highly inexpedient that an ambiguous verdict of the kind contended for should be permissible, for it is obvious that the degree of criminality involved in such a charge may vary almost infinitely; for as already observed the more venial or the more wicked of the two statements, or both, might have been false; and one of the many consequences would be that, from the uncertainty of the facts found, the Appellate Court would be quite unable often to exercise any control, or

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even express an opinion as to the measure of punishment which was proper in the case. Other embarrassments and other unsatisfactory results might ensue. If, for instance, one of the false statements charged had been in support of a charge of murder, the accused, if he were convicted, might, in a certain case, be punished with death under s. 194. Could the Court which tried him tack on to an alternative as to fact, a second alternative as to offence, and say that he had either given false evidence, for which he might be hanged under that section, or given some other false evidence by which he could be imprisoned only under s. 193; and although, if this could be done, the Court would be bound under s. 72, Indian Penal Code, to award the lighter punishment, would it be desirable, would justice be satisfied, if so momentous an issue were left undetermined as to whether the prisoner had or had not given false evidence with intention, and had thereby caused an innocent person to be convicted and executed in consequence of his false evidence?

Nor does the question apply only to the case of false evidence. At least one other instance occurs to me, in which, if the arguments for the Crown be well-founded, analogy would authorize an alternative finding. I mean the offence of bigamy.

There is a case in Hale called *The Lady Madison's* case (1). *A* married *B*, and afterwards during *B*'s life married *C*. *B* then dying, but in the lifetime of *C* she married *D*. Thus, marriage of *A* with *D* was not bigamy, because, *B* living, the marriage to *C* was void. Now let us suppose that in this case, the evidence left it in doubt whether *B* had been living at the time of *A*'s marriage with *C*. Could *A* have been charged alternatively with having committed bigamy either with *C* or with *D*,—for, if *B* was then living, the marriage with *C* would be bigamy, but if he was dead, then the marriage with *C* would be good, and the marriage with *D* bigamy,—and could she be convicted on such alternative charge?

I conclude, therefore, that the conviction in this case is not sustainable, and I would order the appellant to be discharged.

The contrary, no doubt, was held seven years ago by a Full

(1) 1 Hale's Pl. Cr., 693 (p. 692, ed. of 1800).

Bench of this Court. The precedent has been followed, though it has always appeared to me unwillingly by the Division Benches, and there is this further reason for adhering to it now that the ruling has been adopted by the High Court of Madras. But this does not bind my conscience. The Courts are bound to solve to the best of their ability questions of law which arise in the course of their business; and if these questions relate to civil rights or obligations, and the rule becomes settled, persons begin to shape their conduct thereby, and numerous titles are founded thereupon, and the mischief of unsettling titles far outweighs the benefit of securing scientific accuracy of decision. If scores of men, however, have been improperly convicted and punished on erroneous views of the law, that is not in my opinion a good reason for proceeding to convict and punish others on the same view. The Courts are not empowered to inflict penalties for that which the law has not constituted an offence, nor are Courts which are subject to a code of procedure, in cases provided for by that code, authorized to act otherwise than in accordance with the procedure enjoined. The Legislature might, of course, if it thought fit, prescribe a punishment for contradictory statements, material or otherwise made before a Court of Justice, as an impediment in the way of justice, though, whether in so doing, an equally serious mischief might not be done by as it were constraining men through fear of certain punishment to cleave to false statements once made, may be worth considering. And if the occurrence of this case should have the effect of bringing about an authoritative declaration by the Legislature one way or the other, I shall not regret having brought the matter under the serious attention of my colleagues.

COUCH, C.J. (KEMP, J., concurring).—The charge in this case against the accused was first "that he did, on or about the 23rd of January 1873, at Alipore, in the course of the trial of Tulsi Das Dutt and Mahomed Latif on a charge of cheating, state in evidence before Abdul Latif, the Deputy Magistrate of Alipore, that the greater part of the furnitures was sent by me to that house (*viz.*, the house at Chitpore), and a small

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portion by Belilios and Zahuruddin; and that he did, on or about the 13th of February 1873, at Alipore, in the course of the trial of J. R. Belilios, Tulsi Das Dutt, and Mahomed Latif in the same case of cheating, state in evidence before Moulvie Abdul Latif, Deputy Magistrate of Alipore, that Belilios never sent any furniture of his own or of any one else to that house (*viz.*, the house at Chitpore), nor was any of the furnitures in that house belonging to Belilios," one of which statements he either knew or believed to be false, or did not believe to be true, and that he had thereby committed an offence punishable under s. 193 of the Indian Penal Code. The second charge is similarly framed, and states that the accused gave evidence on the 23rd of January 1873 and the 13th of February 1873 at Alipore, and that he either knew or believed one of the statements to be false, or did not believe it to be true.

It is material to notice that the charge does not allege that the statement made on the 23rd of January 1873 was known or believed to be false, or not believed to be true. Nor does it allege that the statement made on the 13th of February 1873 was known or believed to be false, or not believed to be true. It merely alleges that one of the two statements set out in it was known or believed to be false by the accused, or not believed by him to be true.

Upon this charge he was tried, and in the summing-up of the Judge, the jury were told, and very properly:—"Before you can find him guilty, you must be satisfied that he made one or other of the statements contained in the charge knowing that such statement was false, and deliberately intending to make a false statement." The majority of the jury found that the accused was guilty of the offence specified in the first and second heads of charge, the offence specified being an offence punishable under s. 193 of the Penal Code. After such a summing-up, calling the attention of the jury so plainly to the necessity of their being satisfied that one or other of the statements was known to be false, and that the accused deliberately intended to make a false statement, I think there can be no doubt that the offence of giving false evidence within the mean-

ing of s. 191 of the Penal Code was committed on one or other of the occasions specified in the charge. Then it appears to me that the only question is, was it necessary, in order to make the conviction legal, that the jury should find on which of the two occasions the offence was committed? Does the law in this country render that essential to a conviction for giving false evidence?

The 439th section of the Code of Criminal Procedure now in force requires that "the charge shall state the offence with which the accused person is charged," and the 440th that "the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give notice to the accused person of the matter with which he is charged." The charge in this case does that. It states what the offence is, namely, that the accused committed an offence punishable under s. 193 of the Penal Code, and it contains such particulars as to the time and place as give sufficient notice to the accused of what he is charged with. He is told that, by making the two statements, one of which it is alleged he knew or believed to be false, or did not believe to be true, he committed an offence punishable under s. 193.

S. 442 says that the charge may be in the form given in the 3rd Schedule to the Act. In that Schedule there is such a form of charge as was made against the accused in this case, and it appears to me that, unless a conviction upon a charge so framed is allowed by law to be valid, the putting this form of charge in the Schedule was not only useless, but is also inconsistent with saying that the jury is required by the law to find and to state upon which of the two occasions mentioned in the charge the false evidence was given. If the jury is required to state that, then two charges in the form No. 10 in the Schedule would be proper. One would state that evidence was given on the 23rd of January 1873, which the accused either knew or believed to be false, and the other would state that evidence was given on the 13th of February 1873; which the accused either knew or believed to be false. If it is required by the law that the jury or the Court, where the trial is with assessors, should

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find distinctly on which of the occasions the false statement was made, the alternative charge given in the Schedule is perfectly useless.

Again, if it is necessary for the jury in order that the conviction shall be valid to say which of the two statements is the false one, it is requiring the jury to find what is not alleged in the charge. All that the charge alleges is that one of the statements was known or believed to be false, or not believed to be true, and that thereby the offence was committed. Such a charge being authorized by the law, it appears to me that all which the Court has to find to sustain a conviction for giving false evidence is that the allegations in it are proved.

In considering what the intention of the Legislature was in making these provisions in the new Code of Criminal Procedure, and giving in the Schedule this form of charge, I think it is important to see what, at the time this Act was passed, was the acknowledged state of the law. It had been decided by a Full Bench of this Court that a conviction upon a charge of this description was legal. That view of the law had been acted upon, undoubtedly, for some years in this presidency. In Madras, as appears from the case of *The Queen* v. *Palany Chetty* (1), the same view of the law was adopted, and it cannot be doubted that this decision was acted upon in that presidency. We have no reported case in the Bombay High Court, and I do not desire to speak merely from memory as to what was the practice in that presidency. But in Madras and in Calcutta, and my belief is in Bombay also, the law was considered at the time this Act was passed to be that a conviction of a person who was found to have intentionally made contradictory statements on oath or solemn affirmation was legal. I cannot think that the Legislature intended, by the way in which the new Code has been drawn, by the omission of certain sections which are in the old Code and the substitution of others, which probably were supposed to be an improvement in the wording or arrangement of it, to alter the law as to the offence of giving false evidence. That this charge, although called an alternative charge, and being so far alternative that two statements are set out in it

(1) 4 Mad. H. C. Rep., 51.

when one offence only is alleged, namely, that the accused thereby, that is by making statements one of which he knew or believed to be false, committed the offence, should be considered as a charge of but one offence, and was to be dealt with by the jury as such, I think is shown by s. 452, which says that there shall be a separate charge for every offence.

It was argued that it would prejudice the accused in respect of his subsequently pleading an acquittal or a conviction if a conviction were allowed upon a charge framed as this is, and that he might be tried again for making one or other of the statements which are the subject of the present charge. S. 460 provides for a person who has once been tried for an offence, and convicted or acquitted of such offence, not being liable to be tried again on the same facts for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under s. 455, or for which he might have been convicted under s. 456. If the question should ever come before me, what is the effect of a conviction or an acquittal upon such a charge as this, I should hold that the accused could not be tried again for giving the evidence on either occasion which is set out in the charge, for then he would be tried again on at least a part of the same facts as he had been tried upon before.

I concur with my learned colleagues in thinking that the second part of s. 461 does not apply to this case. This is a charge of but one offence, and the conviction is a conviction of that offence, and need not specify more than the offence of which the person accused is convicted. Here the jury found upon the facts proved before them that the accused committed an offence punishable under s. 193. It appears to me that this finding is a good finding; nor do I see that s. 257 as to the duties of the jury interferes with it, or prevents the finding being as it is. S. 257 says "that it is the duty of the jury to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned." I understand this to mean that it is the duty of the jury to find whether the view of the facts that the accused made the two statements, that they were such that they

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could not both be true, and that he knew or believed one of them to be false, is true. I do not understand it as meaning that the jury have to select from a part of the charge some of the facts and say whether they are true. What is meant is the whole view of the facts alleged against the accused, the view taken by the prosecution which leads to the conclusion of his guilt, or the view which is set up on his behalf, and which would make him innocent. I do not feel at all pressed by the provisions of s. 257.

It appears to me that this was a charge authorized by the law, and that the allegations in it which are sufficient to support a conviction have been found by the jury to be proved. If it is a good charge, nothing more is necessary to be found by the jury than that the allegations contained in it are true. I cannot say that it is an illegal charge finding it, as I do, deliberately allowed by the Legislature, and inserted in the Schedule which is referred to in s. 442.

I think therefore that the conviction is a good one.

I have to mention that two learned Judges, not now present, Glover and Pontifex, JJ., are also of opinion that the conviction is good.