

of adultery. Looking at the Indian Divorce Act along with the Evidence Act, I do not think that, where there are such special and distinct provisions as those contained in ss. 51 and 52 of the former Act, which in all other respects is in full force, ss. 120 and 132 of the latter Act can be treated as practically repealing them. The question therefore is not whether Mr. Holme was a competent witness, but whether he "offered" himself as a witness within the meaning of s. 51. For the reasons I have already given I am of opinion that he did not "offer" himself, and such being the view I entertain, his evidence must be regarded as struck out, and should not be taken into consideration in determining the questions at issue between the parties. It will of course remain upon the record, and should an appeal be preferred, it will, if the appellate Court holds me to have erroneously rejected it, be available material to assist it in forming a judgment upon the merits of the case.

1881

 DEBRETTON
 v.
 DEBRETTON.

CRIMINAL JURISDICTION.

 1881
 June 26.

Before Mr. Justice Duthoit.

EMPRESS OF INDIA v. RUKN-UD-DIN.

Witness for the defence—Failure to attend—Refusal to re-summon—Act X of 1872 (Criminal Procedure Code), s. 359.

On the 30th March, 1881, an accused person on his trial before a Magistrate asked that a certain witness might be summoned on his behalf. The Magistrate ordered a summons to be issued for the attendance of such witness on the 18th April, to which day the further hearing of the case was adjourned. There was some delay in the service of the summons, and such witness did not attend on that day. The Magistrate refused an application by the accused for the issue of a second summons to such witness, with reference to s. 359 of Act X of 1872, on the ground that such application was not made in "good faith." Held that the provisions of s. 359 of Act X of 1872 were clearly inapplicable to the case as it stood before the Magistrate on the 18th April, and he was bound to make a further attempt—the first attempt seemed to have been nominal merely—to secure the attendance of the absent witness.

THIS was an application to the High Court by one Rukn-ud-din to revise under s. 297 of Act X. of 1872 an order of Mr. F. H. Fisher,

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Magistrate of the first class, Saharanpur, dated the 18th April 1881, convicting him of an offence under s. 411 of the Indian Penal Code. The applicant sought revision of this order on the ground, amongst others, that the Magistrate had improperly refused to re-summon a person who had been summoned as a witness for the applicant's defence, but who had failed to attend. The facts of the case are sufficiently stated for the purposes of this report in the order of the High Court.

Mr. *Amir-ud-din*, for the applicant.

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

DUTHOIT, J.—On the 30th March, 1881, the accused person asked that a certain witness (Abdul Karim) might be summoned to give evidence in his behalf, and to produce certain papers and accounts. Summons was ordered to be issued for his attendance on the 18th April, which date was fixed for the hearing of the case. But there seems to have been some delay in the service of summons, and on the 18th April the witness did not attend. On that date the Magistrate recorded the following order: "To-day was fixed for the return to the requisition made on the Nahun State for the attendance of Abdul Karim: no reply has been received: it is evident that the accused has only named this man as a witness for purpose of delay: under s. 359 I refuse to issue a second requisition, as I do not think that the application, is one made in good faith." The provisions of s. 359 of the Code of Criminal Procedure are clearly inapplicable to the case as it stood before the Magistrate on the 18th April, and he was, I consider, bound to make a further attempt—the first attempt seems to have been nominal merely—to secure the attendance of the absent witness. The conviction of Rukn-ud-din is set aside. The trial will be re-opened. Every endeavour to secure the attendance of the witness Abdul Karim, with the papers called for by the accused, must be made, and the case must then be disposed of according to law.
