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of uncertainty being other than a formal defect, the Court has no power to amend. If it is for a formal defect, or an uncertainty merely amounting to such, then the Court may amend.

If Stat. 14 & 15 Vict. c. 100, s. 25 had contained these words which are inserted in the Indian Act, the judgment in *Reg.* v. *Sill* would certainly have been in favour of a conviction.

Conviction affirmed.

NOTE.—The allegation that the money, etc. obtained was the property of the person whom it was intended to defraud is expressly declared to be unnecessary by Stat. 24 and 25 Vict. c. 96, s. 88.

ORIGINAL JURISDICTION (*a*)

Criminal Case Reserved.

THE QUEEN *against* 'AIDRUS SÁHIB.

The materiality of the subject-matter of the statement is not a substantial part of the offence of giving false evidence in a judicial proceeding; and an indictment under section 191, 193 of the Penal Code, though it does not allege materiality, is good if it alleges sufficiently the substance of the offence.

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CASE stated by Scotland, C. J.

"The prisoner 'Aidrus Sáhib was tried and convicted before me of the offence of intentionally giving false evidence in a judicial proceeding under sections 191 and 193 of the Indian Penal Code. The indictment charged that the prisoner on the 25th day of September 1862 at Madras, "while being examined as a witness in a judicial proceeding then and there pending before the Honourable Sir Colley Harman Scotland, Knight, Chief Justice, and the Honourable Sir Adam Bittleston, Knight, Puisne Justice of the High Court

(*a*) Present Scotland, C. J. and Bittleston, J.

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of Judicature at Madras and Judges of the said High Court, and being legally bound by an oath to state the truth, intentionally gave false evidence, by falsely stating that he the said 'Aidrus Sáhib, otherwise called Kádar Mastán Sáhib, did not sign the exhibits produced at the trial of the action of J. H. Mollow and others against the said 'Aidrus Sáhib, otherwise called Kádar Mastán Sáhib, and marked respectively A, B, C and E, he the said 'Aidrus Sáhib, otherwise called Kádar Mastán Sáhib, at the time he made the said statement, well knowing the same to be false: Whereas in truth and in fact the said 'Aidrus Sáhib, otherwise called Kádar Mastán Sáhib, had signed the said exhibits, and that he has thereby committed an offence punishable under section 198 of the Penal Code."

"At the close of the case for the prosecution it was objected by the counsel for the prisoner that the indictment was wholly defective and bad on the several following grounds.

"First. That the indictment did not allege before whom or what Court the oath by which the prisoner was legally bound to state the truth was taken, and that it was consistent with the allegations in the indictment that the oath was not taken before a court of justice or a judge.

"Secondly. That the indictment did not sufficiently allege that the oath was taken by the prisoner as a witness in a judicial proceeding and upon and during the trial stated in the indictment.

"Thirdly. That the indictment did not allege or show that the false statement made by the prisoner was material to the matter of the judicial proceeding in which such statement was made.

"I expressed no opinion upon the points, and the case being afterwards left to the jury, they found the prisoner guilty, and I passed upon him a sentence of seven years' transportation, reserving the above objections for the consideration and judgment of the High Court."

Branson for the prisoner.

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1. The indictment merely alleges that the prisoner being legally bound by an oath to state the truth intentionally gave false evidence. It is consistent with the allegation that the prisoner was never sworn before a Court of justice or a judge. The word "oath," according to the Penal Code, section 51, includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant, or to be used for the purpose of proof, whether in a Court of justice or not.

2. The indictment does not state that the prisoner was sworn in any judicial proceeding. Neither does it state that the judicial proceeding therein mentioned was the trial of the action of *Mollow* v. *Aidrus Sâhib*. In *Reg.* v. *Bartholomew*(*a*) Alderson B. held an indictment for perjury insufficient, as it did not clearly and distinctly charge the prisoner with taking a false oath in a matter stated to be in judgment before a Court, or a person having competent authority to decide it. See too *Reg.* v. *Overton*(*b*) per Lord Denman.

3. There is no averment of the materiality of the false statement, *Reg.* v. *Nicholl*(*c*), *Reg.* v. *Murray*(*d*), *Reg.* v. *Bignold*(*e*).

BITTLESTON J. referred to *Reg.* v. *Edward Gibbons.*(*f*)

SCOTLAND, C. J.:—Without at all desiring to encourage that which is very objectionable, undue laxity in the framing of indictments, I have come to the conclusion that the objections cannot be sustained. The provision in section 191 of the Penal Code as to the offence of "giving false evidence," is quite new; and the legislature seems clearly to have intended that it should be so in essentials as well as in name. Perjury, on the other hand, by the law of England is an offence to which statutes and decisions have attached very strict requirements; and it cannot now be contended that everything necessary to the charge of perjury must appear in an indictment for the offence of giving false evidence.

(*a*) 1 Car. & K. 366.
(*b*) 4 Q. B. 90.
(*c*) 1 B & Ad. 21.
(*d*) 1 F. & F. 80.
(*e*) Cited in 2 Russ. by Greaves, 639.
(*f*) 8 Jur. N. S. 159.

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We have here to see what is the offence provided against by the Penal Code. Section 193 enacts that "whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished," as therein mentioned. Section 191 of the same Code defines the giving false evidence as follows: "Whoever being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence." We nowhere find anything said as to the subject-matter of the statement being material to the result of the proceeding in which that statement is made; and without allowing myself to be unduly influenced by what appears in the edition of the Penal Code published before it became law, I may observe that in that edition the word "material" occurs in section 188, which corresponds with section 191 above quoted. Again, looking to section 196 of the Code in force we find it provided that " whoever corruptly uses or attempts to use as true or genuine evidence, any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave false evidence." And then turning to section 192 for the definition of the crime of fabricating false evidence, we find the word " material" introduced (*a*) as is also the case in several other sections in the same chapter.

We may therefore fairly infer that the framers of the Code used the word " material," where it was intended to be an essential of the offence, and advisedly omitted it when such was not their intention ; and it must be taken that they were familiar with the statutes and decisions relating to perjury, and knew that materiality was required to be not only proved but alleged. We find, then, they omit the word

(*a*) Section 192 enacts that " whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion *touching any point material to the result* of such proceeding, is said "to fabricate false evidence." '

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"material" in sections 191 and 193 as to the offence of giving false evidence, though they insert it in sec. 192 as to the offence of fabricating false evidence. We must therefore presume that they did not consider it essential to allege in an indictment for giving false evidence that the prisoner swore that which was material to the result of the proceeding. All the cases shew how hard it is to say what is material and what is immaterial, when the examination goes to the credit of a witness. This fact, too, may have been present to the minds of the framers of the Code, and conduced to their determination that materiality need not be alleged in indictments for giving false evidence. I do not say that the question of materiality may not be matter for the consideration of the jury. For the giving false evidence, to come within section 193 must be an intentional, giving; and in deciding whether or not it was intentional, the jury would have to consider whether or not the subject-matter of the statement were material to the result of the proceeding, inasmuch as if that subject-matter were wholly immaterial, they might well attribute the statement to indifference or carelessness on the part of the prisoner.

The materiality, then, of the subject-matter of the statement is not a substantial part of the offence of giving false evidence: this indictment, though it omits the allegation of such materiality, alleges the substance of the offence: it is therefore sufficient under Act XVIII of 1862, sec. 24.

So much as to the third objection. As to the first, viz. that the indictment does not shew before what court the oath was taken, it seems to me that, reading the whole together, the indictment admits of no reasonable doubt on the subject. I think, however, that the mode of allegation by the present participle ("while being examined," "being legally bound"), which the framer of the indictment adopted, had better not be followed. But taking it altogether the indictment refers to one time and one place, and sufficiently alleges that the prisoner was at that time and place under the legal obligation of an oath.

The second objection resembles the first. It is that the indictment did not sufficiently allege that the oath was taken by the prisoner as a witness in a judicial proceeding, and upon and during the trial stated on such indictment. But

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states positively that on September 25th, 1862, at Madras, the prisoner, whilst being examined as a witness in a judicial proceeding then and there pending, and being legally bound by an oath to state the truth, intentionally gave false evidence. With this before one it is impossible to say that the oath was not taken in that very judicial proceeding then pending. No doubt there is nothing to show that this judicial proceeding was the trial of the action of *Mollow* v. *'Aidrus Sahib*. But the indictment must be regarded as sufficiently charging that the oath was taken and the false evidence given in a judicial proceeding then before the Court; and any objection on the ground of uncertainty is disposed of by our decision in *Reg.* v. *Willans*.

BITTLESTON, J.:—I also think that these objections are not sustainable, and that the conviction must be affirmed. The indictment, certainly, contains no averment that the prisoner's statement was material. But we cannot infer that such statement was immaterial. The indictment simply omits all allegation as to materiality. Now, according to the English law it was necessary to aver that the subject of the false statement was material to the result of the enquiry. This was because the definition of perjury involved the element of materiality. But the definition in the Penal Code of the offence of giving false evidence omits the requisite that the false statement must refer to a subject material to the result of the judicial proceeding. And it seems to me that an indictment founded on this Code cannot be held bad because it makes a similar omission.

I entertain no doubt that the word "material" was advisedly omitted in section 191 and 193 of the Penal Code. In sections 192, 197, 198, 199, and 200, which refer respectively to the fabrication of false evidence, to the issuing or signing a false certificate, to the using as a true certificate one known to be false, to false statements made in declarations receivable in evidence, and to the using as true any such declaration known to be false, we find the word "material" introduced. When we see a distinction thus established between the offence referred to in sections 191, 193 and the other offences just mentioned, it is clear that the legislature advisedly left out materiality as an element essential to constitute the offence of giving false evidence in a judicial proceeding.

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Their reasons for so doing were probably, first, that it may fairly be presumed that a Court will not suffer witnesses to give evidence on matters which have no bearing on the result of the proceeding before it, and, secondly, that it is difficult to say that any statement made during that proceeding may not have some appreciable influence on the result.

I have therefore no doubt that the averment of materiality is no longer necessary is an indictment for giving false evidence. Of course I am far from saying that materiality may not often have to be proved. It will be hard to convict a prisoner if the subject-matter of his statement appear to have been so immaterial as to leave it doubtful whether his falsehood could have been intentional. But that is not the point here.

As to the first and second objections, I think the indictment when reasonably read amounts to this: that the prisoner, when being examined as a witness in a judicial proceeding before this Court, swore falsely, being then legally bound by an oath to state the truth. And though, no doubt, it is left uncertain whether that judicial proceeding was the action of *Mollow* v. *'Aidrus Sàhib*, there is the allegation that he intentionally gave false evidence while being examined as a witness in a judicial proceeding. As all the objections fail, the conviction must be affirmed.

SCOTLAND, C. J.:—I may add that the occurrence of the word "material" in sections 197, 198, 199 and 200 confirms my opinion already expressed. The distinction appears to be this. When the act giving rise to the indictment occurs out of Court, then materiality is made essential to the offence, and must accordingly be averred in the indictment. But when the act occurs in the face of the Court, then materiality is not made essential, and need not therefore be averred.

Conviction affirmed.