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approver or to support the conviction of the appellants for the murder of Bhagwan Das. The statements ascribed to the appellants are in general terms, and represent only the impression conveyed by what may have been said to the mind of the witnesses. It is always essential that the Court should know as nearly as possible what were the words used by the supposed confessors, and what were the questions or matters in regard to which they were said. It may have been that the words ascribed to the appellants taken with the questions put and with the exact subject matter of the inquiry did not amount to a confession of the guilt believed by the hearers to have been confessed.

MATRIMONIAL JURISDICTION.

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June 17.

Before Mr. Justice Straight.

DEBRETTON (PETITIONER) *v.* DEBRETTON (RESPONDENT) AND HOLME (CO-RESPONDENT).

Suit for dissolution of marriage on the ground of wife's adultery—Evidence of adultery—Co-respondent—Act IV of 1869 (*Divorce Act*), *ss.* 51, 52.

The co-respondent in a suit by a husband for the dissolution of his marriage with his wife on the ground of adultery was summoned by the petitioner in such suit as a witness. The Court did not explain to him, before he was sworn, that it was not compulsory upon, but optional with, him to give evidence or not. He did not object to be sworn, and replied to the questions asked him by the petitioner's counsel without hesitation, until he was asked whether he had had sexual intercourse with the respondent. He then asked the Court whether he was bound to answer such question. The Court told him that he was bound to do so, and he accordingly answered such question, answering it in the affirmative. Had the Court not told him that he was bound to answer such question, he would have declined to answer it. *Held*, under such circumstances, that the co-respondent had not "offered" to give evidence, within the meaning of s. 51 of the Indian Divorce Act, 1869, and therefore his evidence was not admissible.

THIS was a petition by Charles James De Bretton for the dissolution of his marriage with Florence Emma DeBretton on the ground of her adultery with one Charles Henry Holme. The petitioner did not himself make the alleged adulterer a co-respondent to his petition, but on the day fixed for the settlement of issues the Court made him a co-respondent on the application of the respon-

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dent's counsel. On the hearing of the petition the co-respondent, who had been summoned to attend and give evidence on behalf of the petitioner, was called, and appeared, and was sworn. The respondent's counsel objected to the examination of the co-respondent on the ground that he had not offered himself as a witness, but had been summoned to attend and give evidence. This objection was overruled on the ground that the co-respondent had not himself offered any objection to be sworn, and his examination must therefore proceed. Having been examined as to when and the manner in which he made the acquaintance of the respondent, and the nature of such acquaintance, the co-respondent was asked the following question: "Have you had sexual intercourse with the respondent in this case."? The respondent's counsel objected to this question, but the Court held that it might be asked, as the objection, if well-founded, did not lie in the mouth of the respondent's counsel, but was the privilege of the witness himself. The co-respondent thereupon asked the Court if he was bound to answer the question. The Court held that he was bound to do so, being of opinion that there was no restriction in the Indian Divorce Act as to the questions that might be put to parties under examination. The co-respondent then replied to the question, admitting that he had had sexual intercourse with the respondent on several occasions.

Mr. *Spankie*, for the respondent, at the final hearing of the case, contended that the evidence of the co-respondent was not receivable. The co-respondent did not "offer" himself as a witness, but was compelled to appear. Under the Indian Divorce Act, unless a party "offers" himself or herself as a witness, he or she cannot be compelled to give evidence of or relating to adultery —see ss. 51, 52. Nothing contained in the Indian Evidence Act affects this rule.

Mr. *Howard* (with him Mr. *Hill*), for the petitioner.

The judgment of the Court, so far as it related to the admissibility of the evidence of the co-respondent, was as follows:—

STRAIGHT, J. (after stating that the question was whether the petitioner had satisfactorily established that the relations of Mrs.

DeBretton and Mr. Holme were of a criminal character, continued :) This question necessarily brings me to the consideration of the most serious and difficult point raised in the case, namely, whether the evidence of Mr. Holme was given under such circumstances as to make the second paragraph of s. 51 of the Indian Divorce Act applicable to him. Now it must be observed that he did not present himself voluntarily for examination, but was brought by *sub pœnâ* from the petitioner. It is true that he made no objection to being sworn, and that to a certain point in his evidence he answered the questions addressed to him without hesitation. It was not until the petitioner's counsel put to him: "Have you had sexual intercourse with the respondent in this case?" and the counsel for the respondent objected, and I overruled his objection, that the witness asked me if he was bound to answer that question. I was at the time of opinion that, having taken the oath without objection, the privilege being his privilege and not that of the respondent, he had offered himself as a witness, and that there being no restriction in s. 51 of the Indian Divorce Act as to the questions to be put to the party so offering himself as a witness, he was bound to answer the petitioner's counsel, and I so told him. Upon further consideration, however, I have come to the conclusion that this view was an erroneous one, and that I ruled wrongly in telling the witness he was bound to answer the question. The provisions of the law upon this point are contained in the s. 51 already referred to, and the words are: "Any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined like any other witness." The co-respondent of course was a "party" to the suit, but he was not a volunteer, for he was brought by *sub pœnâ*, and I think that in asking me if he was bound to answer the question, it must be taken that he objected to answer, and would have declined had I not told him he was bound to do so. Seeing that he was summoned by the petitioner, and was in no sense a volunteer, I do not think he can properly be said to have "offered" himself in the manner contemplated by s. 51 of the Indian Divorce Act, and I ought to have explained to him, before he was sworn, that it was not compulsory upon, but optional with, him, whether he should give evidence or not. But it was urged by the counsel for the peti-

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tioner that since s. 120 of the Evidence Act has come into operation, the position of parties to divorce suits has been materially altered, and that they are now competent witnesses in all divorce proceedings. He further contended that by s. 132 of the Evidence Act they could not be excused from answering questions on the ground that their answers might criminate them. But the competency of the witness is one thing and the power to compel him to give evidence another. At one time the parties to divorce suits in England, on the ground of adultery, were incompetent witnesses, and practically remained so until 1869, when 32 and 33 Vict., c. 68, was passed, which declares them "competent to give evidence in such proceedings: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery." So in the Indian Divorce Act, by s. 52, when the suit is by a wife praying that the marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable "to give evidence of or relating to such *cruelty* or *desertion*." Now it must be remarked that it is as to the cruelty or desertion only that they are competent and compellable witnesses, and not as to adultery, and further that they are only competent and compellable in a suit by the *wife* against the husband for dissolution of marriage on the ground of adultery with cruelty or with desertion. In all other suits they are competent witnesses in the sense that, if they "offer" themselves, as provided by s. 51, they may be examined, cross-examined and re-examined like any other witness. The condition precedent is, that they offer themselves, and when once they have done that, there seems to be no such protection afforded them as is provided by the English Act. No doubt the case primarily contemplated by s. 51 was that of the parties tendering themselves to deny the alleged act or acts of adultery, and in that event they would in England, as here, be liable to be asked and bound to answer questions in cross-examination tending to show they had been guilty

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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.

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,