NOTES.

[*See* also (1881) 4 Mad. 141, where INNES,J., observed,"It cannot be said that a religious institution in the hands of trustees (the Uralars) is sufficiently represented by the agent or manager, for, as a matter of procedure, the devaswam could not be sufficiently represented by him unless he of himself constituted the corporation, which he does not do, or was a person specially authorized by law to conduct suits on behalf of the *devaswam* or its trustees, and he is not so authorized."]

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[271] CROWN SIDE—FULL BENCH.

The 14th February, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, MR. JUSTICE INNES, MR. JUSTICE KERNAN, MR. JUSTICE KINDERSLEY, AND MR. JUSTICE MUTTUSAMI AYYAR.

The Queen

versus

Gopal Doss and another.

Evidence Act. Section 132—Criminatory answer of witness—Privilege conditional on objection to answer being taken

In a Small Cause suit under Chapter XXXIX of the Code of Civil Procedure on a promissory note, which was alleged to have been executed jointly by G and his son V, V filed an affidavit in order to obtain leave to defend the suit, and, having obtained leave to defend, gave evidence at the trial on his own behalf.

On a subsequent trial of V for forgery of his father's signature to the same promissory note, the affidavit and deposition of V in the Small Cause suit were admitted as evidence against V.

Held by TURNER, C.J., INNES and KINDERSLEY,JJ., that both the affidavit and deposition were properly admitted.

By KERNAN and MUTTUSAMI AYYAR, JJ., that the affidavit was properly admitted but not the deposition.

Per TURNER, C.J., INNES and KINDERSLEY, JJ.—Where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement, if relevant, may be used against him on his trial on a criminal charge.

If a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled.

IN June 1880 one *Salem Chand* brought a suit in the *Madras* Small Cause Court upon a promissory note for 1,000 rupees, alleged to have been executed by *Gopal Doss* and his son *Vallaba Doss*.

The suit was instituted under Chapter XXXIX of the *Civil Procedure Code*. *Gopal Doss* and his son both made affidavits in Court, and leave was given to defend the suit under Section 533 by Mr. *Busteed*, the Senior Judge.

Gopal Doss, at the trial on 6th September 1880, denied that the signature on the promissory note was his, and the plaintiff proceeded against *Vallaba Doss* only.

Vallaba Doss was examined on his own behalf, and swore that he wrote both signatures on the promissory note according to the instructions of the plaintiff, and that on the same occasion he **[272]** signed another promissory note and two receipts, and in return received 100 rupees, a ring, a watch, and some muslin.

The plaintiff recovered judgment against *Vallaba Doss*, whereupon *Gopal Doss* obtained sanction from Mr. *Busteed* to prosecute his son, *Salem Chand*, and three witnesses for forgery and perjury.

Salem Chand and *Vallaba Doss* were committed to the Sessions, *Vallaba Doss* for forgery and fraudulently using a forged document, and *Salem Chand* for abetment of forgery, fraudulently using a forged document, and making a false claim in a Court of Justice.

On 20th September 1880 a motion was made before KERNAN, J., by Mr. *Johnstone*, on behalf of the prosecutor *Gopal Doss*, to make *Vallaba Doss* an approver, but rejected as it was not supported by the Crown Prosecutor.

The prisoners were tried at the November Sessions before the Chief Justice.

The affidavit made by *Vallaba Doss* and evidence of the deposition given by him at the trial of the Small Cause suit were, after objection taken by prisoner's Counsel, put in evidence against him by the Crown.

Vallaba Doss was found guilty of forgery and fraudulently using a forged document. *Salem Chand* was acquitted.

On 7th February 1881 *Vallaba Doss*, who had been released on bail since the trial, was brought up for punishment, sentenced to six months' rigorous imprisonment, and again released on bail, His Lordship reversing the question whether the affidavit and evidence of the deposition made by the prisoner in the Small Cause suit had been rightly admitted as evidence at the trial.

The question was referred to and argued before a Full Bench consisting of TURNER, C.J., INNES, KERNAN, KINDERSLEY and MUTTUSAMI AYYAR, JJ., on January 17, 1881.

The Crown Prosecutor (Mr. *Tarrant*) for the Crown.

There are two questions to be considered:

First.—Whether the affidavit made by the accused in the Small Cause Court to obtain leave to defend the suit was properly admitted as evidence.

Second.—Was the evidence given by the accused as a witness at the trial before the Small Cause Court admissible?

[273] The English cases generally show that evidence voluntarily given under similar circumstances is admissible.

The case of *R.* v. *Sloggett* (Dears. 656; S.C. 25 L.J., (M.C.), 128), shows that, where such evidence is given under constraint under Section 117 of the *Bankruptcy Law Consolidation Act* of 1849, it is admissible.

The case of *R.* v. *Scott* (Dears. & B., 47; S.C. 25 L. J. (M.C.), 128), shows that similar evidence is admissible even after objection had been made to the giving of the evidence, and this latter case was followed in *R.* v. *Hillam* (12 Cox, 174) and in *R.* v. *Widdop* (L. R., 2 C.C.R., 3; S.C. 42 L.J., (M.C.), 9.)

The distinction, no doubt, will be said to be that the *Bankrupt Acts* contain no proviso for the protection of the witness, similar to that contained in Section 132 of the *Indian Evidence Act*; but the only conclusion that can be drawn from that circumstance is that unless the witness is protected by express enactment, the evidence is admissible.

The question therefore is, is the witness protected by Section 132,* even where the evidence is voluntarily given? It is contended that he is not.

Section 132 says, "A witness shall not be excused." &c., implying that a request to be excused should be made; and the proviso provides that, "no such answer which a witness shall be compelled to give," &c., also showing that it is only where compulsion is used that the witness is protected; and that where, as in this case, the evidence is voluntarily given, it is admissible.

In this case, with regard to the affidavit, there could be no question of excuse or compulsion; the accused voluntarily made the affidavit to obtain leave to defend the action against him. Nor was it made as a witness; it was tendered as a party. The evidence at the trial also was purely voluntary and given by the accused to support his defence.

Had the Legislature intended to protect a witness under all circumstances, very different language would have been used in the section, and this view is borne out by the provisions of the *Larceny Act*, 1861, and similar protecting clauses in various other **[274]** English Acts absolving from punishment and penalty any witness making a faithful discovery of what he knows.

Section 132 of the *Indian Evidence Act* contains nothing to show that the Legislature intended to interfere with the ordinary rule that where evidence is voluntarily given it is admissible.

This Court, by a Full Bench ruling of HOLLOWAY, INNES AND COLLET, JJ. held under Section 32 of the *Indian Evidence Act* II of 1855 that such evidence was admissible, and that section does not substantially differ from Section 132 of the *Evidence Act*.

It may be argued that the exception in the proviso of Section 132, that such evidence may be used in respect of giving false evidence, supports the view that in no other case shall the evidence be used; but this is not so. The exception provides that in the case mentioned, even a witness who is compelled to give an answer shall not be relieved from the consequences of a new offence, *viz.*, giving false evidence in his answers.

The general result of Section 132 seems to be that where a witness applies to be excused from answering, then the privilege is granted him of not being liable to have what he says used against him; but that, if he does not take this course, the ordinary rule, that evidence voluntarily given is admisssible against the person giving it, is not interfered with.

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* [Sec. 132:—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind:

Witness not excused from answering on ground that answer will criminate.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.]

Proviso.

On the facts of the case the evidence is ample against the accused, even omitting the evidence objected to, in which case Section 167* of the *Evidence Act* applies, as shown by *R.* v. *Pitamber Jina* (I. L. R., 2 Bom., 61).

Mr. *Handley* for the Prisoner.

The evidence received as to what the prisoner deposed on oath before the Small Cause Court was improperly admitted under Section 132 of the *Evidence Act*. That section is similar to Section 32 † of Act II of 1855, which has been repealed by the former Act. These enactments, while introducing a new principle into the Law of Evidence, abolished the old Common Law rule that no one can be compelled to criminate himself so far as regards civil proceedings but by proviso retained the principle of it. The words "a witness shall not be excused from answering," *i.e.*, must answer, refer to an answer which will criminate.

[275] The words "which a witness shall be compelled to give" merely explain the meaning of the words "such answer," which might otherwise mean a criminating answer by anybody. The law does compel a witness to answer such questions, and every answer he gives to such a question is an answer which the witness is compelled to give. The section compels him to answer and the proviso protects him against the consequences of being so compelled. It cannot have been the intention of the *Evidence Act* to take away the protection given by Common Law to accused persons. It is desirable in the interests of justice to elicit truth, but not to make what a man says, as a witness for the purpose of eliciting truth, material for his conviction on a criminal charge. The principle is recognised in all the English cases, and even in later ones, which have somewhat varied the old rule as to the admissibility of statements previously made on oath by accused persons.

The English law now appears to be that a statement on oath by an accused person, while a prisoner on the same charge, is not admissible. But a statement on oath in any other proceeding is admissible. This latter proposition was formerly doubted on the strength of certain observations of Baron *Gurney* in *R.* v. *Lewis* (6 C. & P., 61; *cf.* Russell, Vol. III, p. 409) and in *R.* v. *Davis*, (6 C. & P., 177); but these decisions were overruled by later cases, *R.* v. *Sloggett*, (Dears. 656; S.C. 25 L.J. (M.C.), 128), and R. v. *Scott* (25 L. J. (M. C.), 128). The later rule was founded on the ground that by English law a witness is not compelled to answer, and is therefore inapplicable here, where the witness is compelled to answer. *R.* v. *Scott* goes further and holds admissible a statement which witness was compelled by the *Bankruptcy Laws* to give. But

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* [Sec. 167:—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.]

No new trial for rejection or improper reception of evidence.

† [Sec. 32—A witness shall not be excused from answering any question relevant to the matter in issue in any suit or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind: Provided that no such answer, which a witness shall be compelled to give, shall, except for the purpose of punishing such person for wilfully giving false evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding.]

Witness bound to answer criminating questions.

Proviso.

COLERIDGE, J., dissented, and in a later case, *R.* v. *Robinson* (L.R., 1 C.C.R., 85.) *R.* v. *Scott* was alluded to as an extraordinary case. In *R.* v. *Scott* the decision of the majority of the Court went upon the ground that legislation had expressly taken away the protection of a witness. The *Evidence Act* takes away his privilege of refusing to answer, but does protect him—*See R.* v. *Widdop* (L.R., 2 C.C.R., 3).

If this evidence was improperly admitted, the conviction cannot stand. It is true that the Chief Justice told the Jury **[276]** not to rely on that evidence, and did not make a note of it, but the Jury having heard it, it is impossible to say how far they may have been influenced by it.

The other evidence against the first prisoner consisted of—first an affidavit made by him in the Small Cause Court; secondly, evidence of witnesses who supported the story of *Salem Chand*, the other accused, plaintiff in the Small Cause Court suit whose statements are very doubtful. The affidavit is not an admission of the forgery charged. The date of the document mentioned in the affidavit is not that of the document which the prisoner is charged with forging.

As this is a point reserved, the Court can go into the whole case. *R.* v. *Navroji* (9 Bom. H.C.R., 358).

Turner, C.J.—I adhere to the opinion I expressed at the trial, that where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement may be used against him on his trial on a criminal charge, assuming it to be relevant. The terms of Section 132 of the *Indian Evidence Act* of 1872 reproduce with some differences, which do not now call for notice, the terms of the 32nd section of the earlier Act II of 1855: "A witness shall not be excused from answering any question as to a matter relevant to the matter in issue on the ground that the answer to such question will criminate such witness.....Provided that no such answer which a witness shall be compelled to give," &c. The term "shall be compelled" appears to me to be the correlative of the term "shall be excused," and they pre-suppose the rule that every person giving evidence on any subject, before any Court or person authorized to administer oaths and affirmations, shall be bound to state the truth on such subject (*Oaths Act*, Section 14), and an authority competent at the time to excuse or compel compliance with this rule. They also suggest that the witness has objected to the question, and has sought and been refused excuse, and even constrained to answer. In order to ascertain in what sense the term "compelled" is used in the *Evidence Act*, we may refer to **[277]** other sections in which the same word appears, or in which it is contrasted with other expressions. In the *Evidence* Act of 1855, Section 19, it was enacted that any party to a suit shall be competent and may be "compelled" to give evidence, &c., but it was provided that no Court other than a Supreme Court should "compel" the attendance of any party.....except as therein mentioned.

In the 25th section it was enacted that any person present in Court might be called upon and "compelled" by the Court to give evidence. In all these sections the term appears to denote action on the part of the Court.

In the Act we are now considering the Sections 121-132 declare exceptions to the general rules that a witness is bound to state the whole truth, and to produce any documents in his possession or power relevant to the matter in issue; and in these exceptions the terms "compelled" and "permitted" are so used as to pre-suppose a public officer having authority to compel or to permit, and exercising it at the time the necessity for such compulsion or permission arises.

In Section 121 "No Judge or Magistrate shall be compelled," &c. If the Legislature intended simply to declare an exception to the legal obligation, and not to convey a direction to the presiding authority, the purpose would have been attained by the use of the simple term "is bound." Again, in Section 122,* no one who is or has been married shall be "competent" to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be *permitted* to disclose any such communication unless the person who made it, or his representative in interest, consents.

This rule implies an enquiry and decision on the circumstances which excuse or prohibit the compulsion or permission and action on the part of the authority presiding at the examination in pursuance of its decision. The term "permitted" in Sections 125 & 126†, and the term "compelled" in Sections 124§, 125, 129‖, 130‡, appear to receive their full significance only if understood as applying to the authority which is to enforce the law and not merely to the implied obligation. Again, with regard to the section we are now considering, it will be observed that it does [278] not in terms deal with all criminatory questions

*[Sec. 122:—No person who is or has been married, shall be compelled to disclose any communications made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.]

Communications during marriage.

†[Sec. 125:—No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.

Information as to commission of offences.

Sec. 126:—No barrister, attorney, pleader or vakil, shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the cause and for the purpose of his employment as such barrister, pleader, attorney, or vakil by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Professional communications.

Provided that nothing in this section shall protect from disclosure.—

(1) any such communication made in furtherance of any criminal purpose;

(2) any fact observed by any barrister, pleader, attorney, or vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, attorney, or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.]

§[Sec. 124:—No public officer shall be compelled to disclose communications made to him on official confidence when he considers that the public interests would suffer by the disclosure.]

Official communications.

‖[Sec. 129:—No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.]

Confidential communication with legal advisers.

‡[Sec. 130:—No witness who is not a party to a suit shall be compelled to produce his title deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document, production of which might tend to criminate him unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.]

Production of witnesses, title-deeds.

which may be addressed to a witness, but only with questions as to matters relevant to the matter in issue. Irrelvant questions should not be allowed, and it may be implied from the Limitation in this section that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant. To understand this section it is desirable to consider it in connection with the subsequent Sections 146, 147, 148,* inasmuch as they together embrace the whole range of questions which can properly be addressed to a witness. By Section 138 it is enacted that a witness must be examined and cross-examined as to relevant facts, and by Section 146 it is enacted that, in cross-examination, he may also be asked any question which may tend to test his veracity, or to discover who he is and what is his position in life or to shake his credit by injuring his character, though the answer may tend directly or indirectly to criminate him. If any such question relates to a matter relevant to the suit or proceeding, by which I understand no more than was meant by relevant to a matter in issue, the provisions of Section 132 are by Section 147 declared applicable to it. If the question is as to a matter relevant only in so far as affects the credit of the witness by injuring his character, the Court is by Section 148 directed to decide whether or not the witness is to be compelled to answer, and may (I presume if it does not think fit to compel him to answer) warn the witness that he is not obliged to answer it. The decision of the Court as to whether or not it shall compel an answer is to be governed by the considerations declared in the section. When there is a question asked to which the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant, it is relevant only as affecting his credit by injuring his character.

Questions lawful in cross-examination.

* [Sec. 146 :—When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

(1) to test his veracity ;

(2) to discover who he is and what is his position in life ; or

(3) to shake his credit, by injuring his character although the answer to such question might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

When witness to be compelled to answer.

Sec. 147 :—If any such question relates to a matter relevant to the suit or proceeding, the provisions of sections one hundred and thirty-two shall apply thereto.

Court to decide when question shall be asked and when witness compelled to answer.

Sec. 148 :—If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character the Court shall decide whether or not the witness shall be compelled to answer it, and may if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness' character and the importance of his evidence.

(4) The Court may, if it sees fit, draw, from the witness' refusal to answer, the inference that the answer if given would be unfavourable.]

In the former case, if the question is insisted on, the Court will compel the witness to answer it; in the latter, it will determine whether or not, in reference to the rules which are to guide its decision, it should or should not compel the witness to answer.

If the term "compelled" in the proviso to Section 132 and "compel" in Section 148 do not refer to the Court, but to the obligation of the law, then the witness is left without protection if the Court arrives at an erroneous conclusion as to whether or **[279]** not the question is as to a matter which the witness is bound to answer, or if he has incautiously answered an irrelevant question. On the other hand, if the term refers to the constraint put upon the witness by the authority before whom he is examined, he is protected whether that authority has decided rightly or wrongly that the question is such as the witness is bound to answer. If it had been the intention of the Legislature to protect the witness whenever he was, or believed himself to be, constrained by law to give an answer criminating himself, then this intention could clearly have been expressed in very much more simple language; and if unlearned persons, not assisted by Counsel, are not to be placed in a worse position than persons who are acquainted with the law or have the benefit of professional assistance, I can suggest no reason why the protection should not have been extended to all answers whether relevant or irrelevant. The terms of Section 132, especially when read with the rest of the Act, impel me to the conclusion that protection is afforded only to answers to which a witness has objected or has been constrained by the Court to give. I am led to the same conclusion by a consideration of the alteration that was called for in the English Law of Evidence, which the Indian Legislature appear to have had in view. Except where otherwise provided by special enactments, it was a rule of English law that no witness was bound to give evidence which would criminate himself, and if a witness objected on this ground to answer a question put to him, and the Court considered the objection well-founded, it excused him from answering it; on the other hand, if the Court improperly refused to excuse the witness, and compelled him to answer, his answer could not be used against him to support a criminal charge, except a charge of having given false evidence by his answer.

At the same time, if the witness, being entitled to the privilege, did not claim it, but voluntarily answered the question addressed to him, his answer could be used against him in any subsequent proceeding. A witness was not bound to criminate himself; but if he thought fit to do so, his admission on oath was equally admissible in evidence against him as any other admission. This state of the law in some cases tended to bring about a failure of justice, for the allowance of the excuse when the matter to which the question related was in the knowledge **[280]** solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision.

To avoid this inconvenience, and to obtain evidence which a witness refused to give, it was suggested that, when the question was material to the issue, it should be left to the discretion of the Judge whether or not he would enforce an answer, having regard to the general interests of justice; provided always, that if an answer should be enforced, it should either have the effect of indemnifying the witness from any punishment, &c., with respect to the subject to which the answer related, or at least such answer should not be admissible evidence in any future criminal proceedings instituted against the witness (*Taylor* on Evidence, § 1309).

The Indian Legislature did not adopt this suggestion as it stood. The Indian Act gives the Judge no option to disallow a question as to matter relevant to the matter in issue. It gives him an option to compel or excuse an answer to a question as to matter which is material to the suit only so far as it affects the credit of the witness. But inasmuch as no alteration of the law was necessary to secure the production of all evidence that was attainable where a witness voluntarily gave it, the law relating to answers so given was left unaltered. The end desired, the production of evidence from unwilling witnesses, was sought by depriving them of the privilege they had theretofore enjoyed of claiming excuse; but while subjecting them to compulsion, the Legislature, in order to remove any inducement to falsehood, declared that evidence so obtained should not be used against them except for the purpose in the Act declared. The object of the law was to secure evidence which theretofore could not have been obtained, and it was not its object to afford any additional protection to persons who, by an infraction of the criminal law, had exposed themselves to penalties. It has been argued, it is idle for a witness to seek to be excused in a case in which a Court has no power to allow his excuse but the answer to this objection is that the Legislature has shown no intention to exclude voluntary statements made on oath, and that, until an objection has been taken by the witness, there is no occasion for compulsion on the part of the Court.

I am of opinion that the evidence given by the accused in the Small Cause Court having been given by him without objection [281] on his part, and without compulsion on the part of the Court, was admissible against him. If I am right in the construction I have put on the language of Section 132 it follows that the affidavit on which the accused obtained leave to defend was also admissible.

If I am not right in the construction I have put on Section 132—if by the term "compelled" I am not to understand the compulsion of the law—then I should hesitate to hold the protection would not extend to material statements voluntarily made in an affidavit, equally with statements made by a witness without compulsion by the Court, when examined *viva voce*, either on his own behalf as a party to the suit or on behalf of any other party.

Innes, J.—The maxim *Nemo tenetur seipsum prodere* was acted upon by the Courts in *England* and regarded as the rule both in civil and criminal cases up to 46 George III (1806), when, by Chapter 57 of that year, it was enacted that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit either at the instance of His Majesty or of any other person or persons.

This provision of the law was enacted to remove the doubts which existed as to whether the privilege extended to answers to questions which might entail civil liabilities. The Statute Law upon this question stands thus in *England* to the present day, except as to examinations of a bankrupt in bankruptcy relating to trade dealings and his estate, as to which the privilege is altogether taken away by 12 and 13 Victoria, Chapter 106, Section 117; but the cases show that, except in the matters just referred to, it is the privilege of the witness to refuse to answer questions of a criminating character, but that he may answer if he chooses.

The proper test of whether such answer may be given in evidence against him afterwards is whether the person giving them might have objected to answer. If he might, and did not do so, he voluntarily submitted to the examination to which he [282] was subjected, and such examination is admissible against him on a criminal charge.

But if the answers given are answers which have a tendency to criminate him on the charge, and he as a witness claimed to be excused from answering them, but the Judge improperly compelled him to answer, the answer cannot be given in evidence against him, on the ground that they amount to a confession or admission made under compulsion and therefore not voluntary. It was not considered that by reason of the oath administered to the witness to speak the truth he had been subjected to any compulsion. It was only when notwithstanding that the witness had claimed his privilege, the Judge insisted upon his answering, that he was regarded as having been in respect of such answer under compulsion. This was the state of the law in *England* when Act II of 1855 was passed in this country, Section 32 of which is reproduced almost *totidem verbis* in Section 132 of our present *Evidence Act*. I say such was the state of the law in *England*, for we may disregard those cases referred to in *Russell* on Crimes, in which a self-inculpatory statement made on oath by a prisoner before a Magistrate was altogether excluded on his trial, because the complete exclusion of such statement did not proceed entirely on the ground that the statement was not voluntary by reason of the oath, but on the ground that a prisoner's statement before a Magistrate must be taken in a particular manner to render it admissible, and that it was in those cases not taken in the manner required by law, and also that the prisoner was in custody, and that the oath imposed on a prisoner whilst in custody is likley to operate as a constraint. Now if we examine the Indian Act II of 1855 it will be seen to have had for its object the improvement of the Law of Evidence, and there is not to be found throughout it the smallest exclusion of evidence which had, under English law, been up to that time receivable. Improvement was in the direction, which had set in in *England*, of *admitting* not *excluding*. In Section 12 as to proof of foreign law, Section 15 as to affirmation, Section 29 as to dying declarations, Section 33 as to proof of previous convictions to shake the credibility of a witness, Section 34 as to the mode of using previous statements to contradict a witness, and in many other sections which need not be particularly referred to, the enactment was in the matter of the admission of vidence in advance of the existing law in *England*.

[283] I can see no ground for supposing that, on the particular point in question, the Indian Legislature intended to shut out the evidence which the English law admitted. Yet if we were to construe the provision according to the contention of Mr. *Handley*, we should shut out from the consideration of the Court not only answers to questions which as a witness the person charged had claimed to be excused answering, but all other answers as to which he had not asked to be so excused. As to this Mr. *Handley* urges with some plausibility, that as the law says positively that a man shall not be excused from answering such questions, he must answer them, and would not therefore claim to be excused; and that the Legislature therefore must have intended the indemnity to extend to all answers; but on the very language of the sections the witness can always claim to be excused on the ground of the irrelevancy of the question, and I think the language of the proviso taken in connection with the probable intention of the Legislature as deducible from the previously existing state of the law, is incompatible with the construction contended for. The Proviso runs: "Provided that no such

answer which a witness shall be *compelled to give*, shall subject him," &c. Had it been intended to extend the indemnity to all answers having an inculpating tendency, whether the witness asked to be excused or not, the words "which a witness shall be compelled to give" would be superfluous. As they stand they seem to me to pre-suppose an objection by the witness, which has been overruled by the Judge, and a constraint put upon the witness to answer the particular question.

It is not contended that the prisoner in this case, when examined as a witness, took objection to any of the questions which elicited the answers now given in evidence against him in the present charge, or that, within the meaning of Section 132, he was compelled to answer them. I therefore think the evidence was admissible.

Kernan, J.—In my judgment, the evidence given in the Small Cause Court by the prisoner when examined as a witness is not admissible against him for the prosecution. As a witness the law did not excuse him from answering; he was therefore compelled, within the meaning of the *Evidence Act*, to answer. **[284]** I have had the advantage of reading the judgment of Mr. Justice MUTTUSAMI, and as I agree fully in his views, I do not go into the matter in detail.

Kindersley, J.—I concur in the construction put by the Chief Justice on Section 132 of the *Evidence Act*.

Muttusami Ayyar, J.—The question for decision is whether the affidavit made by the prisoner, and the evidence given by him in the *Madras* Court of Small Causes, may be used against him in a criminal prosecution for forgery. The affidavit was made under Section 532, Act X of 1877, for the purpose of obtaining leave to defend a suit which had been brought upon a promissory note. It was open to the prisoner either to have, or not to have, made the affidavit, and by electing to make it he placed himself in a position in which he had to swear to the correctness of his statement and thereby to criminate himself. It seems to me that in this sense his affidavit was voluntary, and that it was not evidence obtained from him either under the compulsion of the Judge or of law within the meaning of Section 132 of the *Indian Evidence Act*. I think, therefore, it was properly admitted as evidence in the criminal proceeding since instituted against him.

As to the next question, the decision depends upon the construction of Section 132 of the *Evidence Act*. It only re-enacts Section 32 of Act II of 1855, which repealed the law of privilege previously in force.

It is suggested for the prosecution that, according to the true construction of this section, no witness is at liberty to claim the benefit of the proviso unless he first claimed to be excused from answering the criminative question and he was told by the Judge that he must answer it. On the other hand, it is argued for the prisoner that no such previous application is necessary. I am sorry that I do not see my way to adopting the view of the majority of the Court as to the construction which ought to be placed on this section of the *Evidence Act*.

It seems to me incongruous that the Legislature should have directed the Judge *never* to excuse a witness from answering a criminative question relevant to the matter in issue, and at the same time commanded the witness to ask the Judge to excuse him from answering such a question.

If the Legislature had intended to give the witness only a *conditional* indemnity, they would have expressed that intention **[285]** by apt words, and

told the witness to claim to be indemnified against the effect of his answer, though he could not be excused from answering.

I think the first paragraph repeals the prior law, under which a witness might have claimed the privilege of declining to answer criminative questions relevant to the matter in issue; and the words "excused" and "question" do not pre-suppose a case in which a criminative question is asked, an objection is made by the witness, and the objection is overruled by the Judge, but are only words of reference to the law of privilege which it was intended to repeal. In *R.* v. *Boyes* (I. B. and S., 311), it was held that the privilege was not an unqualified right of the witness, but that it was in the discretion of the Judge to recognize it as a valid excuse, when the witness satisfies him that there is reasonable ground for apprehending that the answer will place him in peril. Reading the first paragraph with the explanation given in this case as to the nature of the privilege, it appears to me that the words "a witness shall not be excused from answering any question as to any matter relevant to the issue," are appropriate as words of repeal. The word "question" seems to refer to the recognized mode of examining a witness judicially by interrogation. As to the relative clause in the proviso, it is neither superfluous nor inconsistent with the construction which I place upon the section. It is not superfluous, because the indemnity does not extend to voluntary affidavits. Nor is it material that the word "Compel" refers to a compulsion by the Judge, since a Judge may be said to compel as much by issuing a process and placing a person in the position of a witness—in which he is compulsorily sworn and placed under the necessity of criminating himself—as by saying to a witness "You claim to be excused, but the law directs me not to excuse you."

Further, Section 148, which confers upon a witness the privilege of not answering a criminative question that is material only in so far as it injures his character, and thereby affects his credit, expressly gives power to the Judge to warn the witness that he need not criminate himself until it is decided that the question must be answered. If it were intended by Section 132 [286] that the witness must decline to answer if he wishes to claim the indemnity, would not a power to warn the witness to that effect be expressly given?

Again, the law of *England* anxiously provides against a witness criminating himself through ignorance of law. In Lord *Cardigan's* case (Cited in Dears, 477) the witnesses were warned before they claimed their privilege. In *Fisher* v. *Ronalds* (12 C. B., 762) MAULE, J., said: "I do not know that a Judge would do wrong if he were to caution a witness before every answer." In *R.* v. *Garbett*, (2 C. and K., 474) heard before fifteen Judges, it was held that a witness might claim the privilege at any stage of the inquiry. When the English law attached such importance to warning a witness, and when Section 148 recognizes it by expressly giving a power to warn, the Legislature, as it seems to me, would have expressly directed the Judge to caution the witness if they had intended that the indemnity should be conditional.

Again, under the law of privilege, it is necessary to set it up because it is only an excuse which the Judge may or may not recognize as good, and it is his decision that either accords the privilege or withholds it; but under Section 132 it is not in the power of the Judge to excuse a witness from answering if the question is relevant to the issue. Such being the case, it is not clear to me why a witness should go through the form of asking and being refused to be excused.

In retaining the law of privilege there was a double evil. When the answer was privileged, the maxim that no one is to be compelled to criminate himself prevailed, and the benefit of his answer was lost to the cause of justice whether the privilege was recognized or not.

The necessity under which the witness lay of explaining how the answer might criminate him, amounted in some cases—as observed by Baron *Pollock* in *Adams* v. *Lloyd* (3 H. and N., 362), and by MAULE, J., in *Fisher* v. *Ronalds* (12 C. B., 762) since overruled by *R.* v. *Boyes* (1 B. and S., 311)—to a virtual denial of the privilege, and to an evasion of the rule that no one is to be compelled to criminate himself. Adverting to this state of the law, it is remarked in **[287]** *Taylor* on Evidence, vol. 2, p. 1262, that it was suggested that, "where the question is material to the issue, it should be left to the discretion of the Judge whether or not he will enforce an answer, having due regard to the general interests of justice; provided always, that if an answer be enforced, it should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture with respect to the subject to which the answer relates, or at least such answer should not be admissible in evidence in any future criminal proceedings instituted against the witness." The principle suggested is, when an answer is forced, that answer should be excluded in any future criminal proceeding instituted against the witness, on the ground that no man shall be compelled to criminate himself, and that such answer is analogous to an answer contained in the sworn examination of the accused in a criminal case. It seems to me that the Legislature in *India* adopted this principle, repealed the law of privilege, and thereby obviated the necessity for an inquiry as to how the answer to a particular question might criminate a witness, and gave him an indemnity by prohibiting his answer from being used in evidence against him and thus secured the benefit of his answer to the cause of justice, and the benefit of the rule, that no one shall be compelled to criminate himself, to the witness when a criminal proceeding is instituted against him. The conclusion I come to is that Section 132 abolishes the law of privilege and creates an obligation in a witness to answer every question material to the issue, whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that answer shall not be admitted in evidence against him in a criminal prosecution.

Although the evidence given by the prisoner in the Court of Small Causes is not admissible, still the affidavit and the other evidence on record are sufficient to sustain the verdict of the Jury. I see no reason to doubt that the promissory note which is mentioned in the affidavit is the one in which he was since charged with having forged his father's signature. On this ground I am also of opinion that the conviction and the sentence should be uphold.

Attorneys for the prisoner, Messrs. *Branson* and *Branson*.

NOTES.

[WHEN WITNESS PRIVILEGED—THE COMPULSION TO ANSWER—

A ruling similar to what was given in this case was laid down in (1891) 15 Mad. 63; (1888) 12 Bom. 440; (1893) 21 Cal. 392; (1893) 16 All. 88: (1905) 32 Cal. 756: (1904) 31 Cal. 715; (1909) 19 M. L. J. 504 F. B.]