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decision of which is now impeached, of s. 565 of the Code, has, after much subsequent consideration, been altered, and we have come to the conclusion that that section does not apply in special appeal.

Application rejected.

APPELLATE CRIMINAL.

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July 24.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

EMPRESS OF INDIA *v.* NIAZ ALI AND OTHERS.

Act I of 1879 (*Stamp Act*), *s.* 51—*Application for allowance for spoiled stamps—Inquiry to be made by Collector—False evidence—Contradictory statements—Joinder of charges—Alternative charge—Act XLV of* 1860 (*Penal Code*), *ss.* 181, 193—*Act X of* 1872 (*Criminal Procedure Code*), *s.* 455.

S. 51, Chapter VI of Act I of 1879, enacts that "subject to such rules as may be made by the Governor-General in Council as to the evidence which the Collector may require, allowance shall be made by the Collector for impressed stamps spoiled in the cases hereinafter mentioned, &c." According to a rule made with reference to that section, "the Collector may require every person claiming a refund under Chapter VI. of the said Act, or his duly authorised agent, to make an oral deposition on oath, &c." *Held*, therefore, that the Collector himself is the officer, and no other, to whom power is given by law to make inquiries into applications for allowances for spoiled stamps, to take evidence on oath in reference thereto, and to grant or refuse such applications, and he cannot delegate his authority in the matter.

Held, therefore, where a person had applied for a refund under Chapter VI of Act I of 1879, and the Collector made over the application for inquiry to a Deputy Collector, that the Deputy Collector was not entitled to put the witnesses produced by the applicant on their oaths, and consequently, in reference to the statements of such witnesses, no charge under s. 181 or s. 193 of the Indian Penal Code was sustainable.

In prosecutions for giving false evidence under s. 193 of the Penal Code, the case of each person accused should be separately inquired into, and, if committed for trial, separately tried. It is wholly erroneous to include them in one joint charge.

It is not of itself sufficient to warrant a conviction for giving false evidence that an accused person has made one statement on oath at one time, and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence independent of the other contradictory statement to establish the falsity of that which is impeached as untrue. *R.* v. *Jackson* (1); *Reg.* v. *Wheatland* (2); and *Rex* v. *Harris* (3) referred to. S. 455 of Act X of 1872 (Criminal Procedure Code) is no authority for framing against a person accused of giving false evidence, who has made one statement on oath on one occasion, and a directly contradictory one on oath on another

(1) 1 Lewis C.C. 270. (2) 8 C. and P. 238.
(3) 5 Barn. and Ald. 926.

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occasion, a charge in the "alternative," that word, as used in that section, meaning that, where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated as to guard against his escaping conviction through technical difficulties.

Held, therefore, where three persons were committed for trial jointly charged with "having on or about the 26th September, 1881, or the 18th October, 1881, being legally bound upon oath to state the truth, knowingly on those days, regarding the same subject, made contradictory statements upon oath," and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and such persons were jointly tried on such charge, that such charge was bad for being single and joint against the three accused persons, instead of several and specific in regard to each of them; that it was further bad because it did not distinctly and in terms allege which of the statements was false; that, assuming a committal upon so faulty a charge should be allowed to stand, the Court of Session should have prepared a fresh charge against each of the accused persons, specifically setting forth the statement alleged to be false, and should then have proceeded to try each of them separately; and that, there being no evidence that either of the statements made by two of such persons was false, except that it was contradicted by the other, the charge against such persons was not sustainable, there being no sufficient evidence that either of the statement was false.

THIS was an appeal by the Local Government from a judgment of acquittal of Mr. C. J. Daniell, Sessions Judge of Moradabad, dated the 21st January, 1882. The facts of the case are stated in the judgment of Straight, J.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Local Government.

Mr. *Leach*, for Niaz Ali, respondent.

The Court (STUART, C. J., and STRAIGHT, J.,) delivered the following judgments:

STRAIGHT, J.—This is an appeal by Government against a decision of the Sessions Judge of Moradabad, passed on the 21st January last, acquitting the three respondents of having given false evidence in a judicial proceeding, contrary to the provisions of s. 193 of the Penal Code. In order to render the pleas urged in the petition of appeal intelligible, it is necessary to recapitulate the following facts. It appears that in the month of September, 1881, one Mubarik Husain was contemplating a mortgage of certain property of his, and for the purpose of having a deed formally drawn up had purchased a paper with a Rs. 25 stamp on it from a person named Nawazish. It so happened, however, that after the mortgage had been written and ex-

ecuted, the matter fell through for reasons which it is wholly unnecessary to enter upon, and Mubarik Husain found himself with this useless document and wasted stamp upon his hands. He accordingly applied under the provisions of s. 51 of Act I of 1879 to the Collector of Moradabad for an allowance to be made him for the spoiled Rs. 25 stamp. It may be here observed, that under the preliminary paragraph of that section the Collector is the person who is authorised to make allowances in such matters," subject to such rules as may be made by the Governor-General in Council as to the *evidence* which the Collector may require." According to Rule 16 framed in reference to this section and contained in a Notification of the 26th February 1881, to be found at page 65 of the "*Gazette of India*" for 1881, "the Collector may require every person claiming a refund under Chapter VI of the said Act, or his duly authorised agent, to make an oral deposition, or to put in an affidavit setting forth the circumstances under which the claim has arisen. The Collector may also, if he thinks fit, call for the evidence of witnesses in support of the statement set forth in the deposition or affidavit of the claimant or his agent." Upon the receipt of Mubarik Husain's application for a refund, the Collector of Moradabad, instead of acting in the matter himself, delegated the duty of making the necessary inquiries to Mr. Shaw Deputy Collector, and on the 26th September, 1881, that gentleman examined the three respondents to the present appeal upon oath, professing to do so under the terms of the Notification already set forth at length. It is to be observed, that this examination seems to have been directed less to investigating the circumstances under which the stamp had come to be spoiled, than to fixing Nawazish as the person who had sold it to Mubarik Husain. As to the two respondents Niaz Ali and Rahim-ullah, they no doubt stated in substance before the Deputy Collector that the stamped paper was purchased in their presence by Mubarik Husain from Nawazish Ali, though with regard to the respondent Idu, all he said was: "Four months ago Mubarik Husain bought a Rs. 25 stamp from Nawazish." Upon this Mr. Shaw sent in a report to the Collector, who then passed an order allowing the refund, and the amount was duly paid to Mubarik Husain. Subsequently, proceedings

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were instituted with the sanction of the Collector against Nawazish under s. 68 of the Stamp Act, 1879, for selling the Rs. 25 stamp to Mubarik Husain, he not being a properly licensed vendor. This case was heard by Mr. Shaw on the 18th October, 1881, in his capacity of a Magistrate of the first class, and the three respondents were summoned and examined as witnesses for the prosecution. On this occasion they severally stated, Niaz Ali, first, that he did not himself witness the purchase but heard of it from Mubarik Husain, and then, when his former statement of the 18th October was put to him, that the stamp was purchased in his presence, and that his former statement was true: Rahim-ul-lah that the stamp paper was not purchased in his presence, and that he had only heard of it; and Idu that he had not said on the 18th of October that the stamp was purchased in his presence, but that he had heard of the purchase. In the result there being no evidence against Nawazish, he was discharged. Thereupon the respondents were, with the sanction of the Magistrate of the District, prosecuted under s. 193 of the Penal Code for giving false evidence both on the 26th September, when they made their first statements in the inquiry under the Stamp Act, and on the 18th October, when they gave their depositions in the case of Nawazish. Mr. Shaw again held these proceedings, and in the result, to use his own very extraordinary expression, "finding them guilty of the charge as laid out in the charge sheet, I direct that they be tried by the Court of Session." In ordinary course the case came before the Sessions Judge, who held "that the statements of the defendants on the 26th September were not made in a judicial proceeding, and that the oath administered to them was administered by a person not authorised to administer such an oath." He further ruled, that their statements having been reduced into writing, and such writing being inadmissible, he could not take oral evidence as to what was said by the defendants on the 26th September, and holding these views he acquitted them. The Government now appeal from his decision under the provisions of s. 272 of the Criminal Procedure Code on three grounds: (i) that the Judge was wrong in rejecting the statements of the 26th September; (ii) that under the rules contained in the Notification of the *Gazette of India*, Mr. Shaw had authority to administer the oath on the

26th September, 1881; (iii) that at least the respondents are shown to have committed an offence under s. 181 of the Penal Code.

It seems to me that the first question to be considered is whether Mr. Shaw the Deputy Collector had authority to administer an oath to the respondents or any of them on the 26th September, 1881, when prosecuting his inquiries in reference to the stamp. It has already been noted, that in s. 51 of Act I of 1879 the person empowered to make allowances for spoiled stamps is the Collector, and in the Government of India's Notification of February, 1881, he it is who may require an oral deposition on oath or affirmation, or an affidavit of the applicant or his agent, or the evidence of witnesses to support the application. Hence it is obvious, that the Collector himself is the officer, and no other, to whom power is given by law to make inquiries into applications for allowances for spoiled stamps, to take evidence on oath in reference thereto, and to grant or refuse such applications. But it was urged by the Junior Government Pleader that the term "Collector" as explained in the interpretation clause to the Stamp Act, 1879, includes "any officer whom the Local Government may by Notification in the official Gazette appoint in this behalf, by name or in virtue of his office." It is sufficient to say, that Mr. Shaw never was appointed in the manner mentioned, and that this suggestion does not help the prosecution. In my opinion the Collector of Moradabad was himself alone empowered by law to hold the inquiry upon Mubarik Husain's application, and to administer the oath to those persons whose oral or written statements he required. It was illegal and incompetent for him to delegate his authority in the matter, and I therefore hold, that Mr. Shaw was not entitled to put the respondents upon their oaths, and that in reference to their statements before him on the 26th September, no charge under either s. 181 or s. 193 could be sustained. The second plea taken in the petition of appeal in my judgment accordingly fails.

It will be convenient now to examine the terms of the charge sheet prepared by Mr. Shaw upon which the respondents were committed to the Court of Session. "I, H. Shaw, Magistrate of the first class, hereby charge you Niaz Ali, Rahim-ul-lah, and Idu

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as follows:—That you on or about the 26th of September, 1881, or the 18th day of October, 1881, at Moradabad, being legally bound upon oath to state the truth, did knowingly on those days, *regarding the same subject, make contradictory statements upon oath*, in saying on the 26th September, 1881, that you saw Nawazish Husain Khan sell a stamp of Rs. 25 value to Mubarik Husain, and on the 18th October, 1881, saying you did not see, but heard of the transaction, that you gave false evidence voluntarily, and thereby committed an offence punishable under s. 193 of the Penal Code, and within the cognizance of the Court of Session."

Now in the first place the charge was open to objection for being single and joint against the three respondents instead of several and specific in regard to each of them. In prosecutions for giving false evidence under s. 193 of the Penal Code, the case of each person accused should be separately inquired into by the Magistrate, and if committed to the Sessions Court, separately tried by the Judge. It was wholly erroneous to include them in one joint charge. But apart from this fatal objection, the Magistrate avowedly committed the case upon the extraordinary assumption, that because the respondents had made contradictory statements they must necessarily be guilty of the offence of giving false evidence This is a very mistaken view of the law, and it is right it should be corrected, for it is by no means peculiar to Mr. Shaw, but on the contrary prevails to a considerable extent in these Provinces among Magisterial officers. It is not of itself sufficient to warrant a conviction either for giving false evidence or making a false oath, that an accused person has made one statement on oath at one time, and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor *must* be prepared with confirmatory evidence independent of the other contradictory statement to establish the falsity of that which is impeached as untrue. The remarks of Holroyd, J. in *R.* v. *Jackson* (1) are valuable upon this point: "Although you may believe that on one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury, for there are cases in which a person might very honestly and conscientiously believe and swear to a particular fact from the best of his

(1) 1 Lewis C.C. 270.

recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict where it is not possible to tell which is the true and which is the false." Gurney, B. also took a similar view in the case of *Reg.* v. *Wheatland* (1) upon which and a decision of the Court of King's Bench in *Rex* v. *Harris* (2) Mr. Greaves in Russell on Crimes, Vol. III, pages 82 and 23, *notes*, records some valuable comments. S. 455 of the Criminal Procedure Code is no authority for the form of charge prepared by the Magistrate in the present case, and the word " alternative " as used in the sections means, that where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated, as will guard against his escaping conviction through technical difficulties. I have no hesitation whatever in declaring, that the charge framed by Mr. Shaw was erroneous in point of law, as being joint against all the respondents instead of several, and for not distinctly and in terms alleging which of their statements was false. Assuming that a committal upon so faulty a charge could be allowed to stand, the Sessions Judge should have prepared a fresh charge against each of the respondents, specifically setting forth the statement alleged to be false, and should then have proceeded to try each of them separately. This however he did not do, and his procedure, were it necessary to enter into the point, would thus be open to serious objection.

From what I have said in the earlier part of this judgment it is clear, that no charge could have been properly preferred or sustained as to the statements made on the 26th of September. Indeed, as to the respondent Idu, I have already pointed out, that he did not distinctly assert, that the stamp was bought in his presence. As to the evidence given by the respondents Niaz Ali and Rahimul-lah in the case of Nawazish, beyond their own contradictory assertions on the 26th September, there was no other proof against them, and, as standing alone, it was impossible to say which of them was true and which was false, as no legal charge could be framed or

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sustained against them or either of them. Upon the face of the depositions there is nothing whatever to show whether they were or were not present when the stamp was bought by Mubarik Husain, nor was that person called as a witness in the case, though he could have thrown important light upon it. In my opinion no charge of giving false evidence under s. 193 of the Penal Code against any or either of the respondents was capable of being maintained for want of sufficient proof, and that while it was imperative to allege one or other of their statements as being false, it was equally necessary to establish its falsity by some confirmatory evidence other than that of their contradictory statements. If the prosecution could not succeed under s. 193, it was equally clear that it must fail under s. 181, for the falsity would in that case have to be proved with equal exactness. Looking at this appeal in its entirety and bearing in mind the several matters to which attention has been called, I am very clearly of opinion that it should be dismissed.

STUART, C.J.—This case has been very carefully examined by my learned colleague, Mr. Justice Straight, and I entirely agree with him in his conclusion that the appeal must be dismissed. I may at the same time observe that in regard to the very objectionable and inartificial manner in which the charges were drawn up against the three accused, an amendment by the Judge of the charge or charges might have removed any error on that score, or this Court might under s. 297, Criminal Procedure Code, have directed a new trial under proper charges, or we might do that now, if we thought that such a mode of proceeding would serve any useful or relevant purpose.

But the imputed false swearing or perjury alleged to have been committed before Mr. Shaw is the one material question with which we are concerned in this appeal, and that, in the circumstances, could under no form of charge be investigated by that officer, whether in virtue of his own powers or as the delegate of the Collector, and the inquiry that took place before him was not a "judicial proceeding" within the meaning of s. 193, Indian Penal Code, and could afford no grounds for his committal of the accused to take their trial before the Sessions Judge This is also the opinion of the Sessions Judge of Moradabad, and he is clearly right.

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Even if the inquiry by Mr. Shaw (whose unfitness for the duty cast upon him by the Collector is painfully manifest) could be regarded as in any respect a "judicial proceeding," it is plain that the case on any merits it may be supposed to have was of the most trumpery description, and quite undeserving of the ordeal through which it has passed, and I agree with Mr. Justice Straight that the statements by the accused relied on by Mr. Shaw as showing false swearing are not, on the face of them, of that character, but if anything little more than variations, perhaps careless variations, not necessarily of a wilfully deceitful or misleading nature, or in themselves charged with the vice of perjury. This is specially the case with respect to the alleged contradictory statements of the accused Niaz Ali, who simply adheres to his first statement, explaining that his second statement, to the effect that he did not personally witness the sale, was made when he was suffering from fever and ague, complaints not certainly calculated to sharpen the memory and intelligence of the most conscientious person. Then, besides these considerations, if regard be had to the peculiarity of the native character when acting the part of a witness, and the different languages in which the depositions, supposed to contain the false swearing were ultimately made to appear, it is reasonable to believe that the trial might not have resulted unfavourably to the accused men. Indeed, if the supposed offence of these men had not been connected with a matter relating to the revenue, as to which all Government officers are so laudably zealous, this prosecution would in all probability never have been heard of. The appeal is dismissed.

REVISIONAL CIVIL.

1882
July 3.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

DHIAN RAI (DEFENDANT) *v.* THAKUR RAI (PLAINTIFF).*

Landholder and tenant—Ex-proprietary tenant—Rent—Damages—Act XII of 1881 (*N.-W. P. Rent Act*), *ss.* 14, 95 (*l*), 206.

T, who had acquired the proprietary rights of *D* in a certain mahal, sued *D* in a Civil Court for damages for the use and occupation of sir-land of which *D*,

* Application No. 224 of 1881, for revision under s. 622 of the Civil Procedure Code of a decree of Rai Raghu Nath Sahai, Additional Subordinate Judge of Gházipur, dated the 10th September, 1881, modifying a decree of Munshi Kulwant Prasad, Munsif of Ballia, dated the 23rd May, 1881.