LAW COMMISSION OF INDIA

SIXTY-NINTH REPORT
ON THE
INDIAN EVIDENCE ACT, 1872

MAY, 1977
MY DEAR MINISTER,


As I had mentioned in my letter forwarding the last Report (68th Report—Powers of Attorney Act), revision of the Evidence Act was an arduous task, but the Commission has done its best to examine its provisions in depth and has made recommendations for amendment which the Commission thinks it is necessary to make in some of them. Before making these recommendations, the Commission dealt exhaustively with all the relevant questions and then reached its final conclusions. In consequence, the present Report has become an extensive document and it spreads over more than two thousand pages.

In dealing with the problem of making recommendations in the relevant provisions of the Act, the Commission has been fully conscious that the Act is a very commendable piece of legislation and has served a very useful purpose of affording invaluable assistance in the conduct of proceedings before the Courts. Nevertheless, with the passage of time, it has been disclosed that there has been a difference of judicial opinion on some relevant and important points and, in making its recommendations, the Commission has taken into consideration this aspect of the matter.

After the Act was passed in 1872, some new juristic principles have been evolved and have received acceptance from the jurists and these have been kept in view by the Commission in making some of its recommendations.

The Act has always been regarded by teachers of law, Jurists and Judges as a model piece of legislation. The scheme of the Act and the meticulous and comprehensive manner in which its provisions deal with all the relevant topics justly entitled it a place of pride in the Statute-book of India.

While studying the provisions of the Act, the Commission has fully borne in mind the respect which they have universally received; but it may not be inappropriate to mention that even in regard to adjectival law like the Evidence Act, respect for its excellence should not amount to blind adoration bordering on reverence. Since we feel that, even in regard to the branch of law covered by the Evidence Act, compulsion of the changing needs of socio-economic considerations has given rise to new concepts which, after critical examination, have received acceptance from the jurists, and
its working for over a century has posed some vexed problems, the Commission thought that the Act needs a careful study with a view to find out whether any recommendations should be made to change some of its provisions. After examining the provisions of the Act from this point of view, we have decided to make recommendations for amendment of some of them only where we thought that it was necessary to do so. That is the approach which we have adopted in making this Report and, indeed, that has been our approach in dealing with all the subjects whose study we have undertaken.

In considering this problem, we have come to the conclusion that it has become necessary to make certain recommendations for the removal of obscurities, the elimination of controversies and the solution of problems raised by the working of the law.

It is a trite saying that no reform touches a people so closely or has such a direct influence on their well-being as an improvement in the system and machinery of administering justice.

As we have explained in the introductory chapters in this Report, the Act has an important part to play in the scheme of administration of justice. Of course, setting up the machinery and recommending necessary reform thereof may not, by themselves, meet the purpose we have in view: much would, inevitably depend upon the members of the judiciary whose privilege it is to interpret and administer the provisions enshrined in the Act. We have not overlooked this aspect of the matter, as will be apparent from the concluding Chapter of the Report.

The Report, I hope, will speak for itself. But I would like to mention some of the important amendments which the Commission has recommended in order to simplify and rationalise the law with a view to improving its working.

In its examination of the Act, the Commission found that the definitions of 'Court' and 'Judicial Proceedings' presented certain problems. It has, therefore, attempted to solve them by suitable redrafting of these definitions.

It is plain that in the Evidence Act, an important and indeed vital matter pertains to the relative importance of oral and documentary evidence. The diversity of judicial opinion in respect of the import of these provisions, particularly sections 91-92, appeared to the Commission to weaken the very foundation of the law. After a careful study of the true juristic position in this matter, the Commission has recommended solutions which, it is hoped, attempt to state the position in a clear, compact and easily intelligible manner.

The law relating to hearsay has been the subject-matter of much debate and controversy during recent times. While we have not considered it necessary to suggest any radical amendment in this branch of the law in view of the present conditions in India, we have, nevertheless, dealt with the relevant sections at length, particularly, sections 32 to 35 and 60.
Similarly, the sensitive topic of what is known as Crown privilege has, as all of us are aware, come up before the courts in various contexts in India in reference to sections 122 and 163; and the same problem has faced the higher judiciary in other countries as well. It, therefore, became necessary for us to sift and examine in depth the material—judicial as well as academic—which indeed is voluminous. In this case, we have recommended certain amendments which, we think, will hold the scales even between the rights of citizens to lay before the courts all factual material relevant to the issues in a pending judicial proceeding against the Government and the legitimate considerations of security of the State. Our recommendation on this particular subject, it is hoped, will be conducive to justice in the broadest sense.

If two contending values are apparently irreconcilable, it is for the Court—at least in a matter of adjective law—to act as the final arbitrator. That has been the approach which the majority of us have adopted.

I ought to add that, on this important matter, two of our colleagues, Mr. Dhavan and Mr. Sen-Varma, have taken a different view which has been expressed by them in a minute of dissent.

The majority and the minority views elaborately expressed in the Report and the minute of dissent respectively will, it is hoped, enable the Government to decide which of the two competing views they should accept.

On section 63, the proposals for expanding its scope with a view to bring it in conformity with section 65, which were intended to be made, the Commission was equally divided. My colleagues Mr. Sen-Varma, and Mr. Bakshi and I took the view that section 63 should be so amended, while my other colleagues, Dr. Tripathi, Mr. Dhavan and Mr. Mitra took the view that no change should be made in the said section. Since the Commission was thus equally divided, we unanimously decided that the Report should content itself by setting forth the two points of view and leave it to the Government to decide which view to accept.

In regard to sections 23 and 68, my colleague Mr. Mitra differed from the conclusion reached by the rest of us and has expressed his view in a minute of dissent.

Except for these points, the recommendations made by the Commission are unanimous and that, in my view, can well be regarded as a distinctive feature of the Report when the subject-matter under examination raised some issues which were complex, complicated and difficult and needed an elaborate discussion during the course of our study.

At present, the Commission is engaged on the study of the Transfer of Property Act; and this task again is arduous and exacting. But let me assure you that the Commission has undertaken this task with the full confidence that it will be able to forward to the Union Government its report on this subject before its tenure expires on the 31st of August this year.
I am happy to note that you agree with the suggestion which I have been repeatedly making for some time past that the Commission’s reports should be printed as early as possible and circulated to all academic bodies like the Bar Associations in the whole of India, the Judges of the Supreme Court and the High Courts, the Bar Council of India and the State Bar Councils, and other institutions interested in the study of law. If the course suggested by me is adopted, it will stimulate an intellectual debate on the propriety or otherwise of the approach adopted by the Commission and the merits of the recommendations made by it in regard to specific Acts which are the subject-matter of the reports.

Before concluding, I would like to add that, after the Commission was constituted in September 1971, it has forwarded twenty-five reports (numbering forty-five to sixty-nine) including the present one; and, after the Commission was re-constituted in September 1974, it has forwarded nine Reports including the present one.

Yours sincerely,

(P. B. Gajendragadkar)

Shri Shanti Bhushan,
Minister of Law, Justice and Co. Affairs,
Government of India,
Shastri Bhavan,
New Delhi-110001.
<table>
<thead>
<tr>
<th>CHAPTER No.</th>
<th>SUBJECT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Introductory</td>
<td>1</td>
</tr>
<tr>
<td>2.</td>
<td>History of Rules of Evidence in England</td>
<td>14</td>
</tr>
<tr>
<td>3.</td>
<td>Scope and object of rules of evidence and their relation to judicial investigation of facts</td>
<td>29</td>
</tr>
<tr>
<td>4.</td>
<td>Scheme of the Act</td>
<td>34</td>
</tr>
<tr>
<td>5.</td>
<td>Preliminary provisions</td>
<td>39</td>
</tr>
<tr>
<td>6.</td>
<td>Definitions</td>
<td>42</td>
</tr>
<tr>
<td>7.</td>
<td>Relevant facts—the general provisions</td>
<td>72</td>
</tr>
<tr>
<td>8.</td>
<td>Relevancy in particular cases</td>
<td>125</td>
</tr>
<tr>
<td>9.</td>
<td>Admissions and confessions</td>
<td>165</td>
</tr>
<tr>
<td>10.</td>
<td>Confessions—General discussion and Scheme</td>
<td>180</td>
</tr>
<tr>
<td>11.</td>
<td>Confessions and admissions</td>
<td>202</td>
</tr>
<tr>
<td>12.</td>
<td>Statements made under special circumstances by persons who cannot be called as witnesses</td>
<td>227</td>
</tr>
<tr>
<td>13.</td>
<td>Entries in books of account</td>
<td>271</td>
</tr>
<tr>
<td>14.</td>
<td>Entries in public records and other published writings</td>
<td>276</td>
</tr>
<tr>
<td>15.</td>
<td>How much of a statement to be proved</td>
<td>287</td>
</tr>
<tr>
<td>16.</td>
<td>Judgments</td>
<td>295</td>
</tr>
<tr>
<td>17.</td>
<td>Opinion of Experts</td>
<td>327</td>
</tr>
<tr>
<td>18.</td>
<td>Foreign Law</td>
<td>342</td>
</tr>
<tr>
<td>19.</td>
<td>Opinion evidence—Other provisions</td>
<td>350</td>
</tr>
<tr>
<td>20.</td>
<td>Character</td>
<td>355</td>
</tr>
<tr>
<td>21.</td>
<td>Judicial notice</td>
<td>359</td>
</tr>
<tr>
<td>22.</td>
<td>Certificate of the Government as to certain matters concerning international relations</td>
<td>370</td>
</tr>
<tr>
<td>23.</td>
<td>Facts admitted</td>
<td>375</td>
</tr>
<tr>
<td>24.</td>
<td>Oral evidence—General discussion</td>
<td>379</td>
</tr>
<tr>
<td>25.</td>
<td>Oral evidence</td>
<td>381</td>
</tr>
<tr>
<td>26.</td>
<td>Hearsay—whether basic changes needed</td>
<td>392</td>
</tr>
<tr>
<td>27.</td>
<td>Documentary evidence—the general scheme</td>
<td>408</td>
</tr>
<tr>
<td>28.</td>
<td>Primary evidence</td>
<td>410</td>
</tr>
<tr>
<td>29.</td>
<td>Secondary evidence</td>
<td>412</td>
</tr>
<tr>
<td>30.</td>
<td>Secondary evidence when admissible</td>
<td>427</td>
</tr>
<tr>
<td>31.</td>
<td>Proof of signature</td>
<td>433</td>
</tr>
<tr>
<td>32.</td>
<td>Attested documents</td>
<td>436</td>
</tr>
</tbody>
</table>

(v)
<table>
<thead>
<tr>
<th>Chapter No.</th>
<th>Subject</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>33</td>
<td>Comparison of signature by the court</td>
<td>445</td>
</tr>
<tr>
<td>34</td>
<td>Public documents and private documents</td>
<td>454</td>
</tr>
<tr>
<td>35</td>
<td>Certified Copies</td>
<td>459</td>
</tr>
<tr>
<td>36</td>
<td>Public documents</td>
<td>467</td>
</tr>
<tr>
<td>37</td>
<td>Presumptions as to documents</td>
<td>473</td>
</tr>
<tr>
<td>38</td>
<td>Presumptions as to record of evidence</td>
<td>480</td>
</tr>
<tr>
<td>39</td>
<td>Presumptions as to certain official documents</td>
<td>484</td>
</tr>
<tr>
<td>40</td>
<td>Miscellaneous presumptions as to documents</td>
<td>488</td>
</tr>
<tr>
<td>41</td>
<td>Ancient documents</td>
<td>493</td>
</tr>
<tr>
<td>42</td>
<td>Exclusion of oral evidence—in substitution for documentary evidence</td>
<td>501</td>
</tr>
<tr>
<td>43</td>
<td>Variation of documentary evidence by other evidence</td>
<td>510</td>
</tr>
<tr>
<td>44</td>
<td>Evidence for interpretation of documents</td>
<td>521</td>
</tr>
<tr>
<td>45</td>
<td>Burden of proof</td>
<td>527</td>
</tr>
<tr>
<td>46</td>
<td>Burden of proof—exceptions to criminal liability</td>
<td>533</td>
</tr>
<tr>
<td>47</td>
<td>Facts especially within a party's knowledge</td>
<td>543</td>
</tr>
<tr>
<td>48</td>
<td>Presumption of life</td>
<td>551</td>
</tr>
<tr>
<td>49</td>
<td>Presumption of death</td>
<td>555</td>
</tr>
<tr>
<td>50</td>
<td>Proposed new section</td>
<td>562</td>
</tr>
<tr>
<td>51</td>
<td>Partnership, tenancy and agency</td>
<td>571</td>
</tr>
<tr>
<td>52</td>
<td>Possession</td>
<td>573</td>
</tr>
<tr>
<td>53</td>
<td>Good faith</td>
<td>576</td>
</tr>
<tr>
<td>54</td>
<td>Presumption of legitimacy</td>
<td>578</td>
</tr>
<tr>
<td>55</td>
<td>Cession of territory</td>
<td>594</td>
</tr>
<tr>
<td>56</td>
<td>Presumptions—discretionary and rebutting</td>
<td>595</td>
</tr>
<tr>
<td>57</td>
<td>Estoppel</td>
<td>603</td>
</tr>
<tr>
<td>58</td>
<td>Rule excluding evidence of title</td>
<td>608</td>
</tr>
<tr>
<td>59</td>
<td>Estoppel of acceptor of bill, bailee or licensee</td>
<td>615</td>
</tr>
<tr>
<td>60</td>
<td>Competence and compellability—General rule</td>
<td>617</td>
</tr>
<tr>
<td>61</td>
<td>Parties and their spouses</td>
<td>621</td>
</tr>
<tr>
<td>62</td>
<td>Privilege and disability—General observations</td>
<td>627</td>
</tr>
<tr>
<td>63</td>
<td>Judicial privilege</td>
<td>631</td>
</tr>
<tr>
<td>64</td>
<td>Marital privileges</td>
<td>634</td>
</tr>
<tr>
<td>65</td>
<td>State privilege</td>
<td>645</td>
</tr>
<tr>
<td>66</td>
<td>Communications in official confidence</td>
<td>681</td>
</tr>
<tr>
<td>67</td>
<td>Information as to offences</td>
<td>687</td>
</tr>
<tr>
<td>68</td>
<td>Legal professional privileges</td>
<td>694</td>
</tr>
<tr>
<td>69</td>
<td>Incriminating documents and title deeds</td>
<td>706</td>
</tr>
<tr>
<td>70</td>
<td>Incriminating Questions</td>
<td>711</td>
</tr>
<tr>
<td>CHAPTER NO.</td>
<td>SUBJECT</td>
<td>PAGE</td>
</tr>
<tr>
<td>------------</td>
<td>-----------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>71.</td>
<td>Privileges of family counsellors</td>
<td>727</td>
</tr>
<tr>
<td>72.</td>
<td>Patent agents</td>
<td>731</td>
</tr>
<tr>
<td>73.</td>
<td>Accomplice evidence</td>
<td>734</td>
</tr>
<tr>
<td>74.</td>
<td>Minimum number of witnesses</td>
<td>748</td>
</tr>
<tr>
<td>75.</td>
<td>Order of Examination of witnesses</td>
<td>757</td>
</tr>
<tr>
<td>76.</td>
<td>Determination of questions as to admissibility</td>
<td>760</td>
</tr>
<tr>
<td>77.</td>
<td>Examination and Cross-examination</td>
<td>764</td>
</tr>
<tr>
<td>78.</td>
<td>Cross-examination—who can be cross-examined</td>
<td>772</td>
</tr>
<tr>
<td>79.</td>
<td>Leading questions</td>
<td>773</td>
</tr>
<tr>
<td>80.</td>
<td>Matters in writing used in examination</td>
<td>778</td>
</tr>
<tr>
<td>81.</td>
<td>Contradiction of witnesses</td>
<td>781</td>
</tr>
<tr>
<td>82.</td>
<td>Impeaching the credit</td>
<td>790</td>
</tr>
<tr>
<td>83.</td>
<td>Cross-examination as to credit—the powers of the court</td>
<td>794</td>
</tr>
<tr>
<td>84.</td>
<td>Objectionable question in cross-examination</td>
<td>805</td>
</tr>
<tr>
<td>85.</td>
<td>Contradiction as to matters affecting credit</td>
<td>816</td>
</tr>
<tr>
<td>86.</td>
<td>Cross-examination of one’s own witness</td>
<td>820</td>
</tr>
<tr>
<td>87.</td>
<td>Impeachment of credit of witnesses</td>
<td>826</td>
</tr>
<tr>
<td>88.</td>
<td>Corroborative evidence and re-establishing credit</td>
<td>835</td>
</tr>
<tr>
<td>89.</td>
<td>Credit of declarants other than witnesses</td>
<td>848</td>
</tr>
<tr>
<td>90.</td>
<td>Refreshing the memory of witnesses</td>
<td>850</td>
</tr>
<tr>
<td>91.</td>
<td>Evidence with reference to past memoranda</td>
<td>855</td>
</tr>
<tr>
<td>92.</td>
<td>Rights of adverse party with reference to writings used as aids to or substitutes for memory</td>
<td>858</td>
</tr>
<tr>
<td>93.</td>
<td>Production of documents</td>
<td>859</td>
</tr>
<tr>
<td>94.</td>
<td>Documents produced after notice and inspected</td>
<td>862</td>
</tr>
<tr>
<td>95.</td>
<td>Documents not produced after notice</td>
<td>864</td>
</tr>
<tr>
<td>96.</td>
<td>Power of the Judge</td>
<td>866</td>
</tr>
<tr>
<td>97.</td>
<td>Jury and assessors</td>
<td>869</td>
</tr>
<tr>
<td>98.</td>
<td>Improper admission or rejection of evidence</td>
<td>870</td>
</tr>
<tr>
<td>99.</td>
<td>Discretion of the Judge</td>
<td>873</td>
</tr>
<tr>
<td>100.</td>
<td>Conclusion</td>
<td>878</td>
</tr>
</tbody>
</table>
CHAPTER 1

INTRODUCTORY

1.1. This Report deals with the Indian Evidence Act, 1872. The Law Commission has taken up the subject suo motu; but, it may be noted, that numerous suggestions for amending the Act have also been received by the Commission from diverse sources, from time to time.

1.2. For the proper working of any legal system, adjective law is as important as the substantive law and in the field of adjective law, the law of evidence is as important as the law of civil and criminal procedure. The Commission has, having concluded the examination of the chief procedural codes, considered it appropriate to devote its attention to the law of evidence which regulates the enquiry into facts by judicial tribunals. The law is principally contained in the Act with which we are concerned in this Report.

Society governs the conduct of its citizens by principles and rules prescribed by statutes, regulations and rules of court.

The machinery of trials in our law is designed to ensure the fair conduct of a case before the courts of the land. This has been achieved progressively over the years by rules ultimately derived from common sense and prudence. These rules must change with the passage of time, not only in order that they may improve their efficiency, but also in order to secure harmony.

Law is classified as substantive or adjective. Substantive law is that which has an independent standing, and determines the rights and obligations of persons in particular circumstances. Adjective law is dependent or subsidiary, and prescribes the procedure for obtaining a decision according to substantive law. Procedural law is often regarded as including both procedure proper and evidence, for evidence is concerned with establishing the facts to which substantive law is applied. Though procedure is only a means, in practice, it often assumes as great an importance as questions of substantive law.

1.3. Over the last half a century or so, increasing interest has been shown in the reform of the law of Evidence. In those countries where the law was not codified, many of the topics belonging to the Law of Evidence were regarded as complex and confused, and sometimes even considered to be "absurdly technical". In the United States, for example, two leading writers commented in 1937 that "a picture of the hearsay rule with its exceptions would resemble an old fashioned crazy quilt, made of patches out from a group of paintings by cubists, futurists and surrealists."

The movement for reform has now led to a number of official and unofficial codifications.

---

1The Act will hereafter be referred to as the Act.
3Myers v. Director of Public Prosecutions, (1965) A. C. 1001, 1019 (per Lord Reid).
Elsewhere in the Commonwealth, until very recently, attempts to secure a comprehensive code of evidence were not successful, owing to considerable prejudice against codes that is natural to persons who are unfamiliar with their operation. This is not the position now. In India, there never prevailed any such prejudice.

The codification in the Act has avoided, in India, many of the problems which were experienced elsewhere. Fortunately, some of the provisions of the Act, one can now say, were a head of the times. But this does not dispense with the necessity of examining its provisions with a view to checking up whether they are complicated, obscure, irrational or unjust in operation and as such, need to be revised.

1.4. Any statute relating to evidence is based on two fundamental postulates. The first is that in the judicial process, facts come up for determination. The second is that in such determination of facts, certain rules are required. It is obvious that the Evidence Act deals with a vital part of the judicial process—the determination of facts. The necessity for determination of facts arises in a judicial proceeding because—

"In order that the Judge may decide upon a question in litigation, it is necessary that the parties to the action should satisfy him of the truth of the facts submitted for his decision. But they must not only satisfy the Judge; they must also prove the facts adduced. Facts that must be proved, and such as affect and are relevant to the decision to be given, are uncertain facts, that, such as are disputed by the other party."

This process of proving the facts, if it is to be carried on efficiently and impartially, must need rules. The actual content of the rules may vary. But there have to be some rules.

1.5. Archbishop Whateley, in his Rhetoric, has made certain observations as to the need for guidelines in certain intellectual processes, which apply with equal force to rules of evidence:—

"It has been truly observed that genius begins where rules end. But, to infer from this, as some seem disposed to do, that in any department wherein genius can be displayed, rules must be useless, or useless to those who possess genius, is a very rash conclusion. What I have observed elsewhere concerning Logic, that 'a knowledge of it serves to save a waste of ingenuity', holds in many other departments also. In travelling through a country partially settled and explored, it is wise to make use of charts, and of high-roads with direction posts, as far as these will serve our purpose, and to reserve the guidance of the compass or the stars for places where we have no other helps. In like manner we should avail ourselves of rules as far as we can receive assistance from them, knowing that there will always be sufficient scope for genius in points for which no rules can be given."

---


2Tomkin and Jenkin, Modern Roman Law, page 92, cited by Field, Introduction to the Evidence Act, page xi.

3Whateley, Rhetoric, Preface, page vi.
The definition of "evidence" that was contained in some of the American Codes—"evidence is the means sanctioned by the law of ascertaining in a judicial proceeding the truth respecting a question of fact"—aptly brings out this aspect.\(^1\)

1.6. While substantive law, as already stated,\(^2\) defines the rights, duties and liabilities, adjective law regulates the pleadings, procedure and proof by which the substantive law is applied in practice.

In India, pleadings and procedure are dealt with in the two procedural Codes; the subject of limitation of suits is dealt with in the Limitation Act; and the remaining part of the adjective law—proof—is dealt with in the Evidence Act. As an abstract proposition, one could state that there is but one general rule of evidence, namely, that that evidence should be the best which the nature of the case can admit. However, circumstances in real life are so complex that it is often not easy to discover what is the best evidence; and, even if one could determine what is the best evidence, necessity might demand the substitution of the second best evidence in its place, in a particular case.

One of the objects of the law of evidence, then, is to "restrict the investigations made by courts within the bounds prescribed by general convenience."\(^3\)

1.7. Of course, the law of evidence does not command that every fact must be proved. The object of restricting the scope of inquiry is achieved also\(^4\) by "the doctrine that certain classes of facts are already within the 'judicial notice' of the Courts, and by 'presumptions' by which certain propositions are to be assumed to be sufficiently proved when certain other propositions have been established."\(^5\)

1.8. Since, principally, the law of evidence restricts the scope of inquiry, a part of the law of evidence consists of negative rules declaring what "is not evidence". Of this negative aspect, a striking illustration is found in section 5 of the Act, which provides that "evidence may be given of all facts in issue and all such other facts as are hereinafter declared to be relevant and of no others." Evidence tendered must be shown to be admissible under one or other of the sections of the Act\(^6\)—or the provisions of some other Act previously passed and not repealed, or an Act enacted subsequent to the Act.\(^7\)

1.9. The nature and basis of the particular restriction laid down in the law of evidence may vary. But, broadly speaking, the law excludes "certain kinds of evidence as having too remote a bearing on the issue, or as incapable of being satisfactorily tested or as coming from a suspicious quarter.\(^8\)

---

\(^1\)Section 1823, California Code of Civil Procedure, cited in Bouvier, Law Dictionary (1914), page 1091.

\(^2\)New Jersey Rules of Evidence.

\(^3\)Para. 1.2, supra.

\(^4\)R. v Prabhulal, (1874) 11 Bom. High Court Reports 91.

\(^5\)Holland Jurisprudence (1910), referring to Thayer's, A Preliminary Treatise on Evidence at the Common Law (1899).

\(^6\)Cf. Lord Mansfield's observations in the Berklew pearase Case. 4 Camp. 414.

\(^7\)See Collector v. Palakhidhar, (1899) I. L. R. 12 All. 1, 43.


\(^9\)Holland Jurisprudence (1910), referring to Thayer's, A Preliminary Treatise on Evidence at the Common Law (1899).
1.10. After this discussion of the essential nature of the law of evidence, it will be convenient to give a brief history of the law of evidence in India since the commencement of the British rule. For this purpose, it would be desirable to deal separately with the position in the Presidency towns and the position elsewhere.

Presidency Towns.

1.11. In the Presidency towns, the English rules of evidence were followed, since the establishment of the Supreme Courts in Calcutta, Madras and Bombay, and perhaps even earlier, that is, since the establishment of the Recorder's Courts.

The royal charter of September 24, 1726 provided for the establishment at Madras, Fort William and Bombay, of civil and criminal courts that derived their authority from the King, instead of the East India Company. The charter recites that a representation had been made by the company, that there was "a great want" at these places of a proper and competent power and authority "for the speedy and effectual administering of justice in civil causes, and for the trying and punishing of capital and other criminal offences, and misdemeanours." Thus was introduced into each Presidency town a Mayor's Court, not a court of the company as there had been in Madras, "though exercising its authority in a land to which the King of England had no claim to sovereignty." We do not consider it necessary to discuss the question where, in law, sovereignty resided during that period.

Rankin states:¹

"That the law intended to be applied by these courts was the law of England is clear enough from the terms of the charter, though this is not expressly stated: and it has long been accepted doctrine that this charter introduced into the Presidency towns the law of England—both common and statute law—as it stood in 1726."

Thus, the English rules of evidence were always followed in the Courts established by Royal Charters in the Presidency Towns of Calcutta, Madras and Bombay.

1.12. Some Central Acts did modify or supplement the rules of English law. The process of reform was, however, slow, and mostly followed the English statutes that were passed from time to time.

At common law, "The oath of an infamous person is not accepted." In 1837, Act 19 abolished the incompetence of convicts to give evidence. This reform seems to have been enacted in England later—in 1843.

Section 1 of Act 9 of 1840 made certain provisions as to interested witnesses. It followed Statute 3 & 4 Will. 4 Ch. 42. In 1843, in England, Lord Denman's Act—the Evidence Act, 1843 (6 & 7 Vict. c. 85)—was passed, which enacted that no person offered as a witness should be excluded, by reason of incapacity from crime or interest, from giving evidence either in person or by deposition. There were several exceptions, one of which excluded the parties and their spouses. In India, Act 7 of 1844 introduced similar provisions applicable to Her Majesty's Courts in the Presidency towns.

In England, in 1846, the Statute 9 and 10 Vict. c. 95, first declared parties to the proceeding, their wives and all other persons competent as witnesses in

¹Rankin, Background to Indian Law (1946), page 1.
²Coke on Littleton, 158a.
the Country Courts; and, in 1851, the Evidence Act—Lord Brougham's Act No. 2 (14 and 15 Vict. Cap. 99), was passed, which declared the parties and the persons in whose behalf any suit, action or proceeding might be brought or defended, competent and compellable to give evidence in any Court of Justice or before any person having by law or by consent of parties authority to hear, receive and examine evidence. In India, similar provisions were enacted for Her Majesty's Courts in India by Act 15 of 1852. It made the parties competent witnesses except in criminal proceedings and proceedings for adultery or breach of promise of marriage.

In England, the Evidence Amendment Act of 1853 (16 and 17 Vict., Cap. 83 introduced by Lord Brougham)—Lord Brougham's Act No. 3—made the husbands and wives of parties to the record competent and compellable as witnesses, subject to certain exceptions—the exceptions were mainly concerned with suits for breach of promise of marriage and proceedings based on adultery. In India, the same reform was introduced by Act 2 of 1855.

1.13. The juristic interest of the Act removing incompetence on the ground of "interest" is obvious. The older theory was, that a party would naturally support his own case, and, therefore, would not be a truthful witness, and hence, was not competent. In the Pickwick Papers, Charles Dickens exposed the absurdity of this rule, by describing with ridicule the trial of Bardell and Pickwick. As stated above, the older theory was abrogated in England and in India by legislation.

In Tilley v. Tilley, Denning L. J. (as he then was) gave a brief historical survey of the English legislation on the subject—

(1) At common law, neither parties nor their spouses were competent to give evidence at all.

(2) Lord Brougham's Evidence Act, 1851, section 2, made the parties (but not their spouses) competent and compellable. Section 3 made an exception in criminal proceedings. Section 4 made exceptions in proceedings instituted in consequence of adultery and in actions for breach of promise of marriage.

(2h) Lord Brougham’s Evidence Act, 1853, section 1, made the spouses of the parties competent and compellable. Section 2 made exceptions to section 1 in criminal proceedings and 'in any proceeding instituted in consequence of adultery'.

(3) As a result of the Matrimonial Causes Act, 1857, the preservation of the common law rule that parties and their spouses were neither competent nor compellable to give evidence in proceedings instituted 'in consequence of adultery' assumed a new importance, as proceedings under that Act fell within this category.

(4) By the Evidence Further Amendment Act, 1869, section 1, the exceptions made in Lord Brougham’s Acts in respect of actions for breach of promise of marriage and proceedings instituted in consequence of adultery were repealed.

Some of the reforms mentioned above were extended to Civil Courts of East Indian Company in the Bengal Presidency by Act 19 of 1853.

1 Lord Brougham’s Act No. 2 Evidence Act, 1845, related to official documents and copies of Acts.

Elaborate provisions dealing with evidence were made by Act 2 of 1855. In fact, between 1835 and 1855, there were eleven enactments touching the law of evidence and, by Act 2 of 1855, all the enactments were consolidated.

1.14. In the mofussil, however, since the Courts were neither required to follow nor debarred from following the English law, a very vague customary law of evidence prevailed. Courts sometimes relied on the Hedayat, sometimes on English text-books, sometimes on lectures given in India and the like. Some Regulations made between 1793 and 1834 dealt sporadically with some rules of evidence in Bengal and in Madras, and somewhat more elaborately in Bombay. But these Regulations touched only the fringe of the subject.

Bengal Regulation 9 of 1793 directed the Magistrates to be careful to cause the witnesses on the part of the accused to be in attendance by the time of the arrival of the court of circuit. The same Regulation provided that the religious persuasions of witnesses were not to be considered as a bar to the conviction of a prisoner. If, in any case, the evidence of a witness would be considered inadmissible under the Muhammedan Law, on the ground only that the witness was not a Muslim by religion, the courts were directed to give validity to that evidence, by a circuitous way, on the supposition that the witness was of the Muhammedan persuasion.

Bengal Regulation 9 of 1796 directed that a prisoner was to be questioned at the time of his being committed or held to bail, and his answer was to be recorded on the Magistrate’s proceedings, with the specification of any witness named by him. And the courts of circuit were expected to ascertain that all due measures had been taken to cause the attendance of all witnesses both for the prosecution and for the defence.

Bengal Regulation 4 of 1797 prohibited leading questions to witnesses, but allowed cross-examination either by the Judge or by the opposite party for the purpose of extracting the information they possessed and the discovery of the truth. The court of circuit was directed to take note of any variations in the depositions of the same witnesses before them and the Magistrates, but depositions taken before the Magistrates were not to be read until the witnesses were re-examined.

Bengal Regulation 3 of 1812 prohibited Magistrates from issuing process to witnesses without previously satisfying themselves that sufficient grounds existed for the prosecution. The prosecutor was to deposit in the hands of the Nazir a sufficient amount of money for the maintenance of the witnesses during the period of their stay.

1.15. Besides these occasional directions to be found in the old Regulations, some other rules embodying the most striking reforms, then recently introduced in England, were inserted by Central Acts—e.g. Act 19 of 1853, the operation of which was, however, restricted to the Bengal Presidency. Two years afterwards, Act 2 of 1855 was passed. This Act reproduced, with some additions, all the reforms advocated by Bentham and carried out in England by Lords Denman and Brougham; but nearly all its provisions presupposed the existence of that body of law upon which these reforms and amendments were engrafted.

3See infra.

1First Report of the Commissioners appointed to consider the reforms of the judicial establishments in India, Appendix B No. 3, page 29.
2Sections 12 and 56 of the Regulation.
3Sections 2 and 4.
4Section 7, clauses iii and vii.
1.16. The position outside the Presidency towns may be summarised as under—

(a) All persons admitted that the Mohammedan law of evidence was not to be followed.

(b) The whole of the English Law of Evidence had never by any general enactment been rendered applicable to India, though some portions of it, with or without modifications, had been expressly incorporated in the statute Law of this country; Act 2 of 1855 was the largest specimen of this fragmentary legislation, while other fragments were to be found scattered through the Statute Book, more specially in the Codes of Civil and Criminal Procedure.

(c) Where the Statute Law was silent, it devolved upon the higher Courts to supply the deficiency with Judge-made law. In laying down precedents and setting disputed points, these higher Courts carefully considered the different systems in force in different countries, the former usage in India (if any), the peculiar circumstances of the country and their modifying effect on principles of general application; and where, with due regard to these considerations, they found themselves able to follow the English Law of Evidence, they were generally willing to take it as their guide.

1.17. In Banwari Lal v. Hetnarin Singh¹, before the Privy Council, on the 22nd February, 1858, Dr. Lushington remarked: “It is unfortunately too much the habit of those Courts to receive documents without that just discrimination which would prevail, were the rules of evidence known and established, but their Lordships are of opinion that they cannot in these cases take upon themselves to determine what ought or ought not to have been received in the Courts in India. They may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal consequences, because the administration of justice was not more strictly conducted with reference to the admission of evidence.”

1.18. The law thus rested in a state of great indefiniteness. In a Full Bench decision of the Calcutta High Court², it was held that the English law of evidence was not the law of the Mofussil; that at the time the Mohammedan criminal law, including the Mahomedan law of evidence, was no longer the law of the country, and that by the abolition of the Mahomedan law, the law of England was not established in its place. The Mofussil Courts were, thus, not required to follow the English law, although they were not debarred from following it where they regarded it as the most equitable.

1.19. We may, now refer to some of the Central Acts relating to evidence enacted before 1872, which introduced a modicum of certainty in the law.

The first Act of the Governor-General-in-Council which dealt with evidence strictly so-called was Act 10 of 1835, which applied to all the Courts in British India, and dealt with the mode of proof of Acts of the Governor-General-in-Council. This was followed by several enactments passed at intervals during the next twenty years, which effected various small amendments of the law.

---

³See R. v. Ramaswamii, (1869) 6 B. H. C. R. Cr. 49.
and applied, to the Courts in India, several of the reforms in the law of evidence made in England. We have mentioned a few of them while dealing with the position in Presidency Towns. We shall now refer to them in detail.

These Acts were as follows:

Act 19 of 1837 abolished incompetency by reason of conviction; Act 5 of 1840 dealt with affirmations; Act 18 of 1843, s. 9; Act 9 of 1840; and Act 7 of 1844 dealt with incompetency by reasons of crime or interest; Act 15 of 1852 dealt with competency of parties and other matters; Act 19 of 1853 extended several of these reforms to the Civil Courts of the East India Company in the Bengal Presidency.

As a specimen of the type of legislation and its object, we may quote Act 7 of 1844, passed on the 6th April, 1844, whose long title was "An Act for improving the law of evidence". The Act was in these terms:

"An Act for improving the Law of Evidence:

1. Whereas the enquiry after truth in Her Majesty's Courts of Justice is often obstructed by incapacities created by the present Law, and it is desirable that full information as to the facts in issue, both in Criminal and in Civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony."

"It is hereby enacted, that within the local jurisdiction of Her Majesty's Courts, no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the Court on the trial of any issue joined, or of any matter or question, or on any enquiry arising in any suit, action or proceeding, Civil or Criminal, in any of Her Majesty's Courts, or before any Judge, Jury, Sheriff, Coroner, Magistrate, Officer or person having by Law or by consent of parties, authority within the jurisdiction of Her Majesty's Courts to hear, receive and examine evidence, but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation, in those cases wherein affirmation is by Law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or enquiry, or of the suit, action, or proceeding, in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: Provided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replying may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: Provided also, that this Act shall not repeal any provision in the Act of the Government of India XXV of 1838: Provided that in any of Her Majesty's Courts sitting in Equity, any defendant to any cause pending in any such Court so sitting, may be examined as a witness on behalf of the plaintiff, or of any co-defendant in any such cause, saving just exceptions; and that any interest which much defendant so to be examined may have in the matter or any of the matters in
question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

1.20. In 1855, Act 2 was passed for the further improvement of the law of evidence.

The Act of 1855 was the most important legislative enactment prior to 1872 in the field of evidence. We shall briefly summarise its provisions. Sections 2 to 5 of the Act declared that judicial notice should be taken of all Regulations passed before 22nd April, 1834, all Acts of the Governor-General-in-Council, all Public Acts of Parliament, the courts' own members and officers, the name, titles and authorities of the Governor-General and other specified officers; divisions of time; geographical divisions, war and peace, the existence, title and national flags of States recognised by the British Government, Government Gazettes, recitals in laws of facts of a public nature, and advertisements purporting to be published by authority. Sections 6 to 11 provided that the courts may refer to books, maps and charts on certain matters. Section 12 provided for evidence of foreign law, and by section 13, maps made under the authority of Government or of any public municipal body, when not prepared for the purpose of any litigation in question, were admitted without further proof.

1.21. As regards the competence to testify, the only persons incompetent to testify were, by section 14, children under 7 years and insane persons, who appear incapable of receiving just impressions of the facts respecting which they were examined or of relating them truly. In the case of children and persons of defective religious belief, sections 15 and 16 substituted a simple affirmation in place of oaths or solemn affirmations. Section 18 provided that no one was to be incompetent from interest or relationship, and section 19 specifically declared that parties to civil suits might be examined as witnesses. Under section 20, husbands and wives were, in general, declared competent in every civil proceeding to give evidence for or against each other.

1.22. Evidentiary privilege was dealt with in quite an elaborate manner. By section 21, witnesses were exempted from producing documents relating to affairs of State. Section 22 exempted parties from producing documents not relevant to the case of the party requiring production, and also confidential correspondence with legal advisers. Under section 24, barristers, attorneys and vakils were not, without their clients' consent, to disclose professional communications.

By section 25, persons present in courts were bound to give evidence even though not subpoenaed. Section 26 exempted persons summoned merely to produce documents from personal attendance.

1.23. Except in the case of treason, the evidence of one witness was made sufficient proof by section 28. But there was no provision abrogating the common law rule relating to corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury. It may be noted that the exception as regards treason was based on the English law as it was then in force, and as it remained in force for a long time until abrogated during recent times.

By section 29, dying declarations were made admissible even though the declarant expected to recover. It may be noted that this was a departure from

---

1As to this Act, see R. v. Gopal Dass, I.L.R. 3 Mad. 271, 282.
2Treason Act, 1945.
the English law, whereunder, to render a dying declaration admissible, the declarant must have abandoned all hopes of recovery. The English case law on the subject up to 1888 is reviewed in R. v. Glosser. In this connection, section 371 of the Code of Criminal Procedure, Act 25 of 1861, may also be seen, as well as the under-mentioned case.

1.24. Section 30 of the Act of 1855 allowed a party, with the leave of the Court, to cross-examine and discredit his own witnesses. By section 31, certain former statements of witnesses were made admissible to corroborate their testimony. Under section 32, witnesses were bound to answer criminating questions, but the answer was not to be used against them unless they wilfully gave false evidence. The question whether a witness had been convicted of any crime could be put to the witness under section 33, and he might be cross-examined as to previous statements made by him in writing, under section 34.

1.25. Secondary evidence was provided for, as also documentary evidence in general. Thus, by section 36, secondary evidence might be received where an original document was out of reach of process, and by section 35 copies made by a copying machine were deemed to be correct. The Common law regarding attested documents was not modified; but documents which did not require attestation by law could, under section 37, be proved as if unattested; and section 38 provided that the admission of a party to an attested instrument of its execution by himself was, as against him, prima facie, proof of such execution.

1.26. Section 39 provided that entries made against interest or in the course of business were, in certain cases, admissible in the lifetime of the person making them. Under section 40, entries in the course of business were, in certain cases, made admissible for the purpose of identifying the payer or receiver. Sections 41 and 42 made admissible receipts against certain persons other than the giver. Certain books and other documents were made admissible as corroborative evidence under sections 43 and 44. Witnesses were allowed to refresh their memory by certain documents or copies thereof under sections 45 and 46. Under section 47, in cases of pedigree, the declarations of intimate acquaintances were admitted. Under section 48, on the question of genuineness of a signature etc., comparison of an undisputed signature, etc., was allowed.

Under section 49, a power of attorney purported to have been executed before a notary public might, in certain cases, be proved by its production. Sections 50 and 51 provided that despatch and receipt of a letter might be proved by letter books and the receipt book.

Under section 56, an official document admissible by law was made prima facie evidence without proof of any seal etc., which it was directed to have.

Section 57 provided that the improper admission or rejection of evidence was not to be a ground for a new trial where there was other evidence to justify the decision.

1.27. A number of Acts were passed after Act 2 of 1855, as follows:

Act 10 of 1855 (Attendance of witnesses) Act 8 of 1859 (Civil Procedure; contained provisions similar to the present Code provisions as to witnesses); and Act 25 of 1861. The Act of 1861, mainly dealt with Criminal Procedure; but it also contained provisions as to witnesses, confessions, police-diaries, examination of the accused and Civil Surgeon, reports of Chemical Officers, and dying declarations.

1R. v. Glosser. (1888) 15 Cox 471.
2In the matter of Tenoo, (1871) 15 Weekly Reports Criminal 11.
Act 15 of 1869 dealt with the evidence of prisoners—provisions which were later placed in the Prisoners Act, 1890 and then in the Attendance of Prisoners Act, 1955, and now in the Code of Criminal Procedure, 1973 (so far as they concern criminal courts).

1.274A. These Acts did not affect the applicability of the English law. While, therefore, within the Presidency Towns, the English law of evidence was in force, modified by certain Acts of the Indian Legislature, (of which Act 2 of 1855 was the most important), the Mofussil Courts, on the other hand, had, down to 1872, hardly any fixed rules of evidence, save those contained in scattered Regulations and Acts.

English law was, therefore, more or less followed, especially in criminal cases, till express enactments prohibited its operation. Act 2 of 1855, whilst laying down certain isolated rules of evidence, did not prohibit the adoption either of the English law or of the rules of Mohammedan law which, by custom or practice, had been followed by the Courts. Indeed, section 58 of the Act of 1855 expressly laid down that “nothing in this Act contained shall be so construed as to render inadmissible in any Court any evidence which, but for the passing of this Act, would have been admissible in such Court.” The Act, therefore, did not operate to repeal the rules of evidence which existed before, and, although it did not require the Courts to follow the English law or any other particular system of evidence, it did not, at the same time, preclude them from adopting the English rules of evidence where they appeared to be the most equitable.

To recapitulate, before the passing of the Indian Evidence Act (1 of 1872), India did not have any uniform laws on the subject of evidence.

(a) In the Presidency towns, the rules of the English law of evidence were followed, subject to such modifications as certain Acts of the Indian Legislature had introduced. Of these enactments, Act 2 of 1855 may be said to be the most important, but that Act, even taken with the others, was far too inadequate to supply a substantial code of the rules of evidence.

(b) In the Mofussil, where the English law did not prevail, there were scattered rules of evidence based upon the practice of the Courts, which had never assumed any definite or systematic form.

1.28. The lax character of the law of evidence in the Mofussil Courts was the subject of frequent judicial comment.

This was the state of things found by the Legislature when the Indian Evidence Act was undertaken as a legislative measure having, for its object, the consolidation of the rules of evidence and repeal of all others that had prevailed before. This appears from the express words of section 2 of the Act; and the saving clause contained in the last paragraph of that section may be taken, in fact, to have an extremely limited operation. The Act became law on the 15th March, 1872, at a time when the Legislature had also in hand an equally important measure connected with the consolidation of the rules of Criminal Procedure.

---

1See observations in—
(a) Unide v. Pemmanamby, (1858) 7 M.I.A. 128, 137;
(b) Bwcchur v. Majhee, (1874) 22 W.R. 355, 356, 357;
(c) Naraguntly v. Yengamma, (1861) 9 M.C.A. 90;

2Phul v. Surian, I.L.R. 4 All. 249, 250.

1.129. The Draft Bill on the subject of evidence was drawn up by Her Majesty's Commissioners, and introduced by Sir Henry Maine, then the Legal Member in Council. This first draft Bill did not, however, meet with approval.

The Bill did not get beyond the first reading, and was pronounced by every legal authority to which it was circulated to be unsuitable to the wants of the country. The chief objection to the Bill was that it was not sufficiently elementary for the officers for whose use it was designed, and that it was, in several respects, incomplete so that it would not supersede the necessity of the judicial officers acquainting themselves with the English law on the subject. In other words, it postulated a considerable knowledge of the English law.

1.130. The Commissioners, believing that the English law of Evidence contained "the most excellent rules derived from most extensive experience", while omitting all that appeared to them unsuited to India endeavoured to adapt the rest to the peculiar requirements of the administration of justice as above described. But the Draft Bill did not meet with approval in India. The Select Committee of the Legislative Council, to which the Bill was referred for report, after a very careful consideration of the draft, arrived at the conclusion that it was not suited to the wants of the country. The grounds on which this conclusion was based were, in a few words, "that it was not sufficiently elementary for the officers for whose use it was designed, and that it assumed an acquaintance on their part with the law of England, which could scarcely be expected from them".

1.131. Since the first Bill did not meet with approval, a new Bill was, prepared by Sir James Fitzjames Stephen, and was ultimately passed as the Indian Evidence Act, 1872.

It should be noted that Stephen prepared (a) the Indian Evidence Act, 1872, (b) an English Bill of 1873, and (c) Digest of the Law of Evidence (first published in 1876)\(^1\).

The Act was adapted to territories elsewhere, from Ceylon\(^2\), Burma, Malaysia and Singapore in the East to countries in the West\(^3\), as well as to large tracts of Africa\(^4\), such as Kenya, Nigeria and Uganda\(^5\).

1.32. That, broadly stated, is the genesis and historical background of the Act.

1.33. There are several systems of the law of evidence in force in the various countries of the world; but, principally, we could divide them into the Anglo-American system, the Continental system, the system in force in Eastern Europe and the native system. The continental system—to mention the principal characteristics—has in contrast with common law system, the minimum of rules of evidence in the legal framework, and assigns to the judge a more active role. The most striking distinction between the continental system and the common law system is the prominence of cross-examination in the latter and the dominance of the presiding officer in the former. In addition, there

---


\(^3\)For example, Revised Laws of Grenada (1953), i. 939; Laws of the Turks and Caicos Islands (1952); i. 194 referred to in Nokes, "Codification of the Law of Evidence", (1956) 5 I. C. L. Q. 347, 350.

\(^4\)Morris, Evidence in East Africa.

\(^5\)Law of Kenya in force.......1948 (n.n.), i. 109; Law of Nigeria (1948), iii. 42; Laws of the Uganda Protectorate (1951), i. 92; See also Laws of the Zanzibar Protectorate (1935), i. 353.
are, in the continental system, provisions designed to ensure a pre-recording of facts to a larger extent than the common law system. The greater use of notaries and the fuller opportunity for a record of the statements of the accused illustrate this. Incidentally, it may be mentioned that the provision in section 164 of the Code of Criminal Procedure, 1973, is reminiscent of the continental system of recording statements—though, of course, this does not imply that a statement under section 164 is substantive evidence.

In the common law system,—to mention only the very important characteristics—there is a large mass of rules laid down by the courts or legislature for the determination of facts; the judge plays a subordinate part, in contrast with the part played by the counsel; where the system of trial by jury prevails, questions of fact are exclusively for the jury; and the content of the law of evidence is, therefore, richer than in the continental system.

The system in force in certain countries of Eastern Europe, though largely based on the continental system, differs from it inasmuch as there is lesser emphasis on technical rules and the search for the truth is not restricted by numerous rules.

1.34. In the Encyclopaedia Britannica¹, the systems of evidence have been briefly described.

"Generally speaking, two different systems of the law of evidence are prevalent all over the world: the Anglo-American and the Continental European systems. The latter can be sub-divided into three variants: the Germanic, the French or Roman, and the Socialist patterns. The Germanic variant tries to utilize all means of proof; it follows the principle of formallessness and balance between the accusatorial and the inquisitorial principles. The French or Roman variant favours evidence by documents and is dominated by a very formal procedure of "enquete" or investigation. The Socialist variant makes believe that objective truth might be ascertained by evidence. It therefore favours the inquisitorial principle and does not protect witnesses, parties, and experts by privileges or procedural rights.

"Japan provides an interesting example of mixture of the Continental European system (Germanic and Roman variants) with the Anglo-American system with the continental model dominating, however."

¹Article on Evidence from the new Encyclopaedia Britannica Macropaedia Volume 7, page 6.
HISTORY OF RULES OF EVIDENCE IN ENGLAND

I. INTRODUCTORY

2.1. The rules of law that underlie most of the provisions of the Indian Evidence Act could be better understood if the history of the corresponding English rules is borne in mind. For this reason, we propose to deal in brief with the history of some of the important English rules.

2.2. In England, the system known in practice by the title of "The Law of Evidence", began to form about the middle of the seventeenth century. Noting this fact, Best's comments—

"The characteristic feature which distinguishes it (the English system of judicial evidence), both from our own ancient system and those of most other nations is, that its rules of evidence, both primary and secondary, are in general rules of law; which are not to be enforced or relaxed at the discretion of judges, but are as binding on the court, juries, litigants, and witnesses as the rest of the common and statute law of the land, and that it is only in the forensic procedure which regulates the manner and order of offering, accepting, and rejecting evidence, that a discretionary power, and even that a limited one, is vested in the bench. A judge consequently has now no more right to receive prohibited evidence, because he thinks that by so doing justice will be advanced in the particular case, than he has to suspend the operation of the Statute of Mortmain, or to refuse to permit an heir-at-law to recover in ejectment, because it appears that he is amply provided for without the land in dispute. It must not, however, be supposed that this great principle became established all at once; and indeed the gradual development of our system of judicial evidence, from the above epoch to the present day, may be studied alike with advantage and pleasure."

II. DOCUMENTS

2.3. It will be convenient to begin with documentary evidence. In modern law, it is the rule that, if the parties to any transaction have embodied their intentions in a document or a series of documents, no evidence may be given of the terms of the transaction except the document itself, or secondary evidence of its contents, when such evidence is admissible. Nor can the terms of the document be contradicted, altered added to, or varied, by oral evidence. This is not a primitive principle. In fact, it was not fully established before the latter half of the seventeenth century; and the provisions of the Statute of Frauds had something to do with the modern scope of the rule.

2.4. That it was not a primitive principle is shown by the rules as to the effect of the production of the sealed documents—the records and the deeds

---

1Best, Principles of Evidence (1922), page 100, para. 116.
3Stephen, Digest of the Law of Evidence, 95.
If those documents were adduced as a conclusive proof, they were much more than mere evidence. The party who was not prepared to deny their genuineness was absolutely bound—he was estopped.

2.5. A statement made by the parties to a sealed writing was conclusive proof of the facts contained therein. If, therefore, one of the parties to a litigation could produce a sealed writing which showed that the other was bound, he produced a proof as conclusive as a record. The other party was estopped by his deed.

2.6. The old custom of summoning the attesting witnesses with the jury illustrates the transition from the older idea that the deed properly attested is a form of proof, to the newer idea that the proof is to be made by the verdict of the jury. The other party was estopped by his deed. That estoppel by deed grew naturally out of estoppel by matter of record is very clearly explained by Professor Wigmore. He says: "the legal value of the seal was the result of a practice working from above downwards, from the king to the people at large. It is involved, in the beginning, with the Germanic principle that the King's word is indisputable. The King's seal to a document makes the truth of the document incontestable. This leads to the modern doctrine of the verity of judicial records. For private men's documents, its significance is that the indisputability of a document sealed by the king marked it with an extra-ordinary quality, much to be sought after. As the habitual use of the seal extends downwards, its valuable attributes go with it. This extension of the seal (from the king to private persons) begins in the eleventh and is completed by the thirteenth century." The effect of the rule that the party is estopped by his deed, had no small influence upon the growth of the law as to documentary evidence in general.

2.7. The rule that written documents cannot be varied by oral evidence had its origin in the days when the summoning of witnesses to testify before the jury was a new thing. In the beginning, evidence was stated in the pleadings, and that is why a written document could not be varied by a mere averment. This rigid approach gave rise to certain rigid rules as to the relationship between documentary and oral evidence, and this rigid approach gave rise to the evolution of strict rules in the construction of written documents. Even the illegality of a transaction was not, initially, recognised as a defence which could be pleaded to a bond, and lawyers tried to interpret a deed with as little reference to outside facts as possible.

III. THREE LEADING RULES OF EVIDENCE RELATING TO DOCUMENTS, OPINION AND HEARSAY

2.8. The three leading rules which were beginning to emerge during the 17th Century, were,—The rule that the contents of a written document cannot be varied by oral evidence, the rule that mere opinion is not generally admissible,

---

1Holdsworth, History of English Law, Vol. 9, page 173.
3"Anything contained in the writing cannot be any exception of the parties be removed", Y. B. 21, 22 Ed. 1 (R. S.) 436; cp. Y. B. Im. 2 Ed. II (S. S.) 68-69; 3 Ed. II (S. S.) 171 per Herie agr; Salmond, Essays in Jurisprudence 51-52.
5Evidence iv. 3414, 2426.
6Holdsworth, H. E. L. Vol. 9, pages 163 and 177.
7Holdsworth, History of English Law, Vol. 9, pages 176 and 219.
and the rule that "hearsay" is not evidence. As regards the first of these rules, we have already discussed the history.\(^3\)

**OPINION**

2.9. The rule as to opinion evidence has a long history. It was an old rule of the civil and canon law that a witness should speak as to matters which had come under the personal observation of his own senses.—"de visu et auiditu". This rule made for the exclusion of mere opinion. The main exception was in the case of experts, to whose opinion courts had recourse as early as the 14th century. For example, in 1353, surgeons were summoned by the court to give their opinion on the question whether a wound amounted to a mayhem (crime of maiming the person so as to render him partly or wholly defenceless.

2.10. It may, in this connection, be of interest to note that as early as the 14th century,\(^4\) experts with no personal knowledge of the facts in issue used to advise the English Courts about matters of science that would be helpful in determining the facts in issue. In this connection, we may quote Learned Hand, who has observed—

"In early times, and before trial by jury was much developed, there seem to have been two modes of using what experts knowledge there was; first to select as jurymen such persons as were by experience especially fitted to know the class of facts which were before them, and second, to call to the aid of the court skilled persons whose opinion it might adopt or not as it pleased. Both these methods exist, at least theoretically, at the present day, though each has practically given place to the third and much more recent method of calling before the jury skilled persons as witnesses."

2.11. In 1345, before the jury system developed fully, the court summoned surgeons to rule whether or not a wound was fresh. This practice illustrates the established fourteenth century procedure of having qualified people decide the issues. The special jury, in this connection, means a jury of persons especially fitted to judge of the peculiar facts upon which the particular issue at bar turns.\(^5\) The practice is certainly old, at least in one instance of like kind—the jury of matrons de ventre inspicienda.\(^6\)

2.12. In this connection, it is pertinent to quote Learned Hand again. He has stated—

"The method mentioned above was to summon to the advice of the court certain skilled persons to help it out of its difficulties. I wish particularly to distinguish here between what we should today call matter of

---

\(^1\)Holdsworth, History of English Law, Vol. 9, page 211.

\(^2\)See supra.


\(^6\)Learned Hand, "Historical and Practical Considerations regarding expert testimony", (1901), 15 Harv. Law Rev. 40.

\(^7\)Anonymous Lib. Ass. 28, Pl. 5 (28 Ed. III), cited in "Impartial Medical Testimony" (Civil), 34 Temple Law Quarterly 470.


\(^9\)Cy Beg v. Wyckerly, 8 C. & P. 262.

\(^10\)Learned Hand, in 15 Harv. L. Rev. 40, 42.
fact for the court and matter of fact for the jury. The cases I shall mention are those in which during a procedure incident to the conduct of a case there arose some question of fact which the court had to decide. That is, the court, having no rule of law to administer and not intending to establish any, had a mere question up for decision of something in that particular case, and summoned experts to help it where its knowledge was lacking."

"In 1345, in an appeal of mayhem, the court summoned surgeons from London to aid them in learning whether or not the wound was fresh. This was, however, in deciding whether or not the appellant should be allowed to go to trial at all."

2.13 and 2.14. In 1620, the conclusions of physicians\(^1\), not called by either side, were submitted to the jury for the first time. This represents the second method.

Later, the third method was devised, namely, calling the expert as witness.

2.15. In course of time, many of the cases on which opinion was admissible became the centres of separate rules of law—for example, rules as to handwriting. With some limitations, the rule was that a witness whose handwriting was in issue, could express his opinion. The *trial of Sidney*\(^2\) is one of the earliest known cases of the admission of such evidence. Some of the limitations disappeared in course of time, and, in 1854,\(^3\) (evidence of persons who got their knowledge merely from a comparison of the disputed document with genuine documents—that is, opinion of handwriting experts—also became admissible, like the evidence of experts in any other art or science.

**HEARSAY**

2.16. The rule against hearsay evidence, in its modern form, was not established fully till the end of the 17th century. It would appear that the development of this rule was facilitated by several factors, of which the important are mentioned below:

1. First, there was the old rule, applied in civil and canon law, that witnesses should testify only to matters under the personal observation of their own senses. No doubt, this older rule is somewhat different from the modern hearsay rule. According to the older rule, once a witness gives evidence as to matters which he has himself heard, an assertion of a person who is not called as a witness could be given in testimony, but the modern rule would reject it. The modern rule might have developed separately, but its development was helped by the memory of this older rule.

2. The disappearance of the doctrine that a particular number of witnesses was required, led to importance being given to the credibility of witnesses.\(^5\) This might have helped to call attention to the admitted inferiority of hearsay evidence, and induced the judges to agree to its total exclusion.

---

\(^{1}\) *Alceste v. Bowtrell*, Cro, Jac. 541.

\(^{2}\) *Trial of Sidney*, (1683).

\(^{3}\) *Common Law Procedure Act, 1854*, extended to criminal courts by the *Criminal Procedure Act 1865* (17-16 Vict. Chapter 125), section 27.

\(^{4}\) *Holdsworth, History of English Law, Vol. 9, page 214.*

\(^{5}\) *Holdsworth, History of English Law, Vol. 9, page 218.*
(3) During the 16th century, it was gradually coming to be evident that juries based their verdicts neither upon their own knowledge nor upon enquiries, but upon the oral evidence of witnesses given in open court\(^1\) and the statute of 1562-1563 provided for the first time a compulsory process for witnesses. More attention was, therefore, paid to the nature of the evidence by which the juries were led.\(^4\)

(4) There was a strong condemnation of hearsay by Coke in his third institute (1641)—a statement which was at once accepted as an authoritative statement of law. This might have fixed the attitude of the post-Restoration judges in relation to criminal cases, and, obviously, the rule for criminal cases would easily be applied to civil cases also.\(^1\)

2.17. Once the general rule of exclusion of hearsay was established, there was logical expansion of its scope. The first such expansion was the emergence of the view that hearsay was not admissible even as corroborative evidence.\(^5\) In this connection, it should be noted that at least up to 1683, the view seems to have been canvassed that hearsay evidence was admissible as corroborative evidence.\(^4\) In fact, the utility of hearsay at least as corroborative evidence survived for a long time, in the rule that a witness’s own prior statement could be proved to show that he had always told the same story and, therefore, ought to be believed.

2.18. The next expansion of the rule against hearsay is illustrated by the establishment of the rule that the bar applied even to previous statements made on oath\(^7\) which are res inter alios octa.

2.19. The reason assigned was that the defendant, not being present when the depositions were taken, had lost the benefit of a cross-examination.\(^8\) It was because of this development that some depositions of witnesses before justices of the Peace were, by legislative action, excluded except under very stringent conditions.

2.20. No doubt, the tide turned in the 18th and 19th centuries, when some exceptions to the rule against hearsay were elaborated.

2.21. In general, the exceptions to the rule against hearsay were intended to permit evidence of a certain statement where the nature and the special circumstances under which it was made, offered strong assurances of accuracy, and the declarant was unavailable as a witness. This reform, sometimes by judicial exposition and sometimes by legislation, was gradual, and therefore, the process was piecemeal.

2.22. The courts, it is said, “seem to be satisfied with a showing of circumstances in which a normal man in the situation of the declarant would have desired to tell the truth, and in which the dangers from deficiencies in his perception, memory and narration are not incapable of intelligent appraisal by the trier of fact.”\(^7\)

\(^{2}\)Holdsworth, History of English Law, Vol. 9, page 216.
\(^{5}\)Holdsworth, History of English Law; Vol. 9, page 217.
\(^{7}\)Case of Penwick, (1696) 13 State Trials 618.
\(^{7}\)Edmond M. Morgan, “Hearsay and preserved memory”, (1926-27) 40 Harvard Law Rev. 712, 714
2.23. In the various exceptions to the hearsay rule, the dangers of deliberate or inadvertent departure from the ideal, as regards perception, memory and narration, though not eliminated, are usually reduced to a manageable proportion. The following illustrations¹ would bear this out²:—

(a) Former testimony: The witness was subject to cross-examination when he gave his testimony. Hence one of the safeguards of truth is present.

(b) Admission: The person who made the admission, can hardly object that he had no opportunity to cross-examine himself.

c) Reputation: The witness testifies, and can be cross-examined, as to the existence and content of the reputed fact.

d) Commercial lists and reports: The compiler of such lists has usually power, opportunity and incentive for correct perception. The danger of incorrect narration will usually be minimised by the fact that the reports are likely to be checked by members of the trade or profession for whom they are prepared.

e) Learned treatises: Normally a person in the position of the writer of the treatise would desire to speak truly, because his opinion would usually be subject to criticism by professional colleagues.

(f) Shop books and entries: Since the entries are usually of a regular character, and relate to simple matters, and are made near the time of the event, there is little danger of faulty memory. The danger of fabrication and lack of opportunity for cross-examination is no doubt, there, to some extent.

(g) Official statements: Official duty usually furnishes a sufficient guarantee of a desire to observe and record facts correctly, though it must be stated that where the statement relates to matters observed not by the person recording but by others, the defects of hearsay are present in some degree.

(h) Declarations of presently existing state of mind: Memory is not involved, nor is there a danger of error in perception. The requirement that the declaration must be made naturally and without circumstances avoids suspicion.

(i) Contemporaneous declarations (Res gestae): There is little danger of fabrication or faulty memory, though not sufficient means of checking the accuracy.

(j) Dying declarations: There is no strain upon memory in general, and the man would desire to tell the truth at the time of death. However, there may not be a guarantee of accuracy or completeness of perception or of narration.

(k) Statements against interest: Usually, there is a guarantee against fabrication.

(l) Statements as to pedigree: There is no motive to misrepresent the facts, and normally the declarant would have some trustworthy information.

¹Some of the reasons are taken from Edmond Morgan, "Hearsay and preserved memory", (1926-27) 40 Harvard Law Review 712, 714.
²The illustrations deal with exceptions in force in England or elsewhere.
(m) Ancient documents: Where declarations in ancient documents are accepted for the truth of the matter and accepted without qualifications, there is a danger of their being untrue.

2.24. In this connection, the position as to conspiracy is of interest. The special evidentiary rule that permits out of court statements of one conspirator to be used against another, has some cogent reasons in support thereof. On the subject of the evidentiary advantages of a conspiracy trial to the prosecution, considerable literatures has come into being during the last half a century. Nevertheless, it is obvious that such statements are exceptions to the rule against hearsay. The important pre-requisite to their admissibility is that, speaking broadly, the statements made by one conspirator, in order to be admissible against others, must be made in furtherance of the criminal purpose. The rationale of admitting this evidence is that the common purpose having been established, the acts and observances of one conspirator can be used against the other in evidence because of the common purpose. The aspect of common purpose was brought out in a working definition of conspiracy which was supplied by Mr. Justice Holmes, who said, "A conspiracy is a partnership in criminal purposes."

There may be a practical reason also, namely, that every conspiracy is, by its nature, secret. "A case can hardly be supposed where men concert together for crime and advertise that purpose to the world."

2.25. The hearsay rule did not present any obstacle to the admission of a prior conviction in a civil case. But the bar against admitting a conviction seems to be an illustration of the opinion rule or, at least, an illustration of the rule that transactions not between the parties to the present case are not, in general, admissible. The position is different if the parties are the same. For example, where the State is a party to the civil action, a previous acquittal would be conclusive.

IV. CORROBORATION

2.26. Coming to corroboration, we may state that English criminal law still requires that certain testimony should be corroborated. Statutory examples of such requirement as to perjury, and the requirement of corroboration of the evidence of the plaintiff in suits based on breach of a promise to marry, The last mentioned illustration has now no practical value, because the cause of action for breach of promise to marry does not now survive in England. Judicial requirements as to corroboration exist—to mention two important cases—in regard to the testimony of accomplices and certain sexual offenses.

V. WITNESSES

2.27. A few observations about witnesses may now be made. In this connection, it may be stated that documentary evidence came into existence earlier than witnesses in England. It has been said...
"The record authenticated by the King's seal was conclusive. This naturally led to the establishment of the doctrine of estopped by deed. Other matters stated under the seal, either of the King, or of private persons, were equally conclusive. In other words, both matters of record and documents under seal were proofs—proofs as conclusive as the older proofs by which in former days men were wont to try the truth of their respective allegations. It may thus be said that the efficacy of these kinds of estoppel was derived, partly from the new fashion of recording pleas and of authenticating the record by the King's seal, and partly from the application of this new idea to the old conception of a trial, it gradually came to be seen that these sealed documents might have another effect. The jury was a body of reasonable men, whose verdict could be guided by the evidence put before them.

And so the difference between the jury and these older modes of trial, which, as we have seen, had a decisive influence on the development of the common law system of pleadine, had an influence equally great on the law of evidence, for it gradually gave rise to the idea that these sealed documents could be used, not only as providing an absolute proof by creating an estoppel, but also as evidence. Hence we get the growth of the idea that a deed can be used, not only to estop the party as against whom it is produced, but also to give the jury evidence as to the truth of the matters in issue. Gradually this idea that a deed can be used as evidence, is applied to other writings, and so we get the modern conception of documentary evidence."

2.28. There was, thus, no place for the witness as known to us in the old system of procedure, according to which trials were conducted by means of fixed methods of proof. And this fact was emphasised by two connected principles which rendered the modern use of witnesses legally impossible. The first of these principles was that no one ought to be convicted of a capital crime by mere testimony. The second was that a witness was neither competent nor capable to testify to a fact, "unless when that fact happened, he was solemnly taken to witness." Both these principles profoundly influenced the development of the mediaeval common law on this topic.

2.29. Oral evidence was a later-comer. Maintenance and champerty were crying evils of the time; and, by these practices, persons were able to use the law courts, instead of the arms of their retainers, to prosecute their feuds whenever they thought this course desirable. Nothing was easier than to get a partial jury; and, as the verdict of the jurors was given as the result of their own knowledge or inquiries, it was natural that they should get their instructions from the side whom they favoured. The remedy for this state of things, suggested in a Parliamentary petition of 1354, was that all the evidence should be openly produced at the bar, and that, after the jury had been charged and had departed from the bar, no person should be allowed to confer with them. But this remedy was plainly insufficient. In the first place, it did not prevent the jury from giving a verdict in accordance with its pre-conceived ideas. In the second place, it did not prevent persons, who were in a position to intimidate the jury, from coming forward and giving evidence at the bar in such a way as to make it quite plain

1Holdsworth, H. E. L. Vol. 3, 613, 63.
2"Nemo de capitalibus placitis testimonio convicatur, Leg. Henr. xxxi, 5.
3P. and M. ii 599; Wigmore, iv. 2190.
6R. P. ii 259 (27 Ed. III. No. 30).
7Mid. cited Thayer, Preliminary Treatise on Evidence, 124-125.
to the jury what the consequences of a hostile verdict might be. To meet this difficulty the courts so stretched the conception of maintenance, that a witness who, without having any interest or cause to meddle in the litigation, volunteered, his testimony, rendered himself liable to be proceeded against for this offence.1

2.30. The method by which the Legislature effected this change, was suggested by the existing state of the law2 and as Wigmore has said3: "The lead as furnished by the existing qualification already noted that 'what a man does by compulsion of law cannot be called maintenance' .................. Let an order of the judge commanding such a person's appearance be obtainable as of course before the trial, and the risk of a charge of maintenance would be removed, and no man need fear to come forward as a witness."4

2.31. This was the course adopted in England. The Act of 1562-15635, which created the statutory offence of perjury6, enacted that witnesses served with process to attend and testify should be liable to penalty if they did not appear. And though the common law courts had no compulsory process, the weapon of subpoena, which had been used by the Council and the Chancery for upwards of a century, was ready to hand, and was adopted by them.

VI. COMPETENCE AND COMPPELLABILITY

2.32. When it became permissible to summon witnesses and to compel them to give evidence under the Act of 1562-63, two questions arose, namely, (a) competency, and (b) compellability of witnesses under which their testimony could be admitted.

2.33. As to the competency of witnesses, it would be noted that the canon law had developed a number of detailed rules7 as to the class of persons who were not competent to become witnesses. Some of these rules had been adopted by the common law in relation to jurors, when it became permissible to summon witnesses. As such, the rules as to competency at canon law filtered into common law in relation to witnesses also.

2.34. Of course, the rules were not adopted wholesale or without modifications, but were developed on native lines8. As a result of this process, rules developed as to (a) the natural, and (b) artificial, incapacity of witnesses. "Natural" incapacity was of witnesses who were insane or (subject to certain qualifications) infants. The rule as to disqualification of women: which prevailed in canon law was not, however, adopted.

2.35. Apart from natural incapacity, cases of artificial incapacity based on (i) religious grounds, (ii) moral grounds and on (iii) the ground of interest in litigation, arose. As to the religious ground, it was presumed that only a Christian could be a competent witness, until the matter was settled in Omichunda’s

---

1Holdsworth H. E. L. Vol. I 335; Vol. III 398; Thayer, 125-129.
2Holdsworth H. E. L. Vol. 9, page 185
3Wigmore, Vol. 4, 2961, 2190.
4Wigmore, iv. 2961, 2190.
5Elizabeth c. 9 (1562).
6Holdsworth H. E. L. Vol. 4, page 518.
7Elizabeth c. 9, section 12 (1562).
8Holdsworth, History of English Law, Vol. 9, page 185
9See also chapter 1, supra.
Case. As to moral grounds, the idea that the commission of such crimes rendered a man so infamous that his testimony should be excluded, had its roots in Roman law, which, in its turn, had borrowed the rule from canon law. The operation of this disqualification was complicated by the intricacies of the criminal law as then in operation—for example, the benefit of clergy (which operated as a pardon), and other complications. The rule was largely swept away in 1843. As to the disqualification of the party and other persons interested in litigation, the rule is stated by Coke in Slade's case where he said that experience rules that men's conscience "grows so large" that the respect of their private advantage rather induces men to perjury.

2.36. By the 17th century, this disability was established in civil cases, and, in criminal cases, it was established later in the latter half of the 17th century. Gradually, by the process of legislation in the 19th century, this disqualification was abolished in respect of:

(a) persons interested.
(b) parties in civil cases.
(c) parties in criminal cases.

2.37. At one time the unworn evidence of children of tender years was not admissible except in special circumstances. The rule no longer prevails.

2.38. When the statute of 1562-63 had established the general rule that all competent persons could be compelled to testify, the question soon arose whether there were any, and, if so, what exceptions to the general rule of compulsion. It is obvious that there is no necessary connection between the causes which render a witness incompetent, and the causes which may make it fair that he should be exempted from the general rule of compulsion. But in some cases these two very different sets of exceptions to a general rule seem to have exercised some influence upon one another. This influence is most marked in the case of husband and wife. The rule that the husband or wife cannot be compelled to testify against the other is stated by Coke in the same sentence as that in which he states their incompetence to testify on one another's behalf; and, it would seem, that the privilege is better attested in the earlier cases than the disability. It was justified—as the rule of incompetence was justified—on the ground that any other rule "might be a cause of implaceable discord and dissension between the husband and the wife". From that time onwards it was accepted as an absolute rule in civil cases, and, subject to one or two exceptions, as the general rule in criminal cases.

---

See Omichand v. Barker, (1744). 1 Atk. 21, 48, 50.
Statutes 6-7, Vict. Chap. 85.
Slade's case (1602) 4 Co. Rep. at folio 95a.
(a) R. v. Powell, (1755), L. Leach 110, and
(b) R. v. V. Brazier, (1779), 1 Leach 199.
Holdsworth, H. E. L. Vol. 9, p 197.
Co. Litt. 6b.
Wigmore, iv. 3034-3035, 2227.

3—131 LAD/ND/77
2.39. While it became possible to compel witnesses to give evidence, privilege in respect of certain particular kinds of questions survived. One such privilege will now be discussed.

VII. SELF-INCrimINATION

Privilege against self-incrimination.

2.40. In the early Middle Ages, a party accused had no privilege to refuse to answer incriminating questions.¹

The older modes of proof, such as compurgation and ordeal, forced the accused to a direct denial of the charge under oath; and, in the sixteenth century the Legislature had no hesitation in sanctioning forms of procedure which involved an examination of accused persons. The Act Pro Camera Stellata of 1487,² and many other Acts³ sanctioned such an examination; and Acts of 1553 and 1555 required accused persons to submit to examination by justices of the peace.⁴

2.41. The case of Lilburne is instructive⁵ in this context. The following is Lilburne’s account of the oath he was asked to take in the Star Chamber: —

"............... and then he bid me pull off my glove, and lay my hand upon the book. What to do, Sir said I. You must swear, said he. To what? “That you shall make true answer to all things that are asked you”. Must I so, Sir? but before I swear, I will know to what I must swear..................
........ And withal I perceived the oath to be an oath or inquiry; and for the lawfulness of which oath, I have no warrant, and upon these grounds I did and do still refuse the oath.”

After being punished for contempt, Lilburne stated that he was condemned “because I would not accuse myself.” It may be noted that Lilburne used the old theological argument against the oath—that it violates man’s right of self-preservation: “Withal, this Oath is against the very law of nature; for nature is always a preserver of itself, and not a destroyer.............”

2.42. Interrogation as a method of investigating violations of the law has a long history. Within the first few pages of the Old Testament, Adam is asked, “Hast thou eaten of the tree ............?” and Cain replies to the demand “Where is Abel thy brother?” with an evasive “Am I my brother’s keeper?”⁶

The nature of a typical response by those subject to interrogation does not seem to have changed much over time. Compare Adam’s “the woman whom thou gavest to be with me, she gave me of the tree, and I did eat”, with what Escobedo,⁷ the accused in the well-known case, said, “I didn’t shoot Mannel............ (Digerlando) did it.”

2.43. Right down to the middle of the seventeenth century, the examination of the accused is the central feature of the criminal procedure of the common law.⁸ Nor do we read anywhere that a witness could refuse to answer on the ground that his answer might incriminate him. The first instance of this was

---
¹Holdsworth, H. E. L. Vol. 9, page 198.
²3 Henry VII c. 1 (1487).
³13 Elizabeth c. 7 x. 5—bankrupts; 35 Elizabeth c. 2, II—Jesuits; 43 Elizabeth c. 6, 1—those who abused warrants.
⁴, 2 Phillip and Mary c. 13; 2, 3 Phillip and Mary c. 10; Vol. i 296; Vol. iv. 529.
⁶Genesis 3,11, 4:9-10.
⁸See infra, under “The Accused”.
in 1679. It is not till the Commonwealth period that this privilege to refuse to answer incriminating questions is accorded to accused persons. Existence of this privilege of the accused was established after the Restoration; and it was then extended to ordinary witnesses.

VIII. THE ACCUSED

2.44. The history of judicial questioning of the accused in England is of interest. By statutes enacted in the middle of the sixteenth century (1554-1555), justices of the peace, before committing to goal admitting to bail a person charged with a felony, were required to question him and to record their examination in writing. The Act passed in 1554 required the justice of the peace to conduct the examination only if the accused was applying for bail. Its purpose seems to have been to prevent collusion between criminals and justices, who were allegedly granting bail too easily and sometimes as the result of bribes.

2.45. The Act passed in 1555 extended the requirement for a judicial examination to those persons who were committed to jail. It was apparently passed because the examination of the accused proved to be a useful proceeding for all cases. It has been stated in one study—

"The office of Justice of the Peace goes back over six centuries—to the statute 1 Edw. 3, Stat. 2, c. 16, passed in the year 1327, which provided that 'for the better keeping and maintenance of the peace, the king will that in every country good men and lawful, which be in the country, shall be assigned to keep the peace'. At first the duties of a justice were, generally speaking, very much like those of a constable—to arrest suspects and to see that they were held in custody or to bail until they could take their trial. Various important administrative functions, however, devolved upon him, and these necessitated regular meetings with his colleagues. These meetings took place in session's four times a year,—the origin, no doubt, of the courts of quarter session as we know them today.

2.46. Gradually, the justices were empowered to try minor offences—such as, drunkenness, swearing and vagrancy—'out of sessions' Side by Side with this work they held preliminary examinations in relation to major offences. Their duty was to examine accused persons about their alleged offences in much the same way as is done in France and other countries by a juge d'instruction. They also examined the witnesses, but not in the presence of the accused, who were not permitted to know the case which was to be alleged against them on their trial. Such was the effect of a statute passed in 1555 in the reign of Philip and Mary—2 & 3 Ph. & M. C. 10 (an Act to take the examination of prisoners suspected of manslaughter or felony)."

These depositions were taken in private. Then, on August 14, 1848, was passed the Indictable Offences Act which, as the Lord Chief Justice of England,

---

King Charles Trial, (1649) 4 S. T. at p. 1101; Lilburne's Trial, (1649) 4 State Trials at pp. 1292-1293, 1341.
4(1554) 1 & 2 Phill. & M., c. 13, section 4; (1555) 2 & 3 Phill. & M., c. 10, section 2.
(a) Plucknett, A Concise History of the Common Law (1956) 432;
(b) Stephen, History of Criminal Law, Vol. 1, pages 237, 238.
*Emphasis supplied.
Lord Goddard, has, said 'effected a complete revolution in the position of justices of the peace in regard to indictable offences'.

2.47. The earlier statutes contemplated an inquisitorial examination of the accused rather than a judicial inquiry into the strength of the case of the prosecution against the accused. This examination was conducted without putting the accused upon oath. By these statutes the justices performed the functions of police, detective, prosecutor, and chief complaining witness at trial, as well as examining magistrate. Following the interrogation, the justice transmitted his record of the evidence to the trial judge, and the compulsory examination of the accused was read to the jury. Stephen noted: "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial."

This practice of questioning the accused, prior to trial fell into gradual disuse during the eighteenth century, and, by the beginning of the nineteenth, the practice had become limited to the recording of any voluntary statements that the accused wished to make. The accused was being advised that such statements would be used against him at the trial. By statute enacted in 1848, to which we have already referred the change from inquisitorial examination to preliminary inquiry was completed; the accused could be asked no questions; he was invited to make a statement if he wished and was cautioned that it would be taken down and might be given in evidence against him; the witnesses were examined in the accused's presence and could be cross-examined by him or his counsel.

2.48. In his work on "Historical Trials", in the Chapter on Socrates, Sir John Mcdonnell, Quain Professor of comparative law, University College, London, has picturesquely described what would have been the fate of socrates if he would have been in modern Europe. He points out that instead of secluded and uninterrupted colloquies with his philosophic friends until his painless end, Socrates would have been cut off from his disciples by the "Inquisition", and delivered over, shattered and crushed in body, to an excruciating death. According to Sir John Mcdonnell, "In Tudor or Stuart reigns he would have been brow-beaten by the law-officers prosecuting, scolded by the presiding judge as a pestilent nuisance in the State, and his last words might have been cut short or drowned in the roll of drums beneath the scaffold."

IX. NUMBER OF WITNESSES

2.49. The rule that at least two witnesses were needed for the proof of certain facts is found in the classical Roman Law; but it gained its great authority in mediaeval Europe from the fact that it became a rule of the canon law, justified, not only by the authority of the Old and New Testaments.

---

(a) Holdsworth, H. E. L. (1949), Vol. 4, p. 529;
(c) Stephen, H. C. L., Vol. 1, page 441.

For description of the justices' functions see Stephen, H. C. L., Vol. 1, pages 221, 225, 228.

See R. v. Green, (1832) 172 E. R. 990, for a description of the appropriate caution.

See supra.


Dig. 22.3.12; Code 4.28, 4; 4.20.9.

Decret. Greg. 2.20c; 23; Decret. pars. ii causa iv qu. ii and iii c. iv, 26; both passages cited by Wigmore, iii 2096, note 5.

Deut. xvii 6, and xix 12.

Mat. xvi 16; John viii 17.
It is not surprising that, under these circumstances, the maxim *testis unus
*testis nulius should be regarded almost as a provision of the Divine law. Its posi-
tion is well illustrated by the objection to the system of trial by jury, which For-
tescue, in his *De Laudibus*, puts into the mouth of the Prince. "Though", says
the Prince,1 "we be greatly delighted in the form which the laws of England use
in sifting out the truth in matters of contention, yet whether the same law be
contrary to Holy Scripture or not, that is to us somewhat doubtful. For our Lord
saith to the Pharisees in the eighth chapter of Saint John's Gospel, 'In your law
it is written that the testimony of two men is true'; and the Lord, confirming the
same, saith, 'I am one that bear witness of myself, and the Father that sent me
beareth witness of me.' Now, the Pharisees were Jews, so that it was all one
to say: It is written in your law, and it is written in Moses law, which God
gave to the children of Israel by Moses. Wherefore to gainsay this law is to deny
God's law: whereby it followeth, that if the law of England swerve from this
law, it swerveth also from God's law, which in no wise may be contradicted.
It is written also in the eighteenth chapter of Saint Matthew's Gospel............'But
if they brother hear thee not, then take ye with thee one or two, that, in the
mouth of two or three witnesses, every matter may be established'. If the Lord
have appointed every matter to be established in the mouth of two or three wit-
nesses, then it is in vain for to seek for the verdict of many men in matters of
doubt. For no man is able to lay any other or better foundation than the Lord
hath laid."2

2.50. The idea that the evidence of one witness is not enough to prove the
fact in issue emerges3 during the sixteenth and seventeenth centuries, sometimes
in the provisions of statutes, and sometimes in argument and judicial dicta.
Various statutes of the sixteenth and seventeenth centuries, which required the
evidence of two witnesses for a conviction of the offences created by them, show
that the Legislature was convinced4 of the danger of allowing a conviction on the
unsupported testimony of one person.

But, by 1551, the common law (vide *Reniger v. Fogoassa*), had come to the
conclusion that it would reject any rule requiring more than one witness as a
general rule of the law of evidence. As Professor Wigmore5 points out,6 the deci-
sion in *Reniger v. Fogoassa* was in favour of the defendant, though he only
produced one witness. Coke's speech in the proceedings on Becon's impeachment
shows that he rejected it; and, even in the Star Chamber the rule requiring more
than one witness was not invariable. After the Restoration, the rule that one
witness is sufficient is stated as a positive rule of law.

2.51. The only two exceptions recognised, other than exceptions introduced
by express statutes, were in the case of *high treason* and in the case of *perjury*.

The requirement of two witnesses in case of *high treason* rested upon a
strained construction of the combined effects of statutes of Edward VI's and Mary's

---

1De *Laudibus* c. 31.
3Statutory references omitted.
4Reinder v. Fogoassa (1551) Plowden 1.
5Wigmore, iii 2702, note 22.
pronounce their verdict upon one single testimony; which thing the civil law admits not
of."
8For treason, the rule is now different in England.
reign, and was not wholly freed from doubt till it was put upon a statutory basis by the statute of 1696. The requirement of two witnesses in the case of perjury is due to two main causes. In the first place, the offence was developed in the court of Star Chamber, where the tendency to the adoption of the civil and canon law rule had always been stronger. In the second place, the requirement of more than one oath against another oath is a particularly obvious measure of justice, and it was a requirement which in the shape of the attainder procedure against a perjured jury had a native tradition behind it.

2Wigmore, Vol. iii, 2720-2722, 2040.
3He that travaileth to convince witnesses of perjury must of necessity bring forth many more than they were, so that the testimony of two or three men shall not ever be judged true,” De Leubidus c. 32.
CHAPTER 3

SCOPE AND OBJECT OF RULES OF EVIDENCE AND THEIR RELATION TO JUDICIAL INVESTIGATION OF FACTS

3.1. We propose to discuss, in this Chapter, the scope and object of rules of evidence, and their relationship to the judicial investigation of facts.

As already stated, the law of evidence is a law of procedure. It deals with the means or the process of the law, as distinct from the substantive law, which deals with rights and liabilities. We have already referred to some of the American codes, which define evidence as the means sanctioned by law of ascertaining in judicial proceeding the truth respecting a question of fact. The nature of the means so prescribed by the law bears examination.

3.2. It is to be noted that the law of evidence is distinct from the logical processes of reasoning; but it based upon, and assumes, the existence of these processes. Because of this assumption, as Holdsworth has pointed out, three consequences follow: In the first place, the rules of the law of evidence sometimes take the negative form of exceptions to these assumed processes of reasoning by laying down that this or that fact, which, on the general principles of reasoning, has an evidential value shall not be admissible in a court of law. Secondly, the court takes judicial notice of certain obvious facts. In this context, we are concerned with defining the matters which are so notorious that the court can notice and act upon them without further proof and the like. Thirdly, the existence of certain facts creates a presumption as to the existence of other facts; but, as cases are decided and the law gets more elaborate, a large number of these presumptions arise in connection with different branches of the law, sometimes conclusive, sometimes not conclusive, but in both cases giving rise to an inference as to the facts in issue.

3.3. Coming to presumptions we may state that in essence, presumptions are rather rules of substantive law. However, because they are applied in the conduct of litigation, and because of the form in which these presumptions are expressed, they have been supposed to be part of the law of evidence. Though belonging primarily to those particular branches of the substantive law with which they are concerned, these presumptions are connected with that part of the adjective law which is concerned with evidence, because they direct the court to deduce particular inferences from particular facts till the contrary is proved. Ever irrebuttable presumptions of law, though they belong more properly to the substantive law, are rules of substantive law which borrow the terminology and adopt the disguise of that branch of law which deals with evidence. There is much in common between an irrebuttable presumption of law and an estoppel.

---

Footnotes:
1 Chapter 1, supra.
2 Gardner v. Lucas, (1878) 3 A. C. 582, 603 (H. L.).
3 Chapter 1, supra.
6 Holdsworth, History of English Law, Vol. 9, p. 139.
7 Holdsworth, History of English Law, Vol. 129, 139.
8 Thayer, Law Magazine, vi. 348 (1831), printed as App. A to Thayer, Evidence (pp. 539, 540), cited by Holdsworth, H. E. L. Vol. 9, p. 128.

29
In Thayer's Essay on Presumption of Law and Presumptive Evidence, it is said that, 'in some cases of conclusive legal presumption a party is said to be estopped, and to have created an estoppel against himself. An estoppel is when a man has done some act which affords a conclusive presumption against himself in respect of the matter at issue'; so too Stephen in his Digest of the Law of Evidence, devotes one Chapter (Chapter 14) to 'Presumptions and Estoppels'.

3.4. In relationship to the rules of the logical process of reasoning, it can be said that sometimes the law of evidence adopts them, sometimes it modifies them and sometimes it supplements them. The doctrine of 'relevance' represents the area common to both. However, the rules of evidence with which the law has been concerned all through its history, have never been solely dependent upon the doctrine of relevancy. They are concerned primarily with the selection of the material on which these processes operate. As Thayer observed, 'In giving evidence, we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element thus added is what we call the evidence.' In this sense, the term 'evidence' is a term of "forensic procedure", and "imports something put forward in a court of justice."

3.5. To spell out this function of the law of evidence, it may be stated that rules as to evidence and proof are intended to attain one or more of the following objects, with a view to the ascertainment of truth, namely,

1. to limit the discretion of judges in declaring facts as proved or disproved,
2. to provide for speedy decisions and, at the same time, to guard the judges from error,
3. to preclude needless vexation and expense in coming to decisions, and
4. to preclude injury to the State or the public.

3.6. The term "evidence" is not a term peculiar to the law. We employ it in every-day life. "Evidence is that which tends to render evident or to generate proof of a fact. The fact which is sought to be proved may be called the principal fact, and the fact which tends to establish it may be called the evidentiary fact." Judicial evidence is a species of evidence.

---

1Thayer, Law Magazine, vi, 348 (1831), printed as App. A to Thayer, Evidence (pp. 539, 540), cited by Holdsworth, H. E. L. Vol. 9, p. 128.
4Best on Evidence (7th Edition), paragraphs 38, 41, 47 and 49.
5E.g. provisions as to "relevant facts".
6E.g. rule against hearsay.
7E.g. rule as to judicial notice.
8E.g. provisions as to affairs of the state etc.
"Judicial" evidence may be used as indicating the evidence received by courts of justice in proof or disproof of facts, the existence of which comes in question before them. In general, it is evidence modified by rule of positive law. Some of these rules are of an exclusionary nature and reject, as legal evidence, facts which are in themselves entitled to consideration. Others are of an "investigative" character, inasmuch as they invest natural evidence with an artificial weight, and may even attribute the property of evidence to that which, speaking in the abstract, has no probative force at all.

3.7. Doubtful and disputed facts come up for determination in judicial proceedings, what then, is the need for limiting the sphere of judicial evidence to a narrower one than that permitted by logic? The need for imposing some limitations on the process of such determination arises for several reasons. In the first place, while the relations of cause and effect are innumerable, the power of a tribunal in relation to the determination of questions of fact cannot remain unrestrained, because there must be some stability and uniformity in the principles followed in the determination of questions of fact. This restraint is illustrated by the rules which prevent judges from deciding facts on their own personal knowledge.

More concretely, this aspect is also demonstrated by the requirement that there must be some connection between the principal fact and the evidentiary fact.

Judicial evidence is evidence connected with any matter of fact, the effect, tendency or design of which (connection) is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. The law seeks to define the nature of this connection.

3.8. Judicial fact-finding cannot be perfect. There may be weaknesses in the methods employed for finding facts, or in the witnesses, or in the quality of the judge. There are inherent difficulties in any restructuring of the past by oral narrative or even by a record. The non-congruence of facts as found by the Court, with the actual facts, cannot sometimes be avoided. Even the most perfect rules of evidence, and the most truthful witnesses before the most competent judge, can reconstruct the past facts only in an approximate manner.

Again, the more complex the facts, the more difficult will be even the approximate ascertainment of truth.

As has been pointed out by Best on evidence, if things are traced up to their ultimate source, the remote but chief cause of the appearance of a criminal at the bar might be found in his parents, his education, and the examples of others, but the tribunal must look at the proximate cause,—his own act.

3.9. Secondly, a tribunal must give a decision, and must give that speedily. "Litigation should not be interminable while litigants are merely mortal."

This aspect has been well explained by Bonnier, a foreign jurist, in French, of which the following is a translation: "The determining to what extent a certain known element renders probable the existence of such or such an unknown cause, governed, as it necessarily is, by the light of reason, in general...

---

1 Best, Principles of Evidence (1922), p. 22, paragraph 33.
2 Cf. section 165, first proviso.
4 Best, Principles of Evidence (1922), page 26.
5 Bonnier, Traité des Preuves, 710, 2nd Ed. cited in Best, Principles of Evidence (1922), page 29.
depends wholly on the discrimination of the judge. But, in the most important cases, the law, desirous of insuring the stability of certain positions, and of cutting short certain controversies, has established PREMPTIONS to which the judge is obliged to conform."

In an English case, an eminent judge observed: "The laws of evidence as to what is receivable or not are founded on a compound consideration of what, abstract considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into; and inquiries carried on from month to month as to the truth of everything connected with it. I do not say how that would be, but such a course is found to be impossible at present."

3.10. Thus, while facts which are in dispute in courts of justice are enquired into and determined in the same way as doubtful or disputed facts are enquired into and determined by making in general, positive law interposes with artificial rules to secure impartiality and accuracy of decision or to exclude collateral mischief likely to result from the investigation.

3.11. So much as regards the function of legal rules of evidence. Some attention may now be paid to the term "evidence". The word "evidence" is derived from the Latin "evidentia", and signifies the state of being evident, that is, plain, apparent or notorious. But, as has been pointed out, it is applied to that which tends to render evident or to generate proof. In R. v. Earl of Banbury, Hold C.J. observed: "All causes... consist more of matters of fact than of law, and it is beneath the dignity of their Lordship to be troubled with matters of fact."

The history of this reluctance of the appellate courts has been dealt with exhaustively by Dixon C.J. in an Australian case. It is for these reasons that facts as are taken for purposes of a particular judicial proceeding can, at best, only have an approximate relation to the actual facts.

3.12. To supplement these deficiencies, where they are regarded as causing serious injuries, the court has a power to call witnesses of its own, and in matrimonial causes, it has a special duty of satisfying itself about the truth of the allegations on which relief is claimed.

The judgment in a case must be based upon facts which are relevant and duly proved in the proceedings in that particular case. It is so enacted in the first proviso to section 165 of the Evidence Act.

3.13. It is in the light of the above aspects, that a reform of the law on the subject will have to be thought of. It may not be difficult to enunciate theoretically the broad principles on which a well-designed and well-constructed code can be built. Two leading principles were enunciated by Thayer, more

---

1Attorney-General v. Hitchcock. (1849) 11 Jurist, 478, 482; S. C. 1 Exch. 91, 105; 74 R. R. 592 (Rolfe B.);
2Best, Principles of the Law of Evidence (1922), page 2, paragraph 2.
3Best, Principles of the Law of Evidence (1922), page 6, paragraph 11.
that about eighty years ago, "(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."

3.14. As often happens, formulation of broad principles does not present much difficulty; what presents difficulty, however, is the prescribing of rules to implement the said broad principles. We have carefully borne in mind this aspect of the problem in examining the several provisions of the Act, and our approach in the present inquiry will, therefore, be to recommend changes in the existing provisions of the Act only where we are satisfied that the working of the Act has shown that some of its provisions do not adequately meet the complex requirements of modern litigation.
CHAPTER 4

SCHEME OF THE ACT

4.1. The object of legal proceedings is the determination of disputed rights and liabilities on facts.¹ Those facts may be themselves in issue,² or they may be facts relevant to the facts in issue.³

4.2. So far as facts in issue are concerned, they are facts from which, either by themselves or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. They constitute such a state of things—physical or psychological—that the existence of a disputed right or liability would be a legal inference from them. Facts which are not directly in issue may, however, affect the probability of the existence of the fact in issue, and thus be used as foundations of inferences respecting facts in issue. These facts are described in the Act as "relevant facts". The word "relevant" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.⁴ In general, under the Act, evidence can be given only as regards facts in issue and "such other facts as are hereinafter declared to be relevant".⁵ This emphasis on "facts in issue or relevant facts", is intended to exclude the reception of other facts which might tend to distract the attention of the tribunal and to waste its time. The law of evidence is framed with a view to restraining the trial within practical limits.⁶

4.3. Having laid down these basic principles for confining the evidence to facts in issue or relevant facts, the Act proceeds to indicate what facts are to be regarded as relevant. Broadly speaking, these facts are—

(a) connected with the "issue" ;
(b) admissions ;
(c) statements by persons who cannot be called as witnesses ;
(d) statements under special circumstances ;⁷
(e) judgments in other cases ;⁸
(f) opinions ;⁹
(g) character.¹⁰

¹Section 3.
²Section 3.
³Section 3.
⁴Stephan, Digest of Evidence, Article 1.
⁵Section 5.
⁷Sections 5 to 16.
⁸Sections 17 to 31.
⁹Sections 32 and 33.
¹⁰Sections 34 to 39.
¹¹Sections 40 to 44.
¹²Sections 45 to 51.
¹³Sections 52 to 55.
4.4. Stephen’s work on the Law of Evidence was originally undertaken in connection with the drafting of the Indian Evidence Act. Sections 6 to 11 of the Act contain the most important provisions as to relevancy. We need not quote these sections; but the emphasis on “highly probable” found in section 11, is noteworthy. Section 11 reads—

“Facts not otherwise relevant are relevant:

(1) if they are inconsistent with any fact in issue or relevant fact;
(2) if, by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact highly probable or improbable”.

4.5. By 1876, when the first edition of his Digest of the Law of Evidence was published, Stephen had amended the definition of relevancy to read as follows—

“Facts, whether in issue or not, are relevant to each other when one is,
or probably may be, or probably may have been—

The cause of the others;
The effect of the other;
An effect of the same cause;
A cause of the same effect;
Or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;
Or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other:

Provided that such facts do not fall within the exclusive rule contained in Chapters 3, 4, 5, 6; or that they do fall within the exceptions to those rules contained in those Chapters”.

4.6. In the Introduction to the first edition of his Digest, Stephen stated the meaning of “relevancy” in the following terms:

“A fact is relevant to another fact when the existence of the one can be shown to be the cause, or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, whether alone or together, with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events”.

In later editions of the Digest, however, Stephen adopted a much shorter definition of the word “relevant”, namely:

“The word ‘relevant’ means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other”.

4.7. It will be noted that at first—vide section 11, Indian Evidence Act.—Stephen was disposed to emphasise cases in which the existence of one fact was rendered ‘highly’ probable or improbable by reason of the existence of

\(^*\)See supra.
another. But, in his later views that he expressed on the matter—vide the later editions of the Digest—he was content to refer merely to probability.¹

Of course, 'relevancy' and 'admissibility' do not always coincide: facts logically relevant may be rejected for reasons of policy.²

4.8. It is also to be noted that, although Stephen (in later editions of the Digest) omitted the word 'highly' from his definition of 'relevant', so as to apply the term 'relevance' to a connection of mere probability as opposed to high probability, Article 2 of his Digest contains a proviso—"that the Judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him to be too remote to be material under all the circumstances of the case."

4.9. Of the various relevant facts under the Act, the most important are the following:—

(1) Facts which form part of the same transaction as a fact in issue (s. 6).

(2) Facts which are the occasion, cause or effect of relevant facts or facts in issue (s. 7).

(3) Facts relating to motive, preparation or conduct with reference to a fact in issue or relevant fact (s. 8).

(4) Explanatory or introductory facts (s. 9).

(5) Statements and actions referring to common intention (s. 10).

(6) Facts inconsistent with, or affecting the probability of, facts in issue or relevant facts (s. 11).

(7) Facts affecting the quantum of damages (s. 12).

(8) Facts affecting the existence of any right or custom in question (s. 13).

(9) Facts showing any state of mind or feeling when the existence of such state of mind or feeling is in issue or is relevant (s. 14).

(10) Facts showing a system (s. 15).

(11) Facts showing a course of business (s. 16).

4.10. Having laid down the facts which can be proved, the Act proceeds to deal with the materials by which they can be proved.

4.11. The topic of proof of facts in issue and relevant facts is dealt with in sections 56 to 100 of the Act. Certain facts are judicially noticed and need not, therefore, be proved.¹ Facts which require to be proved may be proved by oral evidence,² or they may be proved by documentary evidence.³

4.12. Oral evidence must be direct.⁴ This is the general rule, but exceptions thereto are found in a few sections⁵

---

¹See supra.
²This aspect will be discussed in detail under section 3, infra.
³Chapter 3, sections 56 to 58.
⁴Chapter 4, sections 59-60.
⁵Chapter 5, sections 61-90.
⁶Section 60.
⁷E.g., sections 21-31 and 32-33.
The inter-relationship of oral and documentary evidence is dealt with in ten sections.\(^1\)

Documentary evidence, in its turn, may be—
(a) primary or secondary,\(^2\)
(b) attested or unattested,\(^3\)
(c) public or private,\(^4\)
(d) sometimes presumed to be genuine,\(^5\)
(e) exclusive or not exclusive.\(^6\)

4.13. The Act then deals with the party who has to produce proof. The proof may, and must, be produced by the parties on whom the burden of proof lies,\(^7\) but, in certain cases, the party may be stopped from doing so.\(^8\)

If the proof is given through witnesses,\(^9\) they must testify in court in accordance with the rules as to examination, cross-examination and re-examination.\(^10\)

These are the detailed rules, but they have to be administered in a liberal spirit. Hence, the effect of mistakes in the reception and rejection of evidence on the result of the trial is dealt with by a specific provision\(^11\) of the Act.

4.14. The Act contains 167 sections in all. Their source is heterogeneous. Some of the sections are taken from the earlier Indian legislation—the most important being the Evidence Act, 1855 (2 of 1855)\(^12\). Some of the sections,\(^13\) as was pointed by West, J., in a Bombay case,\(^14\) are suggested by Taylor’s Book on Evidence.

Some of the sections are taken from the Code of Criminal Procedure, 1861,\(^15\) which was the Code then in force.

4.15. The Evidence Act does not contain all the rules of evidence which are recognised in the Indian legal system. In the first place, the two Codes of Procedure—Civil and Criminal—contain rules on particular matters which pertain to evidence. In the second place, there are Central Acts—such as the Bankers’ Books Evidence Act and the Commercial Documents Evidence Act—which contain a few rules of evidence. In the third place, other Central Acts (special laws) or local laws, while dealing with substantive law, incidentally provide rules of evidence in the nature of presumptions or otherwise, and these are now a familiar feature of modern legislative measures. Therefore, while the Evidence Act repealed various rules of evidence, it was not intended to affect special laws. This is clear from section 2 of the Act which stood thus\(^16\):—

\(^1\)Sections 91-100.
\(^2\)Sections 61 to 66.
\(^3\)Sections 67 to 73.
\(^4\)Sections 74 to 78.
\(^5\)Sections 79 to 90.
\(^6\)Sections 91-100.
\(^7\)Chapter 7.
\(^8\)Chapter 8.
\(^9\)Chapter 9.
\(^10\)Chapter 10.
\(^11\)Section 167.
\(^12\)For example, sections 9 and 13, sections 18 and 37, and section 57, clauses 1, 2, 7, 13, sections 81, 83, 84, 118, 120, 123, 124, 126, 129, 131 and 162.
\(^13\)I.G. Section 92.
\(^14\)J.R., 4 Bombay 581 (West J.).
\(^15\)Sections 25 to 27, corresponding to sections 148 to 150 of the Code of Criminal Procedure, 1861.
\(^16\)Section 2 has since been repealed.
"2. Repeal of enactments.—On and from that day\(^1\), the following laws shall be repealed:

(1) all rules of evidence not contained in any statute, Act or Regulation in force in any part of British India;

(2) all such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861 (24 & 25 Vict. c. 67), in so far as they relate to any matter herein provided for; and

(3) the enactments mentioned in the Schedule hereto to the extent specified in the third column of the said Schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."

4.16. Before closing this Chapter, we may state that the subject of oath is dealt with by a separate Act—the Oaths Act\(^2\). It is allied to evidence. The Constitution,\(^3\) in the entries dealing with the distribution of legislative powers, (in entry 12, Concurrent List), mentions evidence and oaths together.

\(^1\)The date of commencement of the Act.
\(^2\)The Oaths Act, 1963.
\(^3\)Constitution, Seventh Schedule, Concurrent List, entry 12, "Evidence and oath".
CHAPTER 5

PRELIMINARY PROVISIONS

5.1. Section 1 of the Act deals with the short title, commencement, extent and application of the Act. Insofar as the section deals with the application of the Act, it requires some examination. This part of the section really deals with two aspects, namely, application of the Act as regards authorities, and application of the Act as regards proceedings. As regards the authorities, the section provides that the Act applies to all judicial proceedings in or before any court including courts martial, other than courts martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act, 1934 or the Air Forces Act, but not to any proceedings before an arbitrator. As regards proceedings, the section provides that the Act applies to judicial proceedings only, and not to affidavits.

5.2. As originally enacted, the section\(^1\) was much simpler, and read:

"1. This Act may be called the Indian Evidence Act, 1872:

It extends to the whole of British India, and applies to all judicial proceedings in or before any court, including courts martial, but not to affidavits presented to any court or officer, nor to proceedings before an arbitrator;

and it shall come into force on the 1st day of September, 1872."

There was no express exclusion, by the text of the original section or European courts-martial, but the Army Act, 1881 (a British statute)\(^2\) excluded the application of the Indian Evidence Act in relation to courts-martial convened under that Act, and made the English law of evidence applicable to those courts.

5.3. Let us first examine the question of courts martial. The appellation "marshal" is derived from the Court of the Constable and the Marshal which, in England, administered regulations and articles issued by the King for the governance of the Army until the passing of the Mutiny Act in 1688.\(^3\)

In India, section 73 of the Government of India Act, 1833 empowered the Governor-General-in-Council to legislate for what was then referred to as native army — and laws so made were given general application to all native officers and soldiers wherever serving. Articles made in exercise of this power (first made in 1845) were amended from time to time; and when the Indian Evidence Act was passed, the articles were to be found in an Act of 1869. It was in 1911 that the Indian Army Act was passed.

5.4. Apparently, the specific mention in section 1 of courts martial was considered necessary because these courts do not belong to the ordinary judicial system. The primary objects of military law, — which these courts administer — are disciplinary and administrative.

5.5. In 1919, the textual amendment of section 1, for excluding Courts-Martial convened under the Army Act, was made. The amendment excluding courts martial convened under the Naval Discipline Act and the Indian Navy

\(^1\)See infra.
\(^2\)See infra.
(Discipline) Act was made in 1934. The amendment excluding courts martial convened under the Air Force Act was made in 1927. These enactments should not be confused with post-Independence legislation relating to the three wings of the defence forces of the Union.

5.6. What was the need for this exception? The answer seems to be this. In general, the law of evidence is the lex fori. But, by excluding the applicability of the Act to Courts which may be described conveniently as European Courts Martial, Section 1 constitutes an exception to this rule. Sections 127 and 128 of the Army Act, 1881 (a British Statute) provided that the rules of evidence to be adopted in a proceeding before European Courts Martial shall be the same as those which are followed in civil courts in England. That is why these courts have been excluded.

5.7. The Army Act, the Naval Discipline Act and the Air Force Act referred to in the present section are statutes of the British Parliament. The exception in regard to courts constituted under these statutes was made for the purpose of European courts martial, on the basis that these courts were governed by the English law of Evidence, as already stated.

5.8. It should also be noted that the Army Act, 1881 (44 and 45 Vic. Ch. 58), has been actually repealed, in its application to India, by the British Statutes (Application to India) Repealing Act, 1960 (57 of 1960). As regards the Naval Discipline Act, (29 and 30 Vict. c. 109), it may be stated that the Indian Navy (Discipline) Act, 1934 (34 of 1934), when it was adopted by the Adaptation of Laws Order, 1950, ceased to refer to the (English) Naval Discipline Acts, vide adaptations made in the preamble, and long title, the addition of new sections and the omission of section 102 which referred to the Naval Discipline Act. The current Indian legislation regulating the naval forces is the Navy Act, 1957, which has repealed the Act of 1934.

The Air Force Act, i.e., the Air Force (Constitution) Act, 1917 (7 and 8 Geo. V. Ch. 51), has also been repealed, in its application to India, by the British Statutes etc. Repeal Act, 1960, just now referred to. In fact, in the changed political context, these Acts had no relevance, and even their repeal was only a legal formality, because, even without such repeal, these Acts had lost their utility for India. Therefore, the references to these Acts should be deleted from section 1, as obsolete.

5.9. So far as Indian courts-martial are concerned, the Evidence Act applies to them, first, because section 1 so provides and, secondly, because the relevant provisions of the Indian statutes applicable to the Defence Forces expressly provide that the Indian Evidence Act shall, subject to the provisions of those Acts, apply to all proceedings before a court-martial.

5.10. The Evidence Act applies to ‘judicial proceedings’ before all ‘courts’. Points arising out of these two expressions will be dealt with later, when considering the definitions in the Act.

5.11. The Act does not apply to affidavits; but it may be noted that the Code of Civil Procedure contains rules as to the facts which can be mentioned in an affidavit. The Code allows a person to mention, in an affidavit, facts on

---

1See sections 127, 128, Army Act, 1881 (Eng.) read with sections 163-165.
2Para. 5.6 supra.
4See discussion under section 3—Court, and Section 3—Judicial proceeding', infra.
information and belief. In interlocutory applications, the Court acts on evidence given on information and belief, because no other evidence is obtainable at so short a notice.

5.12. As regards arbitrators, they are not, in matters of procedure, bound by technical rules of court, and they are also unfettered by technical rules of evidence. The expression 'court', as defined in the Act, also excludes arbitrators.

5.13. In the light of the above discussion, we recommend that section 1 should be amended so as to delete that portion of the section which excludes the courts martial mentioned above, i.e. those constituted under British Statutes, now repealed.

(a) *Howard v. Wilson*, (1878) 1 L.R. 4 Cal. 231.
(b) *Supu v. Govinda*, (1887) 1 L.R. 11 Mad. 85.
Section 3.
Para. 5.8 *supra.*
CHAPTER 6
DEFINITIONS

I. INTRODUCTORY

6.1. We shall now consider the definitions contained\(^1\) in sections 3 and 4. Some of the definitions given in the Act require careful scrutiny, having regard to the obscurity felt with respect to their scope and meaning. Of particular interest in this connection is the definition of "evidence". Another definition which is of importance is that of "relevant fact". The question to be considered with reference to the latter definition is more basic, and will be discussed in detail later.\(^2\) The question does not pertain to the content and form of the particular definition, but concerns the scheme of the entire Act in regard to its terminology, i.e., concept of "relevant facts" as distinguished from "admissible evidence".

6.2. The definitions given in sections 3 and 4 are of vital importance. Many of them are fundamental for understanding the scheme of the Act and application of the Act. For example, the definition of "court" is of importance, because the Act applies only to "courts" under section 1. Similarly, the definitions of "facts in issue" and "relevant facts" are important, because, in general, evidence can be given only of these facts.\(^3\) Again, the definition of "evidence" indirectly lays down the scope and meaning of numerous sections in the Act which employ that expression.

II. COURT—THE GENERAL CONCEPT

6.3. The definition of 'court' in section 3 provides that it includes all Judges and Magistrates and all persons except arbitrators legally authorised to take evidence. The words 'Judge' and the word "Magistrate" have not been defined in the Act, but assistance in this regard can be obtained from the definitions of these expressions as contained in:

(a) Section 2 of the Code of Civil Procedure, 1908, section 19 of the Indian Penal Code, section 3(17) of the General Clauses Act, 1897, and

(b) the Code of Criminal Procedure, 1973 and section 3(32) of the General Clauses Act, 1897 respectively.

6.4. It is to be noticed that 'court' has been defined with reference to "evidence" and the expression "evidence" has been defined with reference to "court". Strictly speaking, this is not satisfactory. Since we are recommending a redraft of the definition, this difficulty will now recur, and we need not concern ourselves with this defect in the present law.

6.5. The definition is inclusive and courts have been called upon to lay down some test or the other. Several tests—statutory and others—have been formulated for defining the expression "court". It would be convenient to refer...
to a few of them, before considering the question whether the definition in the Act should be revised.

6.6. The principal tests found in the statutory provisions, or in the important judicial decisions, for determining whether a body is to be regarded as a court, may be enumerated as follows:

(i) Test of exercise of judicial functions under authority derived either immediately or mediatly from the sovereign;

(ii) Test of definitive judgment;

(iii) Test of legal power to take evidence;

(iv) Test of judicial power, or of being a part of the judiciary;

(v) Test of exercise of a power otherwise exercisable by Civil and Revenue Courts;

III. SOVEREIGNTY

6.7. As regards the first criterion (exercise of judicial functions under authority derived from the sovereign), it may be mentioned that the administration of justice is a primary function of sovereignty. In England, it is accepted that the administration is one of the prerogatives of the Crown, though it is a prerogative which has long been exercisable only through duly appointed courts and judges. In earlier times, the King himself might sit in court, and he was presumed to be present in the King's Bench, though the judgment was given by the court. Henry IV, and even Edward IV, occasionally sat in court; by the end of the fourteenth century, however, the opinion prevailed that though the King might be present with his Judges, he could not himself give judgment.

Earlier, Henry II rendered justice in his own presence. But the court which was held before him had no regular staff, no regular records, no regular procedure, and when he left the country, the court went overseas with him. The Kings of England had not been Englishmen since 1066, and would not be Englishmen for many generations to come. They were Frenchmen, French in language, French in culture, French in interest, and though naturally they prized their power in England, they left their hearts in France. Thus, Henry II spent 13 years in England and 21 years in Normandy; Richard I spent only eight months of his ten years as King in England. The novel problem of how the king was to govern England and Normandy, when absent from one or the other, was solved by creating a Justiciar in both the kingdoms and the duchy, who held the most exalted office that man could conceive of as existing under the king. So this court began to sit in bane at Westminster; it became a sedentary court, and the single central court of law, through the accident of the king's absences. King John had, however, after the deprivation of Normandy, to stay at home, and he reversed the process, keeping the court coram rege with him and allowing the 'bench' at Westminster to wither away.

1See discussion as to exercise of functions under sovereignty, infra.
2See discussion as to definitive judgment (Penal Code), infra.
3Present definition of 'Court', in the Evidence Act.
4See discussion as to section 195, Code of Criminal Procedure, infra.
5See the Contempt of Courts Act.
8See case of Prohibitions, infra.
9Professor G. O. Sayles, History of Court of King's Bench, Address to Selden Society, 19 March 1959 (1959) 227 Law Times, 229.
6.8. Chief Justice Coke relates that he "greatly offended" James I, when that monarch wished to revive the earlier practice, by saying: "The King in his own person cannot adjudge any case, cause............. but this ought to be determined and adjudged in some court of Justice, according to the law and custom of England......... Thus it was that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it."

6.9. According to Halsbury, "Originally, the term "court" meant, among other meanings, the Sovereign's palace; it has acquired the meaning of the place where justice is administered and, further, has come to mean the persons who exercise judicial functions under authority derived either immediately or mediately from the Sovereign." All "Tribunals, however, are not courts, in the sense in which the term is here employed, namely to denote such tribunals as exercise jurisdiction over persons by reason of the sanction of the law, and not merely by reason of voluntary submission to their jurisdiction. Thus, arbitrators, committees of clubs, and the like, although they may be tribunals exercising judicial functions, are not 'courts' in this sense of that term."

6.10. Utilising one of the points made in the discussion in Halsbury, we may say that since all tribunals are not courts, it becomes desirable to indicate, in each statute, or by case law, how far a particular tribunal is or is not to be regarded as 'court' for the purposes of the particular statute.

IV. DEFINITIVE JUDGMENT

6.11. The second test is the test of definitive judgment. In the Indian Penal Code, section 20, "Court of Justice" is defined as meaning a Judge or body of Judges empowered by law to act judicially, when such Judge or body of Judges is acting judicially. In the same Code, section 19, the expression "Judge" is defined in terms which require a power to give a definitive judgment.

For the purposes of that Code, the definition has, on the whole, worked well.

V. LEGAL POWER TO TAKE EVIDENCE

6.12. The next statutory test is to be found in the Evidence Act, where the definition of "court" includes all judges and magistrates and all persons except arbitrators legally authorised to take evidence. The emphasis in the Penal Code is on the power to give definitive judgments — that being an essential ingredient of the definition of "judge" in the Code. In the Evidence Act, on the other hand, the emphasis is on the authority to take "evidence".

VI. JUDICIAL POWER OR BEING PART OF THE JUDICIARY

6.13. Section 195 of the Code of Criminal Procedure (so far as is material), enacts that certain offences against public justice, which are alleged to have been committed in or in relation to any proceeding in any "court", cannot be taken cognizance of except on the complaint in writing of the court or some other court to which it is subordinate. But Section 195(2) in the Code of 1898

---

3Emphasis supplied.
4Para. 6.9, supra.
5Sections 19-20, I.P.C.
6Sections 19-20, I.P.C. (supra).
enacted that the term "court", for the purposes of that section, includes a civil revenue or criminal court, but does not include a Registrar or Sub-Registrar under the Registration Act. Because of this wording of the old Code, controversy used to arise whether a particular tribunal or officer was or was not a court within the meaning of section 195. Since the expression "court" is a generic expression, this controversy was unavoidable, as also because of the inclusive nature of the definition in the old Code. Some of the High Courts adopted the test of performance of quasi-judicial functions and duty to act fairly and impartially. Some of them went further, and required power to regulate legal rights by the delivery of definitive judgments and a power to enforce its orders by legal sanction, coupled with a procedure judicial in character.

The test approved by the Supreme Court in 1963 with reference to section 195, in a case which related to a sales tax officer under the U.P. Sales Tax Act, was different. The Supreme Court held that a sales tax officer was not regarded as a court for the purpose of section 195 of the Code of Criminal Procedure. In the view of the Supreme Court, though the Sales tax officer was required to perform some quasi-judicial functions and to act fairly and impartially, he was not a part of the judiciary; he was merely an instrumentality of the State for the purposes of assessment and collection of tax. The nature of his functions and the manner prescribed for the purpose showed that he could not be equated with a court.

6.14. As regards income-tax officers, the same question arose, but the question was not decided by the Supreme Court, in the case of Lalji Haridas.

A person to whom the judicial power is not entrusted and who is merely an arbitrator authorised within the limits of the power conferred to adjudicate upon the dispute before him, would not be a court within section 195 of the Code of Criminal Procedure.

6.15. The Supreme Court has also pointed out, in a case decided under the Code of Criminal Procedure of 1898 that the true test for finding out whether a tribunal is a court is whether it has judicial power, that is, as was observed in the case of Shell Co. of Australia, the exercise of judicial power does not begin until some tribunal, which has power to give a binding and authoritative decision, is called upon to take action.

As we have noted, the meaning of the expression "Court" for the purposes of s. 195 of the Code of Criminal Procedure, 1898, (complaint regarding offences against public justice committed in relation to proceedings in a court), created considerable uncertainty, and in view of the obscurity that was felt in this regard, the new Code of Criminal Procedure has the following definition of court in the corresponding provision: "Court" means a civil, revenue or

---

3. Emphasis supplied.
8. Para. 6.13, supra.
Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

VII. POWER OTHERWISE VESTED IN COURTS

6.16. With reference to the Contempt of Courts Act, it may be that on the terms of that particular statute, an officer or a tribunal not forming part of the ordinary judicial hierarchy may be held to be a court, when he exercises a power which would otherwise have fallen on the ordinary civil and revenue courts of the land.

This concludes our consideration of the principal tests adopted for determining whether a particular body is a court.

6.16A. We are not concerned in this Report with the question whether there is a right of appeal when a court is vested with certain special jurisdiction. That aspect need not, therefore, be considered.

We shall now consider the question (a) whether the definition in the Act needs an amendment, and (b) if so, in what direction. This necessitates an examination in detail of the position regarding certain bodies. We begin with administrative courts.

VIII. ADMINISTRATIVE COURTS

6.17. In recent years, the movement to create specialised administrative courts has received considerable impetus. The need for economy and expertness led to the development of executive officers dealing with particular subjects, as also to specialisation in respect of courts sitting in judgment on executive officers. Courts so set up could hope to become specialists after some experience with work in their respective fields.

6.18. It was in the fifties of the last century that Britain — and the world with her — became the creature of the railway age. Disputes relating to Railway rates and the like were put under administrative agencies, and thus started the trend away from the courts, — a trend which is still continuing. Almost with each successive Act is created a special tribunal. Their number is legion. They vary in standing, function and powers, but they are all vested with judicial or quasi-judicial functions.

In India, the number of such courts (administrative courts) is fairly large, and many more are certain to come into existence in future. Various industrial tribunals, tribunals dealing with compensation, tribunals dealing with matters relating to taxation, tribunals dealing with railway rates and claims in respect of motor accidents, are important examples. Moreover, quasi-judicial powers have been conferred on agencies which are labelled not as tribunals but as boards, such as, The Press Registration Appellate Board, the Copyright Board, and the Central Board of Indirect Taxes. Some of them are even described as “courts” — for example, the Employees’ State Insurance Court.

\(^1\)Section 155(3), Cr. P. C. 1973.
\(^2\)The case-law on this subject is reviewed in S. D. Transport Company v. Madan Lal, A.I.R. 1968 Punj. 277. Cf. the recent constitutional amendments.
\(^4\)The Elements of the State Insurance Act, 1948.
IX. WHETHER ACT SHOULD APPLY TO ADMINISTRATIVE TRIBUNALS

6.19. While many of these tribunals, boards and other authorities certainly perform judicial functions, must observe the rules of natural justice and are subject to the special appellate jurisdiction of the Supreme Court under article 136 of the Constitution, that does not conclude the matter as regards the need for applying or not applying the Evidence Act to them. Nor does the power conferred on them to summon witnesses and examine them on oath conclude the matter, because that only means that persons who make false statements before them could be prosecuted for the offence of giving false evidence, having regard to the legal obligation imposed on them by the oath to state the truth. The essence of the matter is that these tribunals are not necessarily places where “justice is judicially administered”, and even if they very nearly resemble courts—to borrow the language used by Kania, C.J., in the Bharat Bank case, they cannot, merely on that ground, be equated to courts for the purposes of the Evidence Act. This is apparent from the fact that the relevant statutes, or rules made thereunder, usually contain provisions deeming them to be civil courts for certain purposes only, and deeming their proceedings also to be judicial proceedings for certain purposes only. It is for this reason that in the absence of specific provision, a general provision which would apply the Act automatically to them is not required.

X. POSITION IN U.S.A. AND ENGLAND AS TO COURT

6.20. We may briefly refer to the position in the U.S.A. and in England as to administrative tribunals. In the U.S.A., the Federal Administrative Procedure Act contains the following rules as to evidence:

“(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as and as supported by and in accordance with the reliable, probative and substantial evidence. Every party shall have the right to present his case or defence by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule-making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudicial thereby, adopt procedures for the submission of all or part of the evidence in written form.”

6.21. In England, the Committee on Administrative Tribunals and Enquiries (the Franks Committee) plainly stated that it would be a mistake to introduce

---

1Displaced Persons (Compensation and Rehabilitation) Act, 1954.
4Section 7(c), Administrative Procedure Act (U.S.A.).
5Emphasis supplied.
6Report of the Committee on Administrative Tribunals and Enquiries (Frank’s Committee), page 22.
the strict rules of evidence of the courts into proceedings before administrative tribunals.

XI. SOME STATUTORY PROVISIONS IN INDIA AS TO ADMINISTRATIVE COURTS

6.22. In general, in India also, administrative tribunals and quasi-judicial bodies are not required to adhere to strict rules of evidence. The position depends on the provision in the parent Act.

It may be noted that many local laws have often provided for the adjudication of claims in respect of taxation or valuation by tribunals. For example, the Bombay Municipal Corporation Act, provides for the hearing of various proceedings — such as, election enquiries, references to the judge, appeals against valuation and taxes, appeals against certain orders of the Municipal Commissioner to the Judge or the District Court, references to magistrates in respect of certain matters, and the like. The Act makes specific provisions as to the application of the Code of Civil Procedure, the law of limitation, execution of orders and, when appropriate, the application of the Code of Criminal Procedure, to enquiries and proceedings before magistrates.

Similarly, the Bombay Public Trusts Act empowers the Charity Commissioner appointed under the Act to frame certain schemes for the governance of public trusts. He has power to summon and examine witnesses etc. on oath. The Act also contains provisions as to, for what purposes, such enquiries shall be deemed to be judicial proceedings within the Penal Code.

6.23. Often, the parent Act confers power on the appropriate authority,—sometimes even on the tribunal,—to make rules regulating its procedure.

The Unlawful Activities Tribunal Rules, made under the Unlawful Activities Act, 1967, provide that in respect of inquiries and proceedings concerning the disposal of applications, the Tribunal should follow, “as far as practicable”, the rules of evidence set out in the Evidence Act, 1872. It has also been provided that the Tribunal may require the Central Government to produce documents claimed to be confidential.

6.24. The Railway Rates Tribunal is governed by the rules made under the parent Act. Rules 43 and 44 of the Rules read:

“43. The provisions of the Indian Evidence Act shall generally be followed in proceedings before the Tribunal: Provided that in the discretion of the Tribunal, any of its provisions may be relaxed in order that needful and proper evidence may be conveniently, inexpensively and speedily produced in the interests of justice, while preserving the substantial rights of the parties.”

1Sections 403 to 437, Bombay Municipal Corporations Act (Bombay Act 59 of 1949).
2Sections 434 to 437, Bombay Municipal Corporations Act (Bombay Act 59 of 1949).
3Section 50-A and section 73, 74, Bombay Public Trusts Act, 1950 (Bombay Act 29 of 1950).
4Section 74, Bombay Public Trust Act, 1950.
5Rule 3(1), Unlawful Activities (Prevention) Rules, 1968.
7The Railway Rates Tribunal Rules, 1959.
8See sections 34-44, Indian Railways Act, 1890.
"44(i) The evidence at the hearing of a complaint may be taken either by affidavit or by viva voce; or partly by affidavit and partly by viva voce: Provided that if either party intends to rely on any evidence, he shall send or deliver to the other party a copy of the affidavit, failing which he shall not be allowed to use the same except by special leave of the Tribunal.

(ii) Either party may send or deliver by registered post to the other party a notice requiring the deponent to be produced at hearing of the complaint for cross-examination..........................

(iii) For the purpose of any affidavit to be sworn in any proceedings before the Tribunal, the Chairman may empower any official to administer an oath to the deponent of the affidavit."

XII. JUDICIAL AND QUASI-JUDICIAL

6.25. The Donoughmore Committee (Committee on Ministers' Powers) in England formulated the following distinctions between judicial and administrative powers:†

(a) A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites—

(1) the presentation (not necessarily orally) of their cases by the parties;
(2) the ascertaining of any disputed facts by evidence adduced by the parties, often with the assistance of argument on that evidence;
(3) the submission of argument on any disputed question of law;
(4) a decision which disposes of the whole matter by a finding upon disputed facts and "an application of the law of the land to the fact so found, including where required a ruling upon any disputed question of law."

(b) An administrative decision is one in the making of which the authority is not required to employ any of the processes familiar in courts of law (hearing evidence and arguments, etc.) and where the grounds upon which he acts are left entirely to his discretion.

6.26. The Committee also sought to define a "quasi-judicial" decision by reference to its definition of a judicial decision: "A quasi judicial decision equally pre-supposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is, in fact, taken by administrative action, the character of which is determined by the minister's free choice."

The analysis of "judicial" and "quasi-judicial" functions as made by the Donoughmore Committee came to be recorded judicially in the case of Cooper v. Wilson," in the judgment of Scott L.J., who had taken a leading part in the Donoughmore Committee. He described the Watch Committee in the case before him as obliged to make a "quasi-judicial approach" which meant that they were "exercising nearly judicial functions", though "not tied to ordinary judicial procedure."

XIII. NATURAL JUSTICE

6.27. There is no doubt that bodies exercising judicial and quasi-judicial powers will be held to the observance of the rules of natural justice. Classification of a power as executive or administrative has sometimes been used as a

†Committee on Ministers' Powers Report (1932), (Cmd. 4060), pages 73 and 81.
‡Committee on Ministers' Powers, Report (see supra).
means of excluding the application of the rules. But this approach is inconsistent with the actual decisions, and with dicta in numerous cases. Lord Denning M.R., has said: "That heresy was scotched in *Ridge v. Baldwin*."

In the Australian case of *Banks v. Transport Regulation Board*, Barwick, C.J., expressed entire agreement with Lord Reid's judgment in *Ridge v. Baldwin* and also indicated that the prerogative writs may, in appropriate circumstances, be available in respect of an administrative discretion, if the discretion is not an "absolute and unfettered" one.

As Parker J. observed in *R. v. Manchester Legal Aid Committee*:

"...the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively."

6.28. For example, decisions of tribunals will not be on surmise. As the Mysore High Court observed:

"Surmises have no place in judicial and quasi-judicial proceedings."

**XIV. INDUSTRIAL TRIBUNALS**

6.29. The question of industrial tribunals may be considered in some detail. It has been held by the Calcutta High Court that it is a "Court" within the Evidence Act. We may, however, point out with respect that the Industrial Tribunals Act, 1947, contains limited provisions, which do not make the tribunal a court. This aspect (the provisions of the Act) was not fully discussed in the Calcutta case. That case relied partly, if not mainly, on the judgment in the *Bharat Bank case*. But it may be pointed out that in the Bharat Bank case itself, Kansa C.J. observed that the Industrial Tribunal is not technically a court, though it has all the essential attributes of a court of justice.

He described the tribunal as "discharging functions very near to those of a court". Moreover, that case was decided with reference to article 136 of the Constitution, and the judgment emphasised the words — "court or tribunal" and "cause or matter", which occur in that article.

As regards article 136, the jurisdiction of the Supreme Court is discretionary. As the Supreme Court pointed out in the case of *Dhakeshwari Cotton Mills v. C.I.T.* it is not possible to define with any precision the limitations on the exercise of this discretionary jurisdiction.

6.29A. The question may arise whether the present definition of "court" covers Coroner appointed under the *Coroners Act*. Coroners have powers to administer oath and take "evidence" (section 19, *Coroners Act*). Coroners are "magistrates" for the purposes of section 26, *Evidence Act* (section 20, *Coroners Act*).

5R. v. Manchester Legal Aid Committee, (1952) 1 All E.R. 480, 489.
8Particularly, sections 11(5), 15, 17, 38B etc., Industrial Disputes Act, 1947.
11Coroners Act, 1871 (4 of 1871).
But they need not be termed as "courts" for the present purpose. They hold merely an "inquest" (section 21, Coroners Act), and draw up an inquisition (sections 23-24, Coroners Act). It should be noted that they do not give any definitive judgement and, in that sense, are not analogous to courts. They may be "courts of investigation", but they do not give final decisions affecting the liability of the citizen. It may be noted that under the Coroners Act, proceedings before Coroners are judicial proceedings only for limited purposes.

XV. NEED FOR AMENDMENT

6.30. Having regard to the fact that since 1872, so many tribunals have come into existence and many more will come into existence, an attempt to evolve a precise test is preferable to the present position. The discussion above would show—(i) how, in the absence of a very precise test, conflict and uncertainty may arise, and (ii) why the only precise test would be to confine it to civil, criminal or revenue courts, in the absence of statutory provisions.

XVI. RECOMMENDATION AS TO COURT

6.31. Having taken into consideration all aspects of the matter, we have come to the conclusion that it is essential that the scope of the definition of "court" should be indicated more precisely than at present; and we are of the view that this delimitation should take the shape of a revised definition, which will confine the ambit of the expression "court" in this Act to civil, criminal and revenue courts, at the same time leaving scope for including a tribunal of a special nature within the definition by appropriate legislative action. No definition can be perfect, but we believe that the first part of the revised definition will introduce a modicum of certainty, while the second part will leave scope for that much of elasticity as is desirable in such matters. The elasticity will not, however, be achieved at the cost of precision, because, whenever a special tribunal is created, it will be open to the Legislature to take a decision whether or not it should be regarded as court within the meaning of the Evidence Act, and such a course will minimise the scope for controversy arising in the matter.

Every authority with judicial functions is not a court under the Evidence Act. There are features common to courts and tribunals, and features distinct to each.\(^1\) One cannot catalogue them.

6.32. It is, no doubt, true that the definition as proposed to be revised will restrict the scope of "court", unless the Legislature declares the particular tribunal as court.

In some cases, as noted above,\(^2\) for example, Industrial Tribunals have been held to be courts for the purposes of the Evidence Act, and the amendment would change the existing law. This departure from the existing law, as interpreted by some High Courts, is deliberate. It may, however, be pointed out\(^3\) that the amendment will not preclude Parliament or State Legislature from making such provisions;\(^4\) and if any statutory provision exists, they also would be saved under the draft suggested.

The present uncertainty will be avoided, and in each case, the appropriate Legislature can make a suitable provision.

---

\(^1\) A.C.C. v. P. N. Sharma, (1965) 1 S.C.A. 723.
\(^2\) See, supra.
\(^3\) Section 87(3), Representation of the People Act, 1951.
\(^4\) Check up as to provisions "under law".
6.33. In the light of the above discussion our recommendation is to confine the definition of court to "civil, criminal or revenue court", and, as regards tribunals, we would include only such tribunals as may be declared by or under Central or State or Provincial Acts to be tribunals for the purposes of the Evidence Act.¹

We, therefore, recommend the following revised definition of "court":—

"court" means a civil, criminal or revenue court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by or under that Act to be a court for the purposes of this Act, but does not include an arbitrator.

6.34. In the formula suggested above, the inclusive portion is, in a sense, redundant, because, if the other Act provides for applying the Evidence Act, the provision in the other Act possesses its own potency, and will operate whether or not the Evidence Act refers to it. However, the inclusive portion makes it clear, by implication, that "tribunals" do not fall within the definition, in the absence of an express provision. The express provision could, as already stated, be made by the appropriate legislation.

It may incidentally be noted that the first part of the formula uses phraseology used in the legislation relating to traditional judicial hierarchy—such as, the Civil Courts Act and the Code of Criminal Procedure.

XVII. & XVIII. DOCUMENT

6.35. The term "document" has been defined in section 3 as "any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used", for the purpose of recording that matter.

6.36. In our Report on the General Clauses Act¹, the following re-draft of the definition of "document" in that Act has been recommended:

"document" shall include any substance having any matter written, expressed, inscribed, described or otherwise recorded upon it by means of letters, figures or marks or by any other means, or by more than one of these means, which are intended to be used or which may be used for the purpose of recording that matter.

Explanation.—It is immaterial by what means the letters, figures or marks are formed.”

6.37. The definition in the Evidence Act should be similarly revised, as the reasons which we mentioned in that Report for revising the definition in the General Clauses Act apply to the definition in the Evidence Act also, and need not be repeated here.

XIX. EVIDENCE

6.38. The next definition to be considered is of "evidence". "Evidence", as defined in section 3, means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

²Shri Dhavan has a reservation in the matter.
³S60th Report (Report on the General Clauses Act), Para. 3.40, recommendation as to section 3 — "document".
(2) all documents produced for the inspection of the Court: such documents are called documentary evidence.

The definition is not exhaustive of all matters which a Court can consider in determining questions of fact. The expression "matters before it", in the definition of the expression "proved", obviously includes matters which do not fall within the definition of "evidence". This is pointed out in a Calcutta case1.

6.39. The definition of evidence has been objected2 to for incompleteness, in so far as, by its terms, it does not include the whole material on which the decision of the Court may rest. Thus, in so far as a statement by a witness only is "evidence", the following are not "evidence" according to it, (a) the oral statements of parties and the accused in Court by way of admission or confession or in answer to questions by the Judge3, (b) a confession by an accused person affecting himself and his co-accused4, (c) "real evidence"5, and (d) the presumptions to be drawn by reason of the absence of producible witness or evidence. But it should be pointed out that this clause is an interpretation clause, and is only meant to indicate what is intended to denote whenever the word "evidence" is used in the Act. The definition must be considered together with the definition of "proved". When it is so considered, we have a certain measure of elasticity and the apparent incompleteness becomes immaterial. As Jackson J. has observed, "it seems to follow therefore that if a relevant fact is proved and the law expressly authorises its being taken into consideration, that is considered for a certain purpose or against certain persons, in a certain situation, the fact in question is 'evidence' for that purpose, or against such persons, although the result has not been expressed in these words by the Legislature: and, being evidence, it must be used in the same way as everything else that is 'evidence'. Thus, an oral admission in Court is a matter before the Court which may be taken into consideration4"6.

The confession of a prisoner affecting himself and another person charged with the same offence is7, when duly proved, also one of such matters, as the law now stands8, although in actual practice courts are reluctant to rely on it.

6.40. The expression "evidence" is used in several sections, including section 5 (evidence of facts in issue and relevant facts), 59, 60 (oral), 60 (evidence must be direct), 61-100 (documentary), 91-100 (exclusion of oral by documentary), 114(g), (producible but not produced), 100-116 (production and effect of), 118-166 (witnesses), 167 (improper admission and rejection of evidence).

6.41. It may be of interest to note that the Bill, as originally drafted, contained a third sub-section divided in the definition of "evidence", namely—

"(3) All material things other than documents produced for the inspection of the Court:

2Thayer's Preliminary Treatise on Evidence (1898), 263, referred to by Woodroffe.
3Section 165.
4Section 30.
5See infra.
6Section 114, illustration (g).
11(a) R. v. Ashootosh, I.L.R. 4 Cal. 483.
(c) R. v. Dada, (1889) I.L.R. 15 Bom. 459.
12Section 30.
such things are called material evidence”.

However, this part of the definition did not find a place in the Act as enacted. Stephen⁴, regarded the definition as unnecessary, on the ground that material objects will, in any case, have to be produced by witnesses who give oral evidence.

6.42. There is considerable academic discussion about real evidence. Phipson⁵, in an article in the Yale Law Journal, defined real evidence as “material objects other than documents provided for the inspection of the court”.

It may be noted that the name “real evidence” was adopted by Best, though the division of evidence into personal and real dates from the time of Bentham.

6.43. Certain writers include, in the category of real evidence, (a) evidence from things as distinct from persons, (b) material objects produced for the inspection of the Court, (c) perception by the court as distinct from the facts perceived, and (d) the behaviour of witnesses.

6.44. There are, in the two procedural Codes⁶, appropriate provisions for the inspection of premises of property; but these provisions are usually interpreted not as furnishing a fresh species of evidence, but as useful for appreciating evidence already given.

However, if the view of the place is accompanied by a demonstration by the witness, it is regarded as a part of the evidence. The witness, if taken to the spot, to make his evidence intelligible, may start to give his evidence all over again. As Shakespeare said: “Old man forget, yet all shall be forgot; but he’ll remember with advantages what feats he did that day”—that is to say, if he is taken to the place.

6.45. Sometimes, the real object is not produced in Court and only its photograph is produced. In Lucas v. Williams⁷ the production of the photograph of an engraving of a picture was admitted as evidence, in an action infringing the copyright of the picture by selling the photograph.

Again, the appearance of a person who is not a witness may have value as evidence when identity or age or physique is in issue. Thus, the resemblance of an infant to an alleged parent may be relevant (though not cogent) evidence of paternity, and the alleged similarity or dissimilarity may be observed by as comparison of the child and the adult in court⁸.

6.46. We are mentioning this species of real evidence or matters analogous thereto, in order to facilitate an examination of the question whether it is necessary to include such evidence in the definition in the Act. After careful consideration, we have come to the conclusion that it is not necessary to do so. Such

---

⁵Phipson, “Real Evidence” (1920) 29 Yale Law Journal 717.
⁶(a) Order 18, rule 18, Code of Civil Procedure, 1908.
⁸Shakespeare, Henry the Fifth, Act 4, Part 3.
⁹Lucas v. Williams, (1892) 2 Q.B. at page 116 (G.A.) (per Lord Esher).
(b) Russell v. Russell, (1923) 129 I.T. 151, 153 (this point was not discussed in the appellate courts; see (1924) A.C. 687 at 705, 749).
⁵See note in 102 Law Times Journal 188.
material can be produced for the inspection of the court and is, in that sense, not unknown to the scheme of our law. This is, in a sufficient measure, established by the provisions for production of the material objects before the court which are contained in the two procedural Codes and which are also indirectly referred to in section 60. The extent to which the courts can rely on such real or material evidence or local inspection and the like is a matter not dealt with in the Act and would, in fact, seem to be a topic rather difficult of legislative codification. Moreover, the fact that a court can, in coming to a conclusion, have regard not only to what is strictly speaking "evidence" as defined in the Act, but also to matters which are properly for its consideration is, as already stated, a proposition implicit in the definition of the expressions relating to proof. In the circumstances, we do not consider it necessary to recommend any change on this point.

XX. FACT

6.47. The next definition to be considered is that of the expression "fact". Section 3—

(1) any thing, state of things or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

The first clause of the definition of "fact" refers to external facts which are the subject of perception by the five senses, and the second clause refers to internal facts, which are the subject of consciousness. Illustrations (a), (b) and (c) are illustrations of the first clause; illustrations (d) and (e) of the second. Facts are, thus, (adopting the classification of Bentham), either physical,—e.g., the existence of visible objects, or psychological,—e.g., the intention or animus of a particular individual in doing a particular act. The psychological facts are incapable of direct proof by the testimony of witnesses; their existence can be ascertained only by the confession of the party whose mind is their seat or by presumptive inference from physical facts. This constitutes the only difference between physical and psychological facts.

6.48. The expression "fact" has a comprehensive connotation. The definition in the Act, taking this into account, is also comprehensive enough. The concept of "fact" is itself wide enough to cover not only things at rest, but also things in motion—acts and events.

The concept of "thing" is not confined to objects of right. As in metaphysics, it covers whatever is capable of being perceived by the senses or being contemplated by the mind. All phenomena are covered. As Immanuel Kant has said:

"That all our knowledge begins with experience, there can be no doubt. For, how is it possible that the faculty of cognition should be awakened into exercise otherwise than by means of objects which affect our senses, and (which partly of themselves produce representations, partly rouse our powers of understanding into activity, to compare, to connect, or to

Rama v. Harakdhar, 47 L.C. 710.
Best, Evidence (1922), pages 6 and 7.
Kant, Critique of Pure Reason, Introductory Chapter, first paragraph.

5—131 LAD/ND/77
separate these, and so to convert the raw material of our senuous impressions into a knowledge of objects, which is called experience? In respect of time, therefore, no knowledge of ours is antecedent to experience, but (it) begins with it."

6.48A. Bentham gave the following as important examples of psychological facts:

1. Sensations: feelings having their seat in some one or more of the five senses—sight, hearing, smell, taste and touch.

Sensations, again, may be sub-divided into those which are pleasurable, those which are painful, and those which, not being attended with any considerable degree of pleasure or pain, may be called indifferent.

2. Recollections: the recollections or remembrances of past sensations.

3. Judgments: that sort of psychological fact which, has place when we are said to assent to or dissent from a proposition.

4. Desires: which, when to a certain degree strong, are terms passions.

5. Volitions: or acts of the will etc.”

6.48B. “Thing” — an expression used in the definition — is defined in the Oxford English Dictionary as — “That with which one is concerned (in action, speech or thought); an affair, business, concern, matter, subject; . . . . That which is done or to be done; a doing, act, deed, transaction; an event, occurrence, incident; a fact, circumstance, experience . . . . . That which is said; a saying, utterance, expression, statement; with various connotations e.g. a charge or accusation made against a person, a form of prayer, a story, tale; a part or section of an argument or discourse; a witty saying, a jest. Formerly used absolv: (without article or qualifying word) also a thing, in indefinite sense — anything, something. An entity of any kind. That which exists individually (in the most general sense, in fact or in idea); that which is or may be in any way an object of perception, knowledge or thought, a being, an entity. (Including persons, when a personality is not considered.” It is not thus confined to static phenomena.

In Webster’s Dictionary, “Thing” is defined to include; assembly, reason a matter of concern, affairs; a particular state of affairs; situation, complication; . . . . . . Deed, act, accomplishment, used commonly as cognate object of do; . . . . . . . . . . a product of work or activity . . . . the end or aim of effort or activity. Whatever exists or is conceived to exist as a separate entity or as a distinct and individual quality, fact or idea; a separate or distinguishable object of thought . . . . something that is said, told or thought.

6.48C. In legal discussion also, the expression “thing” is used to refer to events.

The word ‘occurrence’ has been judicially defined as that which occurs — an event, incident or happening — and as that which occurs especially adversely — an appearance of happening. Incidentally “occurrence”, to the lay mind, and

---

1Bentham, Works, Vol. 6, page 236.
2The Oxford English Dictionary, (1933), Vol. 11, page 308-309
3Emphasis supplied.
5Jones v. Kansas City, 243, S.W. 2d 318, 320 (Mo. 1951).
more so to the legal mind, has a much broader meaning than the word “accident”. “As these words are generally understood, accident means something that happened in a certain way, while an occurrence means something that came about in any way.”

It would appear that there are precedents for taking the expression “thing” as covering every thing that exists or can exist in reality -- physical or psychic, animate or inanimate, static or dynamic. Not only what exists without change, but also what represents a change or an event, is covered. If the body can feel or the mind can conceive of a subject, then it is a “thing”. Every matter within the ambit of the physical or the intellectual apparatus of man can, therefore, be regarded as a “thing”. It is not confined to what can be seen again and again, — a permanent physical object. It covers also events or acts which can be perceived only once — phenomena which have a transient effect on the senses.

“Relation of things” would, in any case, seem to cover acts — see illustrations (b) and (c) — and events also, because an event represents a “relation” in point of time.

6.49. This discussion does not lead to any radical change in the definition. Recommendation. But the words “and includes” should be deleted, as confusing and inaccurate. We recommend accordingly.

XXI. RELEVANT

6.59. Then we come to the definition of “relevant”. One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. The expression “relevant” occurs mainly in sections 5-55. Expressions cognate thereto occur in sections 8, 32, clause (8), 132, 135, 137, 148 and 153. The expression “irrelevant” occurs in sections 24, 29, 43, 52, 54 and 165.

The definition needs no change. It may be noted that the concept of relevance is linked up with the definition of ‘fact in issue’ in the scheme of the Act

6.51. The expression “facts in issue”, as defined, means and includes —

“any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.”

Where under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

The expression “facts (or ‘fact’) in issue” occurs in sections 5, 6, 7, 8, 9, 11, 17, 21, ill. (d), 33, 36, 43; “questions in issue” occurs in section 33; “matters in issue” in section 132.

Illustrations to the definitions are as follows:—

A is accused of the murder of B. At his trial the following facts may be in issue;

That A caused B's death;
That A intended to cause B's death;


3The enumeration is not exhaustive.
That A had received grave and sudden provocation from B;

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

6.52. and 6.53. In the definition of "facts in issue" also, we recommend that the words "and includes" should be removed, as unnecessary and confusing.

XXII. PROVED

6.54. We now come to the definition of the expressions 'proved', 'disproved' and "not proved". These three expressions have been thus defined.

"Proved" — A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved" — A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved" — A fact is said not to be proved when it is neither proved nor disproved.

6.55. Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence, till it believes it to exist. "Evidence" of a fact and "proof" of a fact are not synonymous terms. A judgment is to be based on facts duly proved. "Proof", in strictness, marks merely the effect of evidence. Proof considered as the establishment of material facts in issue in each particular case by proper and legal means to the satisfaction of the Court is effected by (a) evidence of statements of witnesses, admissions or confessions of parties, and production of documents and also previous statements; (b) presumptions; (c) Judicial notice; (d) inspection, which has been defined as the substitution of the eye for the ear in the reception of evidence, — as in the case of observation of the demeanour of witness, local investigation, or the inspection of instruments used for the commission of a crime.

6.56. It may be noted that the expression "not proved" does not appear to occur anywhere in the Act. However, the definition is useful for explaining the concept of "not proved", and the expression has come in handy in the understanding of the general scheme of the Act. It need not, therefore, be disturbed.

We may point out that the words "matters before it", in the definition of "proof" are wide enough to cover matters which are not "evidence", as defined in the Act. Those words are not confined to "oral" and "documentary evidence".

Section 165.

1Section 165.

2Stephen, Digest, Article 58.

3Sections 3, 5-55, 58, 60 (oral proof).

4Sections 61-100 (documentary proof).

5Sections 157-158, sections 32-33; R. v. Asootee, (1878) I.L.R. Cal. 492

6Sections 4, 79-90, 112-114.

7Sections 56, 57


9Wartoh, Evidence, section 345, quoted by woodroffe.


12See discussion as to real evidence under sec. 'evidence'.

13See discussion as to section 3, 'evidence', supra.
6.57. “India” is defined in the Act as meaning the territory of India excluding the State of Jammu & Kashmir. The definition of ‘India’ should be deleted.

In the substantive sections, the expression “territories to which this Act extends” should be substituted with such consequential changes, if any, as may be required. The reasons which have been set out in our Report on the Stamp Act are applicable to the definition in the Act under consideration also.

XXIII. JUDICIAL PROCEEDING

A. INTRODUCTORY

6.58. We shall now deal with the term “judicial proceeding”, which has not been defined in the Act. It may be noted that the very section which deals with the application of the Act — section 1, second paragraph — provides that the Act applies to all “judicial proceedings” before the specified “courts”. The expression “judicial proceeding” occurs also in sections 33 and 80. We shall first refer to the important case-law under the Evidence Act, then to definitions as given in a few other Acts or in some decided cases, and then record our own conclusions.

B. CASE LAW UNDER THE EVIDENCE ACT

6.59. So far as cases under the Indian Evidence Act are concerned, it has been held, under section 80 of the Evidence Act, that the record of a statement made by a witness to a police officer in the course of a police investigation is not a record of “evidence”, and such statement does not prove itself.

On principle, the statements recorded by Magistrates during investigation should also not be regarded as made in “judicial proceedings”, as the Magistrate does not intend to give any judgment or to determine any question of law or fact, and records the statements merely in order to preserve evidence. The object of the power conferred on the Magistrate is to provide a convenient machinery whereby a witness whose evidence is of some importance may be asked to record his immediate recollection of the facts. Such a statement can be used to corroborate, refresh or contradict the witness, but is not substantive evidence at the trial or inquiry. The relevant section in the Code appears in the Chapter on Investigation; the Explanation to that section makes it clear that the Magistrate receiving and recording a confession or statement need not be a magistrate having jurisdiction in the case. All this would seem to support the view that it is not a judicial proceeding.

6.60. But the above discussion is academic for the Evidence Act. The definition of ‘evidence’ has been interpreted1 as excluding statement recorded by Magistrates during investigation in general. It is not intended that the Evidence Act should be applied to such statements; the question of relevancy of facts or admissibility of evidence cannot, in the very nature of things, be of any importance in such statements, and such statements would be of no use so far as section 33 is concerned. As regards section 80 of the Act, an express provision can be made, if necessary2 to mention these statements specifically.

---

1Report on the Stamp Act, discussion as to the definition of ‘India’.
(b) However, Paramanand v. Emperor, A.I.R. 1940 Nag. 340, 344; I.L.R. 1940 Nag. 110 apparently seems to take a contrary view, as the Court relied more upon section 32 than upon section 33.
6To be considered under section 80.
6.61. In a Bombay case, one of the question to be considered was whether proceedings before the coroner are judicial proceedings. Tulzapurkar J., after referring to some of the case law on the subject, said:

"In view of the aforesaid citations, it seems to me clear that in its ordinary or normally accepted connotation, the expression 'judicial proceeding' means a proceeding in which judicial function are exercised and a final decision is given affecting either the right or liability of one or the other party thereto, for, according to Sir James Stephen, unless the purpose of the proceeding is ascertaining of some right or liability, the proceeding would not be a 'judicial proceeding'. Looked at from this point of view, it would be very difficult to come to the conclusion that the 'Inquest proceeding' held by the Coroner under the Coroners Act at which no right or liability of any one is finally or effectively adjudicated upon is a 'judicial proceeding' for the purpose of the Evidence Act."

6.62. It has been held that proceedings before the Income-tax authorities are not "judicial proceedings" under the Evidence Act.

Regarding Industrial Tribunals appointed under the Industrial Disputes Act, 1947, it has been held by a Division Bench of the Allahabad High Court—that the Evidence Act does not apply to such Tribunals.

It may be noted that section 11(3)(a) of the Industrial Disputes Act, 1947, gives power to examine witnesses on oath, but that has not come in the way of the Court holding as above. There was a single judge decision of the Calcutta High Court to the effect that the Evidence Act applies to Industrial Tribunals; this is based on the definition of "court" in the Evidence Act, which includes all persons legally authorised to take evidence. The reasoning of the High Court was that the Act (the Industrial Disputes Act) authorises the Tribunal to take evidence, and the Tribunal has the power as a civil court of examining witnesses on oath. In a subsequent case, the Calcutta High Court held that the Evidence Act does not apply to such Tribunals. The High Court relied upon the Supreme Court decision in Union of India v. D. R. Verma where Venkatarama Aiyar J. made the following observations with reference to a Tribunal holding an enquiry for the purpose of disciplinary action against a Government servant—presumably an enquiry under the Public Servants (Inquiries) Act, 1850 (37 of 1850):

"Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by Tribunals even though they may be judicial in character."

After this, again, a different view was taken in 1966 by the Calcutta High Court in a Division Bench ruling. In view of our recommendation as to "court", this aspect loses its importance.

4See also Electroy Mechanical Industries v. Industrial Tribunal, A.I.R. 1950 Mad. 839, 840, para. 5 holding that rules of evidence do not apply to them.
5Barrakar Coal Co. v. Labour Appellate Tribunal, A.I.R. 1950 Cal. 226, 228, para. 4 (Suaha J.).
8See discussion as to "Court".
C. DEFINITIONS IN OTHER ACTS

6.63. Definitions in other Acts may now be seen. To begin with, we may state that the expression “judicial proceeding” is defined in the Code of Criminal Procedure, as “including any proceeding in the course of which evidence is or may be legally taken on oath.”

6.64. It may be noted that in the Code of Criminal Procedure of 1872, the expression “judicial proceeding” was defined as “proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence, or final order is passed on recorded evidence.”

The Code of Criminal Procedure, 1882, section 4(d), contained the following definition—

“Judicial proceeding” means any proceeding in the course of which evidence is or may be taken.

6.65. The words “proceedings in which evidence is or may be taken” (in this definition in the Code of 1882), were interpreted to mean a proceeding in which evidence is or may be legally taken. The Code of 1898 added the word “legally” apparently to implement this interpretation. The requirement of “oath” was also added in the definition in 1898, and the latter limb of the definition (in relation to judgment etc.) was removed. In one of the Allahabad cases, decided with reference to the old Criminal Procedure Code, 1872, it was held that where, after an appeal is preferred to the High Court against the judgment of acquittal of the Court of Session, the persons acquitted are arrested by the police and brought before the Magistrate, and the Magistrate illegally directs that they should be detained in custody pending decision of the appeal, the High Court could not interfere in revision under section 297 of the old Code (under which the court could interfere in a proceeding if there was a material error in any “judicial” proceeding of a subordinate court).

6.66. With reference to the Indian Penal Code, the question whether the expression “judicial proceeding” includes, for the purposes of sections 191 to 193(1) of that Code, (punishment for giving or fabricating false evidence in a judicial proceeding), a statement recorded by a Magistrate in the course of investigation, has given rise to difficulty, as appears from decisions under the Penal Code. The view taken by the Madras High Court is that such proceedings are judicial proceedings for the purposes of section 193, Indian Penal Code. One of the Madras’ cases stresses two points, viz., (i) the Magistrate is empowered by law to administer oath, and (ii) the statement is one which the law (section 164) permits to be made before the Court by a “witness” and is, therefore, whether the definition could include statements recorded by Magistrates.

---

1Section 2(1), Code of Criminal Procedure, 1973; section 4(1)(m), Code of Criminal Procedure, 1898.
2The following sections of the Code use the expression “judicial proceeding”:
   Section 343(2), 1
   Section 344(1), 1 1973 Code.
   Section 345(3), 1
3Queen v. Cholam Ismail, (1875) I.L.R. 1, 6 All. 1, 6 (Turner C. C. J.).
4Queen v. Cholam Ismail, (1875) I.L.R. 1 All. 1, 6.
   (b) 37th Report of the Law Commission (ss. 1 to 176) (Criminal Procedure Code), para. 466.
“evidence” within the definition in the Evidence Act. The later Madras case stresses a further point, namely, that the Magistrate is acting in the discharge of a duty imposed upon him by law. The High Court also observed, that an investigation is a “stage of a judicial proceeding”.

6.67. The Allahabad High Court once took the view that if the Magistrate who recorded the statement has himself authority to complete the trial, the statement becomes a judicial proceeding, for the purposes of the Penal Code. But, in a later case, it took a different view with respect to section 80, Evidence Act.

A decision of the Bombay High Court, in a matter which also arose under section 193 of the Indian Penal Code, may be noted. The question at issue was, whether a statement recorded by a Magistrate in the course of a police investigation was “evidence in a stage of judicial proceeding” within section 193 of the Indian Penal Code. The High Court held that such a statement cannot be said to be made in the course of a “judicial proceeding”, for the reason that the statement is recorded during a police investigation, and a police investigation cannot be a stage of a judicial proceeding. In the course of the discussion, the High Court observed that though a Magistrate examining a witness during investigation does so on oath, the definition of “judicial proceeding” in the Criminal Procedure Code is “limited to that Code and does not apply to that phrase as used in the Indian Penal Code.

The Lahore High Court, following the Bombay decision summarised above, held that such a statement is not “evidence” in a stage of judicial proceeding within the meaning of the Explanation to section 193, Indian Penal Code. The Court saw no reason to dissent from the Bombay decision.

6.68. Thus, though controversy often arises whether a particular proceeding is or is not a judicial proceeding for the purposes of the Penal Code, Courts have refrained from attempting a definition, choosing to decide each case on a consideration of the nature of the proceedings, the body before which they were held, the parent legislative provision and other relevant circumstances.

The expression occurs also in section 228 of the Penal Code, (Intentional insult to a public servant sitting in a stage of judicial proceeding).

6.69. There is no definition of the expression “judicial proceeding” in the Code of Civil Procedure, 1908. In fact, the expression itself does not occur at many places in that Code. In one Bombay case, the question arose whether an order under section 244 of the old Code of Civil Procedure (corresponding to section 47 of the existing Code), was passed in a judicial proceeding so as to entitle a party to an appeal (since an appeal lay from all “decrees”). The definition of “decree” in the old Code was as follows:

“Decree” means the formal order of the court in which the result of the decision of the suit or other judicial proceeding is embodied.

---

1Supra v. Emp., I.L.R. 29 Mad. 89.
2Shoa Raj v. State, A.I.R. 1964 All. 290 (F.B.) holding that such statements are not judicial proceedings, and section 80, Evidence Act does not apply to them.
5The enumeration is not exhaustive.
The Court did not follow the definition of “judicial proceeding” given in the Code of Criminal Procedure then in force, on the reasoning that in the definition of the term “decree” in the Code of Civil Procedure, the expression “suit or other judicial proceeding” must, according to a common rule of construction, be understood as meaning a suit or other judicial proceeding of the same nature as a suit. Moreover, “decree” is limited to a formal order, i.e., cases where a decision is recorded in a particular formal manner.

6.70. It has been held in Madras that if a confessional statement of a person is recorded by a Magistrate in an executive capacity, it is not receivable in evidence under section 80 of the Evidence Act, the document not having been taken in accordance with law.

D. DEFINITION SUGGESTED BY MAYNE

6.71. We may now refer to the definition suggested by Mayne. The definition of “judicial proceedings” suggested by Mayne is—“any step in the lawful administration of justice in which evidence may be lawfully recorded for the decision of the matter in issue in the case, or on a question necessary for the decision or final disposal of such matter.”

The definition given by Mayne is, in substance, satisfactory, for the purpose of the Evidence Act. The definition given in the Code of Criminal Procedure is, no doubt, satisfactory so far as that Code is concerned. But it is of no use in the Evidence Act, in view of section 1 of the Act, which makes the very applicability of the Act dependent on the existence of a ‘judicial proceeding’.

6.72. It has been said in one earlier Bombay case that ‘judicial proceedings’ mean nothing more or less than a step taken by a court in the course of administration of justice in connection with a case. This agrees, in substance, with the definition given by Mayne.

In a Madras case, Queen v. Venkatachalam Pillai, Scotland C. J. accepted the definition of ‘judicial proceeding’ given by Mayne. In Question-Empress v. Tulja, though the Bombay High Court was principally concerned with the question as to whether a sub-Registrar of Assurances was a ‘Court’ within the meaning of section 195 of the Criminal Procedure Code, the Court has explained what is meant by ‘Judicial inquiry’:

“............ An inquiry is judicial if the object of it is to determine a jurial relation between one person and another, or a group of persons: or between him and the Community generally: but, even a judge, acting without such an object in view, is not acting judicially.”

E. QUERIES RAISED WITH REFERENCE TO MAYNE’S DEFINITION

6.73. We shall now deal with several queries raised with reference to Mayne’s definition of “judicial proceeding”.

1Queen Empress v. Biran and Others, (1886) I.L.R. 9 Mad. 224.


3Cited above.

4A.I.R. 1921 Bom. 366.

5Queen v. Venkatachalam Pillai, (1864) 2 Mad. H.C.R. 43.

6Q.E. v. Tulja, (1887) I.L.R. 12 Bom. 36, 42.
First, it is stated, if the definition is incorporated in the Evidence Act, it is to be carefully considered whether that might create some difficulty in criminal trials, in view of the existing inclusive definition of the expression "judicial proceeding" in the Code of Criminal Procedure, 1973 where it has been defined as follows:

"judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath."

This answer to this query is, that each of these definitions is confined to the respective Acts, and the proposed definition cannot affect the interpretation of the expression as occurring in the Code.

6.73A. The query has been raised if "affidavit evidence" comes within the scope of "legally recorded evidence". The answer should be "no", because affidavits are not "recorded". It may, incidentally, be stated that section 1 expressly excludes affidavits.

6.74. The query is then raised that Mayne's definition is too narrow. According to Mayne's definition, "judicial proceeding" is "any step in the lawful administration of justice in which evidence may be legally recorded for the decision of the matter in issue in the case....." Would "judicial proceeding" include only the step in which evidence may be legally recorded? Should not the steps preceding or following the step in which evidence may be legally recorded be included in "judicial proceeding"?

The answer, however, is that the preceding or subsequent steps have no significance for the Evidence Act.

6.74A. It has next been stated that the hall-marks of a judicial proceeding are not exhausted by mere recording of evidence. The Committee on Minister's powers laid down four essential characteristics of the judicial process:

(a) a presentation either orally or in writing of the case for each side i.e. joinder of issue;
(b) right of each party to adduce and examine evidence to prove its case (the recording of evidence will come within this characteristics);
(c) arguments by the parties on facts and law; and
(d) a decision disposing of the matter in hand, the findings being based on stated conclusions concerning facts.

6.75. The query is raised that if the recording of evidence without anything more is made the hall-mark of a judicial proceeding, then, evidence required to be recorded in any proceeding before any administrative tribunal or other authority—such as, an income-tax officer or customs official etc.—will make such proceeding judicial proceeding, although such tribunal or authority may not be a court but may be acting only judicially.

Moreover, it is stated, section 1 of the Evidence Act speaks of judicial proceedings in or before any court.

In reply to this query, we may point out that the definition given by Mayne does not make the recording of evidence the sine qua non of a Court. There are other ingredients. Moreover, as regards Income-tax Officers and the like, we may state that section 1 clearly provides that there must be a "court", an expression which we are going to define.

*Donoughmore Committee.*
6.75A. A query is also raised as to the expression “administration of justice”. It has been used in the Constitution, State List, entry 3 and the expression “judicial proceedings” has been used in entry 5 and entry 12 of the Concurrent List, but neither of these expressions (it is stated) has been defined in the Constitution. In this connection, we would state that the absence of a definition in the Constitution should not be a material consideration when reviewing an Act where the expression needs, on the merits, to be defined. A statute defines expressions for its own purposes.

6.76. It has been stated that it should be considered whether any definition of “judicial proceeding” is at all necessary; it is stated that the Act has worked quite well without such a definition during the last 103 years. In dealing with this query, we may point out the case law on the subject of statements under section 164, Code of Criminal Procedure and also the judgment of Tulzapurkar J. In Bombay case¹ illustrate the obscurity as to “judicial proceeding”. Hence there is need for a definition.

6.76A. An objection has been raised that the word “lawful”, in the expression “lawful administration of justice”, used in Mayne’s definition, is unnecessary and redundant.

6.77. In answer to this objection, it may be stated that the contrast is not between ‘lawful’ and ‘unlawful’. The word “lawful” in this context means “according to law”, or according to the machinery established by law.

We have, in this context, to make a distinction between—
(a) (i) justice in the abstract; and
(ii) justice according to law, and also between
(b) (i) administration of justice by a private tribunal, and
(ii) administration of justice by a public agency.

6.78. Justice in the abstract reminds one of natural law. The view that natural law is written on the hearts of men, is traced back to St. Paul and his letter to the Romans² where he says,—

“When Centiles who have not the law do by nature what the law requires, they are a law to themselves, even though they do not have the law. They show that what the law required is written on their hearts……”

However, when we talk of “lawful administration of justice”, we do not merely indicate justice in the abstract which may be described as the ideal relations among men. We refer to justice, according to law, i.e., in accordance with the scheme of a positive legal order. We also imply that the traditional machinery of the law is employed. We are speaking of the (i) principles and (ii) procedure in force in a particular society. Positive law is real, actually existing law, with its own machinery. And what Mayne meant by “lawful administration of justice” was—administration of justice in conformity with the positive legal order as established in a particular society—or, briefly, administration of justice according to law.

F. ENGLISH ACT OF 1968

6.79. We have, by now, dealt with the important points relevant to the statutory and other material regarding “judicial proceeding”. Before concluding the discussion, we would refer to the expression “civil proceeding” in the

¹Constitution, 7th Schedule, State List, entry 3; Concurrent List, entries 5 and 12.
³St. Paul’s letter to the Romans, II, 14.
Civil Evidence Act (Eng.). The principal object of the Civil Evidence Act, 1968, was to modify the rules of hearsay in civil proceedings. The expression "civil proceeding", as defined in that Act, in a positive form, really covers (so far as tribunals are concerned), only proceedings before those tribunals where the strict rules of evidence apply.

Having so defined the expression "civil proceedings", the draftsman of the Act was faced with a problem, namely, while the proceedings to which the important sections of the Act applied would, in view of this definition of civil proceedings, cover proceedings before those tribunals where the strict rules of evidence applied, the substantive sections of the Act used only the expression "court", and not the expression "court or tribunal".

6.80. To meet this situation, the draftsman of the English Act has defined "court" as meaning, in relation to proceedings before a tribunal not being one of the ordinary courts of law, the tribunal. The last mentioned definition (of "court") is a verbal device, intended to dispense with the use of the cumbersome expression "court or tribunal" in the main sections. Far from equating all tribunals to courts, this device implicitly recognises the fact that there is a distinction between the two. The words "not being one of the ordinary courts of law", in the definition of "court" may be seen.

It appears that the Lands Tribunal is one of the very few tribunals to which strict rules of evidence apply in England.

G. CONCLUSION

6.81. If a definition of "judicial proceeding" were necessary the function of administration of justice should be emphasised, in this context, as has been done by Mayne. Essentially, it is for proceedings held in exercise of this function of the State that the Act is primarily intended. The mention of "court" in section 1, in juxta-position to judicial proceedings, also lends support to this approach.

In fact, at one stage we thought that the following definition should be inserted in section 3:---

"Judicial Proceeding' means any step in the administration of justice according to law in which evidence may be legally recorded for the decision of the matter in issue in the case, or of a question necessary for the decision or final disposal of such matter."

However, since we are re-defining the expression "court", no definition of "judicial proceeding" is now required.

6.82. At present, though "court" is defined widely, the expression 'judicial proceeding' is understood somewhat narrowly, and in section 1 the net effect of the double requirement that there must be "court" and a "judicial proceeding", is that the Act applies only to proceedings before courts proper. In other words, the apparently wide scope for applying the Act, created by the present definition of "court", is cut down by the requirement that the proceeding must be a "judicial proceeding". Since we are recommending a more precise definition of "court" than at present, it is not necessary to make any change by way of clarification in regard to the expression "judicial proceeding".

---

Section 18(1)(a), Civil Evidence Act, 1968 (See Appendix to this chapter).
Sections referring, for example, to "rules of court" or using other phrases containing the word "court".
Section 18(2), Civil Evidence Act, 1968 (See Appendix).
XXIII. "ADMISSIBLE"

6.83. For reasons which will be indicated later, when we discuss the distinction between "relevant" and "admissible", we recommend that the expression "admissible" should be defined as meaning "admissible in evidence".

XXIV. SECTION 4

6.84. This takes us to section 4. The definitions of "may presume", "shall presume" and "conclusive proof", contained in this section, are of great importance in relation to presumptions. The expressions denote various classes of presumptions.

6.84A. The subject of presumptions has been the subject-matter of academic discussion in other countries and, as a result, nice classifications have been made as to the various kinds of presumptions. Fortunately, the Act enables us to avoid most of these problems by providing a simple formula which, while retaining the basic classification of presumptions, does not suffer from the complexity that prevails in other countries. We shall not, at this stage, refer to the various presumptions to be found in succeeding sections of the Act. It is sufficient to explain briefly the scheme of section 4.

6.85. The section contemplates three classes of presumptions, which can be classified as—

(i) rebuttable and discretionary presumption — "may presume";
(ii) rebuttable but mandatory presumptions— "shall presume", and
(iii) irrebuttable and mandatory presumptions — "conclusive proof".

6.86. The first paragraph of section 4 provides that whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. In such a case, as is evident from the words used in the section, it rests with the discretion of the court whether or not to draw the presumption, and even if it is drawn in a particular case, it is rebuttable. Such presumptions are essentially inferences formed not by virtue of any law but by the spontaneous operation of the reasoning faculty. They correspond to what Stephen described as 'bare presumptions of fact'.

6.87. The second paragraph of section 4 provides that whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. The presumption in this case is mandatory, and must be drawn where the conditions requisite, as laid down in the particular section, are satisfied. However, it is rebuttable, and the fact presumed can be 'disproved' — it being borne in mind that the expression 'disproved' bears the meaning assigned to it by section 3.

6.88. The third and last paragraph of section 4 provides that when one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. Usually, in illustrating the expression "conclusive proof", sections 112 and 113 of the Act are referred to. These sections do use the expression "conclusive proof". However, it may be noted that section 113 has been declared ultra vires. For reasons to be given later, we propose to recommend its deletion. Section 112 provides that birth during

\[\text{\textsuperscript{1}Para. 6.99, infra.}\]

\[\text{\textsuperscript{2}Stephen, Introduction to the Evidence Act, page 174.}\]

\[\text{\textsuperscript{3}See recommendations as to section 113.}\]
marriage is conclusive proof of paternity; but the section does leave scope for rebutting this presumption by showing that the parties to the marriage had no access to each other at any time when the person in question (i.e. the person born during marriage) could have been begotten.

It may also be pointed out that section 41 uses the expression "conclusive proof": that section provides that a final judgment, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers or takes away any legal character etc., is conclusive proof, inter alia, that any legal character which it confers accrued at the time when such judgment, order or decree came into operation. In this section, the word 'conclusive' seems to have been suggested by the discussion by Peacock C. J. in *Kanika v. Radha* where it is said of a decree of divorce — "It is conclusive upon all persons that the parties have been divorced and that the parties are no longer husband and wife: but it is not conclusive, nor even prima facie evidence against the strangers that the cause for which the decree was pronounced existed."] The expression "conclusive evidence" occurs also in one of the leading English cases on *res judicata* — *the Duchess of Kingston's case*.

6.89. Lastly, section 31, provides that admissions are not conclusive proof of the matters stated.

**XXV. "RELEVANT" AND "ADMISSIBLE"**

6.90. Before concluding our discussion of the definitions, we should deal with an important question concerning the terminology employed in other sections of the Act. The question arises by reason of the broad principle underlyiing the Act, namely, that evidence can be given only of facts in issue and facts relevant to facts in issue, — unless the evidence is excluded by specific rules of exclusion. Such relevant facts as are not facts in issue can be conveniently described as "collateral facts."

6.91. This broad principle shows the importance of three propositions, namely—

1. Facts sought to be proved must be connected with *facts in issue.*
2. The connection must amount to *relevance* as provided in the Act.
3. There should be no rules of *exclusion* applicable to the particular evidence.

6.92. The first proposition stresses the importance of facts in issue and of a connection between the fact in issue and the collateral fact. The collateral fact must be relevant to a *fact in issue.* It must, in other words, be 'material' for the purpose of the particular dispute. According to Nokes, "Materiality" indicates that a fact is adequately related to a party's case; in other words, that a fact constitutes or relates to some element of his claim or defence, without which he cannot establish the right asserted, or resist the claim. The element of 'materiality' has been stressed in other writings also.

6.93. The second proposition is concerned with 'relevance'. Relevance is really a question of validity of thought, or a question of probative value. The need for using the expression 'relevant' in the Act has been felt only in

---

2*Duchess of Kingston's Case*, 11 State Trials 262.
3*Nokes, Introduction to Evidence* (1967), page 83.
4*See, for example, J. L. Montrose, "Basic Concepts of the Law of Evidence" (1954)* 70 L.Q.R. 527.
order to indicate, broadly, the circumstances in which one fact is regarded as of probative value to another fact which is to be proved. This part of the Act. — that is to say, mainly (but not exclusively) sections 5 to 16 — is really a codification of rules about probative value based on ordinary principles of common sense.

To quote Stephen again, "The word 'relevant' means that any two facts are so related to each other that according to the common course of events one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of that other."

6.94. As Montrose has observed, "The concept of relevance is concerned with the relationship which the tendered evidence has to the fact it is sought thereby to prove because of the order of nature: it posits a natural connection between factum probans and factum probandum." Thayer often used, as a synonym for 'relevant', the phrase 'logically probative', and Wigmore used the phrase 'rationally probative'.

6.95. The third proposition really relates to the 'admissibility' of evidence, and not to its relevance. A fact otherwise relevant may be excluded, because of some policy of the law, — e.g. hearsay, opinion, character, privilege, State secrets etc. The reason for excluding hearsay evidence, evidence of opinion, character, privilege, State secrets and the like is not that the fact concerned is not relevant. Hearsay may be relevant. As has been often pointed out, in a trial for murder the fact that B (non-witness) told A (witness) that B saw the accused stabbing the victim, is 'relevant' in the logical and rational sense. The relationship between the two facts — the fact in issue and what B told he saw — is such that according to the common course of nature, one fact does render the other probable. What B saw is, if not a fact in issue, at least a collateral fact. If the collateral fact is true, its truth tends to show the existence of the fact in issue. The real reason for excluding the evidence in question is the policy of the law. Relevance is a 'pre-legal' concept. Admissibility is legal concept. The two should be kept apart.

6.96. The logical relevance of hearsay, can hardly be doubted, and its exclusion must, in our view, rest on the infirmities inherent in second-hand information. In fact, it has been held in Australia that it is proper to pay regard to hearsay, if, by accident or design, the party entitled to object to it lets it in. This shows that hearsay would be 'relevant', though this does not imply that it is admissible.

6.97. The same reasoning applies to character. In Brown v. Eastern & Midlands Rly. Co., Stephen J. said, "you must not prove..........that a particular engine driver is a careless man in order to prove that a particular accident was caused by his negligence on a particular occasion". This is because the law excludes evidence of character as shown by habit,—except in special cases, as a matter of policy.

1Stephen, Digest of the Law of Evidence.
2See also supra.
6See para. 6.96, infra.
8Walker v. Walker, 57 Commonwealth Law Re. 630 (Australia).
The position regarding opinion is the same. The fact that a person holds a particular opinion as to the facts in issue may be relevant; but, in general, the opinions of non-experts are excluded. Generally speaking, it is for the tribunal of fact to formulate its own opinion on facts presented by witnesses who perceived them by the exercise of their physical senses. Nevertheless, logically, the opinion of an eye-witness who perceived the fact in issue might be of value, even though the witness had no recollection of the fact perceived, but only a recollection of an opinion formed at the time. In fact, in some cases, evidence is allowed to be given of an opinion formed by a non-expert. Age, identity, speed, and intoxication are, for example, subjects on which non-expert opinion is admissible.\(^5\)

6.98. Now, the terminological flaw in the Evidence Act, in this respect, lies in its using the expression 'not relevant', where\(^6\) what is really meant is 'not admissible'. According to Nokes\(^7\): "Relevance depends on reasoning, but admissibility depends on law; and, to be received in evidence, facts must be both relevant and admissible. Admissibility denotes that there is no rule of law or practice by which facts must or may be excluded. It is, thus, necessary to bear in mind the distinction between relevance and admissibility: or, more clearly, the distinction between relevance and inadmissibility."

6.99. In view of the inaccuracy in the present terminology as discussed above, the better course, in our view, would be to avoid the term 'not relevant' in those sections where what is meant is 'not admissible'. Whilst preserving the word 'relevant' in sections 5-16, we should, therefore, substitute the word 'admissible' for the word 'relevant', wherever the former appears to be more appropriate. — a definition of 'admissible' being added. in section 3, as meaning 'admissible in evidence'.\(^8\)

6.100. The sections relating to confessions and character require some discussion in this connection. One of us was of the view\(^9\) that in section 24, the confession is, logically also, not relevant. In sections 52-55 also, according to him, character evidence is excluded because logically, it is not relevant.

The rest of us are, however, of the view that both in section 24 and in sections 52-55, the evidence would be relevant, but is excluded for certain reasons. For example, character evidence is excluded, not because it has no relevance in the sense of probative value, but for certain reasons of policy. If a man has committed a hundred thefts previously, logically he may have committed the present theft. But the law excludes such evidence for reasons which are well-known.

Similarly, involuntary confessions are not 'irrelevant', speaking logically. It is true that they are not the products of a free will. But it can be said that even if a confession is involuntary, it may be logically probative. The law excludes it for reasons of policy.

6.101. It may be stated that though the words 'logically relevant' are not used in the Act, the concept of logical (probative) effect is writ large in sections 5 to 16.

---

\(^1\)R. v. Davies. (1962) 1 W.L.R. 1111.
\(^3\)E.G. Sections 51 to 55 etc.
\(^4\)Nokes. Introduction to Evidence (1967), page 83.
\(^5\)Section 3 to be amended to insert a definition of 'admissible'. See para 6.83 supra.
\(^6\)Shri Sen-Varma.
It could be argued that Stephen's scheme is that in the definition in the Act of 'relevant', the scope of 'irrelevant' includes what is inadmissible. It should, however, be pointed out that 'relevance' must be based on a logical connection. Section 5 provides that evidence may be given of facts 'hereby declared to be relevant'. But that does not mean that rules of admissibility are disregarded. It only shows that logical and legal relevance are not the same. The mere fact that a fact is relevant does not make evidence of it admissible. The crucial question is, whether facts, which are relevant, should, when they are excluded on grounds of policy, be described as 'irrelevant' or whether they still remain relevant and would be better described as inadmissible. We take the latter view.

In Stephen's scheme, he used the expression 'irrelevant' as covering 'inadmissible'. The question is whether the artificial usage should be retained, or whether there is scope for improvement, to think that an improvement is needed, and is practicable.

6.102. In the light of the above discussion, we recommend that the sections concerned should be amended accordingly, and also that a definition of "admissible" should be added, as suggested above.

(a) Section 3 (a definition of 'admissible' to be inserted).
(b) Section 5 (Explanation to be added). (Expression 'relevant' to be replaced by the expression)
(c) Sections 21-23 (Abridged).
   Section 21, 22, 29 (Confessions) 'admissible' where the context so justifies, i.e., sections 32-36 (Statements out of court).
   Section 38 (Law Reports)
   Sections 40-44 (Judgments)
   Sections 45-51 (Opinions)
   Sections 52-55 (Character).

Appendix

Extract of section 18 of the Civil Evidence Act, 1968 (Eng.)

"General interpretation and savings"

18. (1) In this Act "Civil proceedings" includes in addition to civil proceedings in any of the ordinary courts of law—
   (a) civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply; and
   (b) an arbitration or reference, whether under an enactment or not, but does not include civil proceedings in relation to which the strict rules of evidence do not apply.

(2) In this Act—
   "Court" does not include a court-martial, and in relation to an arbitration or reference, means the arbitration or tribunal and, in relation to proceedings before a tribunal (not being one of the ordinary court of law), means the tribunal.
   "Legal proceedings" includes an arbitration or reference, whether under an enactment or not.

The list is tentative.

6–131 LAD/ND/77
CHAPTER 7

RELEVANT FACTS—THE GENERAL PROVISIONS

SECTIONS 5 TO 11

Facts in issue

7.1. Under section 5, evidence can be given only of facts which are in issue or which are relevant to a fact in issue. Sections 6 to 55 deal with facts which may be relevant to a fact in issue. For this reason, sections 6 to 55 constitute an important group of provisions.

Grouping.

7.2. The facts treated as relevant under these sections fall into a few broad groups. The first group includes a few sections (sections 6 to 11) containing general provisions which could apply to all cases; the next group comprises a few sections (sections 12 to 16), which deal with facts which may be relevant in particular cases. These are followed by provisions as to the admissibility of statements, opinions and character. Thus, we have five broad groups under which the provisions as to relevant facts can be placed, namely,—

(1) Facts in general;¹
(2) Facts in particular case;²
(3) Statements (of facts);³
(4) Opinions;⁴ and
(5) Character;⁵

Sub-divisions.

7.3. These could be sub-divided, according to the nature of the facts, as follows:—

FACTS IN GENERAL

(1) Facts which form part of the same transaction as — a fact in issue (section 6).
(2) Facts which are the occasion, cause or effect of relevant facts or facts in issue (section 7).
(3) Facts relating to motive, preparation or conduct with reference to a fact in issue or relevant fact (section 8).
(4) Explanatory or introductory facts (section 9).
(5) Statements and actions referring to common intention (section 10).
(6) Facts inconsistent with, or affecting the probability of, facts in issue or relevant facts (section 11).

FACTS IN PARTICULAR SITUATIONS

(7) Facts affecting the quantum of damages (section 12).

¹Sections 6 to 11.
²Sections 12 to 16.
³(a) Sections 17 to 31;
(b) Sections 32, 33;
(c) Sections 34 to 39;
(d) Sections 40 to 44.
⁴Sections 45 to 51.
⁵Sections 52 to 55

72
(8) Facts affecting the existence of any right or custom in question (section 13).

(9) Facts showing any state of mind or feeling when the existence of such state of mind or feeling is in issue or is relevant (section 14).

(10) Facts showing a system (section 15).

(11) Facts showing course of business (section 16).

STATEMENTS

Evidence is also admissible, under certain circumstances, of the following statements:

(1) Admissions (sections 17–23).

(2) Confessions (sections 24–31).

(3) Statements by persons who cannot be called as witnesses (sections 32–33).

(4) Statements under special circumstances (sections 34–35).

(5) Judgments of courts (sections 40–44).

OPINIONS

Opinions of third parties (sections 45–51).

CHARACTER

7.4. Section 5, which may be regarded as the basic section of the Act, lays down the fundamental rule that evidence may be given of (1) facts in issue, and (2) relevant facts, and of no others.

The Explanation to the section goes on to provide that the section shall not enable any person to give evidence of a fact which he is “disentitled to prove” by any provision of “any law for the time being in force relating to civil procedure”. Illustration (b) puts, in this context, the case of the plaintiff not bringing with him (and not having in readiness for production at the first hearing) a document on which he relies. The Explanation had obviously in mind, provisions corresponding to present Order 7, Rules 14 and 18, Order 13, Rule 1 and Order 41 rule 27, of the Code of Civil Procedure, 1908. The words “law for the time being in force relating to civil procedure” in this Explanation should, however, be made more precise by mentioning the Code of Civil Procedure, 1908.

As regard areas where that Code is not in force—areas referred to in paragraphs (a), (b) and (c) and proviso to section 1(3) of the Code,—suitable words can be added to cover cases of the corresponding laws in force in such areas.

7.4A. We recommend an amendment of section 5, Explanation, on the above lines.

7.5. With section 6 begins the group of provisions enumerating the facts declared by the Act as “relevant”. According to section 6, facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

There are four illustrations to the section. Illustration (a) puts these facts. A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.
That the accused need not be present, is illustrated by another illustration. A is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

Illustrations (c) and (d) deal with civil cases. They read:

"(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact."

7.6. The principle of section 6 is clear. If the connected facts form part of the same transaction as the fact which is the subject of enquiry, manifestly evidence of those facts ought not to be excluded, because, to view a fact in isolation would be to have only a partial or incomplete view. Moreover, such facts,—i.e. facts forming part of the same transaction,—could not often be excluded without rendering the evidence unintelligible.

7.6A. There have been several attempts to formulate the exceptions recognised under the head of res gestae. The phrase itself has been criticised as a "bubble of verbiage". But the concept is fairly intelligible.

The California Evidence Code deals with the matter under the head of "spontaneous statement" and "contemporaneous statement" in these terms.

"1240. Spontaneous statement"

"1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) was made spontaneously while the declarant was under the stress of excitement caused by such perception.

"1241. Contemporaneous statement"

"1241. Evidence of a statement is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement:

(a) purports to narrate, describe or explain an act, condition, or event perceived by the declarant; and

(b) was made while the declarant was perceiving the act, condition, or event."

1See Norton, Evidence, 101, referred to in Woodroffe, Evidence (1941), Comment on section 6.
2See rules 512-513 of the Model Code and rule 63(4) and 63(12) of the Uniform Rules.
4Sections 1240-1241, California Evidence Code.
7.7. In England, acts, declarations and circumstances which constitute or accompany, and explain the fact or transaction in issue, are admissible as forming part of the res gestae. The section deals with a substantial part of this topic. The point for decision under the section will always be whether the facts sought to be adduced do form part of the same transaction, or are too remote to be considered really part of the "transaction" before the Court.

7.8. The illustrations to the section bring out a few important aspects. Illustration (a) makes it clear that the facts relevant under the section could include acts and declarations, not only of the parties involved in a crime, but also those of bystanders, provided they are part of same transaction as the fact in issue.

Illustration (b) indicates that the nature of a crime may be such that the acts of several other persons could be relevant as parts of the same transaction, even though the person charged as the principal offender was not present at any of them. The illustration relates to waging war—an offence which usually, if not invariably, requires the participation of numerous persons. In fact, these occurrences are part of the waging of war—a fact in issue. Incidentally, the facts are reminiscent of a celebrated English treason trial.

Illustration (c), relating to a suit for tort, is useful as making it clear that the section applies as much to documents as to acts and declarations and also that it is not confined to criminal proceedings. The correspondence is admissible, because the letter cannot be viewed in isolation.

Illustration (d) also pertains to a civil suit—this time a suit on contract. The various deliveries have to be viewed cumulatively. They are part of the fact in issue—Did the goods pass from A to B?

In an English case, the question was whether A sold goods to B personally, or to B as C's agent, the sale being made subject to inquiry from D. B's referee. A letter written by A to his own agent, asking him to "inquire from D as to the credit of C and also of B, who is making large purchases for C", was held admissible for A as part of the transaction and in corroboration of other evidence, though there was no proof per se that B's purchase was for C. In that case, the transaction was the cumulative result of a number or arrangements.

7.9. According to Cross and Wilkins—

1. Statements connected with, and made substantially contemporaneously with, the occurrence of the facts to which they relate are often said to be received as part of the res gestae (part of the happenings or part of the story). Statements received as part of the res gestae are sometimes received by way of exception to the rule against hearsay, but they can now only be so received in criminal cases; on other occasions they constitute original evidence, i.e. they are not proved in order to establish the truth of that which was asserted.

2. Statements proved as conduct are sometimes said to form part of the res gestae.

---

1As to the history of this "catch all" phrase, see Phipson in 19 Law Quarterly Review 435.
2See discussion as to "English Law and Section 6", infra.
5Minns v. Lebler, (1862) 7 H.&N. 786; the action was by A. who gave evidence, against a third party to whom B had pledged the goods.
6Cross and Wilkins, Outlines of Evidence (1971) pages 139, 140, Article 51.
3. Facts forming part of the transaction under investigation are also said to form part of the res gestae.

4. The doctrine of the res gestae is inclusionary, allowing for the reception of evidence by way of exception to a number of exclusionary rules."

7.10. The phrase "res gestae" has often been criticised in England. In *Homes v. Newman*, Lord Tomlin, sitting as an additional Judge in Chancery, suspected that "the phrase 'res gestae' had been adopted to provide a respectable legal cloak to a variety of cases to which no formula of precision can be applied."

The word "res gestae" has been used in several senses, that is, as meaning the transaction itself, or the events constituting the transaction, or the surrounding circumstances accompanying the transaction, or the transaction together with the accompanying circumstances. However, the principal idea sought to be conveyed, namely, the idea of a whole in relation to its constituents or its constituent parts, is intelligible enough, and the principle of admission of such evidence is also sound. Of course, section 6 does not exhaust the field of res gestae. Some of the later sections—for example, section 8—also deal with matters which are usually dealt with in English text books under the topic of res gestae. But, in practice, most of the cases under res gestae are of declarations falling or alleged to be falling within section 6.

7.11. Academic writers in England and elsewhere, when discussing res gestae, usually concentrate on declarations or utterances, because, in practice, they figure frequently.

7.12. The expression "res gestae", in the context of the law of evidence, may be used in at least three different ways, as has been pointed out in the judgment of Lord Wilberforce in *Ratten v. R.*

1. When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin, and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife without knowing, in a broader sense, what was happening. Thus, in *O'Leary v. The King*, evidence was admitted of assaults, prior to a killing committed by the accused during what was said to be a continuous orgy.

As Dicon, J. said (in that case):

"Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event."

2. The evidence may be concerned with spoken words as such (a part from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, i.e., are the relevant facts or part of them.

---

2 For example, see Morgan, "A suggested classification of utterances admissible as res gestae" (1922) 31 Yale Law Journal 229.
4 *O'Leary v. The King*, (1946) 73 C.L.R. 566, 577 (Australia).
3. A hearsay statement is made either by the victim of an attack or by a bystander—indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the *res gestae*.

7.13. The following discussion by Taylor, on the subject, will also be found to be very useful:

"Certain other declarations and acts are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. These *surrounding circumstances* may always be shown to the jury along with the principal fact, provided they constitute parts of what are termed the *res gestae*; and whether they do so or not must, in each particular case, be determined by the Judge in the exercise of his sound discretion, according to the degree of relationship which they bear to that fact. Thus, on the trial of Lord George "Gordon for treason, the cry of the mob, who accompanied the prisoner on his enterprise received in evidence, as forming part of the *res gestae*, and showing the character of the principal fact."

7.14. It has often been pointed out that statements which are otherwise excluded would be admissible if they fall within section 6 or, in England, the doctrine of *res gestae*. In particular, evidence which may be excluded by virtue of the hearsay rule, the opinion rule, rule against self-corroboration or rule against evidence showing bad character, may be admissible as providing the circumstances in which the statement was made.

7.15. After this general discussion, a few special features of section 6 may be noted. Section 6 takes care to make it clear that the declaration or other facts relevant thereunder—"facts which are so connected with a fact in issue as to form part of the same transaction"—are relevant, whether they occur at the same time and place or at different times and places.

7.16. In this respect, the position in England is somewhat controversial. In *Bedingfield’s case*, a man who had cut a woman’s throat was tried for murder. It was proved that the deceased, with her throat cut, came suddenly out of a room, in which she had left the prisoner. Evidence was tendered to show that immediately after coming out of the room, and shortly before she died, she had made a remark was something like "Oh: See what Harry’s done". It

---

2Per Parke, J., in—
Rawson v. Haish, 2 Bing. 104;
Ridley v. Cyde, 9 Bing. 349, 352;
Pool v. Bridges, 4 Pick 379;
Allen v. Duncan, 11 Pick. 3099.
4R. v. Hardy, 24 Howard State Trials, pages 1066 to 1096.
7R. v. Bedingfield, (1879) 14 Cox CC 34.
was held that her statement was not admissible in evidence, either as a dying declaration, as it did not appear that she was in fear of death, or as res gestae as it was made after the transaction was complete.

7.17. This was a judgment of Cockburn C.J. and the case gave rise to considerable comment. Writing extra-judicially, Cockburn (whose view is phrased with Bedingfield in mind) enunciates the principle as follows:

"Whatever act, or series of acts, constitute, or in point of time immediately accompany or terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment—whether on the part of the agent or wrongdoers, in order to its performance, or on that of the patient or party wronged, in order to its prevention—and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including, herein, what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive—as, e.g., in the case of flight or application for assistance—form part of the principal transaction, and may be given in evidence as part of the res gestae, or particulars of it: while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrong-doer—such as, e.g., statements made with a view to the apprehension of the offender—do not form part of the res gestae, and should be excluded."

This shows that what weighed with the court in Bedingfield's case was the interval that had lapsed between the crime and the exclamation which destroyed the continuity.

Thayer's view.

7.18. Thayer, who was one of the first to intervene in the Bedingfield controversy, considered that Cockburn should have received the declaration. He observed:

"The leading notion of the doctrine seems to have been that of withdrawing from the operation of the hearsay rule declarations of fact which were very near in time to what they tended to prove, fill out, or illustrate—being at the time not narrative, but importing what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration. and who can be cross-examined as to these indications; this nearness of time is made specific by the term 'contemporaneous' and 'a part of the res gestae', and it is enough that the declaration be substantially contemporaneous: it need not be literally so."

Both Cockburn and Thayer, thus, insist on the requirement of substantial contemporaneity, and the controversy between them is a matter of degree. Cockburn requiring that at the time of the statement the action of the accused

---

1R. v. Bedingfield, (1879) 14 Cox C. C. 34.
3Emphasis supplied.
4Para. 7.17. supra.
should be continuing, either actually or constructively, while Thayer does not demand this, provided that the statement is substantially contemporaneous with such action.

7.19. Wigmore's view. He regards the element of contemporaneity as properly applicable only to what he calls the "verbal act" doctrine, where the utterance is offered irrespective of its truth as accompanying and explaining a material equivocal act. His other main head of res gestae evidence is "spontaneous exclamations"—a statement of exclamation, by a participant, immediately after an injury, declaring the circumstances of the injury, or by a person present at an affray, or rail road collision, or other exciting occasion, asserting the circumstances of it as observed by him. Instead of the requirement of contemporaneity, there is, according to Wigmore, a "liberal time-allocation" which is exhausted only when the influence of the exciting cause has been dissipated.

Wigmore explains the cases as depending upon the consideration that the exciting nature of the event evokes a spontaneous and sincere response which tends to put aside self-interest and to make the utterance particularly trustworthy.

7.20. Wigmore's reasoning, however, ignores psychological considerations put forward over a quarter of a century ago by Hutchins and Slesinger, who pointed out that the exciting event might very well prevent or limit accurate observation, so that the assumption of truthfulness in Wigmore's argument might, for reason not considered by him, be very dubious. The criticism of Wigmore's position did not, however, lead the authors to conclude that such utterances should be excluded under the hearsay rule; but that they should be admitted on more satisfactory grounds.

7.21. So far as the English authorities are concerned, the admission of such statements has often been inadequately explained in the cases: quite often, res gestae is relied on. A brief but important discussion of the problem is to be found in the judgment of Dixon J. (as he then was) of the High Court of Australia in Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle. There a question for the court was whether a statement made by a deceased person shortly after an accident was admissible. The Court held it to be inadmissible. In the course of deciding this point, it was necessary to review some of the cases which Wigmore classifies under "spontaneous declaration". Dixon J. observed that the general tendency of English law was not to explain the cases in this way. While the cases provided some support for the view that spontaneous and unreflecting statements were more trustworthy, Dixon J. pointed out that the question which the courts normally asked in considering admissibility was whether the statement formed an integral part of a transaction.

7.22. On this point, — i.e. on the question of contemporaneity — the section is specific. As we have already pointed out, the section (last fifteen words) make it clear that the declaration need not be literally contemporaneous with

---

2Wigmore (1940) vi, para. 1756, pages 162-164, 197.
3Wigmore (1940) vi, para. 1746, page 134.
4Wigmore (1940) vi, para. 1750, page 142.
5Hutchins and Slesinger in (1928) 28 Columbia L.R. 432.
7See supra.
the principal fact. Nor need it be made at the same place. The test, and the only test, is whether the declaration and the act form part of the same transaction. Of course, this does not mean that the interval of time between the two can be immaterial. As is often pointed out, a few minutes can make a difference in deciding whether the two form part of the same transaction; but this aspect is not conclusive. One could make use of the classification, popularly attributed to Aristotle, of the three "dramatic unities", and say that section 6 does not place so much emphasis on unity of time and unity of place, as on 'unity of action'.

7.23. This takes us to the meaning of the word 'transaction', in section 6. The word 'transaction' has not been defined in the Act, though it occurs at several places\(^1\) e.g. section 6, section 13 and section 32(1).

7.24. As occurring in section 13, the word received judicial construction in the Calcutta High Court in a case where the question was whether a judgment is a transaction. According to R. C. Mitter J., the word 'transaction' in section 13 means 'that which is done'. A 'transaction', in its ordinary sense, is, according to Garth, C.J., one business or dealing which is carried on or transacted between two or more persons. A 'transaction', as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were, whereas the judgment of a court is something imposed by the authority of the tribunal! This interpretation of section 13 is not, it seems, conclusive for interpreting the word 'transaction' in section 6.

7.25. The principle that acts which are part of the same transaction as the fact in issue form part of the 'res gestae' can be traced at least to R. v. Ellis\(^2\). The prisoner in that case was charged with stealing six shillings, market money, from a till. Evidence was allowed of the taking not only of that amount, but also of other moneys taken during the same day. Bayley J. said:

"I think that it was in the discretion of the Judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction, then the one is evidence to show the character of the other. Now all the evidence in this case tended to show that the prisoner was guilty of the felony charged in the indictment. It went to show the history of the till from the time when the marked money was put into it up to the time when it was found in the possession of the prisoner. I think, therefore, that the evidence was properly received." (Holtroyd J. concurred).

Under the Code of Criminal Procedure,\(^4\) offences committed by several persons "in the course of the same transaction" can be tried together. With reference to this provision, the general consensus is that where the transaction consists of different acts, those acts, in order that the chain of such acts may constitute the same transaction, must be connected together by proximity of time, proximity or unity of place, continuity of action and community of purpose or

---

\(^1\)The list is not intended to be exhaustive.
\(^3\)Guilfo v. Fattah Lal, (1879) I.L.R. 6 Cal. 171, 183 (F.B.) (per Garth, C.J.).
design. But, it should be noted that under section 6 of the Evidence Act, statements, to be admissible as substantive evidence of the truth of the facts stated therein, must themselves be 'part of the transaction', and not merely uttered 'in the course of the transaction'.

7.26. The area of events covered by the term 'res vestae' or by the term 'part of the transaction', depends on the circumstances of each case. Murphy J. said in Emperor v. Ring, that while all acts and events are linked together, and while, in reality, there is no independent act or event, yet, on the other hand, "there is a practical unity in men's actions which enables us to draw a mental circle round an act or event, or a series of them and to call it, for practical purposes, a single transaction, though theoretically this may not be a true description." These observations were made with reference to the Code of Criminal Procedure, but they are quoted here to illustrate how every case involving interpretation of the word 'transaction' in section 6 requires the court to draw 'mental circle'. The question to be considered is, where exactly the line should be drawn in each particular case. The answer must, to a large extent, depend on the facts of each case.

7.27. In the English case of R. v. Foster, for instance, the accused was charged with man-slaughter by the dangerous driving of a carriage. A witness was allowed to narrate what the deceased said immediately after he had been run down, and the report makes it plain that the statement was received as evidence of the the cause of the deceased's injuries. The statement was not received as a dying declaration, because there was no evidence that the deceased was aware of his impending death; nor was there any question of the statement being made in the presence of the accused, in which case it might have been received on certain other principles. The statement was allowed to be proved as evidence of the truth of its contents. With this case, the case of Bedingfield may be contrasted. In Bedingfield the utterance of the women was excluded, on the ground that the 'transaction was over'. The conclusion thus depends on the facts of each case.

7.28. Stephen has offered a definition of 'transaction'. According to Stephen, "For legal purposes a transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue." This definition is not, however, very helpful for understanding the scope of section 6, because the crucial question in each case is,—Do the facts exhibit the required connection?

7.29. We shall now refer to selected Indian decisions which illustrate the application of the section. In a murder trial, the question was whether the accused, who had some injuries on his body, had those injuries self-inflicted, the prosecution case being that he, the accused, had declared his decision to finish the deceased and then to finish himself. A threat uttered by the accused on the morning of the day of occurrence (murder) that he would finish off the

---

Footnotes:
1 See Amrital Hazara v. Emperor, A.I.R. 1916 Cal. 188. 196.
4 R. v. Foster, (1834), 6 C.R.P. 325. The case is referred to in the matter of Surat Dhubini, (1884) I.L.R. 10 Cal. 302, 304 (infra).
5 R. v. Bedingfield, (Para. 7.16. supra).
deceased and then finish off himself was held admissible on the ground that
evidence as to the manner in which the injuries came to be sustained by the
accused was closely connected with the offence of murder as to form part of
the evidence of murder and part of the transaction.

Even an explanation given by the accused himself spontaneously, right at
the moment when the offence is alleged to have been committed, may become
part of the same transaction within section 6.

7.30. The same is the position regarding statements by the victims. In an
Assam case, injuries had been inflicted by the accused on the person of the
deceased, resulting in a fracture of his ribs. Soon after the incident, the deceased
was questioned as to the injuries, and he stated that it was the accused who
had inflicted the injuries. This statement, having been made very shortly after
the deceased sustained the injuries, was held admissible under section 6 (be-
sides section 32), in view of the fact that the doctor's evidence established that
the injuries to the ribs were contributing factor to the death.

7.31. Particularly in respect of complaints of sexual and other offences, the
question whether the statement was made spontaneously or whether it was
merely the narrative of a past transaction comes up for consideration. A
statement which does not explain the physical act, and is not spontaneous
but is a mere narrative, is generally regarded as not covered by action 6,
and it is for this reason that a statement by a ravished woman to her mother-
in-law, or other relative, made some time after the alleged rape, is regarded
as not forming part of the same transaction. Whenever recollection comes in
and whenever there is opportunity for reflection and explanation, then the
statements cease to be part of the res gestae. Such statement may, on the
facts, amount to a complaint and thus be admissible under section 8.

7.32. Somewhat on the same line of reasoning, statements made by witnesses
which are not spontaneous are excluded from use under section 6. For example,
in a trial under section 294 of the Indian Penal Code, for teasing a girl on the
road and using obscene language towards her, the prosecution relied solely on
the testimony of a witness who had reached the spot after the incident and
was told by the girl about the words used. This evidence was regarded, on
the facts of the case, as outside the scope of sections 6 and 8, and inadmissible
as hearsay.

7.33. The question whether a statement falling within the general require-
ments of section 6 is admissible as evidence of the truth of those facts or
allegations of which the statement consists, has been debated in England, and
judicial pronouncements on the subject are conflicting. The case of R. v.
Foster, to which we have already made a reference, takes a wider view in the
matter. The discussion in a judgment of the House of Lords would seem to
support the view that the statements are evidence of the truth of the matter
stated. The discussion in a judgment of the Privy Council, on the other hand,
suggests a narrower view on this point. In that case, at the trial of the appellant
on a charge of indecently assaulting a girl just under the age of four years, the
trial judge held to be admissible evidence by the child's mother of a statement

---

4Raman v. Emperor, A.I.R. 1921 Lahore 258.
6R. v. Foster, Para. 7.27, supra.
8Sparks v. R., (1964) A.C. 964; (1964) 2 W.L.R. 566, 575, 576 (P.C.).
made to her by the child shortly after she had been assaulted (the child not being a witness at the trial), that "it was a coloured boy". The appellant was a white man aged 27 years. The judge also admitted certain statements (involving admissions or confessions) made by the appellant to police officers or made in their hearing. The appellant, who was found guilty, appealed against his conviction on the grounds, *inter alia*, (1) that the evidence of the child's statement should have been held to be admissible either as evidence of identity or because the words of the child formed part of the *res gestae*, and (2) the statements to the police officers were not admissible because they had not been voluntarily made. It was conceded by the prosecution that unless the statements made to the police were admitted, there was no evidence on which the appellant could have been convicted. It was held that the mother's evidence of what her child had said to her would have been hearsay evidence, and the child having neither given evidence nor said anything in the presence of the appellant, there was no basis on which her statement to her mother could be admitted. It was in this context that the Privy Council observed that even if the statement had been admitted as *res gestae* it could not furnish evidence of the truth of the matter stated.

7.34. In a recent judgment of the House of Lords, the statement, though admitted, was not rendered in proof of the truth of the matter stated, and hence the judgment is not conclusive on his point.

7.35. It may, however, be stated that even in England, statements accompanying acts are sometimes treated as part of the *res gestae*—see *R. v. Foster*, *supra*. They could be conveniently styled as "verbal acts." In the *Mersey Docks Board case*, for example, A sued B for damages for negligently causing a fire on A's landing stage. One of B's workmen, as he was escaping from a manhole just after the fire occurred and near the place where it was first seen, said: 'Oh! my God. The stage is on fire. I did it. I am a ruined man'! This was held admissible as part of the *res gestae*, not as narrative but as conduct relevant to the issue.

Julius Stone has pointed out that the American view is that statements admissible as *res gestae* constitute an exception to the hearsay rule. Stone takes the three situations about which most of these problems revolve, namely, (i) statements as to bodily or mental feelings; (ii) spontaneous statements in the face of an emergency, and (iii) statements of intention. He says that all these are exceptions to the rule against hearsay.

7.36. For the purposes of the Indian Evidence Act, however, the controversy referred to above should not be material, because section 6 does not lay down any limitations as to the evidentiary use to which a statement admissible under this section can be put.

In a Calcutta case, the only evidence against the accused woman who was charged with having voluntarily caused grievous hurt to her daughter-in-law with a pair of tongs which had been heated, was a statement made in the presence of the accused by the person injured to a neighbour immediately after

---


3 *Mersey Docks Board v. Liverpool Gas Co.* (The *Times* August 23, 1875) (Facts taken from *Phipson*).

4 Julius Stone, "*Res Gestae Rescripta*", 55 L.Q.R.

5 *In the matter of Surat Dhobini*, (1884) I.L.R. 10 Cal. 302, 304 (C.D. Field and R.C. Mitter LL.).
the infliction of the injuries. The accused did not deny the allegation (contained
in this statement) that she had inflicted the injuries. It was held that this
statement was admissible under section 6, as res gestae and also under illustration
(g), section 8, as conduct influenced by a relevant fact (acquiescence in a charge).

In this case, the statement was made in the presence of the accused. But
that aspect, it is suggested, was not material for the purpose of application of
section 6. It was emphasised to show relevance under section 8—the conduct of
the accused by remaining silent. In fact, the High Court referred to the English
case of R. v. Foster, as in point, though the court took care to observe that
English cases could be taken merely as illustrations and not as binding. It may
be noted that in R. v. Foster, the accused was not present when the statement
was made.

7.37. In this connection, it should be pointed out that statements in the
nature of spontaneous exclamations are ready statements through which the
transaction speaks. Although physically they come from the mouth, they
really come from the heart. The will is subsidiary, the emotion paramount.
They express the inner commotion of the soul. No doubt, such utterances or,
for that matter, any other utterances—are not conclusive; but they render pro-
able the existence of the fact asserted (which is the general test of relevance)'
and, for that reason, it seems to be legitimate to regard them as admissible not
only for proof of the factum of the statement, but also in 'proof of the truth
of the contents. In a recent English case, Lord Wilberforce vividly described
such statements as made under the 'pressure of the drama'.

7.38. This aspect of spontaneity could be illustrated. If a passenger in a
car spontaneously makes the following utterance as to the defendant's car—"See. He has come over on the wrong side", it is more pro-
able than not that the other car had come over to the wrong side. It is
difficult to see what utility such utterances can have as evidence, if they are
not to be utilised for the purpose of proving the truth of the matter stated.

7.39. Incidentally, it may be stated that some of the later sections in the
Act deal specially with statements which are discussed in English text-books
under res gestae. Discussion in the under-mentioned decisions show that
the evidence covered by section 8 etc. is of the nature usually referred to as
res gestae.

7.40. We have considered it necessary to deal with the salient features of the
section, in view of its importance. However, the discussion does not necessitate
any amendment. Such difficulties as may be felt in practice are difficulties of
the application of the section, which are not avoidable by any verbal improve-
ments.

SECTION 7

7.41. According to section 7, facts which are the occasion, cause or effect,
immediate or otherwise, of relevant facts or facts in issue, or which constitute
the state of things under which they happened, or which afforded an opportunity
for their occurrence or transaction, are relevant.

1 R. v. Foster, (1934) 6 C.&P. 325, para. 7.27, supra.
2 See Chapter 4, supra.
4 Particularly, section 8.
5 Yusufali v. The State, A.I.R. 1968 S.C. 147, 149 (section 8).
6 (1879) I.L.R. 3 Bom. 17, 18 (Section 8).
7 (1951) All. L.J. 49, 50.
There are three illustrations to the section. Illustration (a) takes these facts. The question is whether A robbed B. The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

Under illustration (b), where the question is whether A murdered B, marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

Under illustration (c), where the question is, whether A poisoned B, the state of B's health before the symptoms ascribed to poison and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

7.42. It may be stated that in illustration (a), the facts in question are relevant as giving occasion or opportunity for the fact in issue or as being the cause of the fact in issue. In illustration (b), the facts in question are admissible as effects of the fact in issue. Incidently, this illustration furnishes an instance of "real evidence". As to illustration (c), the state of B's health before the symptoms ascribed to poison and the habits of B, known to A, constitute the state of things under which the facts occurred, as also an opportunity for the administration of poison.

7.43. The reason for the admission of facts of this nature is that, if it is desired to decide whether a fact occurred or not, almost the first natural step is to ascertain whether there were facts at hand, which were calculated to produce it or afford opportunity for its occurrence. It is a natural human tendency to look to the cause when an effect is visible, or to look for the effect if the cause is known. Moreover, in order to the proper appreciation of a fact, it is necessary to know the state of things under which it occurred. Knowledge of the circumstances enabling a person to do the act is also relevant. All these facts can be conveniently summed up as "contributory or consequential factors."}

7.44. In this sense, section 7 embraces a larger area than section 6. While section 6 deals with the transaction itself, section 7 provides for the admission of a variety of facts, which, though not possibly forming part of the transaction, are yet connected with it in particular modes. These modes—occasion, cause, effect, opportunity—are really different aspects of contributory or consequential factors. In the case of the particular person who is a victim of robbery—illustration (a)—it is obvious that his physical presence, within a proper range of time and place, forms one step on the way to the belief that he was robbed. Section 6, broadly speaking, concentrated on the immediate present. Section 7 takes us into the immediate past and the immediate future.

7.45. In permitting evidence of these facts, the section is, no doubt, faithful to the general principle underlying the scheme of the provisions of the Act—the principle of probability. The various contributory and consequential factors rendered admissible under section 7, are admitted on the assumption that they render probable the existence of the fact in issue, and their absence may render it improbable.

7.46. In so far as the section enables evidence to be given of facts which afforded an opportunity for the occurrence of a fact in issue, care must be taken

---

1 Woodroffe.
2 See Chapters 3-4, supra.
3 Para 7.57, supra.
against a hasty inference from opportunity for a crime to the commission of a crime. As Norton pointed out, there can be no crime without the opportunity, but there is a wide gulf, to be bridged over by evidence, between opportunity and commission.

7.47. On the other hand, no circumstances can be more destructive of a criminal charge than that the accused had no opportunity of committing the crime. On the strength of this proposition rests the force of a defence founded on an alibi which is admissible under section 11 read with section 7.

7.48. Attention must also be drawn to the rather wide language of the section, in so far as it provides that facts which are the cause or effect immediately or otherwise of relevant facts or facts in issue, are relevant. These words, if taken literally, would take in the remotest cause, and, if pursued to its logical extreme, such a course would open up a field for endless inquiries. That, however, could not be the intention, nor is the section so interpreted in practice. Presumably, the draftsman has deliberately employed an elastic phraseology in order to avoid any objections being raised to the effect that a particular fact sought to be proved under the section was not the immediate cause of the fact in issue and that some other cause had intervened between it and the fact in issue.

7.49. The section could be pressed into service in a variety of situations. An interesting species of evidence admissible under the section is that relating to footprints. The fact that there were footprints at or near the scene of offence, or that they came from or relate to a particular place, is relevant under the section, because they represent the effect of a relevant fact. Illustration (b) to the section, in so far as it relates to marks on the ground produced by the struggle near the place of murder, is itself an illustration of the effect of a fact in issue or a relevant fact.

7.50. In England also, finger-prints or footmarks of an accused found near the scene of the crime are admissible in evidence. In Callis v. Gunn, evidence of the defendant's finger-prints was admitted although he had not been cautioned by a police officer when asked to provide his prints. The Court of Criminal Appeal has upheld convictions where the only evidence against the defendant was that of finger-prints.

7.51. In fact, the potentiality of section 7 as regards scientific evidence is vast. Dealing with recorded tapes, the Supreme Court has held that the imprint on the magnetic tape is the direct effect of the relevant sounds, and, like all photographs of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and admissible under section 7 — though, of course, the evidence must be received with caution. This aspect was also brought out in a Punjab case.

7.52. The utility of section 7 was demonstrated in a Saurashtra case. The accused was a Clerk in the office of the Chief Minister, and his duty was to receive remittances addressed to the Chief Minister's Office towards

---

1Norton, Evidence, 104; cited by Woodroffe, Evidence Act, commentary on section 7.
2Woodroffe.
3(a) R. v. Shaw, (1830) 1 Law. C.C. 116, per Parke B;
(b) R. v. Heatton (1832) 1 Law. C.C. 116, per Alderson, B.
4Callis v. Gunn, (1864) 1 Q.B. 495.
8A.I.R. 1955 Saurashtra 68, 70.
the Scarcity Relief Fund and send them to the Treasury or hand them over to a superior officer. A particular amount, which had been received from an overseas donor, was not so credited, and the superior officer of the accused wrote two letters to the overseas donor for particulars relating to the remittance. The accused was himself entrusted with posting these letters. When no reply was received, the superior officer wrote to the overseas donor another letter, which was despatched by a different Clerk, and a reply was received in due course. On the prosecution of the accused under section 409 of the Indian Penal Code for breach of trust, the letter received in reply was given in evidence for the prosecution. It was held that, although the contents of the letter could not be received against the accused under section 32, because there was no proof that the writer of the letter was the same person as the overseas donor, yet the letter was admissible under sections 7 and 11, to prove the fact that when letters were given to the accused for despatch, no reply was received from the addressee, while a reply purporting to be from the same addressee was received when the letter was given to despatch to some other person, thus leading to the inference that the accused had suppressed the letters entrusted to him.

7.53. The above discussion reveals no need for change in the section. Conclusion.

SECTION 8

7.54. According to section 8, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any proceeding are also relevant under the section, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

According to the first Explanation to the section, the word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this Explanation is not to affect the relevancy of statements under any other section of this Act.

According to the second Explanation, when the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

7.55. There are eleven illustrations.

According to illustrations (a), if A is tried for the murder of B, the facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

Illustration (b) takes the case where A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

A criminal trial is presented in illustration (c). A is tried for the murder of B by poison.

7—131 LAD/ND/77
The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

In illustration (d), the question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will related; that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

According to illustration (e), where A is accused of a crime, the facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

According to illustration (f), where the question is, whether A robbed B, the facts that, after B was robbed, C said in A's presence — "the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant.

Where the question is, whether A owes B rupees 10,000, then, according to illustration (g), the facts that A asked C to lend him money, and that D said to C in A's presence and hearing — "I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts.

In illustration (h), the question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter, are relevant.

In illustration (i), A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

Illustration (j) deals with rape. The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished, is not relevant as conduct under this section, though it may be relevant:

As a dying declaration under section 32, clause (1), or

As corroborative evidence under section 157.

The same aspects are illustrated in illustration (k). The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.
The fact that he said that he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant—

As a dying declaration under section 32, clause (1), or

As corroborative evidence under section 157.

Section 8 and section 7.

7.56. This section is, in a sense, an amplification of section 7. One of the facts relevant under section 7 is ‘causa’, and another fact so relevant is ‘effect’. Motive, which is relevant under section 8, may be described as the psychological cause of the act which is done with the motive. Similarly, conduct which is influenced by a fact (section 8) is, in a sense, the effect of that fact (section 7).

Classes of relevant facts under section 8.

7.57. The classes of facts which become relevant under section 8 fall into three broad groups, namely, (a) facts showing motive, (b) facts showing preparation, and (c) facts showing conduct,—in each case, it being necessary that some connection between the fact sought to be brought under section 8 and some other fact already in issue or relevant, is established.

Motive

7.57A. As to motive, as the etymology of the word indicates, a motive is, strictly, that which moves or influences the mind. It has been said that an action without a motive would be an effect without a cause; the particulars of external situation and conduct will, in general, correctly denote the motive for the criminal action. Statements accompanying acts are often necessary to show the animus of the action.

Motive, a fact in issue.

7.58. In some cases, motive may have an importance of its own, being an ingredient of the crime or tort,—e.g., motive on a privileged occasion in relation to defamation. When motive is such an ingredient, it is not merely a relevant fact, but is a part of the “fact in issue” as defined in the Act, because on motive depends the existence of the liability in such cases. Then, there may be cases where motive may affect the extent of the liability, and is, therefore, a fact in issue. In all these cases, evidence of motive can be given under section 5, and recourse to section 8 is not needed. However, even where section 5 does not apply, motive may be relevant under section 8.

It has been said\(^1\) that the section embodies, in a statutory form, the rule of evidence that the testimony of res gestae is always allowable when it goes to the root of the matter concerning the commission of the crime.

Importance of motive and preparation explained.

7.59. In a consideration of the cause or occasion of a fact, or the state of things under which it happened, nothing can be more material than to know whether any person had an interest in its happening, or took any measures calculated to bring it about. For this reason, motive and preparation become of the utmost importance. If A is found murdered, the fact that B had a strong motive for wishing A dead is, so far as it goes, a piece of evidence against B. So, if A is poisoned with arsenic, the fact that B, shortly before, procured arsenic, or made arrangements by which he would have access to A’s food, points, in a measure, to B being the poisoner, and would be relevant fact at his trial\(^2\).

Preparation.

7.60. Preparation is also relevant, it being obviously important in the consideration of the question whether a man did a particular act or not: to know whether he took any measures calculated to bring it about. Premeditated action must necessarily be preceded not only by impelling motives, but

---

\(^{1}\)See section 3, definition of “fact in issue”.

\(^{2}\)Kallijian v. Emperor, A.I.R. 1936 Cal. 316, 318; I.L.R. 63 Cal. 1015

\(^{3}\)Cunningham, pages 93-94, cited by Woodroffe, Evidence (1941), commentary on section 8.
also by appropriate preparations.\(^1\) The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act planned or designed.

It may be mentioned that, as a matter of law, a preparation for committing an offence is different from an attempt to commit it. The sufficiency of the *actus reus* of attempt is a question of law which has led to some difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it. However, the distinction is, to quote the Supreme Court.\(^2\)

"The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a 'direct movement' towards commission after preparations are made.

In order that a person may be convicted of an attempt to commit a crime, he must be shown to have had an intention to commit the offence, and secondly to have done an act which constitutes the *actus reus* of a criminal attempt."

7.61. The next broad category relates to conduct. "Conduct" is the expression, in outward behaviour, of the quality or condition operating to produce these effects. These results are the traces by which we may infer the moving cause. In point of time, conduct is closely associated with the internal condition giving rise to it; nevertheless, the indication is strictly not a concomitant, but a retrospective one, because the argument is backward from effect (conduct) to cause (internal condition).\(^3\)

Illustrations.

7.62. Illustrations (a) and (b) to section 8 refer to motive. Illustrations (c) and (d) refer to preparation. Illustration (e) refers to previous and subsequent conduct of an accused. Illustrations (e) and (f) and (h) indicate a desire to avoid or stifle enquiry, thus representing conduct, and illustration (g) is an instance of silence which may amount to admission.

Illustration (a) elaborated.

7.63. A case analogous to illustration (a) to section 8 may be cited. In a trial\(^4\) of the accused woman for the murder of her husband's elder brother, the circumstances that the relations between the deceased and the accused were strained, that the deceased threatened to expose her to her husband on his return from ulterior, that the deceased was beaten by the paramour of the accused five days before his murder—were held to be relevant under section 8, as showing motive or preparation.

Illustration (e)

7.64. Illustration (e) would apply if it could be shown that the act of the person providing evidence would have the effect of giving an appearance favourable to himself.\(^5\)

Illustration (g)

7.65. As to illustration (g), we may refer to a Calcutta case.\(^6\) The accused woman was present, when the person for injuring whom the accused was tried stated, almost immediately after the infliction of the injuries, that the accused

---

\(^1\)See the case of Patch, cited in Stephen, Introduction sections 99-106.


\(^5\)The *State v. Debnu*, A.I.R. 1957 H.P. 52, 57.

\(^6\)In the *matter of the petition of Sarat Dhabini* (1884) I.L.R. 10, Cal. 302, 304.
woman inflicted them, and the accused did not contradict the statements of the injured. These statements were held to be admissible under illustration (g). In England, it is a general rule that a statement made in the presence of the prisoner, which he might have contradicted, if untrue, is evidence against him.  

7.66. The case law as to offences of corruption furnishes interesting illustrations of conduct as a relevant fact. In a Mysore case, at the time when the Inspector of Police, Anti-Corruption Branch, called upon the accused to produce the money which had been received as a bribe, the accused hesitated, and was trembling and perspiring. It was held that the conduct of the accused under such circumstances was a relevant fact which could be taken into consideration by the Court. In Shiv Bahadur Singh’s case the Supreme Court took into consideration the reaction and confusion on the part of the appellant in that case, at the time when he was called upon by the police to explain his possession of the bribe money. In the case of State of Madras v. Vaidyanatha also, the Supreme Court took into consideration evidence to the effect that when the accused was caught, he was seen to be trembling.

7.67. There is also a Calcutta case illustrative of conduct. The accused was charged with the murder of his wife, S, who was missing for some time. A photograph of the dead body was published in the newspaper for establishment of the identity of the dead woman. With the publication of the photograph in the newspaper, the matter moved swiftly towards identification. On seeing the photograph, the members of the wife's family had no doubt in their mind that this was the body of S. Soon after the photograph was published, the accused was the first to speak to B about the photograph appearing in the newspaper and told him—"people are saying that the photograph is that of S, please go and see". When the accused spoke to B, the accused appeared to be in a disturbed state of mind and tried to go away, taking leave. It was held that the statement which the accused made to B, clearly came under the second paragraph of section 8, as showing the conduct and was a relevant fact. The particular statement by the accused accompanied and explained acts showing his reaction of a disturbed mind on the publication of the photograph in the newspaper, coupled with the suggestion that the photograph was of his dead wife. The statement by the accused to B, immediately on the publication of the photograph of S, was an incriminating circumstance against the accused.

7.68. A few words about silence as evidencing conduct are needed. The silence of a fact that an accused person remains silent when denounced in the presence of witnesses by another person as the latter's assailant, is admissible in evidence. The situation represents a confrontation of the accused by the person he is alleged to have harmed. First, the evidence is of importance as affording evidence of identification. If the victim dies, it may be of the highest importance that before his death he identified the accused as his assailant; if he lives and gives evidence of the identity of the accused at the trial, the fact that he did so at the first possible moment is often valuable as showing the consistency of his story. Secondly, it affords the accused person an opportunity—though he is not bound to avail himself of it—either of denying that he is the person who harmed the injured party or of setting up some fact which may at a later stage form part of his defence.

1R. v. Mallory, 15 Cos. 456, 458 (Per Field J.).
2See also discussion as to 'silence', infra.
The degree of weight to be attached to the silence of an accused person in such circumstances depends upon the nature of the case. Many factors must be taken into account in assessing it, and no hard and fast rule can be laid down. Illustrations which may afford guidance can be found in the cases. Care must be taken in all cases not to put too high a value on the absence of an immediate denial unless the surrounding facts point unequivocally to the conclusion that any accused person, whether educated or ignorant, cautious or impulsive, voluble or taciturn, would have felt bound to make a rejoinder in view of the particular charge against him and in the particular circumstances prevailing when he was made aware of it. It is not permissible to arrive at an adverse verdict on the strength of the opinions formed as to conduct of an accused person to supplement a case for the prosecution which, at the conclusion of the evidence heard on both sides, is too weak to justify conviction.

7.69. The admissibility of silence in such circumstances is usually based upon the Latin maxim "qui tacet, consentir videtur"—silence indicates consent; thus, the silence is thought to be a tacit admission. The alternative justification is that, since "it is the nature of innocence to be impatient of a charge of guilt whenever seriously made and distinctly understood, an innocent person will usually spontaneously deny the accusation," the failure to make a denial is unnatural in an innocent man, and therefore evidence of a guilty conscience.

Thus, the inference from silence is based on the assumption that it is natural for the person against whom the allegation is made to repudiate it. This assumption is as old as the Bible, where we find the following passage:

"And Jesus stood before the governor: and the governor asked him, saying, Art thou the King of the Jews? And Jesus said unto him, Thou savest. And when he was accused of the chief priests and elders, he answered nothing. Then said Pilate unto him, Tearest thou not how many things they witness against thee? And he answered him to never a word; in so much that the governor marvelled greatly."

7.70. The assumption that silence indicates consent is not always valid. No doubt, sometimes this assumption is justified. For example, in Egan v. United States, the accused, his lawyer, other company officers, and their lawyers, were the only persons present at a meeting. The attorney for one of the other officers read a statement made by his client to the Securities Exchange Commission, about a matter then under investigation, admitting the client's guilt and implicating also the accused. In those circumstances, it might well have been natural for an innocent man to reply.

But there are situations where a repudiation may not be expected. This is particularly so where the police are present. For a variety of reasons, the person concerned may not like to make a repudiatory statement. In fact, the existence of such counter—balancing considerations is itself a relevant fact under section 9.

---

1Rex v. Feigenbaum. (1919) 1 K.B. 431.
3Rex v. Tate. (1908) 2 K.B. 680.
4Stephen Seneviratne v. The King. A.I.R. 1936 P.C. 289; 41 C.W.N. 65, 78 (Lord Roche).
6Mathew 27: 11-14.
7.71. It follows that when the silence of the accused is readily explained by special circumstances negating the inference of guilt, it cannot constitute an admission. Thus, the silence of a person under the influence of narcotics or at a formal hearing before a magistrate, is inadmissible.

In applying section 8, all these considerations will have to be borne in mind.

7.72. Similar comments apply to conduct by way of absconding—Illustration (b). Even innocent persons may evade apprehension owing to the instinct of self-preservation.

7.73. We shall now deal in detail with illustrations (j) and (k), which are concerned with statements accompanying and explaining the conduct of a person an offence against whom is alleged to have been committed—i.e. the victim. Under these illustrations, the terms in which the complaint was made are relevant. A distinction is to be made here between a bare statement of the fact of rape or robbery, and a complaint. The latter evidences conduct; the former has no such tendency. There may sometimes be a difficulty in discriminating between a statement and a complaint. It is conceived that the essentials difference between the two is that the latter is made with a view to redress or punishment, and must be made to some one in authority—the police, for instance, or a parent, or some other person to whom the complainant was justly entitled to look for assistance and protection. For instance, a petition impugning the conduct of a police officer and begging that he may be put on trial is a complaint within the meaning of the Code of Criminal Procedure.

7.74. The distinction is of importance, because, while a complaint is always relevant as conduct, a statement not amounting to a complaint will be relevant only under particular circumstances,—e.g., if it amounts to a dying declaration, or as a corroborative evidence. Section 8, in so far as it admits a statement as included in the word "conduct", must be read in connection with sections 25 and 26, and cannot admit, as evidence, a statement which would be shut out by those sections.

7.75. A complaint, as we have already stated, is one made with a view to redress or punishment, and must be made to some authority or some person to whom the complainant is justly entitled to look for assistance and protection. In a Lahore case, a woman who was raped, was questioned by a relative of her husband. The woman told him that the accused had raped her and asked him to tell her father-in-law in his field, which the relative did. When her father-in-law came home, she made the same statement to him. It was held that while the above statements could not be regarded as forming part of the same transaction as the offence and so section 6 would not apply, the statements were admissible under section 8 as evidential conduct.

---

5 See the illustrations to section 8.
6 See — (a) Aparba v. R., (1907) I.L.R. 35 Cal. 141;
9 Para 7.73, supra.
10 See — (a) Gangadhar v. Emperor, I.L.R. 43 Cal. 173;
11 Emperor v. Phule, I.L.R. 35 All. 102.
7.76. If a statement does not amount to a complaint and is outside section 8, it is inadmissible unless some other section covers it. In the Patna case of Emperor v. Phaguni Bhuian, it was observed:

“If the girl went to her relatives straight after the occurrence and complained on her own initiative, there is no doubt that her conduct would have a direct bearing upon and connection with the occurrence itself; but if she only answered questions, her statement would be mere hearsay.”

The conduct of a woman who has been raped is, thus, relevant under section 8 only if she lodges a complaint. If she does not make a statement with a view to making a complaint, then that statement will not be admissible in evidence under section 8 as conduct and would be ruled out as hearsay, unless admissible under some other section.

7.77. It should be noted that a statement by a ravished female after the commission of the offence, though not covered by section 6, is admissible, not only as explanation of her conduct under section 8, but also under section 157 by way of corroboration. Thus, where the statement of the girl to her mother (if she had made any) does not form part of the transaction, viz. the raping of the girl, or occur during it, but is made after this transaction, and the rape of the girl was over when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother’s house, the statement is not relevant under section 6. But it may be relevant under section 8. A statement made to the mother by the raped girl is also relevant under section 8, if the girl is a witness, as she usually is, section 157 would also be relevant. If, however, owing to any circumstances, she is not a witness, section 157 would not apply.

The statement should not, however, be made in answer to question.

7.78. We have stated that illustrations (ij) and (k) make a distinction between (i) complaints, and (ii) other statements. The reason for regarding the former as relevant is that they are influenced by a fact in issue (namely, by the offence alleged).

7.79. It may be noted that the position under the section is, in some respects, wider than the English law on the subject. In England, complaints are (according to the usually accepted view), admissible only in sexual cases and in matrimonial proceedings based on adultery. They are admissible to confirm the story of the complainant to prove its intrinsic credibility, and also to prove non-consent. They need not, however, be literally contemporaneous. According to one English write5—

“Complaints are admissible, though not made at the very first opportunity, provided they are made at the first reasonable opportunity, but, unlike statements admitted as part of the res gestae, they are admissible only to show the consistency of conduct of the complainant, or the absence of consent if in issue.”

---

2 Sorsatal v. Emperor, A.I.R. 1925 Nag. 74. 76.
3 Sreehari v. Emperor, A.I.R. 1930 Cal. 132, 133.
4 A.I.R. 1930 Cal. 132, 133.
4(a) A.I.R. 1926 Pat. 58-60;
4(b) (1961) 2 Cr. L.J. 137, 138, 139.
Thus, in charges of rape and similar sexual offences against women, and children of either sex (even though they consented, where consent is no defence), evidence may be given that the victim made a "spontaneous complaint on the first opportunity which reasonably offered itself after the offence. This need not be to the first person she saw." In this case, the words said may be given in evidence. Such evidence is given to show the consistency of the conduct of the victim with the story told by him or her in the witness box".

In India, the section is not confined to sexual offences.

7.80. If it be held that those statements were in the nature of a complaint and are thus relevant and admissible under section 8, the next point for consideration will be as to what would be the value of those statements; could they be used as the basis for conviction of the appellant? In this connection, it would be useful to refer to the observations of Lord Porter in Gillie v. Posho Ltd. In certain cases as, e.g., in the cases of sexual offences against women, statements made to third parties are in some circumstances admissible. But the careful limits placed upon the admissibility of such statements is evidence of the jealousy with which their admission is regarded. They must be complaints made voluntarily and at the earliest convenient moment, and even then they are received not as evidence or corroboration of the facts complained of, but as evidence of the credibility of the complainant's testimony to the fact alleged, and where consent is a defence, to negative consent. They are inadmissible in any other class of cases".

A similar view was expressed by the Madras High Court in the case of Kappinaiah v. Emperor. It was held in that case that—

"If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant and the terms in which the complaint was made are relevant as conduct but they are not relevant as direct proof of the act".

7.81. In England, the Court has a discretion to exclude prejudicial evidence which may influence the jury. In R. v. Parker, the accused was charged with wounding his wife by shooting. A neighbour testified for the prosecution that after the shooting, the wife had come to him, showed him her face which was bleeding, and complained that her husband had shot her. The judge directed the jury to attach no weight to the words of the neighbour. Nevertheless, the jury convicted the accused. The Court of Criminal Appeal allowed the appeal against the conviction, on the ground that the evidence was prejudicial and likely to influence the jury. In India, under section 8, the evidence would be relevant and the court has no discretion to exclude it.

7.82. In England, it is now well settled and held that in prosecutions for rape and offences of similar character, the statement in the nature of a complaint made by the prosecutrix to a third person, need not be in the presence

---

8. For earlier cases, see Cross, "Scope of Rule against hearsay", (1956) 72 L.Q.R. 91.
of the accused, provided such statement is shown to have been made at the first opportunity which reasonably afforded itself after the commission of the offence. The particulars may be so given in evidence in this class of cases,—but only in this class,—not as being evidence of the truth of the charge against the accused, but as evidence of the consistency of conduct of the prosecutrix with the story told by her in the witness-box and as negativing consent on her part. It was, at one time, thought that this evidence was only admissible in cases where non-consent was a material element. But that is not so.

But the complainant must be called. Thus, if the victim of indecent assault is unable to give any evidence of it, evidence by another witness of a complaint made to her by the alleged victim shortly after the incident becomes inadmissible in England.

7.83. Corroboration may be required in England in some civil cases also, e.g. matrimonial proceedings based on adultery and the like. Although Lord MacDermott, in Preston Jones v. Prestone Jones, expressly recognised that the jurisdiction of the Divorce Division must be regarded as entirely distinct from that of a Criminal Court and declared that his conclusions in this respect were not based on any analogy drawn from the criminal law, it is clear that, where adultery is relied on in support of a petition for divorce, the fact that this is a quasi-criminal offence cannot be overlooked. Asking himself what could be the reason why strict proof and corroboration of the adultery were required, Vaisey J., in Ginesi v. Ginesi, observed; “the finding that the offence has been committed may be far more serious in its consequences both to the individual and to society than conviction of a crime. That is true even in these days when its gravity is not so widely appreciated and accepted as it used to be.”

7.84. History of the rule permitting such evidence is intimately connected with the history of criminal procedure. The rule could, in its ultimate origin, be traced to the doctrine of hue and cry. It is a survival of the ancient requirement that the woman should raise “hue and cry” as a preliminary to an “appeal” of rape, the “appellee” being allowed, in defence, to deny that hue and cry had been raised.

In its origin, the process of accusation which the common law evolved was a private one. The accusation could be made either by a single individual, or by a group. Accusation by a single individual was known as an appeal (of treason or felony, as the case may be), and when the accused appeared before the Court and answered to the charge, the appropriate method of trial was by battle. These “appeals” of treason and felony had largely become obsolete in England by the end of the 16th century, but their formal abolition took time. In a case reported in 1818, an abortive effort was made to revive these proceedings, and this led to the formal abolition of “appeals”.

7.85. As society began to develop, some more effective means of bringing persons suspected of crime to trial had to be found. This led to the practice...
of the Kings' Justices, when visiting various countries and in hundreds, assembling men from the locality who would be sworn to state what persons were, to their knowledge, suspected of crime.\footnote{Assize of Clarendon of King Henry the 2nd (1166).}

In the beginning, the trial was by ordeal, but later,—somewhere between the 13th and 15th century,—it developed into the procedure of indictment. An "indictment" was a written charge of crime made by a body of men known as the grand jury. If the grand jury found a \textit{prima facie} case, they could present a "true bill" (\textit{billa vera}) which provided the formal accusation upon which a court of appropriate jurisdiction would try the charge. It was in the above context that "hue and cry" had an importance.

\textbf{7.86.} Afterwards, "appeals" became obsolete, and rape was dealt with on indictment. The woman was then an admissible witness, and her testimony was corroborated or not, according as she made, or failed to make, fresh complaint and pursuit of the offender. At this period, when rules of evidence were in their infancy, it was generally allowable to corroborate \textit{all witnesses} by proof of their prior similar statements;\footnote{Luttrell \textit{v. Reynell}, (1670) Mod. 282, 283.} but, later on, the rule permitting corroboration by proof of former statements was reversed.\footnote{R. \textit{v. Parker}, (1783) 3 Doug. 242.} Complaints, however, survived as an exception to the changed rule.\footnote{R. \textit{v. Osborne}, (1905) 1 K.B. 551.}

\textbf{7.87.} At this stage, it would be convenient to \textit{sum up} the position regarding statements by victims of offences in India, in the form of a table as follows:

<table>
<thead>
<tr>
<th>Statements by victims</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Statements to the offence, other than complaints—</td>
</tr>
</tbody>
</table>

Admissible under—

(i) section 6, if forming part of the same transaction;

(ii) section 32, if amounting to a dying declaration;

(iii) section 157, for corroboration, if the maker of the statement is called as a witness, and if the other conditions of that section are satisfied;

(iv) section 159, to refresh the memory, if the maker is called as a witness and if the other conditions of that section are satisfied;

(v) section 145, for contradicting the maker when called as a witness. \textit{But the statement may be excluded by virtue of section 162 of the Code of Criminal Procedure, 1973 or some other specific provision of the law.}

(b) Statements as to offence when amounting to complaint.

Admissible under—

(i) section 6, if forming part of the same transaction;

(ii) section 8, as showing conduct influenced by a fact in issue (regarding the alleged offence);

(iii) section 9, as negativing consent where consent is material;

(iv) the other sections mentioned in (a)(ii) to (a)(v) above, where applicable,—including section 32.

\textit{But the complaint may be excluded if it falls within section 162 of the Code of Criminal Procedure, 1973 or some other exclusionary provision.}
No change needed.

7.88. The above discussion reveals no need for a change in the law as enacted in section 8.

SECTION 9

7.89. Under section 9, "facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue, or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."

There are 6 illustrations appended to the section, which we shall discuss later.

7.90. The opening 13 words of the section—"Facts necessary to explain or introduce a fact in issue or relevant fact", are not in symmetry with the subsequent full clause beginning with "or which". The proper form should be—"Facts which are necessary to explain or introduce a fact in issue or relevant fact or which support" etc.

The quoted words should be so amended, and we recommend accordingly.

7.91. Illustration (a) to the section provides that where the question is whether a given document is the will of A, the state of A's property and of his family at the date of the alleged will 'may be relevant facts'. These are facts which are necessary to explain or introduce the fact in issue,—the document supposed to be the will. As is apparent from the last nine words of the section, such facts are relevant in so far as they are necessary for that purpose. This, apparently, is the reason why, in this illustration and also in illustration (b), the words "may be" are used. It should also be noted that in illustration (a), only the factum of the will is in issue.

7.92. Illustration (b) deals with a case where A sues B for a libel imputing disgrace to A; B affirms the matter alleged to be libellous to be true. The position and relations of the parties at the time when the libel was published "may be" relevant facts under this illustration. The reason is that they introduce the facts in issue—the libel and the disgraceful conduct imputed thereby. The illustration also provides that the fact that there was a dispute between the parties, if it affected the relations between the parties, may be relevant; but the particulars of a dispute about the matter unconnected with the alleged libel are irrelevant. The existence of the unconnected dispute, though not the particulars thereof, would be relevant either as introducing the alleged libel (section 9), or as constituting a motive for the libel (section 8), or as showing the conduct which influenced the libel (section 8) or as showing facts which are the cause of the libel (section 7).

7.93. In cases of libel, malice may be inferred not only from the transaction itself (i.e., the nature of the libel, with its mode and extent of publication), but also from previous ill feeling or disputes between the parties, the repetition of the libel, the publication of similar ones on other occasions and, in fact, from the defendant's whole conduct down to, or even at, the time of libel.

7.94. Illustration (c) relates to leaving one's house by a person accused of crime, soon after the accusation. The fact that he had some sudden and urgent business is relevant. This refers to facts which are explanatory of conduct which may otherwise appear to be incriminating or wrongful. The presumption or inference which would otherwise arise from the act of absconding

\[\text{Praed v. Graham, 24, Q.B.D. 53 (C.A.); Simpsoon v. Robinson, 12 Q.B. 511.}\]
(section 8) is rebutted. The fact that the accused had sudden and urgent business, rebuts the inference suggested by his suddenly leaving home after the crime was committed.

Illustration (d) refers to alleged breach of contract. A statement by the person alleged to have committed the breach, explaining why he left, is relevant.

7.95. Illustration (e) not only illustrates section 9, but also throws some light on the meaning and scope of section 6. The illustration is as follows:—

"(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it—'A says you are to hide this'. B's statement is relevant as explanatory of a fact which is part of the transaction."

Illustration (f) takes the case where A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Both illustrations (e) and (f) make it clear that statements made by a person other than the accused may be tendered in evidence as explanatory of the transaction which comprises the alleged crime.

7.96. While sections 7 and 8 provide for the admission of facts causative of a fact relevant or in issue, section 9 generally provides for facts explanatory of any such fact. There are many incidents which, though they may not strictly constitute a fact in issue, may yet be regarded as forming a part of it, in the sense that they accompany and tend to explain the main fact, such as identity; names, dates, places, description, circumstances and relations of the parties and other explanatory and introductory facts of a like nature. The particulars receivable will necessarily vary with each individual case; it is not all the incidents of a transaction that may be proved; for the narrative might be run down into purely irrelevant and unnecessary detail. It should be noted that the facts are relevant, "in so far as they are necessary for that purpose".

7.97. Both these illustrations raise an important question as to whether the statements which are made relevant by those illustrations are receivable only as evidence that such statements were made, or whether they are receivable as evidence of the truth of the facts declared. It would be obvious, on a close reading of the section and the wording of the illustrations, that the former is the correct view. Under illustration (d), for example, the statement made by the person leaving the service as to a better offer made by another person, is relevant only as explanatory of the conduct of the person leaving, and does not, it is suggested, amount to any evidence that B did, in fact, make such a better offer. That fact has to be independently proved. This view has the support of Norton. Since the conduct of the person leaving is a relevant fact,—or rather, a fact in issue,—whatever explains that conduct, is admissible under section 9. Such explanatory facts are relevant, as the section says, "in so far as they are necessary for that purpose".

1See also discussion below.
2See—
   (a) R. v. Richman, 2 East, P.C., 1035;
   (b) R. v. Rooney, 7 C. & P. 517.
3See R. v. Amir Khan, (1871) 9 B.L.R., 36, 50, 51.
4Para 7.99, infra.
7.98. The same comment applies to illustration (e). Though, at first sight, it may appear that, by virtue of this illustration, what a person said is going to be made evidence against the accused, it is not in reality so. Before the illustration can apply, two facts, postulated in the illustration, must exist, namely, that the accused was seen to give stolen property to B, and B was seen to give the stolen property to the wife of the accused. If these two facts are proved, then, in explanation or elucidation of the conduct of B (giving stolen property to the wife of the accused), what B said at the time becomes relevant. It is, however, relevant only for the purpose of explaining his conduct, and his statement that "A says you are to hide this" cannot be used to prove that A said so, but can be used to prove only why B gave the property to the wife of the accused.

7.99. Commenting on illustrations (d) and (e), Norton,\(^1\) in his work on Evidence, expresses the opinion that this section introduces a dangerous innovation. Statements explanatory under this section are admissible, irrespective of the English "hearsay" rule, which requires the presence of the person against whom the statement is made. It is necessary to distinguish the purpose for which such statements are admitted, and Norton's suggestion that the statements made by C in the one case and B in the other are receivable only as evidence of the fact that they were made and not of their truth as affecting B or A respectively, appears to be justified. No doubt, if such a statement be once admitted and the Court believes that it was in fact made, it may be difficult to exclude its purport from consideration. But the law does require the court to do so. On this interpretation of the scope of the section, there is no need to object to the illustrations under discussion.

7.100. Illustration (f) to the section is taken from the case of Gordon.\(^2\) In the case put in this illustration, the cries would be made in the presence of the leader though they were the cries of third parties, and the silence of the leader would be equivalent to an admission that he acquiesced in those cries as explanatory of the common object of himself as well as of the persons whom he led. His presence, and the fact of his having led the mob, are essential pre-conditions for the application of the illustration, which also assumes that he did not protest or object to the cries. They are also declarations accompanying the transaction.

7.101. Quite a number of cases relate, in practice, to that part of section 9 which declares, as relevant, facts which establish the identity of anything or person whose identity is relevant. The most troublesome problem which has arisen in this context, both in England and in India, is that relating to evidence of similar facts. The law on the subject in England is still in a fluid condition. It cannot be said that similar facts are always relevant. There must be a nexus between those acts and the offence charged which helps to identify the accused. The leading statement of the law is still that of Lord Sunner,\(^3\) in Thompson v. R., which is to the effect stated above.

7.102. Another very commonly cited judicial statement of the rule is that of Lord Herschell in Makin v. A. G. for New South Wales.\(^4\)

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to

---

\(^1\)Norton, Evidence, page 116, cited by Field.


\(^3\)Norton, Evidence 119 cited by Woodroffe. Evidence (1941), page 159, footnote 5.

\(^4\)Thompson v. R., (1908) A.C. 221, 234.

the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

In the House of Lords in *Harris v. Director of Public Prosecutions*, it was stated that the jury must be directed that they can only make use of the conduct on other occasions in determining the question of the accused's guilt on the occasion in question, if satisfied beyond reasonable doubt of the occurrence of the former conduct that similar facts should be connected in some relevant way with the accused and his participation in the crime.

7.103. How difficult a decision of this question could be is illustrated by the celebrated English case of *R. v. Beck*, which led to a famous public inquiry. In that case, Beck was charged with obtaining money by false pretences in 1895. An expert gave opinion that the handwriting of the letters which contained the false pretence was, though disguised, the same as that of a list, which had been written by Beck, and had been found in his luggage when he was arrested. In cross-examining the expert, the defence proposed to ask a question whether the handwriting of the letters was not the same as that of certain other documents which the prosecution had previously submitted to the witness for examination, being exhibits in the trial of X for a similar offence in 1877. The defence was also prepared to show that while X was undergoing his sentence for such offence, Beck was in America.

This was held to be inadmissible, as involving a collateral issue likely to mislead the jury, namely, whether Beck was or was not the man convicted in 1877 under the name of X. There was, at that time, no provision for a right of appeal in criminal cases. But there was a public agitation and a public inquiry after the conviction of Beck.

7.104. The public inquiry presided over by Collins M.R., exonerated Beck. The names, handwriting and methods employed in the two crimes (1877 and 1895) were remarkably similar, and the defence of Beck was that they must have been committed by the same man. If, therefore, Beck proved that he could not have committed the crime of 1877, it went far to show that he had not committed the crime of 1895, and that the crime was committed by X. This evidence, as already mentioned, was rejected at the trial, but was considered in the public inquiry as clearly relevant and admissible for Beck.

It was this case which led to the establishment of the Court of Criminal Appeal under the Criminal Appeal Act, 1907.

7.105. Broadly speaking, it may be stated that evidence of similar facts is General rule, not admissible if its effect is only to show generally bad character or good character. But, if the evidence has rational probative value otherwise than as showing bad and good character—for example, as showing identity—it is admissible. The question whether it renders the fact in issue highly probable, cannot be disregarded. In an Australian case, McTiernan J. said that "there is that degree of probative force in the evidence of similar acts which qualifies it to be the basis for judicial inference concerning the existence of the fact in issue."

1 *Harris v. Director of Public Prosecutions*, (1952) A.C. 694; (1952) 1 All E.R. 1044. (H.L.).
3 For later developments, see 47 Law Journal 379; 133 Law Times Journal 157.
4 Now the Court of Appeal (Criminal Division).
7.106. One attempt to state the English rule, for legislative purposes, was as follows:¹

"Evidence which merely shows that a person has a propensity to do acts of a certain kind, or that his disposition, character or antecedents makes or make it probable that he will act in a certain way or with any particular intention, is not admissible to prove that he did any such act or acted in such way or with such intention on any particular occasion: Provided that nothing herein shall be deemed to exclude evidence tending to show such matters if it is otherwise relevant, and, in particular (without prejudice to the generality of this proviso), the foregoing provision shall not render inadmissible any evidence which is adduced to show—

(a) that any occurrence is one of a series of two or more similar occurrences, and that the facts of the occurrences comprised in the series indicate some system, plan, or design on the part of any person;
or

(b) that any person implicated by any evidence in the commission against or in respect of another person of any particular act has committed other acts indicative of some passion, emotion or feeling in regard to the other person, which would naturally lead or dispose to the commission of the particular act aforesaid with a view to establishing—

(i) that the occurrence or act was the act of, or was caused or committed by, the person concerned in such system, plan or design or so implicated as aforesaid;

(ii) that, being his act or caused or committed by him, it was done, caused or committed by him intentionally or with any particular intent."

7.107. The legal position is realistically described by Stone in the following words² while discussing evidence of similar facts:—

"Evidence must be excluded which indicates that the prisoner is more likely than most men to have committed it, but evidence must be admitted which tends to show that no man but the prisoner, who is known to have done these things before, could have committed it. There is a point in the ascending scale of probability when it is so near to certainty, that it is absurd to shy at the admission of the prejudicial evidence."

7.108. Position in India is as follows:—

Evidence that a person committed an offence or civil wrong on a specified occasion is inadmissible to prove his disposition to commit an offence or civil wrong as the basis for an inference that he committed an offence or a civil wrong on another specified occasion. But such evidence may be admissible to prove some other fact in issue, or relevant, fact, including motive,² identity,² plan,² knowledge,² identity,² or absence of mistake or accident.²

¹Stow in (1922) 38 L.O.R. 63. 72.
³Section 8.
⁴Section 14.
⁵Section 11.
⁶Sections 5 and 14
⁷Section 9.
⁸Sections 14 and 15.
7.109. Coming to identity, the type of evidence which can be used as ancillary to identity is varied. For example, where a fact is relevant, scientific records thereof would be relevant. Hence, when relevant and properly authenticated, motion pictures would be admissible, apparently to establish the scenes or events they depict and would not be subject to the objection of hearsay. They must be ‘relevant’, in the sense that they must tend to prove or disprove some fact in issue or relevant fact. They must be authenticated, in the sense that the persons, objects or places pictured should be identified by witnesses. As a motion picture describes more fully and accurately the event than a witness can describe, it may be valuable in many cases, particularly when the relative positions of various objects or the detailed conditions under which an event took place, are of importance.¹

7.110. The importance of section 9 has rendered necessary a discussion of the above points which do not call for any substantial modification of the section. The only change to be made in section 9 is a verbal improvement in the opening words, namely: the section should read—“facts which are....”

SECTION 10

I. INTRODUCTORY

7.111. Section 10 provides that where there is a reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to the common intention, after the time when such intention was first entertained by any one of them is a relevant fact, as against each of the persons believed to be so conspiring: and this relevancy is as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that such person was a party to it.

7.112. The illustration to the section emphasises certain propositions, namely, that the statement of a conspirator X or Y is admissible against a conspirator Z, “although he (Z) may have been ignorant of all of them and although the persons by whom they were done were strangers to him and also they may have taken place before he (Z) joined the conspiracy or after he left it.” It may be pointed out that the proposition emphasised in the illustration, namely, that the statement is admissible even though it was made after the other conspirator (against whom it is sought to be proved) left it, is a departure from the English law.²

The occasion for applying the section may arise in a criminal prosecution, as also in a civil suit. —that, in practice, most of the cases relate to the former. It will be convenient to examine the relevant provisions of the substantive criminal law, and also the position with reference to the law of torts.

II. CRIMINAL CONSPIRACY—INDIAN LAW

7.113. Under Indian Criminal law, conspiracy has two aspects — (a) it is a species of abetment;³ and (b) it is offence by itself.⁴ As a species of abetment, it is governed by section 107 of the Indian Penal Code. The terms of that section are restrictive: an overt act is required, and this is essentially an instance of an auxiliary criminal liability, as is clear from the provisions in the connected sections—sections 108 and 109—of that Code.

---
¹See the note, “Motion Pictures as evidence” (1962). 64 Bom. Law Reporter. (Journ.) 184, 186. reproduced from “C and C”.
³Section 107, I.P.C.
⁴Sections 120A, and 120B, I.P.C.
Section 107 of the Code classifies abetment under three heads, namely, abetment by instigation, abetment by conspiracy and abetment by intentional aid. The second paragraph of the section defines abetment by conspiracy, by stating that “a person abets the doing of a thing who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing.”

7.114. The other important aspect of criminal conspiracy is conspiracy as a substantive offence. This is governed by sections 120A and 120B of the Indian Penal Code. Section 120A defines the offence of criminal conspiracy as follows:

“120A. When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is legal by illegal means such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation. — It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.”

The punishment is prescribed as follows in the same Code.

“120B. (1) Whoever is party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine, or with both.”

7.115. For more than half a century, the Penal Code recognised only abetment by conspiracy as defined in clause secondly of section 107, and not the offence of criminal conspiracy as such. The latter notion was introduced in the Penal Code by the Criminal Law Amendment Act of 1913 (which inserted a separate Chapter 5A consisting of two sections 120A and 120B). Thus, if a person is engaged with another or others in a conspiracy to commit an offence and if some act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of the criminal act, he is liable to be punished as an abettor directly under the relevant section in Chapter 5. But, whether or not such act or illegal omission takes place, he is guilty of a criminal conspiracy as soon as he becomes a party to the agreement to commit the offence and is punishable under sub-section (1) or sub-section (2) of section 120B, as the case may be, in Chapter 5A.

III. CRIMINAL CONSPIRACY—ENGLISH LAW

7.116. In England, conspiracy originated in the 13th century as a crime punishing conduct equivalent to that which is now covered by the action for

malicious prosecution. By the early 17th century, it had become an inchoate crime, encompassing the malicious agreement alone, even if its object had not been attained. Later, the Judges of the King's Bench extended the conspiracy concept to make criminal all agreements which had crimes as their objects.

By the early 18th century, conspiracy came to be used as a means to punish "all confederacies whatsoever, wrongfully to prejudice the third person." Finally, in 1832, Lord Denman defined 'conspiracy' as "an agreement to do an unlawful act, or a lawful act by unlawful means." But the word "unlawful" was found to be vague. It is well-known that because of the vagueness of the word "unlawful", acute controversy arose. The law of conspiracy even became an economic and political weapon directed against groups threatening the status quo.

7.117. At present, in England, while it is well established that conspiracy to commit an indictable offence is itself a crime, the question how far conspiracy to commit (i) an offence triable summarily, or (ii) a tort, or (iii) breach of contract is punishable has been the subject matter of controversy for some time. Ever since the famous work by R S Wright on Conspiracies was published, this topic has engaged the attention of courts and writers, not only because Wright was a Judge of the High Court with great reputation for his knowledge of criminal law, but also because of the scholarly and penetrating analysis presented in the book.

7.118. It can be said, however, that in England, the law of conspiracy is not so widely drawn as in India. While the commission of a crime, even a non-indictable crime—is naturally recognized as an unlawful purpose, with reference to criminal conspiracy, there are no precise or clear rules in regard to "non-criminal" unlawful purposes. Conspiracy is a common law misdemeanour, punishable with fine or imprisonment at the discretion of the court, except in the case of murder where, by statute, there is a maximum punishment of ten years imprisonment.

Conspiracies to defraud, to commit a tort involving mala fides, or to commit a public mischief are, broadly speaking, indictable. A conspiracy to commit or induce breach of contract is probably not indictable at the present day in England.

7.119. Where the agreement is not to commit a crime but other illegal act, the position in England as to the exact scope of the crime of conspiracy is thus in a fluid state. However, we are not concerned with the details of that debate. The law of criminal conspiracy in England was dealt with in some detail in Kamara's case, where Lord Hailsham, Lord Chancellor, discussed at length the offence of criminal conspiracy. As Lord Diplock said in another case, "the least systematic, the most irrational branch of English penal law (criminal conspiracy) still rests upon the legal fiction that the offence lies not in the overt acts themselves which are injurious to the common weal, but in an inferred anterior agreement to commit them."


Poulter's case (1611) 77 English Rep. 813.


Kamara v. D.P.P. (1973) 3 W.L.R. 198 (H.L.)

D.P.P. v. Bhagwan, (1972) A.C. 60. 79, (H.L.)
7.120. That a conspiracy is complete before any offence is actually committed, was established long ago in England. In a case in which judgment was delivered by Lord Ellenborough, Chief Justice, De Berenger and others were convicted on an indictment which averred that they conspired to circulate false rumors of the death of Napoleon, with the intent that it would be thought that peace would soon be concluded between England and France so that the market price of government stock would rise. After conviction, they moved for arrest of judgment, on the ground that it was no crime to raise the price of public funds and that the indictment was defective in that it did not name the alleged victims. Rejecting this motion, the court said that it was not necessary to specify the persons who become purchasers of the stock. Apart from the fact that the persons to be affected by the conspiracy would, at the time of the conspiracy, not be known because the accused “would not except be a spirit of prophecy, divine who would be purchasers on a subsequent day,” such a statement was wholly unnecessary. “the conspiracy being complete independently of any persons being purchasers.”

7.121. The mens rea in conspiracy consists in the intention to execute the illegal elements in the conduct contemplated by the agreement in the knowledge of those facts which render the conduct illegal.

The agreement represents actualisation of the intent. The assumption being that the individual merely thinking evil thoughts is not punishable, the requirement as to agreement is intended to ensure that the evil intent of the man branded as a criminal has been expressed in a manner signifying harm to society—that is, the threat represented by the agreement. However, it must be recognised that punishing conspiracy means punishing conduct which may nowhere come near to the carrying out of the supposed threat.

7.122. Even where there is a statutory requirement as to an overt act, it does not mean that the overt act itself must be harmful. The overt act may be completely harmless and may indicate little or nothing of the kind of injury to society which the conspiracy seeks to bring about. It is well established that it need not itself be criminal, excepting that it must stem from the agreement. The agreement to accomplish the prohibited purpose furnishes, without more, the basis for criminal liability.

7.123. An agreement with a common (criminal) design may take various shapes. Howart C. J. in Mevrick, had occasion to deal with this aspect. The facts were as follows:—

Between the years 1924 and 1928, in London, a racket existed with regard to the conduct of night clubs in the West End. The police in this district consistently turned a blind eye to the activities of these clubs, which were carried on in a manner involving breaches of the law, particularly of the licensing laws. Ultimately, the matter was investigated, and it was found that one Sergeant Coddard of the Metropolitan Police Force had been bribed by a number of night club operators, including Mrs. Moyrick, Luigi Ribuffi, Anna Gadda, and others. Mrs.

---

2Emphasis added.
3Kamara, D.P.P. (1973) 3 W.L.R. 198 (H.L.).
Moyrnick and Ribuffi were charged, together with Sergeant Coddard, on an indictment containing several counts. They were convicted and sentenced to imprisonment, and Mrs. Moyrnick and Ribuffi appealed. Describing the variety of such crimes, Hewart C.J. said:

"Such agreements may be made in various ways. There may be one person, to adopt the metaphor of counsel, round whom the rest revolve. The metaphor is the metaphor of the centre of the circle and the circumference. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain: A communicates with B, B with C, C with D, and so on to the end of the list of conspirators. What has to be ascertained is always the same matter: is it true to say, in the words already quoted, that the acts of the accused were done in pursuance of a criminal purpose held in common between them."

7.124. So much as regards the nature of the crime. It is well-known that the prosecution in a trial for conspiracy bears some advantage in contrast with other criminal trials. The general rule of the law of evidence is that actions or statements of X are not admissible against the accused, unless they are done or made either in his presence or by his authority. This limitation does not, however, apply to conspiracy trials. The prosecution is permitted to enter evidence which could not be regarded as having adequate probative value to be admissible for trial in any other offence. We shall have occasion to revert to this aspect later.

IV. CONSPIRACY AS A TORT

7.125. Conspiracy to injure is itself a tort, if certain conditions are satisfied.

In the law of torts, a conspiracy is "a combination of several persons against one, with a view to harming him"—to adopt the language of Bowen L.J. In criminal law the classical definition of conspiracy is that given by Wills J. in advising the House of Lords in *Mulcahy v. R.*: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." This was with reference to criminal law. The civil right of action is not, however, complete unless the conspirators do acts in pursuance of their agreement to the damage of the plaintiffs. The concept of civil conspiracy to injure has, in the main, been developed in the course of the last half a century, particularly since the great case of the *Mogul Steamship Co. v. McGregor & Co.* Its essential character is described by Lord Macnaghten in *Quina v. Leathen*, basing himself on Lord Watson's words in *Allen v. Flood*; "a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong." In this sense, the conspiracy is the gist of the wrong, though damage is necessary to complete the cause of action.

7.126. The identity between criminal and civil law in this regard is denied by Lord Porter in *Crafter's case* though it has been later suggested by Lord Reid in his dissenting speech in the famous case of Shaw. The difference between tortious and criminal conspiracy is that conspiracy giving rise to an action

---

Advantages of the prosecution.

Civil liability.

Civil and criminal conspiracy.

---

1*Mogul Steam Shipping Co. v. McGregor,* (1889), 23 Q.B. Div. 598, 617 (Bowen L.J.).


tor damages, being an action on the case, must have been put into execution, and
must have given rise to actual damage, whereas, in a criminal conspiracy, the agreement, and not the execution of the agreement, is the gist of the
indictment.

7.127. Thus, so far as the tort of conspiracy is concerned, it occurs where there is an agreement between two defendants to effect an unlawful purpose which results in damage to the plaintiff. The tort was fully considered in Crafter’s case, where the following principles were laid down:—

(i) The tort covers acts which would be lawful if done by one person;

(ii) The combination will be justified if the predominant motive is self-interest or protection of one’s trade rather than the injury of the plaintiff;

(iii) Damage to the plaintiff must be proved. There are statutory exceptions, particularly in legislation relating to Trade Disputes and Industrial Regulations, which need not be gone into for the present purpose.

7.128. Conspiracy as an offence, like libel, was developed by the Star Chamber, and when taken over by the Courts in the common law, came to be regarded by them not only as a crime, but also as capable of giving rise to civil liability.

7.129. The persons combining should have acted in order that the plaintiff should suffer damage.

V. CERTAIN IMPORTANT ASPECTS OF SECTION 10

7.130. We may now proceed to examine certain important aspects of section 10.

On an examination of the section in the Evidence Act, the first thing that strikes the reader, is its provision for admitting out of court statements of one person against another. If the conditions given in the section are satisfied, a person becomes subject to a special rule of evidence, namely,—the evidence admissible against him may include acts and admissions of another person. This is a departure from the ordinary rule.

7.131. Ordinarily, on the trial of A for an offence other than conspiracy, what B said to C about A would normally be inadmissible to prove, as against A, the truthfulness of the statement. So, if A, a public officer, is charged with taking bribes from B and C, a letter from B to C stating that A was asking for his monthly cheque and that he wished the matter to be kept confidential would, on the trial of A, be inadmissible to prove the truthfulness of its contents, i.e., that A was taking bribes. The rationale for this is that A cannot cross-examine B and this evidence is, therefore, potentially very dangerous. But, if A is charged with a conspiracy with B and C to take bribes, then, once “there is reasonable ground to believe in the existence of a conspiracy”, the letter would be admissible against A to prove the truthness of its contents. However, in England, this exception applies only to acts or statements of any of the conspirators in furtherance of the common design. So, if B and C then

---

L.P.P. (1973) 3 L.R. 196, 212.
2Crafter Handwoven Harris Tweed v. Vecht (1942) A.C. 435.
3Friedman “Mens rea in Conspiracy” (1956) 19 Modern Law Review 27.
4Para 7.127(iii), supra
5See R. v. Whitaker, (1914) 10 Cr. App. R. 243
confessed to the police that A had received bribes from them, that confession would be inadmissible in England to prove that A had conspired with B and C, because the confession would not be in furtherance of the common design.\footnote{R. v. Pepper, (1921) 16 Cr. App. R. 12.}

7.132. No doubt, there is a justification for this departure from the ordinary rule. That justification is furnished by the identity of interest—the combination to act for an unlawful purpose. In Mirza Akbar’s case, the Privy Council observed:

"Where the evidence is admissible, it is, in their Lordships’ judgment, on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy: or the words written or spoken may in themselves be acts done in the course of the conspiracy."

7.133. This approach was approved by the Supreme Court in Sardul Singh’s case.\footnote{Mirza Akbar v. Emperor, A.I.R. 1940 P.C. 176, 180.} If two or more persons combine to commit an offence, each must share liability for whatever is done by the other in pursuance of the combination.

VI. SECTION 10 AS COVERING ACTS BEYOND COMMON PURPOSE

7.134. What is the position where a person travels beyond the common purpose and where acts not done in pursuance of the combination (or, as the English decisions put it, not in furtherance of the object of the conspiracy), are sought to be rendered admissible. It is not fair that acts and statements not so made should bind or be admissible against the co-conspirators. As it stands, the section admits acts or statements made or done “in reference to the common design,” and does not contain the further requirement that they must be made in furtherance of the common design.

7.135. It should, in this connection, be remembered that in 1872, the general offence of criminal conspiracy as a substantive offence was not recognised in India, and conspiracy appeared only as a species of abetment in section 107, clause second of the Indian Penal Code, whereunder an overt act is required.\footnote{Sardul Singh v. The State, A.I.R. 1957 S.C. 749, paragraphs 38-42.} As a substantive offence, it appears only in section 121 of the Penal Code which refers to conspiracy to wage war against the Government of India, or to overawe by force the Government (inserted in 1870). Thus conspiracy to wage war was, practically, the only offence of conspiracy punishable as a substantive offence.

7.135a. The position now is different. Section 120A of the Penal Code (inserted in 1913) covers—

(i) an agreement to commit any offence, and

(ii) an agreement to commit an illegal but not a criminal act, and

(iii) an agreement to commit a legal act by illegal means.

7.136. It may be noted that in England, admissions of the conspiracy, made after failure of its objects, or after accomplishment of its objects, if not made in pursuance of the conspiracy, are admissible only against the party making the admission.\footnote{But see Bhugwan v. State of Maharashtra, A.I.R. 1965 S.C. 682, 687.}

\footnote{Section 197, second para., and section 108, Explanation 5, I.P.C.}

\footnote{Blake, (1844) 6 Q.B., 126, 115, English Reports 49.}
Acts done in pursuance of the conspiracy are evidence of the objects of conspiracy against all the conspirators. The main application of the rule is where all the accused have done acts tending towards an obvious purpose. But acts not done in pursuance of the common purpose are excluded.

7.137. Pennefeather, C. J., in R. v. O'Connell, observed:

"When evidence is once given to the jury of a conspiracy against A, B and C, whatever is done by A, B or C in furtherance of the common criminal object is evidence against A, B and C though no direct proof be given that A, B, or C knew of it or actually participated in it ..... If the conspiracy be proved to have existed, or rather if evidence be given to the jury of its existence, the acts of one in furtherance of the common design are the acts of all; and whatever one does in furtherance of the common design, he does as the agent of the co-conspirators."

7.138. In Stephen's Digest, he states the English law thus:

"When two or more persons conspire together to commit any offence or an actionable wrong, everything said, done or written by one of them in the execution or furtherance of their common purpose, is deemed to be so said, done or written by every one and is deemed to be a relevant fact as against each of them, but statements made by individual conspirators as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirator except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant under this article may not be given until the judge is satisfied that apart from them there are prima facie grounds for believing in the existence of the conspiracy to which they relate."

7.139. The difference between English and Indian law, as given in the text of section 10, can be thus illustrated. A letter written by one of the conspirators to a friend, giving the details of the conspiracy, will not be admissible under English law, as it does not further the cause of conspiracy of common design, nor is the letter written with that object; but it would certainly be admissible under our law, as it has a "reference" to the common intention as is provided by section 10 of the Act, if taken literally.

7.140. Even in England where the scope is narrower, the Court of Criminal Appeal has observed, that unnecessary conspiracy counts in a complicated case "imposed a quite intolerable strain both on the Court and on the jury."

7.141. The stage at which a person becomes liable to be punished for criminal conspiracy is also much earlier than the stage when an attempt becomes punishable. A mere agreement to commit an offence is enough. No physical act need take place. Even preparation—the devising and arranging of the means for committing the offence—is not required.

---

1Eustace, (1858) 175 E.R. 196; see para 7, 149, infra.
2Shellard, (1840) 173 E.R. 834.
3R. v. O'Connell, 5 St. Tr. N.S. 1.710.
4Article 4, Stephen's Digest of Evidence.
5Dawson (1960) 44 Criminal Appeal Reports 87, 93, 95, 96, Griffith (1955) 3 W.L.R. 405.
7.142. The aspect of “common purposes” is recognised in the U.S.A. Judge Learned Hand said in one case, “Nobody is liable for conspiracy except for the full import of the concerted purpose of agreement as he understands it; if later—conners change that, he is not liable for the change.”

7.143. Logically, the test followed in the English law is more satisfactory, for the reason that it brings out the element of “association” and “common purpose”. The law makes the acts and declarations of a conspirator admissible against his associates, for the reason that he is an agent of the associates in carrying out the object of the conspiracy. In India, however, on a literal reading of section 10, an account given by one of the conspirators would be relevant even though it is not in furtherance of the conspiracy.

VII. POSITION IN U.S.A.

7.144. The position in the U.S.A. may be noted briefly.

In the federal law, a conspiracy is punishable only if it is to commit any offence against the United States, or to defraud the United States or any agency thereof, in any manner or for any purpose. Typical States enactments punished conspiracy to commit a crime or conspiracies to punish certain other specified acts, most of which are in the nature of fraud or preventing another person from doing any lawful act and the like.

The attribution of the statements made by the alleged conspirator to another conspirator is, in the U.S.A. dependent on the scope of the agreement. Such statements are attributable to the co-conspirators within the limits of the principle that each member is liable for the act of other members which are within the scope of the agreement among them, and only while that agreement is still operative.

7.145. The Supreme Court of the U.S.A. had stated the rule as to evidence of such acts as follows:—

“It is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This pre-requisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts.”

7.146. It should be noted that there has been extensive criticism in the U.S.A. even of the limited rule permitting evidence of such statements of co-conspirators. In the leading U.S. case on the subject, is a trenchant criticism of the wide scope of the offence of conspiracy, as also of the special rules of evidence. Jackson J. observed in that case—

“The co-defendant in a conspiracy charge occupies an uneasy seat”.

---

1 U.S. v. Peony, (1938) 100 F 2nd 401 (per Learned Hand, J.).
   (b) Emperor v. Vaishampayan, I.L.R. 55 Bom. 839; A.I.R. 1932 Bom. 56.
   (c) Bholanath v. Emperor, A.I.R. 1939 All. 567.
4 See Note in (1955) 66 Harv. Law Rev. 1056.
It has also been pointed out that while the basis for admitting in evidence the statements of a co-conspirator made in furtherance of the conspiracy is that there is a conspiracy—which would postulate the prior proof of the existence of conspiracy by independent evidence—the rule permits statements of co-conspirators to be used for the purpose of proving the conspiracy itself. Thus, there is a movement in circle.

Incidentally, we may observe that this criticism can apply to the Indian section also, because section 10 operates once there is "reasonable ground to believe that two or more persons have conspired together to commit an offence".

7.147. Judicial pronouncements spelling out the rationale of the rule in the U.S.A. emphasize the aspect of agency. Having joined in an unlawful scheme, having constituted agents for its performance, until full fruition be secured, until he does some act to disavow or defeat the purpose, he is in no situation to claim the delay of the law. "As the offence has not been terminated, or accomplished, he is still offending."

It has been said: "And so long as the partnership in crime continues, the partners act for each other in carrying it forward." It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy, and all members are responsible, though only one did the mailing.

VIII. PRESENT POSITION

Need for amendment.

7.148. It was suggested to us that the section, as now worded, is not defensible on principle, and should be narrowed down.

Rational justification furnished by common purpose.

7.149. Although the section is expressed in terms of conspiracy, the real principle and the rational justification, as we have already indicated above, is the common purpose which leads to their being engaged in a common enterprise.

In England, for example, where A and B, employed in a Customs House, are charged with conspiring to pass through Custom goods without paying duty, false entries made by A are admissible against B also, since these entries are made in furtherance of the purpose of the conspiracy. But, an entry made by A on the counterfoil of his own cheque book, saying how he had shared the proceeds of the transaction with B, is not admissible against B, not being in furtherance of the common purpose.

Similarly, if A and B are charged with conspiracy, a letter written by A to a third person (not a member of the conspiracy) describing the proceedings already taken and enclosing the songs composed by A and sung in the proceedings, is not admissible against B, not being in furtherance of the conspiracy.

5Pinkerton v. United States, (1946) 90 L. Ed. 1489.
6See "Injustice of present wide provision", supra.
7R. v. Blake, (1844) 6 Queens Bench 126.
7.150. Again, in a trial for illegal abortion, a diary kept by B, incriminating A, and a letter intended for A but not sent to him, both written after the abortion, would be rejected in the absence of conspiracy. In this case, A was charged with causing B's death by an illegal operation, and statements made by B, the woman, to a doctor during her illness that A had operated upon her and that her illness was caused thereby, were held to be inadmissible. The rejection of the first mentioned evidence was on the ground that there was no conspiracy.

7.151. In England, it is well established by R. v. Blake that acts not done in furtherance of the conspiracy are not admissible. This is in harmony with the rule in substantive criminal law that a party is not, in general and in the absence of special considerations, criminally responsible for the acts or declarations of others, unless they have been expressly directed or assented to by him.

7.152. It should also be noted that in England, the husband and wife cannot be guilty of conspiracy. This is not so in India. In Queen Empress v. Butch, it has been held that there is no presumption that a wife and husband constitute one person in India for the purpose of the criminal law. Thus, the Indian law in section 10 is wider than the English law in other respects also.

7.153. The reason for the wording of the section is a matter of conjecture. A mere statement made by one conspirator to a third party or any act, not done in pursuance of the conspiracy, is not evidence for or against another conspirator.

Patterson, J. described it in Q.E. v. Blake as a statement "made after the conspiracy was effected".

Williams J. said that it merely related "to a conspiracy at that time completed". Coleridge J. said that it "did not relate to the furtherance of the common object". The words used in section 10, Evidence Act, are—

"in reference to their common intention". These words were perhaps chosen as having the same significance as the word "related" used by Williams and Coleridge JJ. If so, the choice was not happy. In Mirza Akbar, the Privy Council observed:

"Where the evidence is admissible, it is in their Lordships' judgment on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy; or the words written or spoken may in themselves be acts done in the course of the conspiracy.".

---

4(a) Hugger, (1730) 2 Stra. 883.
(b) Vane v. Vjanaapoulos, (1965) A.C. 486 (H.L.).
6See also Tirunagoda Madalai v. Tripurasundarimmal, I.L.R. 49 Mad. 738, A.I.R. 1926 Mad. 906.
8Queen Empress v. Blake, (1844) 6 Queens Bench 126.
9See Mirza Akbar, A.I.R. 1940, P.C.
7.154 to 7.156. A reference has been made to the aspect of agency. It may be noted, in this connection, that the attribution of criminality to a corporation originated in the principle of agency. In Mackay v. Commercial Bank of New Brunswick, the opinion of the Privy Council (given by Sir Montague Smith) includes this passage, quoted from the judgment of Lord Cranworth, L.C., in Ranger v. Great Western Rly. Co.:—

"Strictly speaking, the corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals: and there can be no doubt that if the agents employed conducted themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation."

7.157. This aspect of agency, as relevant to section 10, has been noticed in Indian cases. In Indra Chandra’s case, Courtney Terrell, C.J., commenting on section 10, said:

"Now, the object of this section is merely to ensure that one person shall not be made responsible for the acts or deeds of another until some bond in the nature of agency has been established between them and the act, words, or writing of another which it is proposed to attribute vicariously to the person charged. The Act, words or writing must be in furtherance of the common design and after such design was entertained."

IX. NO CHANGE

7.158. Having carefully considered all aspects of the matter, we are of the view that though according to decision, section 10 is narrowed down so as to limit it to acts and declarations made in furtherance of the common intention of the persons concerned, yet it is not desirable to amend the section.

Judicial decision had taken the narrow view. Since there may be extraordinary cases where special considerations apply, a wider view is not ruled out.

Section 10 brings out the following points:—

(a) Section is an exception to hearsay;
(b) Rationale of the section is agency;
(c) Prima facie case to be proved even under the section, i.e., reasonable ground for belief in conspiracy should be first proved;
(d) Distinction between reasonable ground and proof;
(e) Reasonable belief may be elevated into proof by use of the material allowed under the section;
(f) Taylor, in dealing with the corresponding English doctrine, has used the formula “in furtherance of”. The section has used the expression “in reference to”.

2Ranger v. Great Western Railway Co.
4Emphasis supplied.
5See case of Mirza Ali Akbar, supra
6Chairman’s suggestion accepted.
(g) The words used in the section are wider than the English law, but
have been judicially narrowly construed, as already noted in the draft
report of Shri Bakshi.

(h) In all ordinary cases, the narrower construction of these words will be
applied. In extraordinary situations, the scope for a wider view does
not appear to be ruled out. Even then, the evidence to be admissible
under the section should be of such direct and proximate act or state-
ment as would prove the fact of conspiracy or participation therein.

There is also a minor point to be noted with reference to section 10.
Curiously, the section does not link up the relevance of the facts mentioned
in the section with another "fact in issue or relevant fact", — as do sections 6 to 9
and section 11 et seq. Strictly speaking, the section should have the following
words at an appropriate place:

"Where the existence of the conspiracy, or the fact that any such per-
son was a party to it, is a fact in issue or a relevant fact".

We recommend that these words, or some similar words, should also be
added at an appropriate place in the section.¹

7.159. As to those words in section 10, which refer to "reasonable ground
to believe in the existence of a conspiracy, etc.", the question may be con-
sidered whether the standard of proof should not be expressed in more stringent
terms than at present. Occasionally, the matter is discussed, in some text books,
young that the Judge must be satisfied of the existence of an agreement be-
 tween A and B — the alleged conspirators. But this does not accurately reflect
the true position even in England.

7.160. It appears that there are differing points of view in this regard. The
English case of R. v. Griffiths² stands at one extreme. In that case, the Court of
Criminal Appeal deprecated the practice of "rolled up conspiracy counts" and
emphasised, that in order to prove one conspiracy, there had to be evidence from
which it could be inferred that each alleged conspirator knew that there was,
or was coming into existence, a scheme to which he was attached — a scheme
to which there were other parties, and which scheme went beyond the act that
he had agreed to do. Where these conditions are not satisfied, the various per-
sons would not be acting in pursuance of a common criminal purpose. In this
case, there was no evidence of the conspiracy existing between one farmer or
any other farmer, and none was connected with the other.

7.161. At the other extreme, are cases where there is such proof of the
existence of the conspiracy as it required by the definition of "proved" in the Act,
which is as follows:

"A fact is said to be proved when, after considering the matters
before it, the Court either believes it to exist, or considers its existence
so probable that a prudent man ought, under the circumstances of the
particular case, to act upon the supposition that it exists."

In between the two extremes lies the situation which frequently presents
itself, namely, that there is reasonable ground to believe that there is a conspir-
yacy, though the material is not yet of that quality as would satisfy the test
required by the definition of "proved". In such circumstances, section 10 comes
into play, as is clear from the opening words of the section.

¹A re-draft of section 10 is given, infra.
³See section 3.
7.162. In the absence of any serious hardship arising from the present position as regards the aspect discussed above, we are not inclined to suggest any change in this regard in section 10.

Recommendation.

7.163. In the light of the above discussion, we recommend that section 10 should be revised as follows:—

Revised section 10 (without the illustrations)

10. Where—

(a) the existence of a conspiracy to commit an offence or an actionable wrong, or the fact that any person was a party to such a conspiracy, is a fact in issue or a relevant fact; and

(b) there is reasonable ground to believe that two or more persons have entered into such conspiracy.

anything said, done or written by any of such persons in reference to their common intention, after the time when such intention was first entertained by any of them, is a relevant fact as against each of the persons believed to be so comprising, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

(Illustrations as a present, with such consequential changes as may be required).

SECTION 11

I. INTRODUCTORY

7.164. Section 11 provides that facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact; or

(2) if, by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

There are two illustrations to the section. The first deals with a plea of alibi. The second deals with facts which eliminate possible alternatives.

7.165. The scope of the section is, apparently, very wide. 1A. Clause (1) takes within its swn facts inconsistent with facts in issue, or relevant facts—Clause (2) emphasises the high degree of probability suggested by the fact sought to be given in evidence thereunder. But a certain amount of elasticity is introduced by the words “by itself or in connection with other facts”. There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition “highly probable”. 2A and with any reasonable use of discretion, the Court of appeal ought not to interfere. 3 It has been held 4 that in order that a collateral fact may be admissible as relevant under this section, the requirements of the law are—

(a) that the collateral fact must itself be established by “naturally conclusive evidence”, and (b) that it must, when established, afford a reasonable presumption or inference as to the matter in dispute.

1A We have not dealt with consequential changes in the Illustrations.


2 See also Naro v. Narhari (1891) 11 L.R. 16 Bom. 125.

3 See also Birla v. Ram Kall A.I.R. 1971 Punj 9, 11, para. 5.

The expression "highly probable or improbable" in the section is, thus, very significant. It indicates that the connection between the facts in issue and the collateral facts sought to be proved must be immediate\(^1\) as to render to coexistence of the two highly probable or improbable. The relevant facts under this section either (i) exclude, or (ii) imply more or less distinctly the existence of the facts sought to be proved.\(^2\)

7.166. The theoretical justification for the section is easy to explain; it has a part to play in the scheme of the Act. The topic of 'relevant facts', in general, has been treated in sections 6, 7, 8, 9 and 10. Section 11 concludes this treatment, by making a residuary provision\(^3\) as to relevant facts. But the practical application of the section is not so easy. The position can be best understood from the decided cases.

II. ILLUSTRATIVE CASES

7.167. We may now take a few illustrative cases under the section. In a suit for rent of land due from the defendant, the plaintiff alleged that he had bought the land from the defendant, and had thereafter leased it to him year by year. The defendant totally denied the sale and the lease. It was held that though the fact in issue was the lease alone, evidence might be given of the fact of the sale also, as a relevant fact, corroborative of the fact of the lease.\(^4\)

In a Rangoon case,\(^5\) it was stated that the admissibility of a particular evidence under section 11 in each case must depend on how near is the connection of the facts sought to be proved with facts in issue, to what degree do they render facts in issue, probable or improbable, when taken with other facts in the case and to what extent the admission of the evidence would be inconsistent with principles enunciated elsewhere in the Act. In that case, A was charged with entering into a conspiracy to bring false evidence against B and C. All the previous acts of which evidence was to be given were acts in which A acted against B or C, or both. It was held that such evidence was admissible under section 11 (but not under section 10 and 15). The connection was held not to be too remote.

The evidence in question indicated the state of mind of A against B and C, and added to the probability of his having taken part in concerted action against them. The High Court specifically decided that whether or not section 8 was applicable, section 11 did apply to such evidence.\(^6\)

We may also refer to an Irish case. In an action for money lent, the poverty of the alleged lender was a relevant fact to disprove the loan.

7.168. In a Nagpur case,\(^7\) where an oral tenancy was denied and the sale deed in favour of the person suing as landlord was alleged to be bogus, evidence as to the nature of the sale deed was held to be relevant on the question of existence or non-existence under section 11. In a Calcutta case\(^8\) a statement in a scheme to an arbitration award as to certain deposits made by third persons was

---

\(1\)Para 7.167, *Infra.*


\(3\)In support of the proposition that the section is a residuary provision, see *Rangayya v. Innasimuthu*, A.I.R. 1956, Mad. 226, 230, para. 14 (Ramawami J.).

\(4\)Kaung v. Sen, 3 L.R. 90.


\(6\)Dowling v. Dowling. (1860) 10 Irish C.I.R. 244.

\(7\)Sikander Rashid v. Hussain, A.I.R. 1943 Nagpur 265, 266.

held to be relevant in a suit by the depositors on the basis of the award, the
suit being for directions on the receivers to pay them the sums of money which
the arbitrators found as belonging to them, though the depositors were not parties
to the proceedings before the arbitrator.

7.169. Section 11 could be utilised in cases of calamity, where two or more
persons perish at the same time, and the question is who survived. In England,
before the law on the subject was regulated by statute, there was no legal pre-
sumption of survivorship or of contemporaneous death, but such a presumption
could, on the facts, be raised, having regard to the comparative age, strength
and skill of the parties. Incidentally, we may add that on this particular point,
we are going to recommend the insertion of a specific provision.

Where the question at issue was about the religion of a person, a solemn
declaration by that person as to his religion has been held to be relevant under
section 11. The dangers of admitting hearsay under section 11 are also stressed
by a Madras case, where a witness's statement as to what a deceased person
had told him regarding the ownership of the property alleged to have been stolen
was held to be inadmissible, since it did not fall under section 32. We shall
discuss this aspect in detail later.

7.170. In a Calcutta case, the proceedings were for the taking of security
from certain persons, who were alleged to be members of a gang of swindlers,
the allegation being that they habitually committed cheating and extortion, being
members of a gang formed for this purpose. It was held that the fact that the
person proceeded against was a member of an organisation formed for habitual
cheating, was relevant under section 11.

III. FACTS SUGGESTING AN INFERENCE

7.171. In many of these cases, the decision as to the applicability of section
11 may be said to agree with common sense. Difficult question, however, arise
concerning facts suggesting an inference. The Calcutta case of Booth v. Emp
is interesting in this context. On January 13, 1913, one Kali Charan, handed
over to Cox & Co. (Shipping agents in Calcutta), a bill of lading and invoice
relating to certain goods then on board the steamship, "Borneo", and paid them
Rs. 30/- on account of clearing charges. The invoice described the goods covered
by it as 6 bales of old wearing apparel, shipped by C. Potter & Co. of
London, to one Ram Prasad at Darjeeling, containing 900 ladies' jackets. The
bill of lading stated the goods to be 6 packages of old wearing apparel "R.P.
Darjeeling Via Calcutta Nos. 479 to 484" and purported to bear the endorse-
ments of C. Potter & Co. and Ram Prasad. The goods arrived in Calcutta by
the ship "Borneo" and were seized in the Customs House before clearance.
They were opened on the same day to Cox & Co. to receive delivery, but was
taken to the Customs House and was ultimately made over to the police, placed
on trial and convicted by the Chief Presidency Magistrate of unlawfully
importing and being in possession of the cocaine in violation of section 46 and
52 of the Bengal Excise Act, 1909. On revision, the High Court altered the con-
viction to one of attempting to import cocaine under section 61 of that Act.

Woodroffe.
Section 184, Law of Property Act, 1925.
See sections 107-108 and 108-A, infra.
In re Darawami Iyer, 16 Criminal Law Journal 640.
See "Statements how far relevant", infra.
Kalu v. Emperor, I.L.R. 37, Calcutta 91.
Booth v. Emp, (1914) I.L.R. 41 Cal 545 (Mookerjee and Beacraft 41).
7.172. It appears that the appellant, Booth, was also suspected by the customs authorities in connection with the above transaction, and, before Kali Charan was convicted, the customs authorities had obtained an order to detain all letters addressed to G. Potter & Co., London, and, later on, also obtained an order to stop the delivery of all letters addressed to the appellant, Booth. A letter addressed to C. Potter & Co. dated 28th January, 1913, was, accordingly, intercepted at the Post office and was found to be entirely in the handwriting of the appellant, Booth. Two telegrams purporting to have been sent by C. Barker, 71, Canning Street - the business place of the appellant Booth - were also intercepted by the authorities. Of these, one was addressed to the telegraphic address of C. Potter & Co. and the other to some other name, each containing the single word "Mula". The other addressee was, or had been, a partner of the appellant. The handwriting of the name and address of the sender in the telegram was found to have been that of the appellant. Two letters posted in England and addressed to the appellant, of which one stated "your mills received", were also intercepted at the post office and delivery withheld.

The appellant was tried before the Second Presidency Magistrate for unlawfully importing cocaine, and convicted. There was an appeal to the High Court. The principal argument on behalf of the appellant was that the only evidence on which the conviction could be based was the letter dated 28th January, 1913, addressed by the appellant to C. Potter & Co. The letters posted in England and addressed to the appellant never came into his possession. They were not, therefore, admissible against him, according to his contention. As regards the letter dated 28th January, 1913, written by the appellant, it was contended that it was not written by him, and even if it was written by him, it only showed partnership with consignor of the goods. The consignors were the exporters from London, but they were not importers into Bengal. The importer under the Bengal Act is the buyer in India. The property in the goods passed to Ram Prasad, and no connection was shown between Ram Prasad and the accused, and, therefore, there was no importation into Bengal on behalf of the accused.

7.173. Dismissing the appeal, the Calcutta High Court held, first: that the letter was written by the appellant; secondly, that even though the letter was not signed, it was well-settled that a letter written by the accused person, when self-disserving, is prima facie evidence against him, if it relates distinctly to a relevant point. It is enough if it is traced to the writer (in this case, the handwriting was proved to be that of the appellant on the expert evidence of Mr. Hardless and other evidence). Thirdly, it was immaterial that the accused was not the consignee; he was certainly an importer, and he did attempt to import cocaine in contravention of the law, even though it was not possible to determine with precision the benefit that might have accrued to him under a successful venture. Fourthly — and this is the point most material for the purpose of section 11 — the fact that a reply from Potter & Co., posted immediately after the telegram purporting to be sent by C. Barker and referring to the telegram, was addressed to Booth, would be a relevant fact under section 11 of the Evidence Act and cogent evidence to show that Booth was the sender of the telegram. The High Court followed the English case of Queen v. Cooper\(^1\) on this point. In that case, A was charged with obtaining and attempting to obtain money by false pretences from four persons by an advertisement offering employment to all who sent him one shilling in stamps. Letters from 282 other persons expressed to be in answer to the advertisement, and each enclosing twelve one

---

\(^1\)Emphasis supplied.

\(^2\)Queen v. Cooper, (1875) I Queen's Bench Division 19.

9—131 LAD/ND/77
penny stamps, were held to be admissible, although the letters had been intercepted at the post office and had never, in fact, reached A and could consequently be deemed at best, only constructively in his possession.

7.174. While the above Calcutta case is one where section 11 was applied, we may refer to another Calcutta case, where the section was regarded as inapplicable. A and B were charged with theft committed in 1914 in the house of a prostitute; evidence was brought forward to show that C and D committed a theft in the house of another prostitute in 1918, in somewhat similar circumstances. It was held that the evidence was not admissible either under section 9 or under section 11 to prove that A and B were the same persons as C and D. Presumably, the court did not regard the earlier theft as rendering the fact in issue in the present case "highly probable".

IV. STATEMENT HOW FAR RELEVANT

7.175. It is now time to examine the question whether section 11 can be pressed into service for admitting into evidence statements which are not admissible under section 32 or other specific provision of the Act. This has been the subject matter of considerable controversy. From the judicial decisions on the subject, several shades of view can be discerned.

7.176. The first view on the subject is that section 11 must be read subject to the other provisions of the Act, and a statement not satisfying the conditions laid down in sections 32-33 cannot be admitted, merely on the ground that it may render highly probable or improbable a fact in issue or a relevant fact. This view is represented by the Madras case, and earlier Allahabad cases. The view is based on the reasoning that section 32-33 are exhaustive of the law relating to relevancy of statements made by persons mentioned in sections 32 and 33.

7.177. In the Madras case, the defendant relied on certain documents between third parties showing that the limits of an estate extended to certain property. It was contended that these documents had been wrongly rejected by the trial court, and one of the sections under which the documents were admissible was section 11. Rejecting this contention, Varadacharaij J. observed: "As regards section 11, it seems to us that section 11 must be read subject to the other provisions of the Act and that a statement not satisfying the conditions laid down in section 32 cannot be admitted merely on the ground that, if admitted, it may probabilise or improbabilise a fact in issue or relevant fact."

7.178. The second view, which is a slight variation of the first, is represented by a Mysore case. It is based on the reasoning that section 11 deals with facts, while section 32 deals with statements. This view does not agree that section 32 controls section 11. According to the second view, on a proper construction, statements falling under section 32 are excluded from the scope of section 11. Recitals found in documents which are not between the parties are not, according to this view, "facts", within the meaning of that word in section 11.

---

There is also a Calcutta ruling, substantially to the same effect.

7.179. According to the third view, such recitals are inadmissible because they cannot have such probative force. A recent Punjab case gives this as one of the reasons for not applying section 11.

7.180. The fourth view is that statements can be admissible under section 11 even when they are not admissible under section 32. This is represented by certain Bombay, Calcutta, and, later, Allahabad cases. The reasoning on which this view is based was lucidly stated by Desai J. in an Allahabad case:

"There is no connection between the provisions of sections 11 and 32 and there is no justification for saying that one section is dependent on the other. As a matter of fact, each section creates new relevant facts; if a fact is relevant under section 11, evidence about it can be given as permitted by section 5 even though it may not be relevant under section 32. If there is one provision under which a fact becomes a relevant fact, it can be proved regardless of whether it is made relevant under some other provision or not.

"If a fact is relevant under section 32, it can be proved notwithstanding that it is not relevant under section 11 and to say that a fact relevant under section 11 cannot be proved unless it is covered by the provisions of section 32 is nothing short of striking out section 11 from the Evidence Act. When section 32 itself is sufficient to allow a fact to be proved, it would have been futile for the legislature to enact section 11, if a fact made relevant by that section would not be proved unless it was also relevant under section 32".

7.181. This question,—i.e., the question whether statements made by a third person can be relevant under section 11—is, thus, a difficult one. In our opinion, on the present wording, the fourth view is the most cogent. No doubt, the court must exercise a sound discretion and see that the connection between the fact to be proved and the fact sought to be given under section 11 to prove it is so immediate as to render the co-existence of the two highly probable. But it is legitimate to read sections 11 and 32 independently of each other. The section, it should be remembered, makes admissible only those facts which are of great weight in bringing the court to a conclusion one way or the other as regards the existence or the non-existence of the fact in question. The admissibility under this, section must, in each case, therefore, depend on how near is the connection of the facts sought to be proved with the facts in issue when taken with other facts in the case.

Subject to this observation, section 11 does not exclude statements as such on its present wording.

7.182. A similar controversy exists as to recitals in documents. In the case of Dwarka Nath v. Mukunda Lal, it was held that documents though not inter partes, which contain recitals that a particular land belongs to a particular tenure

---

3 Bhuriya v. Ram Kale, supra.
5Ambica Charan v. Kumar Mohan, A.I.R. 1928 Cal 893, 895, see Factum of statement.
8Para. 7.180, supra.
which is in question, are admissible in evidence under either section 11(b) or section 13, although they are not conclusive or binding evidence, and may be very weak evidence or even of no weight at all.¹

A contrary view was, however, taken in the Calcutta case of Abdul Ali v. Syeda Raja and in the later case of Ketabuddin.³

In at Patna case,¹ a statement by a lady witness was held admissible "at least under section 11", though the statement was in her favour and in a document not iper partes. In that case, however, it was used as explaining her other statements.

7.183. The difficulty of the subject is illustrated by the fact that Dr. Justice Mookerjee, who, in Bisheshwar Dayal v. Harbans Sahay⁶ had apparently held that a document of this nature was admissible in evidence under the provisions of sections 11 and 13, altered his view in Abdullah v. Kunj Behari Lal⁷, where he held that a document of this nature was not admissible in evidence under the provisions of sections 11 and 13,—thus differing from the view which he had previously expressed. In Saroj Kumar v. Umed Ali, again, the question was regarded as not free from doubt, by two other judges.

In P. N. Choudhury’s case⁹, it was definitely held that recitals in documents between third parties were not admissible under section 11 or section 13.

7.184. The same controversy exists on the more particular question whether recitals as to boundaries of other lands in documents between third parties are admissible.

Some of the cases referred to above,¹⁰ related to recitals about boundaries.

In the Calcutta case of Brijeswari Prasad v. Budhanudhi,¹¹ it was held:

"A recital in a deed or other instruments is in some cases conclusive, and in all cases evidence, as against the parties who make it. But it is no more evidence as against third persons than any other statement would be."

In another Calcutta case,¹² a statement appearing in the Schedule attached to the order for delivery of possession as to the rent payable for the holding was held inadmissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute.

7.185. In a Calcutta case reported¹³ in 1923, it has been held that when a document has been admitted in evidence as evidence of a ‘transaction’,

¹See also—
(a) Chhauradihani Mantra v. Akashwar Mantra, A.I.R. 1952 Pat. 382;
(b) Raghu Nath v. Bindeshri, A.I.R. 1924 Ali. 520;
(c) Katori v. Om Farbar, A.I.R. 1935 Ali. 351;
(d) Thakur v. Lalji, A.I.R. 1934 Pat. 81.
⁵Bisheshwar Dayal v. Harbans Sahay, (1907) 6 C.L.J. 659.
⁸P. N. Choudhury v. K. C. Bhattacharjee, A.I.R. 1924 Cal. 1067
¹⁰Saroj Kumar v. Umed Ali, A.I.R. 1922 Cal. 251, 253 (Question not free from difficulty).
the recitals therein are not evidence, especially if they are not used as assertions by a person who is alive and who might have been brought before the court as a witness. In the same year, however, there is another case in which a statement by a party, in a document not inter partes, was admitted.

7.186A. Keeping the judicial decisions in mind, it would be convenient to state briefly the position in regard to recitals of boundaries, in documents. Cases falling under this head may be divided into three classes:

(a) When the recital is in a document 'inter partes'. In such a case, the recital is a joint statement made by the parties to the document and, therefore, relevant against all of them as an admission.

(b) When the recital is in a document between a party and a stranger. In such a case, the recital is relevant against the party as an admission, but is not admissible in his favour, unless the fact recited is proved to in court by the executant of the document, in which case the recital will become admissible to corroborate the evidence of the executant or to contradict such evidence:

(c) When the recital is in a document between strangers. It is well-settled that a recital as to boundaries in documents between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. However, if the recital can come within the relevancy and admissibility contemplated by (a) section 11; (b) section 13; (c) section 32(3); and

(d) sections 155 and 157, then an exception may arise. The scope of section 11 in this regard is controversial, as already stated. The scope of section 32(3) is also controversial in this regard.

V. QUESTION OF AMENDMENT CONSIDERED

7.187. Having taken note of the above controversy, we have addressed ourselves to the question whether any amendment in the section is needed and, if so, on what lines. We have already expressed our opinion that on the present language of section 21, the fourth view is the most cogent. On the present language, we find it difficult to reconcile ourselves to the view that the section (as it now stands) excludes statements as to facts. In many other sections of the Act, "facts" are taken as including statements. In section 6, for example, illustration (a) makes this clear. Section 9, illustrations (d) and (e), may also be seen. It is well-known that most of the reported decisions under section 6 (res gestae), have been concerned with statements spontaneously made in connection with a dramatic event. Same is the position as regards section 8, whereunder complaints are specifically relevant as facts influenced by conduct—vide illustrations (j) and (k) to that section. The position with reference to sections 7 and many other sections is not, in its essence, different. We may also add

---

2Section 21.
3(a) Radha Krishna v. Saradeshwar, A.I.R. 1925 Cal. 684(2)(A);
4Section 157.
6Ambicucharan v. Komud Mohun, A.I.R. 1923 Cal. 893
8Para. 7.182 to para. 7.184, supra
9See para 7.181, supra.
10Para. 7.180, supra.
that section 11 begins with the words "Facts not otherwise relevant", and these
words show beyond doubt that the section, as it now stands, is not controlled
by any other section making certain facts relevant.

7.188. Nevertheless, we do not recognise judicial reluctance to allow sec-
tion 11 to be used for proving statements. This reluctance shows that courts
have considered it unwise to construe section 11 widely, and have, in the inter-
ests of justice, considered it essential to read some limitations therein, though
such limitations do not flow from the literal text of the section. We are, there-
fore, of the view that the matter should be put beyond doubt, and that the sec-
tion should, in its wording, be brought nearer to what has in practice been
its interpretation by some of the most eminent of Indian Judges,\textsuperscript{1} by excluding
statements from its ambit by an express provision.

7.189. Stephen seems to have anticipated the problem. We find\textsuperscript{2} that he
suggested that the meaning of the section would have been more fully expressed,
if words to the following effect had been added to it:

"No statement shall be regarded as rendering the matter stated highly
probable within the meaning of this section, unless it is declared to be a
relevant fact under some other section of the Act.".

7.190. We have, after careful consideration, come to the conclusion that
statements should be excluded for the reasons already mentioned.\textsuperscript{3} The form
in which the amendment should be couched, however, requires some considera-
tion. If the form suggested by Stephen\textsuperscript{1} is adopted, the section would become some-
what otiose, because, if a statement is also relevant under some other section,
there is no point in treating it as relevant under this section. We are, therefore,
of the view that the amendment should be as suggested below:

7.191. Our recommendation is that section 11 should be amended by
inserting an Exception on the following lines:

"Exception—Evidence shall not, by virtue of this section, be given of
a statement, whether by a party or by any other person; but nothing in this
Exception is to affect the relevance of a statement under any other section."

\textsuperscript{1}Varadacharier J. and Mookerjee J.
\textsuperscript{2}Stephen, Introduction to the Evidence Act, pages 160-161.
\textsuperscript{3}Para. 7.188, supra.
\textsuperscript{4}Para. 7.189, supra.
CHAPTER 8

RELEVANCY IN PARTICULAR CASES

8.1. Sections 5 to 11, which were dealt with in the previous Chapter, were concerned with certain facts that would be relevant in the generality of cases. With section 12 begins a group of sections dealing with facts that are relevant in particular cases.

8.2. Section 12 provides that in suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded, is relevant. The section, of course, postulates the existence of the liability to pay damages. It does not deal with the principles of liability to pay damages.

8.3. According to Mayne, damages are the pecuniary satisfaction obtainable by success in an action.

8.4. Facts which show the extent of the loss are relevant under section 12. Sometimes, actual damages—often called special damage—must be proved in order to show a cause of action in a tort not actionable per se. In such cases, it is a fact in issue, since the existence of the liability depends thereon.

8.5. There are some points which may be relevant both for the purposes of limitation and for the purpose of damages. For example, the distinction between continuing and other torts is important, both with regard to damages and with regard to limitation for suits. As regards limitation, a fresh period of limitation begins to run at every moment of time during which the breach of contract or the tort continues.

8.6. Where the defendant has committed a continuing tort (such as a private nuisance), the damages are assessed so as to compensate the plaintiff for the harm suffered until the date of the trial. If the defendant continues the tort after that, the plaintiff can bring fresh proceedings, to obtain compensation for the further injury suffered until the second trial. He can sue "from day to day" or "do die in diem", until the defendant discontinues the tort.

8.7. On the other hand, where the tort is not a continuing tort, the plaintiff can sue only once. He does not get a fresh starting point for limitation. The damages have also to be assessed once and for all. The future consequences of the tort have to be assessed and evaluated, as well as the losses actually suffered already.

8.8. It may be noted also that the definition of "fact in issue" in the Act covers facts from which, inter alia, the extent of any liability asserted in any suit or proceeding necessarily follows. In suits in which damages are claimed, therefore, the amount of the damages is a fact in issue. So long as the evidence pertaining to damages is confined to arithmetical calculations to indicate the

---

1Chapter 7.
2Mayne on Damages, cited in Kameshwar Rao, Damages (1953), page 15.
4Section 22, Limitation Act, 1963.
6Section 3—"fact in issue".
extant of the harm caused by a breach of contract or tort such evidence would be admissible under section 5, being directly, related to a fact in issue, and recourse to section 12 is not necessary for admitting such evidence.

8.9. However, very often, questions of detail may arise in relation to damages. The principles on which damages are to be assessed belong to the domain of the substantive law applicable to the case,—for example, the question as to when damages may be recovered, the amount of damages recoverable in particular suits, the defence which can be pleaded, and the like. The facts necessary for applying these principles, however, could be of wide variety. It is, apparently, for this reason that section 12 does not specify how the facts made relevant by the section are to be related with the interest injured by the civil wrong that constitutes the cause of action. It lays down, in general words, that evidence which will enable the court “to determine” the amount of damages, is admissible. This would certainly include evidence which tends to increase or diminish the damages.¹

8.10. Thus, for example, in a suit for damages for defamation, where injury to the feelings is an element to be considered in computing the quantum of damages, this aspect is of importance. The circumstances of time and place—the time when, and the place where, the defamation in issue was given—require different damages. As has been said by Bathurst J., “it is a greater insult to be beaten upon the Royal Exchange than in a private room”.

8.11. We have already stated that the principles on which damages may be awarded are outside the law of evidence. These are matters of substantive law, and may not necessarily be the same in all countries. German law, for example, does not deny some element of retribution or satisfaction as a motivation for the award of damages. Somewhat similar is the position in Swiss law.¹ The principle in these two continental countries—in respect of non-material injury—is that of “mollifying” or giving satisfaction to the plaintiff.

8.12. The principle of full compensation for the wrong committed could include not only out-of-pocket damages (damnum emergens) and loss of profits (luctum cessans), but also those outlays and expense which are the inevitable consequences of the wrong complained of. What should and should not be regarded as such consequence, is for the substantive law.

8.13. Factors which are, and which are not, — to use Lord Denning’s phrase¹ “uncompensatable”, are matters for the substantive law. For example, even in proprietary actions, there is (in England) a disinclination to grant compensation for sentimental attachment of the plaintiff to a piece of property damaged by the defendant.¹

8.14. As we have already stated, section 12 presupposes the existence of the relevant principles, and provides, in effect, that evidence is admissible of facts which may bring those principles into play. We shall indicate the principles below.

¹See Norton, page 124, cited by Woldoffe.
¹Tulldge v. Wade, (1769) 3 Wills 19.
¹Paragraph 8.2.
¹Hinz v. Berry, (1970) 2 Queen’s Bench 40 (Court of Appeal).
8.15. The application of the section will vary according to the nature of the cause of action, as well as according to the other circumstances. In actions for breach of contract, for example, apart from the damages which would be awarded for the loss arising naturally from the breach of contract,—i.e., according to the usual course of things—damages can be claimed for such loss as may reasonably be supposed to have been in the contemplation of the parties as the probable result of this breach. Hence, the special circumstances under which the contract was made, *if communicated by one party to the other*, might be relevant under section 12.  

8.16. As to the consequences of breach of contract, the Indian Contract Act provides as follows:—

73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

"Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

"When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

*EXPLANATION.*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account”.

8.17. According to this section, in estimating the loss or damage for which compensation is made recoverable in cases of breach of contract, the following broad rules are to be followed as guidelines.

1. Damages recoverable must be such as naturally arise in the usual course of things from the breach of contract; or
2. It must be damage which the parties knew, when they made the contract, to be likely to result from the breach;
3. Such damage must in neither case be remote or indirect; and
4. In both cases, the means which existed of remedying the inconvenience caused by the non-performance of the contract, that is to say, from the breach, must be taken into account.

8.18. In actions for tort also, apart from general damages, special damages can be sought. Evidence required to assess special damages will be particularly relevant under section 12.

8.19. Evidence useful for determining the amount of damages under section 12 could, therefore, be of wide variety. In cases where a claim is for compensation for death, specialised evidence may, for example, be useful. Preparation of the analysis of gross and net earnings of a deceased person may require the help of accountants. An actuary can give evidence of the life

---

5Section 73, Indian Contract Act, 1872.
expectancies of the deceased and beneficiaries. Evidence of ordinary witnesses might be required to show the prospects of the deceased increasing or decreasing his income, and the probable benefits that would flow to his family. Even the evidence of economists as to the cost of living and similar factors may be useful. While the court cannot compel a physical examination of a claimant, the health of claimants may be relevant. In an English case, Phillimore J., while refusing to speculate on the likelihood of the re-marriage of a widow, suggested that the statistics of the various ages at which women re-marry might be appropriate.

8.20. In assessing the amount of damages, the court can also take into consideration awards in similar cases.

8.21. Similarly, in an action for breach of contract of marriage, injury to feelings would enter into the realm of damages.

8.22. In certain cases, character of the parties may be relevant in regard to damages; this is specifically dealt with by another section. In actions for seduction or enticement, the character of the woman may be relevant for mitigating the damages.

8.23. Statements may be admissible under section 12, on the facts. Where a defamatory statement, imputing misconduct to a man in relation to his step-daughter, is the foundation of the suit, and, in defence, truth is pleaded, evidence that the step-daughter herself had been spreading rumours abroad that her step-father had been making improper advances to her, is relevant under section 12, in order to assist the court in assessing the damages awarded, though it is mere hearsay as regards the truth of the libel.

8.24. In cases of grave personal injury, the level of awards for pain and suffering is often high, particularly in Western countries. This is because there cannot be any precise and objective yardstick for translating non-material losses into monetary terms.

8.25. The question may be asked why the law should measure, in monetary terms, losses which have no monetary dimension. In 1900, Lord Halsbury said: “What manly mind cares about pain and suffering that is past.” The answer is that monetary compensation is the best that the law can afford. It is often pointed out that in assessing “general” damages, the law usually purports to give compensation and not restitution.

8.26. In recent times, the question how far damages can be awarded for mental anguish as a result of breach of contract has also come up prominently,—for example, in cases when promised accommodation in a hotel or elsewhere has not been given by travel agencies or others undertaking such obligation by contract, and this failure on their part has spoiled a holiday.

---

3Buckley v. John Allen etc. Ltd.. (1967) 1 All. E. R. 539.
6Section 55.
8Apparantly as increasing the extent of herni owing to repetition of the libel.
9The Medina (1900) A.C. 113, 117.
8.27 In an action on an alleged libel appearing in the Saturday Evening Post, the jury, returning after 11 hours, was unable to agree and was excused. Judge Wyman
ski’s charge to the jury.

"In a libel suit the appropriate measure of damages is the loss of re
putation suffered by the plaintiff, the physical pain which he has suffered,
and the mental anguish which he has suffered.

"You will note that I have said the suffering must be by him, not by
others.

"You cannot, under any circumstances, include punitive damages. You
may, however, properly take into account malice, if you find that there is
malice, and you may enhance damages on account of malice.

"You are entitled to take into account the standing of the plaintiff
in the community and group in which he moves. You are entitled to take
into account the extent of the publication of which complaint is made. All
those are proper elements.

"Under the pleadings in this case, no special damage of a technical
nature is alleged, and so you cannot consider any pecuniary loss which the
plaintiff may have suffered, nor can you consider the loss of an election,
if the loss of the election was in any way attributable to the publication.
You must forget that entirely.....

"As to damages—damages are an element about which a Judge has no
better knowledge than a jury. You are practical men. You know what
the consequences practically are of articles which are defamatory and not
ture or privileged, and articles which are defamatory and are malicious.

"I do not suggest that this article is defamatory or malicious or untrue
or unprivileged. I take no position on that matter. That is for you. But
if you should decide that you have to consider the question of damages,
them, gentlemen, your experience is sufficient to decide the matter, and
twelve of you are much better estimators than I alone would be."

8.28. According to some English cases, there is an evident distinction,
almost etymological in nature,—between the terms “damages” and “compensation”.
While the term “damages” is used in reference to pecuniary recompense
awarded in reparation for a loss or injury caused by a wrongful act or omission,
the term “compensation” is used in relation to a lawful act which caused the
injury in respect of which an indemnity is obtained under the provisions of a
particular statute.

8.29. Thus, Esher M.R. said,2 "The expression compensation is not ordi
narily used as equivalent for damages. It is used in relation to a lawful act which
has caused injury. Therefore, that word would not, I think, include damages at
large."3 We shall revert to this aspect later.

8.30. It may be noted that so far as the expression “damages” is concerned,
it is confined to civil cases, but the legal systems of many countries impose an
obligation on the criminal court to deal with claims for compensation. The

3Per Esher, M. R., in Dixon v. Calcraft, (1892) 1 Q.B. 458; 61 L.J.Q.B. 529; 66
L. T. 554.
4See also Mookerjee, J. in Muhammad Mazahar Alah v. Muhammad Azimuddin,
A.I.R. 1923 Cal. 507, 511.
5See also per Fazl Ali, J. in Ram Rachhya Singh v. Raghunath Prasad, A.I.R. 1930
Pat. 46, 49, 50.
provision may be framed in terms of “punishment”, or as a direct one for compensation. But whatever be the form adopted, the principal idea is prompt payment of reparation to the victims for the injury caused by the offender.

8.31. Briefly, the position in this regard is as under: (i) some countries require the court to deal with claims for damages against the accused,—e.g., Cuba, Mexico, Peru, Portugal, Colombia, Uruguay, even if the victim has not applied; (ii) some countries permit the court to deal with such claims, if made by the victim,—e.g., France, Spain, Chile, Venezuela, and some Provinces of Argentina; (iii) some countries recognize the claim for damages to civil courts. This is the traditional position in most common law countries, apparently because the Crown’s right to forfeit the property of the felon had, in ancient times, precedence over private claims; (iv) some countries empower the criminal court to award compensation, but without a right to demand compensation to any person. India is in this last category; (v) In some countries, the State undertakes to pay compensation. Such a scheme is in force in England (non-statutory) since 1964, and in some other countries (by statute—e.g. in some States of the U.S.A.).

8.32. In the Criminal Codes of some countries, there is a mandatory provision for compensation. For example, the provision in Peru is as follows:—

“In case of rape, seduction, abduction or indecent assault upon a woman, the offender shall also be sentenced to pay a special compensation to the victim if she is a single woman or a widow, according to his means and to support any offspring which may result in the same cases, the offender shall be excluded from the effects of the sentence “If he marries the victim with her full consent after she is returned to the custody of her father, guardian or some other place.”

8.33. In ancient Hindu law, the law-givers were fully aware of the necessity of directly compensating the victim of the crime. Thus, Manu says—

“If a limb is injured, a sound (is caused) or blood (flows, the assailant) shall be made to pay (to the sufferer) the expenses of the cure, or the whole (both the usual amercement and the expenses of the cure as a fine to the King).”

Manu also says:

“He who damages the goods of another, be it intentionally or unintentionally, shall give satisfaction to the (owner) and pay to the king a fine equal to the (damages).”

Manu thus, provides for direct reparation to the victim of the crime apart from payment or fine to the king (the State). Brihaspati says:

“He who injures a limb, or divides it, or cuts it off, shall be compelled to pay the expenses of curing it and (who forcibly took an article in a quarrel) restore his plunder.”

“A merchant who conceals the blemish of an article which he is selling, or mixes bad and good articles together, or sells (old articles) after repairing them, shall be compelled to give the double quantity (to the purchaser) and to pay a fine equal (in amount) to the value of the article.”

2See section 357, Cr. P.C., infra.
8.34. Section 357(1) of the Code of Criminal Procedure, 1973 is as follows:—

"357. (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying the expenses properly incurred in the prosecution;
(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a Civil Court;
(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855, entitled for the loss resulting to them for such death;
(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensation any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto."

8.35. Section 357(3) of the same Code provides—

"(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced."

8.36. It is obvious that in proceedings where issues relating to such compensation arise, whether or not section 12 applies, facts necessary in order to enable the court to determine the amount of compensation would be relevant.

8.37. In many countries, the victim is permitted to request the prosecution to include his claim in the criminal case against the accused. Amongst such countries are Austria, Colombia, Italy, Norway, Spain and Sweden. In France, a special action known as "action civil" can be started by the injured person, and it is heard along with the criminal case.

8.38. We have referred above to the use of the word "compensation" in some context. Dixon J. in an Australian case, dealing with compensation for the acquisition of property, said that it means "recompense for loss", and explained that the purpose of compensation in this context is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived.

1Articles 234, 85 to 91, 371 to 375, 418 to 426, 497, French Code of Criminal Procedure.
3Netungalloo Property Ltd. v. Commonwealth, (1948) 75 Commonwealth Law Reports 495, 571.
8.39. In another Australian case, Lathan C.J., interpreting a provision in the Seamen’s Compensation Act which barred the right of a seaman to recover “compensation” both independently of and also under the Act, said that the word “compensation” was wide enough, in its ordinary significance, to include compensation by way of damages for the injuries suffered by the seaman, whether or not some default by the employer was part of the seaman’s cause of action.

8.40. Having regard to the fact that Indian legislative practice — vide the Indian Contract Act — and also the Limitation Act—frequently uses the word “compensation”, it is desirable to substitute the word “compensation” for the word “damages” in section 12. We recommend that the section should be so amended.

SECTION 13

1. INTRODUCTORY

8.41. Section 13 reads—

“13. Facts relevant when right or custom is in question:—Where the question is as to the existence of any right or customs, the following facts are relevant:

(a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.”.

8.42. The illustration to the section deals with a right to fishery, and enumerates certain transactions or instances as relevant facts. Since these are of a non-controversial nature, the illustration is not of much help in solving the controversy that has arisen under the section.

8.43. It may be pointed out that clause (a) of the section is not confined to evidence of a grant creating the right. It includes transactions and instances as evidence of facts relevant to the fact in issue in any particular case, and it thus makes these transactions and instances relevant for the purpose of establishing any right or custom.

Similarly, clause (b) of the section is not confined to particular instances in which the right was asserted. The clause speaks of the particular instances in which the right was (i) claimed, or (ii) recognised, or (iii) exercised, or (2) in which its exercise was disputed or departed from.

8.44. The need for such a provision can be explained without much difficulty. Rights or customs are intangible facts or invisible phenomena; they are abstractions; and they are static. Their existence can, in general, be ascertained, only from concrete instances,—e.g. transactions by which they were created, claimed, modified, recognised, asserted or denied, or which are inconsistent with their existence, or from particular instances evidencing such claim, recognition or exercise or the contrary thereof. In other words, the right can, in general,

---

2Section 73, Contract Act, supra.
3One of us—Shri Sen Verma—regards such change as unnecessary.
4See infra under “Judgments” and “Statements”.
5Secretary of State v. District Board, Rangpur, A.I.R. 1939 Cal. 758, 762.
be conveniently proved by cumulative instances and transactions, and not by a single document of fact or an isolated transaction or instance—except where the single document itself creates the right. This is the assumption on which the section is founded. Dominion or ownership is characterised by particular acts of enjoyment; these acts being fractions of that sum total of enjoyment which characterises dominium.

8.45. The most cogent evidence of rights and customs would be judgments between the parties. But such evidence is rarely available.

The least cogent evidence of rights would be the expression of opinion. The examination of actual instances and transactions in which the alleged custom or right has been acted upon or not acted upon, or of acts done, or not done, involving a recognition or denial of their existence, lies in the middle. Such evidence is usually available without much difficulty.

"In the absence or direct deed, acts of ownership are the best proofs of title."

8.46. Acts of ownership, when submitted to, are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so, and that he is, therefore, the owner of the property upon which they are exercised. But such acts are also admissible, of themselves, proprio vigore, for they tend to prove that he who does them is the owner of the soil. The section is applicable for the latter purpose.

8.47. The principle of the section is, thus, sound enough. But the phraseology in which it is couched—particularly, the word "transaction"—has proved to be a fruitful source of controversy. It will be necessary to discuss this aspect of the matter in detail.

8.48. The facts made relevant by section 13 are (a) transactions, and (b) instances. Neither of these terms is defined by the Act.

A "transaction" is the doing or performing of any business, management of any affairs, performance; that which is done; an affair, as the transactions on the exchange. A transaction is something already done and completed; a "proceeding" is either something which is now going on, or, if ended, is still contemplated with reference to its progress or successive stages. "We use the word 'proceeding' in application to an affray in the street, and the word 'transaction' to some commercial negotiations that have been carried on between certain persons. The 'proceeding' marks the manner of proceeding, as when we speak of proceedings in a Court of law." The "transaction" marks the business transacted, as the transactions on the exchange."

A "transaction", as its derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were.

"Transaction", in its largest sense, means that which is done. Garth, C.J., said: "A transaction", in the ordinary sense of the word, is some

---

1 Jones v. Williams, 2 M. & W., 326. Followed in Sabram v. Odoy, (1922) I.L.R. 1, Pat. 375.
2 Collector v. Deorge, (1865) 2 W.R. 212 (Cal.) (Jackson J.).
3 Starkie, Evidence, page 470, cited by Woodroffe.
4 Webster's Dictionary, "Transaction".
5 Grabb's Synonyms, cited in Woodroffe.
6 Gajju v. Fattah, (1880) I.L.R. 6 Cal. 171, 185, (per Jackson J.)
7 Gajju v. Fattah, (1880) I.L.R. 6 Cal. 171, 175 (per Mitter, J.).
business or dealing which is carried on or transacted between two or more persons."

8.49. The qualifying character of the "transaction" spoken of in the section are—(a) creation (b) claim, (c) modification, (d) recognition, (e) assertion, (f) denial, (g) inconsistency. Of these, (b) and (d) are also qualifying characters of "instances."

8.50. An "instance" is that which offers itself, or is offered, as an illustrative case; something cited in proof or exemplification: a case occurring; and example.¹

8.51. The section distinguishes between a claim and an assertion. Under clause (b), however, instances are admissible in which the exercise of a right or custom was asserted. The word "assertion" includes both a statement and enforcement by act. Ordinarily, the evidence tendered under this section will be evidence of acts done, but a verbal statement not amounting to, and not accompanied by, any act would also be admissible if it amounted to a "claim". We shall revert to this aspect later.

II. JUDGMENTS

8.52. How far the word "transaction" in this section includes a judgment not inter partes is a matter on which serious controversy has arisen. The case law on the subject is legion, and it will not be practicable even to mention the innumerable decisions of the various High Courts on the subject. We shall, therefore, confine ourselves to important judgments of the Privy Council and the Supreme Court, and very important rulings of the High Courts.

8.53. A brief analytical summary of the pronouncements of the Privy Council and the Supreme Court would be useful. We shall begin with the decisions of the Privy Council relating to relevancy of judgments under section 13.

(a) A wide view has been taken by the Privy Council in certain decisions, in which judgments not inter partes have been taken into account. To this category belong Ram Ranjan v. Ram Narain,² where the question was whether the defendants were mukarraridars, and, therefore, not liable to ejection by the plaintiff. Previous judgments not inter partes, in which the defendants had been found to be mukarraridars, were admitted, though section 13 was not expressly referred to.

8.54. In Dino Mony v. Brojo Mohin,³ the section was expressly referred to, and reports forming part of prevarious proceedings under section 145 of the Code of Criminal Procedure, 1882 (disputes as to possession of immovable property), were held to be admissible in evidence. The following observations in the judgment may be noted:—

"These police orders are, in their Lordships' opinion, admissible in evidence on general principles as well as under the thirteenth section of the Indian Evidence Act to show the facts that such orders were made. Reports not referred to in the orders may be admissible as hearsay evidence of reputed possession. To begin a report within that section, the report must be a 'transaction in which the right or custom in question

¹Webster's Dictionary, "instance".
²Ram Ranjan v. Ram Narain, (1895) I.L.R. 22 Calcutta 533, 22 Indian Appeals 60.
was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence. These words are very wide and are wide enough to let in the reports forming part of the proceedings in 1867, 1876 and 1888....."

(b) On the other hand, there are certain decisions of the Privy Council which seem to lay emphasis on the proceedings. In Maharaja Sir Kesro Prasad Singh v. Pahulia Mst. Bhag Joana Kuer, Sir George Rankin, delivering the judgment of the Privy Council, made the following observations:—

"The admissibility of the decree of 1916 is the next question. Whether based upon sound general principle or merely supported by reasons of convenience, the rule that so far as regards the truth of the matter decided in a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English law. That the same rule applies in India though it is not expressly formulated in these terms, may be seen from a reference to section 43 of the Evidence Act and the illustration given thereunder. On the other hand, apart from all discussion whether a judgment is or is not a transaction within the meaning of section 13 Evidence Act of Cal. 1711 and 29 IA. 243 the judgment of 1916 together with the plaint which preceded it and the steps in execution which followed are evidence of an assertion by the Raja of the right which it claims to have acquired in 1903 and are thus admissible evidence of the right........ But the fact that a person not in possession of the land now in suit claimed in 1911 to have been entitled to it since 1903 is not by itself serious evidence of its right..... Serious consequences might ensue as regards titles to land in India if it were recognized that a judgment against a third party altered the burden of proof as between rival claimants, and much indirect lying might be expected to follow therefrom."

8.55. These observations seem to regard the judgment—

(i) as admissible when read with the proceeding, but as (ii) not constituting such serious evidence as would displace the burden of proof.

8.56. In a case from Calcutta, it was held by the Privy Council that the Court is not entitled to refer to, or rely upon, a judgment given in proceedings to which neither the plaintiff nor the defendant was a party, as proving the facts stated therein.

(c) In Collector of Gorakhpur's case, two pedigrees filed with a previous suit were sought to be given in evidence Section 13 was discussed by the Privy Council incidentally. The pedigrees were found with the decree in the previous suit, and the decree recited that the pedigrees had been filed by both the parties: the decree also set out the descent of the persons concerned, according to the pedigrees. The Privy Council held that the statement in the decree that the pedigrees were filed was admissible, either under section 35 as an entry in a public record, or under section 13 as evidence in the course of proceedings in a suit, and that the particular pedigree was admissible as a relevant admission. Referring to the observations made by Sir John Woodroffe

--

2Emphasis supplied.
5Coca-Cola Co. of Canada Ltd. v. Pepsi Cola Co. of Canada. A.I.R. 1942 P.C. 40 (Case from Canada)

10—131 LAD/ND/77
in his Commentary on the Evidence Act (1931 Edition), where the view had been expressed that judgments and decrees were not admissible under section 13, their Lordships pointed out that this view was not in accordance with the decisions of the Board in Ram Ranjan's case\(^1\) and Dino Mony's case\(^2\).

(d) Thus, a judgment being admissible under section 13, the use to which the judgment can be put is, according to certain decisions of the Privy Council, a limited one. Findings of facts arrived at in one case do not constitute evidence of that fact in another case. This was decided in Gopika Raman v. Atal Singh\(^3\). In a later case,\(^4\) in which partibility of the Pandara estate was an issue, Sir George Lowdes made the following observations:

"The judgment in question is only admissible under the provisions of sections 13 and 32, Evidence Act, as establishing a particular transaction in which the partibility of the Pandara estate was asserted and recognized. viz., the partition resulting from the 1793 suit. The reasons upon which the judgment is founded are no part of the transaction and cannot be so regarded nor can any transaction itself be relevant in the present case........"

(c) The sum and substance of the decisions of the Privy Council, referred to above, appears to be, that a judgment in a previous case is relevant under section 13 by virtue of the portion referring to "transaction", but not the reasons behind the judgment, nor the findings of facts on which it is based. Much weight may not, however, attach to such judgment, though it is admissible.

8.57. We shall now refer to two relevant decisions of the Supreme Court bearing on the point.

(a) In Srinivas v. Narain,\(^5\) the point at issue was whether certain properties were joint family properties. In a previous litigation, maintenance had been claimed by a female member, with a prayer for charging the maintenance on the family property. This prayer had been granted, and the judgment was being tendered in evidence: the objection raised was that in the previous litigation, no question of title was directly involved. The Supreme Court, however, regarded the judgment as admissible under section 13 as an assertion of the female member that the property belonged to the joint family. It was pointed out that the amount of maintenance would depend on the extent of joint family property: that an issue as to extent was actually framed in the previous litigation, and that the prayer for charging the maintenance on the family property had also been granted.

Sital Das v. Santi Ram,\(^6\) again, involved the question of succession to the office of a Mahant, and a previous judgment was admitted under section 13 as a "transaction" in which a person from whom one of the parties derived his title, asserted his right as a spiritual collateral of a previous Mahant and got a decree accordingly.

(b) The Supreme Court decisions referred to above show that a judgment can be treated as a "transaction" in which a right was asserted. It may.

---

\(^1\) Ram Ranjan's case, supra.
\(^2\) Dino Mony's case, supra.
incidentally, be noted that in neither of the two cases before the Supreme Court, the decisions of the Privy Council or any other case on this point was discussed.

8.58. Decisions of the High Courts are conflicting as to whether previous 
judgments and decrees not inter partes are, or are not, included in the term 
"transaction". Difference of opinion has arisen in the same High Court also.1

Remarks of Sargent, C.J., in Ranchhoddas v. Basu,1 were—"former 
judgments are not themselves transactions."

8.59. On the allied question whether previous judgments and decrees not inter partes are, or are not, included in the words "particular instances", the 
decisions of the High Courts are, again, conflicting. In some cases, it has been 
held that judgments and decrees are not themselves "transactions" or  
"instances", but the suit in which they were passed and made is a "transaction" 
or "instance".

8.60. While it is too late in the day to say that a judgment is never admiss-Logical position, 
sible under section 13, it must be stated that in order that the admissibility of a judgment under section 13 can be justified, a slightly complicated process of reasoning has to be undergone. On a literal construction of the word "transaction", a judgment would not be covered by it. A judgment is an act of the court embodying its opinion, and is not easy to see how an act of a Court can constitute a "transaction" in which a party asserted etc. a right. It will be more accurate to say that the litigation amounts to an assertion of a right etc. and that the judgment is admissible as evidence of the litigation.

8.61. As was pointed out by Sir Gurudas Banerji J. in the referring judgment in a Calcutta case,2 litigation may itself come within the meaning of section 13. His observations were as follows:—

"If the existence of the judgment is not a transaction within the meaning of clause (a) of section 13, it proves that a litigation terminating in the judgment took place; and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So again, the litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (b) of section 13, in which the right of possession now claimed by the defendant was claimed."

8.62. The chain of relevance can be demonstrated thus:—

(i) The judgment proves the litigation.

(ii) The litigation amounts to a transaction or instance.

(iii) The transaction or instance is relevant under clause (a) or (b) of sec- tion 13, if it is one by which the right etc. was created etc. or in which the right etc. was claimed, etc.

1(a) Neamtu v. Cooro, (1874) 22 W. R. 365;
(b) Gaju v. Fateh, (1889) I.L.R. 6, Cal. 175.
(c) Collector of Gorakhpur v. Pakalhri (1889) I.L.R. 12, All. 1, 43;

2(a) Gaju v. Fateh, (F. B.) I.L.R. 6 Cal. 183, 185, 187.
(b) Collector v. Pakalhri, I.L.R. 12, All. 14, 27, 28.

4(a) Koondu v. Dheer, (1879) 20 W.R. 345 (Cal.);
(b) Imanorilla v. Ramani, (1877) I.L.R. 15, Cal. 233;
(c) Ramaseeni v. Appava, (1887) I.L.R. 12, Mad. 9.
8.63. It seems to be an incorrect use of language to describe a judgment as a "transaction". In any case, a Court does not claim or assert or deny or exercise a right or custom. Nor does it dispute, or assert, or depart from the exercise of a right or custom. The parties do that. What the court does is to determine the cause presented to it for trial and for that purpose it considers the claims, assertions, denials, exercise and so forth of the litigants before it or of those persons whose acts and statements the law treats as their own.\(^1\)

8.64. Even assuming that a judgment is a transaction, it cannot be said to create or modify a right or custom. The right or custom either exists, or it does not, before the cause comes to trial. The Court merely finds, that before and at the date when the suit was instituted, the right or custom did or did not exist. If the parties litigating had no right, the Court cannot give it to them. And, if a right or custom exists, the Court has no jurisdiction to modify either.

8.65. The only portion of the section which may, with any show of reason, be made applicable to judgements is the word "recognised" in clauses (a) and (b), and the phrase "which was inconsistent with its existence" in clause (a).

But it seems that neither was, in fact, intended to apply to judgments since in the context all other acts mentioned in the section refer to acts of parties. The "recognition" referred to in the section appears to be, like the other acts mentioned, an act of a person and not of a tribunal. In that context, it is an act of admission. A Court does not admit a right, but adjudicates upon it. As Garth C. J. has said: "If the parties to a suit were to adjust their differences inter se. the adjustment would be a transaction and, by a somewhat strained use of the word, the proceedings in a suit might also be called transactions, but, to say that the decision of a Court of Justice is a transaction appears to me a misapplication of the term."

8.66. Straight J said\(^4\) that a judgment is not itself an instance, "but the suit in which it was made is an instance."

8.67. In this connection, the observations in the Allahabad case of Collector of Gorakhpur v. Palakdhari\(^3\) may also be referred to.

(a) "In my opinion, a previous litigation, although not between the same parties, may be a particular instance within the meaning of section 13(b) in which the right or custom in question or the subsequent litigation "was claimed", etc. (Edge, C.J.)—

(b) "It seems to me that the true point is not that the judgments and decrees themselves are the "transactions", but that the suit in which they were made was a transaction, and that to establish that such a transaction took place, they are the best evidence." (Straight J.).

8.68. The observations in a Calcutta case\(^5\) may also be compared. It was pointed out that the thing to be proved is the right, the transaction evidences the right; and the transaction may need to be proved, for which purpose the judgment may be used as proving the transaction.

---
\(^1\)Woodroffe.
8.69. From the above discussion, it would appear that—

(i) it is desirable to clarify the relevancy of judgments with reference to section 13;

(ii) the clarification, however, should be made in a manner consistent with the meaning of "transaction", because it is only by a chain of reasoning that a judgment becomes relevant as proving the litigation which proves the transaction which is equivalent to an assertion etc. of the right;

(iii) an Explanation should, therefore, be added to section 13, to the effect that a previous legal proceeding, whether between the same parties or not, may be relevant as a ‘transaction’ or ‘instance’ within the meaning of the section, and a judgment delivered in such proceeding, is admissible as evidence of such legal proceeding, but not the findings of facts or the reasons contained in it. This is not to affect the relevancy of a judgment under any other section.

8.70. A judgment in another suit not between the same parties is, of course, admissible to show the fact of the judgment and who were parties thereto and what was the subject matter of the suit and facts of the decision, and the like, where these matters are relevant under any other section. However, the finding of the facts in the judgment or the reasons upon which the judgment is formed, cannot be admitted, even under section 13.1 If the judgment can be brought under some specific provision of the Act, then it would be admissible. This is fairly clear from the words “unless the existence of the judgment is relevant under some other provision of this Act,” used in section 43.

III. ENGLISH LAW AS TO JUDGMENTS

8.71. In England, in general, a judgment which is not a judgment in rem and which is between strangers or between a party and a stranger, and which does not relate to questions of public and general interest or raise issues based on contract, admission or acquiescence, is not evidence of the truth of the decision or of its grounds, though there is a limited exception in bankruptcy, administration, divorce and patent cases. This rule was settled long ago in the Duchess of Kingston’s case, and elaborated in Natal Land Company’s case.2 As regards its existence and legal effect—as distinct from the findings and reasons—even a judgment in personam is evidence.

8.72. This inadmissibility of judgments between strangers, is sometimes attributed to the rule against opinion evidence or the rule against hearsay, but it is usually based on the ground of res inter alienos acta alteri noceri non debit. It is unjust that a man should be affected by proceedings in which he could not make defence, cross-examine or appeal.

8.73. In Collector of Gorakhpur v. Palakdhari3 Mahmood J. said, — "Now, as I understand the English law, that system of the law of evidence has by itself special technicalities rendered judgments such as those involved in this case inadmissible in evidence for reasons better known to English lawyers who

---

1See discussion as to chain of reasoning, supra.
2This is not a draft.
have founded the doctrine than to me who can only claim a slight knowledge of those doctrines. But, however slight that knowledge may be, I know enough of that system to feel sure that it does not permit of the admissibility of the evidence furnished by judicial adjudications except when such previous adjudication operates either as res judicata or relates to a custom or right of a public nature. Judgments of that character cannot, of course, operate as res judicata in the English system of law or any other unless they are between the same parties or those whom they present. But the question arises as to judgments which are not between the same parties but which represent solemn adjudications by Courts of justice as to the facts in issue in the trials which result in the judgments sought to be produced as evidence in later trials where the same or similar questions arise, but where the absolute identity of the opposing parties is wanting.

"The English law says as to the admissibility of judgments what the Latin adage intends—aut Caesar aut nullus, i.e., either the judgments sought to be produced is evidence should be conclusive inter partes, or they should not be admitted in evidence at all, unless they relate to a public custom or right, or the factum of judgment be a matter in issue."

8.74 and 8.75. The rule against admissibility of judgments between strangers is illustrated by two English cases. Both the cases were of actions based on the same motor car accident, and the earlier judgment, being in relation to a stranger, was regarded as inadmissible.1 We are not concerned with details of the English law as to judgments. In the present context, it will suffice to say that in England there is no specific rule, corresponding to section 13, allowing judgments between strangers to be admitted in evidence on the ground that it represents a "transaction or instance" by or in which a right is asserted, recognised etc.—except where, as already stated, the judgment refers to matters of public or general right.2 In particular, it may be stated that English decisions referring to acts and documents showing ownership or possession do not, in general, involve the use of judgments as such proof. There are, no doubt, decisions holding that a stranger to a judgment may be indirectly estopped by his acquiescence therein.3 But the relevancy of the judgment in such cases, is, strictly speaking, based not on the judgment, but on the conduct of the party in the nature of acquiescence.

IV. STATEMENTS

8.76. As regards statements to or by third parties, including recitals as to boundaries, the same controversy that has arisen under section 114 has arisen in connection with section 13, namely, whether recitals of boundaries in document not between the same parties may become relevant under section 13, which states that where the question is as to the existence of any right or custom, any transaction by which the right or custom was recognised etc. and particular instances in which the right was recognised etc. are relevant. Emphasis is often laid on the words "by which" and the words "in which" in the two parts of the section. But this distinction does not seem to be very material, since a transaction by which the right was recognised is expressly covered, and the relevant wording is not confined to transactions which create a right.

1*Townsend v. Bishop,* (1939) 1 All. England Reports 805; and *Johnson v. Cartledge,* (1939) 3 All England Reports, 654.
2See sections 40 to 44.
3See, for example, *Mohan v. Broughton* (1900) Probate 56.
4See discussion as to section 11.
8.77. We are of the view that such statements should not be relevant under section 13.

In the first place, it will not be right to hold a party as bound or affected by a recital as to the making of which he could have no control whatever, and which has been completely behind his back.

In the second place, such third parties have no particular reasons to be accurate as to who is the owner of the land adjoining their own, and, therefore, a mistake may easily creep in, in the mentioning of such boundaries. Boundaries may often be mentioned on imperfect knowledge, or merely on hearsay information.

There is no reason why the ordinary rule that recitals in a deed are not evidence against third parties, should be departed from.

8.78. To remove the obscurity on the subject, we recommend that a suitable Recommendation. Exception should be added below section 13.

V. RIGHTS

8.79. There existed for some time a controversy as to the word 'right' in section 13.

The section is not confined (as the law is confined in England) to the proof of incorporeal rights. The section applies to all kinds of rights, whether rights of full ownership, or falling short of ownership, e.g. rights of easement, etc. A right may be public or general or private. Further, a right may be (i) incorporeal, e.g. a right of way; or (ii) corporeal, e.g. right of ownership.

It may be noted that the word ‘right’ occurs only once in the Code before section 13,—in the definition of “facts in issue”—where it must necessarily have been used in its largest sense. In the absence, therefore, of any qualification,—such as is to be found in section 48,—the expression "rights and customs" in section 13 must be understood as comprehending all rights and customs recognised by law, and, therefore, including a right of ownership.

On this point, a clarification is not needed.

VI. RECOMMENDATIONS

8.80. Our recommendations relating to section 13, then, are as follows:

(a) The following Explanation should be added to the section:

"Explanation.—A previous legal proceeding, whether it was or it was not between the same parties or their privies, may be relevant as a transaction or instance, within the meaning of this section; and, when a legal proceeding so becomes relevant under this section, a judgment delivered in that proceeding is admissible as evidence of such legal proceeding, but not so as to make relevant the findings of facts or the reasons contained in the judgment; but nothing in this Explanation is to affect the relevance of a judgment under any other section."

4Raghupat Tewari v. Pandit Narbadeshwar Prasad Tewari, A.I.R. 1938 Pat. 103.
(c) Rangayyan v. Innattimuthu Mudali, A.I.R. 1956 Mad. 226, 228.
6See cases, supra.
(b) An Exception excluding recitals of boundaries should be added on the following lines:

"Exception.—Nothing in this section shall render relevant recitals of boundaries in documents which are not between the same parties or their privies."

Section 14.

8.81 to 8.86. Section 14 is an important section and may be quoted:

"14. Facts showing existence of state of mind, or of body or bodily feeling.—Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevance, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But, where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.

"(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b) A accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that A had been previously convicted of delivery to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

(c) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.
The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A’s defence is that B’s contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C’s own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that A knew of the notice did not disprove A’s good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A’s intent, the fact of A’s having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant.

(l) The question is, whether A’s death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(m) The question is, what was the state of A’s health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B’s attention was drawn on other occasions to the effect of that particular carriage, is relevant.
The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

(p) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.”.

8.87. The principle of the section is that if the existence of a mental or bodily state or bodily feeling is in issue or relevant, then acts from which the existence of such mental or bodily state or bodily feeling may be inferred, are also relevant. This may be described as the positive aspect. The first Explanation stresses the negative aspect, and is in the nature of a restriction.

8.88. The section could be analysed into five parts — (a) the provision permitting evidence, (b) the conditions for applying the section, (c) the restriction on the scope, (d) the use of the evidence and (e) mode of proof.

8.89. First, as to the proof of the mental state admissible under the section. A man’s intention or, for that matter, any mental state, is a matter of fact capable of proof. “The state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is; but, if it can be ascertained, it is as much a fact as anything else.” Intention can, thus, be proved like any other ‘fact’, by the evidence of conduct and surrounding circumstances. The state of mind is not only relevant, but a fact in issue, in many criminal cases where the offence under trial requires a mental element. Often, it may be in issue in civil suits also, where the suit is in tort and the liability is not absolute.

8.90. Now, the mental and physical condition of a person may be proved either by that person speaking directly to his own feelings, motives, intentions and the like, or by the evidence of another person describing facts from which the given condition may be inferred.¹

8.91. A person may himself give evidence about his mental state. So, in an English case² for malicious prosecution, where the defendant himself was called and was asked in examination-in-chief, “Had you any other object in view, in taking proceedings, than to further the ends of justice?”, the question was admitted.

8.92. And, on a question of domicile, a person may state what his intention was in residing in a particular place.³

¹Edington v. Fitzmaurice, (1885) 29 Ch. D. App., 483 (Bowen, L.J.).
8.93. However, there are certain shortcomings in a person testifying as to his own state of mind. If a person’s acts and conduct are shown to be at variance and inconsistent with the intent he swears to, then his own testimony in his own favour would ordinarily obtain very little credit.

8.94. Moreover, it is obvious that in many cases the evidence of the person himself may not be available. Hence, it is open to other witnesses also to testify as to state of mind. But other person may not, in general, testify directly to the state of mind of the first, and may state only those external and perceptible facts which may form the material of the Court’s decision. In general, witnesses must speak to facts and let the inference from those facts be drawn by the Court or jury.

8.95. Section 14 is in accordance with the principles mentioned above — principles laid down in numerous English case;—namely, that, to explain a state of mind, evidence is admissible, though the evidence does not otherwise bear upon the issue to be tried. As regards this principle, there is no difference between civil and criminal cases.†

8.96. While on this question, a reference may be made to mens rea. Mens rea. Archbold† states:

“It has always been a principle of the common law that mens rea is an essential element in the commission of any criminal offence against the common law……………………………. In the case of statutory offences, it depends on the effect of the statute ………………………………. There is presumption that mens rea is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals. Unless a statute clearly or by implication rules out mens rea, a man should not be convicted unless he has a guilty mind. In finding whether mens rea is excluded, the court should consider whether the offence consists in doing prohibited acts or in failing to perform a duty which only arises if a particular state of affairs exists.”

8.97. In State v. Lakshman Das,† Patel J. observed:

“Section 14 next relied upon on behalf of the prosecution makes facts relevant if (1) they show the existence of any state of mind or (2) the state of body or bodily feeling, such such state of mind or body is in issue or is relevant. Explanation 2 says that the prior conviction of a person for an offence is relevant if the offence itself is relevant under this section. It would seem that it only means that if the prosecution brings forth the evidence of a prior offence as being relevant under this section, then it may also prove the conviction, which would make the evidence of previous offence more effective in its being accepted. It is also true that the general tendency of an accused cannot be proved as that would amount to proving his bad character, but the facts offered in proof must show the state of mind in reference to a particular matter in question.”

†Swift, Ev., 111 (cited in Woodroffe) “A witness must swear to facts within his knowledge and re-collection and cannot swear to mere matters of belief”.

‡R. v. Richardson, 2 F. & F., 346 (Williams, J).

Blake v. Albion Life Assurance Society, 4 C.P.D. 102.


†The quotation is to be found at page 398 of Vol. 1 of Woodroffe II Ed.

I. PROVISION PERMITTING EVIDENCE

8.98. The section declares, as relevant, facts "showing the existence of any state of mind, state or body or bodily feeling". A few examples of the state of mind are given in the section, we need not quote them again.

8.99. The provisions of the section are simple in form, but not always easy to apply.

In Srinivasan's case, for example, A was a salt agent and B was his employee. A was entrusted with the duty of allotting appropriate quantity of salt to each retail dealer. B was convicted of having sold salt to certain dealers, at a price exceeding the statutory maximum. A was convicted of abetting B in this offence. It appears that the statutory maximum was circumvented in the following manner. The lawful price was paid to another employee of A, and the excess charged was paid to B. The argument of the defence was that the excess paid to B went into B's pocket, and did not form part of the purchase price. At the trial, evidence was given by several dealers who spoke of other transactions (not the subject matter of the present proceeding), with the accused, shortly before and after the period covered by the offence. The evidence showed that the accused A knew of the illegal transactions of B, but connived at them. The Privy Council held that this evidence was relevant, both on the charge for the principal offence and on the charge of abetting. The evidence was relevant to the charge of abetting, because it showed an intention to aid the commission of an offence and an intentional omission to put a stop to an illegal practice.

8.100. The facts in another case which went up to the Privy Council are also interesting. At the trial of the appellants for the murder of Karnail Singh, the approver gave evidence that he and the appellants had murdered Bhan Singh a few days before the murder of Karnail Singh, and that they proposed to conceal the murder of Bhan Singh by causing injuries to Karnail Singh and getting themselves arrested for so doing. That is to say, the evidence of the approver was that the motive, or at any rate one of the motives, for the injuries caused to Karnail Singh was a desire to conceal the murder of Bhan Singh. The Privy Council observed: The suggested motive is, no doubt, a singular one, but however improbable an alleged motive may be, the prosecution is entitled to call evidence in support of it, and none the less so because such evidence may suggest that the accused has committed some crime other than that with which he is charged [see illustration (a) to section 81, Evidence Act].

8.101. It may be noted that in this case, if evidence that the appellants had murdered Bhan Singh had been given with a view to showing that they were persons likely to have committed murder of Karnail Singh, the evidence would have been inadmissible, but it was admissible to establish the motive for the murder with which they were charged now.

8.102. To some degree, of course, the intentions of parties to a wrongful act must be judged by the event. The presumption of intention depends upon the facts of each particular case. A guilty knowledge is not usually a matter on which direct evidence can be afforded. It is a matter of conscience, and it is connected with the secret motives of a man's conduct; it must be inferred from facts.

---

3 R. v. Cooke, (1866) 5 W.R., Cr. 33, 38
4 R. v. Gora, (1866) 5 W.R., Cr. 45, 46.
8.103. Intention may thus be presumed from conduct. But the rule that a person is presumed to intend the ordinary and natural consequences of his acts is not taken as one in the nature of a conclusive presumption. As is well-known, this aspect became the subject matter of acute controversy in England, and a decision of the House of Lords’s was taken as holding that there was an irrebuttable presumption of law that a person foresees and intends the natural consequences of his acts. The matter is now settled by a statute, and it is now provided as follows in England:

“A court or jury in determining whether a person has committed an offence,

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.”

8.104. In regard to facts relevant under the section, it is to be noted that the application of the section is dependent on an important condition being satisfied. The crucial question to be considered is—is a state of mind a relevant fact, having regard to the nature of the charge, or cause of action? This question cannot be answered without a reference to the substantive law. In civil proceedings, it would require an examination of the essential ingredients of the cause of action, in order to determine whether, and if so, how far, a mental element is required. Ordinarily, this question will have to be discussed with reference to sections 5 to 12; section 5 deals with facts in issue, sections 6 to 12 deal with other relevant facts.

8.105. In a criminal case, the question of state of mind may assume importance either in a general way, or in a particular manner. In the general way, state of mind may become important if the accused pleads one of the general defences to criminal liability given in the Indian Penal Code. Many of these defences are based on the absence of a criminal state of mind—the factors justifying exculpation being such as to affect the freedom of will or the cognitive faculties, or to mitigate the criminality in the particular circumstances of the case.

8.106. Broadly speaking, the various defences to criminal liability could be classified into three main groups, namely, justification, excuse and mistake or ignorance or constraint. Justification is illustrated by the defence of duty to act, judicial duty, justification by law and justification on the basis of an act done to avoid other harm. Excuse exists where the harm was inflicted with consent or in good faith for the benefit of the sufferer or was very slight. Both the categories of justification and excuse assume that the injurious event is the consequence of the conduct of the individual; but, in the circumstances of the case, the conduct is not criminal, because the mind was innocent.

8.107. Even where justification or excuse does not apply, innocence may be established on the ground of mistake or ignorance or constraint. Under the category of mistake or ignorance, we can put the defence of insanity—the accused being “incapable of knowing the nature of the act”, and the defence of intoxication, as also the defence of mistake of fact.

2'Section 8. Criminal Justice Act, 1967 (Eng.).
Sections 76 to 106, I.P.C.
3'Section 76 to 79 and 81, Indian Penal Code
4'Sections 87 to 92, 93 and 95, Indian Penal Code.'
8.108. Under the category of constraint, we can put the sections of the Penal Code relating to self-defence, compulsion by threat and the like. In cases of mistake or ignorance or constraint, either the conduct is not voluntary (thus the will is not free), or the consequences are not known, or, if the consequences were known, they were not known to be wrong. To sum up the discussion, in most of the general defences to criminal liability, either the mental element was absent or, though it was apparently present, it was not criminal in the circumstances of the case.

8.109. We may illustrate what is stated above. An infant under seven years is free from criminal responsibility, because "he knoweth not of good and evil."

8.110. The Indian law on the subject of infancy as a defence in criminal cases is contained in two sections of the Penal Code. Section 82 provides:

"Nothing is an offence which is done by a child under seven years of age"

Section 83 of the Penal Code provides:

"Nothing is an offence which is done by a child above seven years of age and under ten who has not attained sufficient degree of maturity of understanding to judge the nature and consequences of his conduct on that occasion."

8.111. The immunity for children under seven years is absolute. However, where the accused stands between childhood and maturity, criminal liability depends upon whether or not the accused in fact possessed a guilty state of mind. This principle is the basis of the provisions quoted above.

8.112. The exemption from criminal liability on the ground of mental incapacity, which is to be found in section 84 of that Code, has its foundation in the view that criminal punitive responsibility presupposes a basic common frame of reference, — a frame of reference shared by the community and the accused. If the accused, by reason of insanity, is unable to think and feel within a frame of reference that is of the vast majority, he ought not to be punished for failing to conform to its demands and rules. That is the general principle underlying the defence of insanity.

8.113. Then, there is the defence of consent or acts done for the benefit of a person. Sections 87, 90 and 91, I.P.C. deal with the subject of consent. The act done is excused, because the sufferer had consented to its being done. In cases of a beneficial act, it is excused because it was done for the benefit of the sufferer. Most of these sections require "good faith", thus involving a determination of a state of mind. Moreover, in so far as they rest on consent, an inquiry into the state of mind of the victim is also needed.

8.114. It is of interest to note what Macaulay observed as to consent:

"We conceive the general rule to be that nothing ought to be an offence by reason of any harm which it may cause to a person of riper age, who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned."

---

1Sections 84, 85, 86, 76 and 79 I.P.C.
2Sections 96 to 106, I.P.C.
3Sections 82-83, I.P.C.
4Draft Penal Code, Note B, para 106 (1837).
5Sections 94, I.P.C.
8.115. The above discussion deals with the mental element in a general sense. In addition, the state of mind in a particular sense may become relevant. When the statutory definition of a crime makes a particular intent a necessary ingredient, such intent must be proved by the prosecution, and there is no onus on the accused.\(^1\)\(^2\)\(^3\)

8.116. In this connection, it may be noted that this is not always an easy question to determine. In a Bombay case,\(^4\) for example, a serious difference arose, on this very point, between Chandavarkar J. and Jacob J. which had to be resolved by referring the matter to Aston J. In that case, the precise question to be considered was whether, for the offence of keeping a common gambling house under section 4 of the Bombay Prevention of Gambling Act, 1887, a previous conviction under the Act would be relevant. Chandavarkar J. considered it to be relevant on the ground that, since the section uses the word “keeping”, it presupposes something habitual, and the previous conviction was, by virtue of explanation 2 to section 14, relevant because the user of a place or keeping it for a particular purpose necessarily connotes the existence of a state of mind—intention to use the place for that purpose and knowledge that it is so used. To “keep” a common gambling house is, according to Chandavarkar J., to hold the house and manage it with the intention of using it as such habitually. To prove knowledge or intention and habitual course of dealing with the house or place, previous convictions are relevant under section 14.

With this view, Aston J. agreed, but, according to Jacob J., the relevance of such previous convictions would be excluded by the terms of the first Explanation to section 14 read with illustration (p) to the section, and he did not regard the offence charged in the case as concerned with any such states or conditions as are specified in section 14 of the Evidence Act.

8.117. A recent Supreme Court case,\(^5\) though it did not relate to section 14, illustrates how difficult it is to determine whether or not a mental state is an ingredient of an offence. In that case, construction of sections 9 and 10 of the Opium Act, 1878, was in issue. Those sections read as follows:—

“9. Any person who, in contravention of this Act, or of rules made and notified under section 5 or section 8,—(a) possesses opium, or (b) transports opium, or (c) omits to warehouse opium or removes or does any act in respect of warehouse opium and any person who otherwise contravenes any such rule, shall, on conviction before a magistrate, be punishable for each such offence with imprisonment which may extend to three years, with or without fine: and, where a fine is imposed, the convicting magistrate shall direct the offender to be imprisoned in default of payment of the fine for a term which may extend to six months, and such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced.

“10. In prosecutions under section 9, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under this Act.”

---

\(^1\) *Ret v. Dair.*, 14 Cox. 143.
\(^2\) *Rey v. Gany*, 17 Cox. 299.
\(^3\) *Rev. v. Slep*, T. and C. 44.
8.118. After a review of the English cases and Indian cases on the subject of possession, the Supreme Court held, in the first place, that by reason of section 10 of the Opium Act, the prosecution need not prove conscious possession before it could resort to the presumption in section 10; secondly, however, it does not follow from this proposition that the word “possessed” in section 9 did not connote conscious possession. The Supreme Court observed—

"Knowledge is an essential ingredient of the offence as the word ‘possess’ connotes, in the context of section 9, possession with knowledge. The legislature could not have intended to make mere physical custody without knowledge an offence. A conviction under section 9(a) would involve some stigma and it is only proper then to presume that the legislature intended that possession must be conscious possession."

8.119. The conviction was, however, confirmed on the facts.

8.120. Even where there is no such provision as to intent, in a statute, the court might hold one to be implied. In *Sweet v. Parley*, for example, the House of Lords seems to agree with a doctrine developed in Australia—

"When a statutory prohibition is cast in terms which at first sight appear to impose strict responsibility, they should be understood merely as imposing responsibility for negligence but emphasising that the burden of rebutting negligence by affirmative proof of reasonable mistake rests upon the defendant."

8.121. Thus, the most important question that arises in each case where section 14 is sought to be invoked is—Is the charge or cause of action such that a state of mind is a relevant fact?

8.122. It should be noted that evidence under this section is not admissible when the case depends on the proof of actual facts and not upon the state of mind. In a Mysore case, Hedge J. pointed out—

"The principle on which evidence of similar acts is admissible is not to show (that) because the accused has committed already some crimes, he would therefore be likely to commit another, but to establish the animus of the act for which he is charged and rebut, by anticipation, the defence of ignorance, accident, mistake, or innocent state of mind. In this case (under section 477A, I.P.C.—falsification of accounts,) it is not sufficient for the prosecution to prove that the entries which are subject matter of the second charge are wrong entries and that they were made by the accused: the prosecution must go further and prove that those entries are false entries and the accused made those entries wilfully and with intent to defraud the State. Therefore, the prosecution can prove similar instances to prove that the accused made the entries in question wilfully and with intent to defraud the State. Those instances can also be proved to rebut the accused’s plea that he innocently made those entries at the behest of his superiors. But that evidence cannot be used to show that the accused was guilty of temporary misappropriations in past or to probabilise the charge levelled.

---

1*Matthew and Dua, II*
2*Sweet v. Parley*, (1969) 1 All. E.R. 347 (per Lord Reid), 357 (per Lord Pearce), 362 (per Lord Diplock)
3(a) *Maher v. Musson*, (1934) 52 C.R. 100;
(b) *Proudnor v. Davman*, (1941) 67 C.R. 536.
against him by proving his past bad conduct, if any. To the extent the trial Court has relied on that evidence in support of its finding that the accused was now and then temporarily misappropriating certain sums of money in the Treasury, the finding in question is vitiating.”

II. THE RESTRICTION

8.123. We now come to that part of the section which lays down an important restriction in regard to its application.

8.124. The first Explanation to the section emphasizes that the state of mind must exist in reference to the particular matter in issue. Thus, for example, in a charge for rash driving, evidence regarding similar previous occurrences resulting from rashness of the accused is not admissible, as it must be proved that the rashness existed in relation to the particular incident. To illustrate the first Explanation, we may state that if the charge was of belonging to a gang of dacoits, evidence as to habitual commission of thefts (as opposed to dacoity) is inadmissible. But, as was held in a Patna case, in order to prove the association of an accused with a gang of dacoits—association in the abstract—evidence of previous convictions may be relevant.

8.125. One of the exclusionary rules of the law of evidence relates to evidence of character and previous convictions—a rule primarily designed to avoid undue prejudice. Where the object of evidence of character is to persuade the court that it is likely or unlikely that a party acted in a particular way, then, as a general rule, such evidence is excluded if it relates to bad character. This general rule was, however, on proper grounds, modified, and evidence allowed to go in of previous occurrences (“similar facts”), even though, incidentally, it might reveal bad character. In section 14, we are concerned with that aspect of character which reveals a state of mind, if the state of mind is itself of relevance in the facts of the case. Evidence might have rational probative value in other respects, and may indirectly reveal bad character; but we are not concerned with that aspect. Nor are we concerned with the question of character as establishing identity. The field of reception of evidence within section 14, so far as it relates to similar facts, is limited. But, even in this limited field, the section is not an easy one to administer.

8.126. To borrow an illustration from the facts of an English case, if a person is charged with the murder of a child and takes up the defence of insanity (sudden mania), evidence of a voluntary confession by the accused as to how the accused killed another child, is receivable, in rebuttal to show the state of mind.

8.127. On the other hand, if the question is merely of the factum of the offence, the fact that the accused had committed similar other crimes, would be irrelevant. In England, in the Brides in the Bath case, the accused was charged with the murder of his wife, who was found dead in her bath. Evidence that subsequently to the wife's death, two other women with whom the accused had contracted bigamous marriages had also been found dead in the baths under very similar circumstances, and that in all the three cases the accused had benefited by their death, was held admissible, to rebut the plea of accident or innocent intent. This case is also relevant with reference to section 15; but, in so far as it relates to intent, it belongs to the field covered by section 14.

3) See discussion as to section 9.
6) 11-131 LAD/ND/77
8.128. Cases relating to sexual offences often present problems in this context. Where a question of intent or passion or guilt is not material, the evidence of prior sexual assaults cannot be admitted under section 14. For example, if A is charged with house-breaking with intent to commit rape on B; evidence that an hour later, he entered another house down the chimney and had connection with another woman with her consent, is inadmissible.\(^2\) It would make no difference that his intercourse with the other woman was without her consent.

8.129. On the other hand, where a person is charged with carnal knowledge of a girl under 16 years, evidence that he had sexual connection with that same girl seven months prior to the charge, would be admissible, not to prove that he committed the second offence, but to show sexual passion\(^4\) for the particular girl.

8.130. Upon the trial of a person charged with being in dishonest possession of stolen property, evidence could be given of a previous conviction of the accused for attempting to receive stolen property, and of the same person knowing it to be stolen, under sections 511 and 411 of the Indian Penal Code.

8.131. There was not, in the law of this country, any such special provision\(^4\) as was made in England in 1871, relating to the admission in evidence, against a person charged with having received stolen goods knowing them to be stolen, of previous conviction of such person, for any offence involving fraud or dishonesty. The question was, however, answered in the affirmative, because section 54 (as it then stood) made previous conviction relevant in every case.

By the amendment of 1891, the scope of section 54 was severely restricted, but, in section 14, Explanation 2 was added. The amendment also made a verbal change in section 14, Explanation 1, but that change is not material for the present purpose.

8.132. Explanation 2 to the section, if properly construed, has a very limited scope. It does not provide that the previous conviction is always a relevant fact—not even where the state of mind is in issue. If, however, the previous commission by the accused of an offence is relevant within the meaning of the section—i.e., as showing the state of mind when relevant—then the previous conviction of such person (of that offence)\(^1\) is also a relevant fact under the Explanation. In order that the Second Explanation may apply, the prosecution must establish, first, that state of mind is relevant, and secondly, that in order to show that the state of mind, the previous commission of an offence is relevant. These two things being established, the Explanation clears the way for giving evidence of a previous conviction. The Explanation thus makes the conviction relevant where previous commission is relevant.

8.133. Evidence of the previous conviction of the accused person amounts to evidence of bad character and is not admissible under section 54, unless and until the accused produces evidence of good character nor are convictions admissible to show the state of mind of accused. As Sultan Ahmed J. said: \(^4\) "the whole principle of British criminal jurisprudence condemns the prejudice which

---

\(^1\)Para. 8, 129, infra.
\(^2\)R. v. Rodley, (1913) 3 K.B. 468.
\(^3\)Compare section 14, illustrations (a) and (c).
\(^5\)Cf. s. 14, illustration (a) and Explanation 2.
\(^6\)Prevention of Crimes Act, 1871, (34 and 35 Vic., c. 112), section 19.
\(^7\)These words do not occur in the Explanation, but are implied.
\(^8\)Tejinder Ahir v. Emp., A.I.R. 1920 Pat. 351, 353.
“may be caused to the accused by the admission of previous conviction before he has been found guilty of the offences on which he has been arraigned.” This general rule is modified by Explanation 2.

8.134. Under the law before 1891, evidence of previous conviction was admissible in evidence both to show the reputation and disposition of the accused, however unconnected it may be to the present trial. This was altered in 1891, as already stated.

III. ILLUSTRATIONS

8.135. The illustrations to the section are very important. Illustration (a) which allows evidence to be given of the possession by the accused of other stolen property, makes no reservation as to ownership or time of theft in relation to the various stolen articles in possession. It is not required that the other stolen property must belong to the person whose property is now alleged to be stolen. However, it must first be proved that the particular stolen article was in the possession of the accused. It may be noted that, in England, on the trial of an indictment for receiving stolen goods, evidence may be given that other property stolen within a period of 12 months preceding the date of the offence charged was found with, or had been in possession of, the prisoner, although such other property is the subject-matter of another indictment against him to be tried at the same assizes.

8.136. The history of the offence of receiving is of interest. The old “appeal of larceny” was the early ordinary method of recovering stolen goods in another’s possession, and this ancient procedure was not yet obsolete in the thirteenth century. It lay against anyone, even though not the thief or wrongful taker, who might be in possession of stolen goods not retain on immediate pursuit. Consequently, the “appeal” could be successfully waged without proof of any mental element on the part of the appellee; and, the English actio furti, closely linked to the appeal for larceny, “can be effectually used against one who is not thief, but an honest man.” Bracton, however, defining larceny, borrows from the Roman law the definition of the ancient actio furti, and makes much of the mental element, the animus furandi. “Theft”, he says, “is according to the law the fraudulent taking of another’s property with an animus furandi against the will of the owner. I say with intent, because without an animus furandi the crime is not committed.”

8.137. Thus, animus furandi is the appropriate means rea for the thief. For the receiver, the knowledge that it is stolen property is the requisite mens rea.

8.138. It should be noted that the case quoted in illustration (a) represents a rule which was previously applied in an earlier case in England, but, later, the evidence of possession of the other goods, stolen at other times from different people, whether found in the possession of the accused at or before the finding

1(1887) I.L.R. 14 Cal. 721, 729 (F.B.);
2See section 54 before 1891.
4Sayre, "Mens Rea" (1931-1932) 45 Harv. L. Rev. 974, 987.
6Pollock and Maitland, op. cit. supra note 6 at 162.
7Bracton, De Legibus 150 b. The definition of furturn is taken from Institutes 4, 1, 1. See 2 Pollock and Maitland, op. cit. supra note 6 at 458, No. 4; 3 Holdsworth, op. cit. supra note 6, at 360, No. 5.
of the property in question, was regarded as inadmissible. The reasoning for over-ruling the earlier decisions, was that possession of stolen property merely went to show that the accused was a bad person, and not that he had received the stolen property on a particular date with guilty knowledge. This position had to be altered by a statute.

8.139. Illustration (b) to section 14 renders admissible a previous conviction of delivering, to another person as genuine, a counterfeit coin known to be counterfeit, in a later prosecution for similar fraudulent delivery of a counterfeit coin. It also renders admissible against the accused his possession of a number of pieces of counterfeit coins.

In either case, the evidence is admissible to prove guilty knowledge. The assumption is that delivery of a counterfeit coin is likely to have resulted in a questioning of the counterfeit article by the person to whom it was presented, and thus drawn the attention of the accused to its suspicious nature. In Rex v. Whiley, Lord Ellenborough, Chief Justice, explained that if the previous utterings of the counterfeit coin are, in point of time, more detached, they will bear "the less relation" to the particular uttering stated in the indictment, but this would not render the evidence (about the previous utterances) inadmissible.

8.140. Illustration (c) to the section relates to the case of a suit by A against B for damage done by a dog of B, which B knew to be ferocious. The illustration assumes the substantive rule of law, that where animals—such as dogs—belong to a species which is ordinarily harmless, liability for harm caused by the animal does not generally arise until the defendant knew, or had reason to know of, the dangerous propensity of the particular animal in question.

8.141. Illustration (d) is adapted from an English case.

8.142. Illustration (e) reminds one of another English case, where libellous hand bills were carried backward and forward before the plaintiff's house, and it was held that the mode of publication was relevant to show the intent of the defendant.

8.143. Illustration (f) to section 14 is appropriate, because the gist of action in such cases is fraud, and where there is bona fides, there can be no fraudulent intention. The illustration is based on an English case, where Cockburn, C. J., pointed out that it was important to ascertain the state of mind of the defendant when he made the representation complained of, and that the state of mind could be shown only by inference. Just as the plaintiff could prove certain facts necessarily leading to an inference of falsehood—for example, calling every tradesman in the town to say that the person in question was insolvent—similarly, it would be proper if, after the plaintiff had established a prima facie case, the defendant calls a number of tradesmen to say that the person in question was believed by them to be perfectly solvent.

8.144. Illustration (g) is also an actual case. Normally, such evidence would be of no consequence in a suit for the price of work which is essentially based on contract, inasmuch as the absence or presence of "good faith", referred to in the illustration, is ordinarily irrelevant in case of contract. However,

Section 43, Larceny Act, 1916, now Theft Act, 1968, section 27(b).

"Mar v. Burdett, 9 Q.B. 212.
"Gibson v. Hunter, 2 H.B.L. 288.
"Bond v. Donalds, 7 C. & P. 179.
"Welsh v. Chartier, 1 Con H. 13, referred to by Woodroffe.
it appears that in the actual case which we have mentioned, a considerable body of evidence had been given by the plaintiff to show that C interfered in the matter as the agent of the defendant, and it was necessary to rebut this evidence by showing the good faith of the defendant. In an action for goods sold and delivered, a general defence is that the defendant is liable to pay for the goods to another person, and since the jury might come to the conclusion that the defendant wants to keep the goods without paying for them, it becomes material for the defendant to show the bona fides of his defence, by proving payment to such third person.

8.145. Illustration (h) is similar to an English case.

8.146. It may be noted that both under the Indian Penal Code — definition of theft—and in English Criminal law, dishonest intention is required. In the English common law offence of larceny, both the act and the intent must concur. At common law, larceny was the taking and removing, by trespass, of personal property which the trespasser knew to belong either generally or specially to another person, with the felonious intent of depriving the other person of his ownership therein.4

8.147. Since the act of trespass and the intent to steal are both required, the offence is not committed if there is no dishonesty. In the Indian Penal Code, this requirement is expressed in terms of “dishonesty”, which is defined—as far as is relevant—as the intention to cause wrongful gain or wrongful loss. In England, as early as 1849, the specific situation which is referred to in the illustration was dealt with in these words by Parke B.3

“If a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them, with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.”

8.148. In this connection, it may be noted that though, in general, things which are abandoned are not capable of being stolen, yet sometimes there may be special situations whereby even in property abandoned some person may have a special property.

8.149. In Hibbert v. McKierman, the Divisional Court held that a golf club, which intended to exclude the general public from its land, had a special property in golf balls lying on the course after being lost and abandoned by their original owners; that the property was sufficient to support an indictment for larceny against a trespasser who picked up the balls *a) *and *b)* that it was immaterial that at any given moment the officials of the club did not know the exact number or position of the abandoned balls lying on the course.

8.150. Illustration (h), where it says that the fact that public notice of the loss of the property had been given in the place where A was, is relevant, assumes that some evidence would be given to show that the notice was within the knowledge of A, the accused.5 It would, therefore, be desirable to add

---

1R. v. Thurburn, (1849) 1 Den. 387.
2Bishop, Criminal Law (1923), page 412, para. 566.
5Compare Stephen’s Digest, article 11, illustration (j).
the words "and in such a manner that A knew or probably might have known of it", after the words "in the place where A was" in illustration (h). We recommend accordingly.

8.151. Illustration (i) is based on the English case of R. v. Voke. It is different from illustration (c), which is a case of murder outright, while illustration (j) is a case of shooting with intent to kill. Of course, so far as section 14 is concerned, the facts made admissible are admissible only to show the existence of the particular state of mind. This is clear from the last 17 words of the section.

8.152. In R. v. Voke previous attempts at shooting were given in evidence to rebut the theory of accidental killing.

8.153. Illustration (j) to the section is taken from the case of R. v. Robinson.

The remaining illustrations need no comments.

8.154. The above discussion does not show any need for amendment of section 14, except in illustration (h) to the extent indicated above.

8.155. According to section 15, when there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

There are three illustrations to the section:

In illustration (a), A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant as tending to show that the fires were not accidental.

In illustration (b), A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than that he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry, is in each case in favour of A, are relevant.

In illustration (c), A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

8.156. In general, it is not permissible to give evidence of similar occurrences with which a party is concerned, because that would protract the proceedings without much corresponding benefit.

1R. v. Voke, (1823) Rus and Ry. 531.
It has been aptly stated—"Although some people intentionally err and others systematically err, there are yet others who never make the same mistake twice, and it is a wise principle of our jurisprudence which provides that a person shall not be condemned on account of his previous mistakes. Thus, in Hollingham's case," Willes J. observed: "I do not see how the fact that a man has once or more in his life acted in a particular way makes it probable that he so acted on a given occasion". In another civil case, which was an appeal from a County Court, the Divisional Court delivered a reserved judgment on a point which Swift J. characterised as of "great importance", as it constantly arose in actions for damages in personal injuries sustained in street collisions. In the County Court, the plaintiff had succeeded in obtaining damages for negligent driving by the defendant of a motor bicycle which had ran on to the pavement and struck the plaintiff. In cross-examination, the counsel for the plaintiff asked the defendant whether he had, at about the same time, another accident in the same street, whether the results were fatal and whether he had told the jury at the inquest that exonerated him that he had had this accident. The answer to the first two questions was "yes", and to the third question the answer was "no". On appeal, the defendant contended that these questions ought not to have been asked, that they were irrelevant to the issues and that they were unfair and prejudicial to the defendant. The Divisional Court held that where a defendant was charged with negligence in a particular case, it was not competent to ask him a question to obtain an answer which would show that he had been negligent on some other occasion. In this case, however, the questions were directed towards the defendant's credibility and his general skill as a driver and were relevant to that extent. The appeal was dismissed.

To the general rule referred to above, section 15 constitutes a qualification, for the limited purpose provided in the section.

8.157. In Stephen's Digest, in the general rule corresponding to section 14, there is added a clarification as follows:— "But such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." Some such limitation is to be read in section 15 also, although it is not expressed. This is because the section has a limited application.

The restriction is of the utmost importance. Two English cases in the Court of Criminal Appeal show its importance.

In R. v. Dunnico, the appellant was sentenced, at the Lancashire Quarter Sessions, to three years' penal servitude, for obtaining money by false pretences. The false pretences alleged were untrue statements to the effect that he had been sent to interview the defrauded man about an advertisement, and that he was carrying on a genuine business. Two other counts of the indictment alleging similar false pretences, were abandoned, but the evidence of four witnesses as to those charges was admitted "to show system". The Court of Criminal Appeal regarded this as wrongly admitted, saying, in effect, that one could not drag in evidence as to other charges by alleging them as part of a system.

3James v. Audiger, 76 Solicitor's Journal 528.
4Stephen's Digest, Article 11, last paragraph.
The statements alleged to have been made in the case being tried were either made or not made; they were either true or untrue. Their making and their untruth could be proved or not proved, entirely without recourse to other occasions. The repetition of a statement neither makes it true or false. It is the old fallacy that nought plus nought can, in some circumstances, amount to more than zero. A system of noughts, a series of noughts to infinity, is still nothing. This self-evident truth received amusing illustration in the bastardy case of Thomas v. Jones, where a number of facts, no one of which by itself amounted to corroboration, was wrongly considered to amount to corroboration. "Zero plus zero cannot produce a plus quantity," said Lord Hewart, re-affirming the truism which had been lost sight of.

8.158. The other case was so similar facts was R. v. Tidmarsh. In that case, a man was charged with house breaking on one date. On a later date, he was arrested under the wide provision of the Vagrancy Act, under which, as re-inforced by the decision in Hartley v. Ellison, suspicion in a police officer’s mind justifies arrest.

The evidence of the case was admitted on the trial for house-breaking on the earlier date, on the ground that, "it becomes evidence because it is evidence of system, showing what he was doing". This was held to be a misdirection by the court of criminal appeal which quashed the conviction. "This evidence and this direction to the jury tended to show that this was the kind of man who would commit this particular crime of house-breaking. That was a misdirection which vitiated this conviction."

8.159. This rule is, however, properly qualified, where the question is whether an act was accidental or intentional, or whether an act was done with a particular knowledge or intention. That the act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant, because the assumption is that if there is a repetition of similar occurrences, the theory of accident would be rebutted.

In Makin v. Attorney-General for New South Wales, Lord Herschell, L. C. delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these, the first was that:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

8.160. In 1934, this principle was, by Lord Sankey, Lord Chancellor, with the concurrence of all the noble and learned Lords who sat with him, said to be 'one of the most deeply rooted and jealously guarded principles of our criminal law' and to be 'fundamental in the law of evidence as conceived in this country'.

8.161. The second principle stated in Makin's case was that—

"the mere fact that the evidence adduced tends to show the commission of other crimes does not render it unadmissible if it be relevant to
an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

8.162. Similarly, the evidence that the accused had been connected with similar cases as the one under charge, is admissible on the question of knowledge and intention.

8.163. Evidence of similar facts may have probative value. Nevertheless, the policy of the law is that in general all evidence tending to show a disposition towards a particular crime must be excluded, unless a specific justification is available—in the present case, the justification is that it tends to rebut a defence otherwise open to the person charged.

It may be noted that in the case of *Brides in the Bath*, the prisoner Smith raised the defence that his wife had died in a fit—these were the words used in the telegram to the uncle after the death, and the prisoner even quoted the doctor as saying that his wife had fit in the bath. However, it so happened that some person who read in the newspapers about the circumstances of her death had noted the similarity between this death and another death, and informed the police about it. This put the police on the track. The theory of natural death was disproved, because, if the girl had died a natural death in the bath, she would have dropped the soap. As it was, she was killed suddenly, her hand had immediately stiffened and she held on to the soap which she was using. This point was used by Dr. Spilsbury to show that the death was not accidental. The similarity of this incident and other incidents in which the accused was involved, also rebutted the theory of accidental death.

8.164. It may be stated that not only the mode of committing the murder, but also the defences advanced by the accused, or rather the false defences advanced, were similar. He would pretend that at the time of the death, he was out for purchasing fish or tomatoes or eggs. The landlady would tell the woman that the bath was ready. Then she would hear someone go upstairs, and the sound of splashing in the bath-room, the noise of someone putting hands against the side of the bath and the long-drawn sigh would be heard.

8.165. The evidence of similar facts is not admissible where its only effect is to show that a person is of general bad character or good character and therefore likely to have behaved in the way alleged. But such evidence is admissible to show his intention or knowledge, and the fact that it incidentally reveals good or bad character does not make it inadmissible. That is the general principle on which section 15 is based.

8.166. Section 15 is a specific application of the principle of section 14. Compared with section 14, section 15 has, however, a narrower application. In the first place, while any state of mind brings section 14 into operation (apart from a state of body or bodily feeling), section 15 is confined to the specified states of mind. Secondly, any kind of evidence can become relevant under section 14, subject, of course, to the other requirements of section while section 15 concentrates on evidence of similar facts. The similarity makes the probability of an innocent explanation so remote that the law provides that the evidence ought to be received.

8.167. Similar facts or acts may have been committed before or after the offence charged. But they must be similar transactions which do not merely tend to show a general criminal disposition, but show an intention which is relevant in the particular case.

Two situations covered by section 15.

8.168. It should be pointed out that there are two kinds of cases which fall within section 15. In the first place, the section may come into operation where the question is whether an act was accidental or intentional. In the second place, the section may come into operation where the question is whether an act was done with a particular intention or knowledge. In the first case, the defence that is taken by the person charged would be that there was no intention at all, while, in the second case, the defence would be that a particular intention or knowledge was absent. The basis of admissibility of the evidence on the issue of accident is the improbability of the coincidence of many identical or similar accidents. As was observed in R. v. Sims, a series of acts with the same characteristics is unlikely to be produced by accident or inadvertence.

In the second case, on the other hand, the relevance of the evidence in question on the issue of a particular intention or knowledge is to show not only the existence of a state of mind in the abstract, but also the existence of a particular state of mind.

Same transaction not necessary

8.169. The words of the section, as well as the language of illustration (a), show that it is not necessary that all the acts should form parts of one transaction. But it is necessary that such acts should form parts of a series of similar occurrences, and also—as the opening words require—that “there is a question whether an act was accidental or intentional or done with a particular knowledge or intention.”

This section, as already stated, is an application of a rule laid down in section 14 to a particular set of circumstances. It will always be a matter of decision of the Court whether there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact. If there is no common link, they cannot form a series as observed by Norton.

8.170. The illustrations to the section are important. Illustration (a) is founded on an English case. The authority of this case, is doubted by Stephen, but the principle of the illustration seems to have been approved in a Bombay case and in a Calcutta case.

Illustrations.

In Queen-Empress v. Vajiram, Telang J., observed,

“And, further, I may point out that in India we have what may be called a legislative approval of the decision of Willes, J., for illustration (a) to section 15 of the Evidence Act is really a statement of the case of Reg. v. Gray.”

\(^{(a)}\) R. v. Mason, (1914) 10 Criminal Appeal Reports 169;
\(^{(b)}\) R. v. Armstrong, (1922) 2 King’s Bench 555;
\(^{(c)}\) Cf. the Brides in the Bath case.
\(^{(e)}\) See—
\(^{(a)}\) Stephen, Digest, Article 12; and
\(^{(f)}\) Norton, Evidence, 140, cited in Woodroffe.
\(^{(g)}\) R. v. Grey 4 F & F 1102 (see infra).
\(^{(h)}\) Stephen, Digest, Article 12, Note.
\(^{(i)}\) R. v. Vajiram, I.L.R. 16 Bom. 433 (see infra).
\(^{(l)}\) Reg. v. Gray, 4 F & F 1102.
8.171. Illustration (b) to section 15 is, in principle, identical with the English case of Reg. v. Richardson where the only difference being that the English case was a case of reducing credits. It is well established that the gist of the section is that, unless there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless, there is in substance some common link, they cannot form a series.

Illustration (c) is comparable to section 14, illustration (b). The presumption in both the cases is the same. In section 14, the illustration refers to possession, while, in section 15, the illustration refers to delivery.

8.172. In general, it may be stated that the caution to be exercised in applying section 14 should also be exercised in applying section 15. It is only when there is a question whether the act (now under consideration) was accidental or intentional, or done with a particular knowledge or intention, that the section applies. In particular, what is relevant under section 15—the fact that an act formed part of a series of such occurrences in each of which the person doing the act was concerned—is so relevant only to show that the act now under consideration was not accidental but intentional, or that it was done with a particular knowledge or intention. While discussing section 14, we have pointed out that the application of that section is dependent on an important condition, and also that the use of that section is subject to a restriction. The same comments apply in relation to section 15 also.

8.173. The section is, therefore, not an easy one to apply. The difficulty of applying the section is illustrated by a Calcutta case where, on a charge involving thefts from rich prostitutes, certain facts were sought to be given to establish that A and B had, in several instances, taken part in thefts from rich prostitutes in a series of incidents from 1914 to 1918, and that they had lived together and had transactions together, that a system had been followed by them and that they used to go about together under different names and had associated together with the evil motive of committing such thefts. By a majority judgment, the evidence was held to be inadmissible under section 14 or under section 15, there being no question involved of a criminal object.

8.174. With this case, we may contrast a Bombay case. The accused was a shopkeeper at Bhilwari, and used to get goods by lorries from Bombay through the limits of the Kalyan Municipality. The lorry-driver, instead of paying octroi duty on the goods at Kalyan, rapidly drove past at the octroi post of the Kalyan Municipality. The accused was prosecuted under section 77(2) of the Bombay District Municipal Act, 1901, for introducing the goods within the octroi limits without paying the octroi dues, in three instances in August and September, 1923. The accused was convicted and sentenced to pay a fine of Rs. 15 or, in default, to undergo simple imprisonment for 7 days, by the trial court. The trial court admitted, as evidence, the similar complaints which were made against the accused in the year 1921.

The matter came up before the High Court, on a reference by the Sessions Judge for quashing the conviction of the accused. One of the points for consideration before the High Court related to the admission of evidence...
of similar complaints of the year 1921. The High Court held that this was admissible to prove the intention of the accused, under sections 14 and 15. Reliance was placed on the summary of law given in two cases of the Calcutta High Court, in the following words:—

"In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question, may be given."

The conviction of the accused was upheld by the High Court.

8.175. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character, and the acts tendered must also have been proximate in point of time to that in question. 2

In Noor Mohamed v. The King, 3 the accused was tried before the Court of British Guiana, on a charge of murdering a woman commonly known as Ayeshah, by poisoning her. Evidence was admitted to show that the accused had earlier murdered another woman—his wife, Galshe—in similar circumstances. It was held that the admission of such evidence was not justified, there being no issue as to whether the act was intentional or accidental.

8.176. The above discussion is intended to elucidate various aspects of the section. However, no change in the law is recommended.

8.177. Section 16 provides that when there is a question whether a particular act was done, the existence of any recourse of business according to which it naturally would have been done is a relevant fact. Illustration (a) to the section relates to the case where a particular letter was despatched, and provides that the fact that it was the ordinary course of business for all letters put in a certain place to be sent by post, and that that particular letter was put in that place, would be relevant. This corresponds to one of the English cases. 4 It may also be noted that the Evidence Act, 2 of 1855, sections 50 and 51, to some extent dealt with this situation.

Illustrations

8.178. While illustration (a) mentioned above, mainly deals with private business; though it is not so confined, illustration (b) is mainly relevant for public business. That illustration provides that where the question is whether a particular letter reached A, the fact that it was posted in due course and was not returned through the dead letter office, is relevant. This illustration may be compared with an English case 5 Warren v. Warren, where Parke B. observed,—

"If a letter is sent by post, it is prima facie proof until the contrary be proved that the party to whom it is addressed received it in due course." 6

Cognate provisions of the Act.

8.179. The matter dealt with by section 16 is usually dealt with in English text-books under the subject of "presumptions". In this connection, we may refer to the observations of the Privy Council in a case decided before

---

8. See also British American Telegraph Co. v. Colson, (1871) I.L.R. 6 Exch. 108.
the Evidence Act,\(^1\) to the effect that "it is reasonable to presume that that which was the ordinary course was pursued in this case."

Reference may also be made to section 32, second clause, where the expression "ordinary course of business" is used, and to section 114, illustration (f), under which the Court may presume that the common course of business has been followed in particular cases. Similar expressions occur in sections 34 and 48. The distinction between section 16 and section 114, illustration (f), is that the former makes the course of business relevant,\(^2\) and the latter then empowers the Court to draw a presumption that the course of business was followed in the particular case.

8.180. Of course, illustration (b) to section 16 does not deal with the question of the time when the letter may be presumed to have reached the addressee. Stephen, in his Digest,\(^3\) has a specific illustration on this point—"A letter is presumed to have arrived at its destination at the time at which it would be delivered in the ordinary course of postal business."\(^4\)

8.181. Nor does the section deal with any presumption as to postmarks on letters as furnishing prima facie evidence that letters were in post at the time and place therein specified.\(^5\) As to such matters, the Court is free to draw a suitable presumption, having regard to the facts of each case, under the general provisions in section 114.

8.182. Besides the Evidence Act, there are other statutory provisions relevant to the subject of "course of business" in relation to post. There is, for example, a rule of construction in section 27 of the General Clauses Act, 1897. It relates to service by post, and consists of two limbs, dealing, respectively with (i) the mode of service, and (ii) the time of service. Under the first part of the section, for the purposes of an Act authorising or requiring a document to be served by post, service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post a letter containing the document. This deeming provision, of course, applies unless a different intention appears from the Act under construction. At present, there is no express saving for cases where the contrary is proved; an amendment in this regard has been recommended by us in our Report on this Act.\(^6\)

8.183. Although the presumption under section 27, General Clauses Act, can arise only when the notice is sent by registered post,\(^7\) there may arise a presumption under section 114, Evidence Act, when notice is sent by ordinary post. But the presumption to be drawn under section 114 is not mandatory.

8.184. Under the second part of section 27—General Clauses Act, 1897, the service shall be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post. This deeming provision applies, unless the contrary is proved, and unless a different intention appears from the context.

8.185. Reference should also be made to section 106 of the Transfer of Property Act, 1882. Under that section, the lessor can determine the lease by a notice to quit, and one of the modes of service of such notice is sending

---

\(^1\)Dwarka v. Jankee, (1855) 6 M.I.A. 50 (P. C.).


\(^3\)Stephen's Digest, Article 13, illustration (a).


\(^6\)See 60th Report (General Clauses Act), p. 106 & cf. s. 4.

\(^7\)Contrast section 26, Interpretation Act, 1889 (Eng.).
it by post to the party intended to be bound by it. There are similar provisions in certain other Central Acts.

Illustrations of various presumptions under section 114, concerning post.

8.186. We have already referred to section 114. A number of presumptions can be drawn by virtue of this section. A few relevant matters concerning letters sent by post may be referred to, by way of illustrations:

(i) In a Calcutta case, a notice was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched. That cover contained the notice, with an endorsement upon it, purporting to be by an officer of the post office, stating the refusal by the defendant to receive the document served. It was held, having regard to two earlier cases and also to section 16, illustration (b), that the notice was sufficiently served.

(ii) In England, the posting of a letter may be proved by showing that it was handed to, or left with, the clerk, whose duty it was in the ordinary course of business, to carry it to the post, and who, though he had no recollection of the particular letter, habitually and invariably took all the letters delivered to him to the post office. The position would be substantially similar in India under section 114.

(iii) In England, the post-mark on a letter has been held to be prima facie evidence that the letter was in the post at the time and place therein specified. The position in India would be the same under section 114.

(iv) The post-marks on letters are considered as evidence of the dates and places mentioned therein.

Thus, on the question whether a letter was sent on a given day, the postal mark on it was held to be a relevant fact.

(v) The possession by a person of a letter with the address torn off prima facie shows that it was addressed to him.

8.187. The above discussion does not disclose any need for amendment of section 16.

---

1(a) Papillon v. Bruton, 5 H & N 518.
1(b) Loof v. Ali, 16 W. R. 223 (Cal.).
3 Fletcher v. Brides, 1, 3 Stark, R. 64.
4 R. v. Johnson, 7 East, 65.
6 Carlis v. Richards, 1 M. & G. 47.
CHAPTER 9

ADMISSIONS AND CONFESSIONS—SECTION 17

9.1. Sections 17 to 31, which we shall now proceed to consider, deal with admissions in general, and more elaborately with a particular species of admissions, namely, confessions. Although, in popular language, the expression "admission" is used to connote a statement against one's interests, that is not the meaning given to it in the Act. No is the expression, as defined, confined to civil cases.1

9.2. An admission has been so defined as to cover, inter alia, any statement by a party, and it is not necessary that at the time when a statement was made, the statement was against the interests of the person making it.

9.3. A few fundamental points may be noted at the outset. First, as already stated, admissions as dealt with in these provisions are not confined to civil cases. This is clear from the definition given in section 17, and also from the reported cases.2,3

Secondly, admissions by way of conduct are not dealt with, in the relevant sections, they having been already covered by section 8.

9.4. Thirdly, admissions constitute an exception to the rule against hearsay.

9.5. Jurisprudentially, therefore, the importance of sections 17 to 31 lies in their covering all kinds of proceedings, and in making statements by the parties and other specified persons relevant, thereby creating an exception to the rule against hearsay. At the same time, it is made clear that admissions are not conclusive proof of the matters admitted; but they may operate as estoppel under the provisions hereinafter contained.

9.6. The principle on which these sections are based is that what a person states, may be presumed to be true as against himself. The general rule, therefore, is that an admission can be given in evidence against the party making it,1 and not against any other party.4 In other words, they are admitted if tendered by the opponent. In this sense, they are adverse to the maker of the statement.

9.7. Admissions are admissible even though, when made, they were not against the party's interests,5 and even though the party did not have personal knowledge of the fact which he admits. Of course, he can show that he was mistaken—section 31. The justification for regarding them as relevant lies in this—that a party cannot be heard to say that his own statements should have been subjected to the usual tests of truth, —oath and cross examination. This is the ground for departure from the general rule against hearsay.

---

1Para. 9.18, infra.
2(a) Sahoo, A.I.R. 1966 S. C. 46;
(b) Bishen Das, (1915) P.B. No. 106 of 1915 (Civil);
(c) Azimuddin, (1926) I.I.R. 54 Cal. 237.
3See infra para 9.18.
4Section 31.
5In Re Whitely, (1891) Law Reports 1 Ch. 558, 563, 564.
6Stanton v. Percival, 5 House of Lords Cases 273.
7Falcon v. Famous Players Film Co., (1926) 2 K.B. 474, 489
9.8. It may be noted that the rule permitting admissions to be given in evidence takes in statements not only of parties, but also of persons who have, what may be called, an "identity of interest" with a party. It is for this reason that admissions made by certain persons who share the identity of interest, are made relevant; the relationship creating such identity includes (a) agency; (b) proprietary interest or pecuniary interest; and (c) derivative interest. On the other hand, where there is no identity of interest, the reason for admitting the statement disappears and, therefore, statements by strangers are not, in general, relevant. The case is different where the strangers are persons to whom a reference is made by a party himself.

9.9. The rationale of treating, as relevant, admissions made by an agent is that if the principal constitutes the agent his representative in a certain transaction, then whatever the agent does in the lawful prosecution of the transaction, is the act of the principal.

9.10. American usage occasionally describes admissions made by agents as "authorised admissions", and admissions made by a person whose statement a party adopts are referred to as "adoptive admissions". In the scheme of the Act, these two are covered by sections 18 and 19, respectively.

9.11. The scheme of the sections is as follows. Every statement suggesting an inference as to a fact in issue or a relevant fact is, subject to certain qualifications, an admission by virtue of section 17, provided it is made by the parties or other persons specified, and under the circumstances specified, in sections 18 to 20. If a statement amounts to an admission by virtue of the provisions just now referred to, its relevancy is provided for by section 21—unless, of course, there are provisions excluding it from evidence either in the Act or in any other law. The Act itself furnishes examples of such exclusionary rules—in section 22 (oral admission as to contents of documents) which applies in all cases; in section 23, which, in civil cases, excludes an admission made on the express condition that evidence of it is not to be given; and in sections 24 to 26, which apply to confessions. The exclusionary rules in sections 24 to 26 are, however, themselves subject to certain qualifications, which are contained in sections 27 to 29. In section 30, there is a provision for "taking into consideration" the confession of a co-accused, in certain cases. Section 31 provides that admissions are not conclusive proof, but may operate as estoppels.

We may now consider each section in detail.

9.12. Section 17 defines an admission as "a statement, oral or documentary, which suggests any inference as to any fact in issue or a relevant fact, and which is made by any of the persons and under the circumstances, hereinafter mentioned".

9.13. Thus, this section lays down three requirements. It must be a statement; secondly, it must suggest any inference as to a fact in issue or a relevant fact; and thirdly, it must be made by the specified person and under the specified circumstances.

---

1Section 18 and 20.
2Section 18, clause (1).
3Section 18, clause (2).
4Stephen Digest, Article 18.
5Section 19.
9.14. The first requirement presents no problems. The statement must be oral or documentary—so that admissions by conduct do not fall under this section, though they can become relevant under section 8 or other section applicable on the facts.

9.15. As regards the second requirement, it is enough if the statement suggests an inference as to a fact in issue or a relevant fact. The words referring to "suggesting an inference" are obviously intended to include statements which do not amount to a direct admission of a fact in issue or a relevant fact, but which suggest an inference about it. Of course, when one turns to confessions, the scope of "confession", in the scheme of the Act, is restricted. Stephen's definition of "confession" as an "admission made at any time by a person charged with crime stating or suggesting the inference that he committed the crime", is not applicable to the Indian Evidence Act.

9.16. Thirdly, the statement must be made by the specified person and under the specified circumstances.

9.17. Apart from the cases specifically mentioned in section 17 read with sections 18 to 20, it may be noted that statements made by a person may bind others. One such example is furnished by section 10, under which declarations etc. of a co-conspirator, when made in reference to the common intention of the conspirators, are relevant against the co-conspirators.

9.18. In the scheme of the Act, the expression "admission" is applicable to criminal cases also. In Sahoo's case, it was observed that statement is a genus, admission is the species and confession is the sub-specie. It was also observed that admissions and confessions are exceptions to the hearsay rule. In the same case, it was held that it was not necessary that a statement, in order that it may amount to an admission, should have been communicated. Words not addressed to others but uttered in soliloquy, or uttered in confidence, would be admissible against the person uttering them, if independently proved. The Supreme Court gave the following hypothetical illustration:

"A kill B; enters in his diary that he had killed him, puts it in his drawer and absconds. When he places his act on record, he does not communicate to another; indeed, he does not have any intention of communicating it to a third party. Even so, at the trial, the said statement of the accused can certainly be proved as a confession made by him. If that be so in the case of a statement in writing, there cannot be any difference in principle in the case of an oral statement."

Of course, with reference to oral statements put in the illustration given by the Supreme Court; independent proof will be required.

9.19. It may be noted that "confession" is narrower than "admission". Under the Act, acknowledgement of a subordinate fact, though incriminating, would not be a confession, though it would be an admission. Every confession is an admission, but every admission is not a confession. This is obvious from the fact that sections 24 to 30 deliberately use the word "confession", as distinct from "admission". If the two were identical, there was no need to use the expression "confession"—an aspect which has been dealt with elaborately in one

---

1See introduction, supra.
2Stephen, Digest, Article 22.
of the earlier Punjab cases. It is for this reason that there is no bar to the admissibility of an admission of any relevant fact made by an accused person to a police officer prior to the commencement of an investigation. The statement may be admissible in evidence as an admission, if it is not hit by the excluding sections of the Evidence Act relating to confession, or by section 162 of the Code of Criminal Procedure.

9.20. Reference may also be made to a case decided by the Privy Council, which related to a trial for murder.

9.21. The Ceylon Evidence Ordinance came up for construction in that case. By section 25 of the Ceylon Evidence Ordinance: “No confession made to a police officer shall be proved as against a person accused of any offence.”

9.22. By section 17: “(1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact. (2) A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence.”

9.23. The Privy Council had to consider the question whether certain statements made by the accused to a police officer were admissions or confessions. Those statements narrated the relationship between the accused and the murdered woman, but they did not admit guilt as such. The Privy Council held that with reference to section 25, quoted above, the correct view was that taken by Acting Chief Justice Garvin in a Ceylon case where he stated, after quoting section 17, “The term ‘admission’ is the genus of which ‘confession’ is the species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggests not any inference but the inference that he committed that offence.”

9.24. Any doubt in this regard would disappear if one bears in mind the fact that confessions become relevant only because they fall within sections 5, 17, and 21. Section 21 constitutes the provision, and the only provision, that makes admissions relevant. If that section is kept aside, there is no other section providing for the relevancy of confessions specifically.

The above discussion does not disclose any need for amending the definition.

SECTION 18

9.25. Section 17 having laid down that admissions must be made by the persons and under the circumstances “hereinafter mentioned”, section 18 deals with the persons whose statements are to be regarded as admissions. The section consists of three paragraphs, of which the first is of general application and deals with parties and agents. The second paragraph introduces certain qualifications as regards parties to suits who are suing or have been sued in a representative character. The third paragraph deals with statements made by persons having a proprietary or pecuniary interest in the subject-matter of the proceedings or by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit. Somewhere, the various paragraphs do

---

5Anandagoda v. The Queen, (1962) 1 W.L.R. 817, 821, 823 (P.C.).
6The King v. Cooray, (1926) 28 N.L.R. 74 (Ceylon).
not use identical language while describing the nature of the legal proceeding. The first paragraph speaks of "proceedings". The second paragraph speaks of "suits". In the third paragraph, sub-paragraph (1) speaks of the "proceeding", while sub-paragraph (2) speaks of "suit". We shall revert to this aspect later.  

9.26. The general principle of the section is sound enough. Statements made by a party are admissions, and so are statements of persons with identity of interest in the subject-matter. But certain changes appear to be desirable in the section. The discussion that follows will indicate that the changes which we contemplate are partly of expression, partly of substance and partly of structure and arrangement. The changes of substance are needed so that the section may be brought into conformity with the correct principle—identity of continuance of interest.

9.27. We may first refer to a verbal point of a general nature. Some paragraphs of the section use the expression "suit", while some employ the expression "proceeding", as already stated. There is, in our view, no reason why the various paragraphs of this section which apply to "suits" should not apply to all civil proceedings. We, therefore, recommend that the expression "civil proceeding" should be used in those paragraphs which speak of "suits".

Changes of substance may now be dealt with.

9.28. The first paragraph of the section deals with admissions by parties and agents. No change is required in its substance. We propose to split it up into two, in accordance with the changes in structure to be indicated later.

9.29. The second paragraph relates to statements made by parties to suits "suing or sued" in a representative capacity. It provides that statements made by such parties are not admissions unless the statements were made while the parties making them held that character. No changes of substance are needed in this paragraph. We have already indicated the need to substitute "civil proceedings" in place of "suits" in the section.

9.30. It may be stated that the legal concept of "suit in representative character" is wide enough to cover several situations—e.g. suits by trustee, executor, Mutawalli, or curator. In this connection, Order 7, Rule 4 and Order 7, Rule 9 of the Code of Civil Procedure etc. may be seen, and also a Bombay case and a Calcutta case. These provisions and cases show the general understanding of the expression "suit in representative character". In our opinion, it is desirable, having regard to the illustrations of representative suits which have been mentioned above, to extend section 19, second paragraph to civil proceedings other than suits also. A trustee may, for example, have to file applications (and not merely suits). Such a situation should be covered.

9.31. The third paragraph of section 18 consists of two sub-paragraphs. According to sub-paragraph (1), statements made by persons who have "any proprietary or pecuniary interest" in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, are admissions.

---

1Para. 9.27, infra.
2See introductory discussion before discussion as to section 17, supra.
3Para. 9.25, supra.
4Para. 9.43, infra.
5See para. 9.27, supra.
6Order 31, Rule 1, Code of Civil Procedure.
The application of this paragraph is usually illustrated by referring to 'joint contractors'. It is to be pointed out that this provision appears to be too loosely worded. In the first place, it covers persons who have any proprietary or pecu
niary interest, though, really, it should have covered only persons having a joint interest. If two or more persons are jointly interested in the subject-matter, the admission of any one may be receivable against the other; but this does not mean that any kind of interest in the subject-matter, should entitle a person to make an admission that may bind any other person having a different kind of interest.

Principle.

9.32. The principle of this part of the section was thus stated in a Calcutta case, where Garth C.J. observed:

"The principle of the rule is that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the other."

Having so stated the reason of the Rule, Garth C.J. further observed:

"and this rule, as I take it, is enacted, though in a somewhat concise form, in section 18 of the Indian Evidence Act."

9.33. The following discussion will show, how, in the process of a concise statement of the rule, some important requirements have been left to be inferred, and not expressed, in this paragraph of the section.

Joint interest.

9.34. We first take up the question of joint interest. In the Calcutta case already referred to, the following rule laid down by Taylor⁴ was quoted:—

"When several persons are jointly interested in the subject matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered."

9.35. Thus, where two or more persons have a joint, as opposed to common⁵ interest, an admission by one of them may be used against the other or others, provided it is made during the continuance of the joint interest. The principle of identity of interest is properly applied where there is a joint interest, but not where there is any interest⁶.

Joint interest.

9.36. The above discussion will show that besides the requirements mentioned in the section, it is, as a matter of principle, necessary that:—

(a) the person making the statement must have a joint interest in the subject-matter, and

(b) the statement must relate to the subject-matter⁶.

9.37. In a subsequent Calcutta case⁷ the rule was thus stated — "when several persons are jointly interested in the subject-matter of the suit, an admission of any one of these persons is receivable not only against himself but also

---

¹Howsell v. Mukta, (1885) I.L.R. 11 Cal. 588, 591.
³Dan v. Browne, 4 Comen 483, 492.
⁴See para. 9.31, supra.
⁵Jaggers v. Binnings, (1815) 1 Stark 64.
“against the other defendant, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.”

9.38. For the reasons stated above, we recommend that in the third paragraph, the first sub-paragraph should be revised so as to introduce these requirements, which are reasonable and have been judicially recognised.

9.39. The third paragraph, second sub-paragraph, which relates to privies, needs no change of substance.

9.40. We recommend a redraft of the second paragraph, so as to cover civil proceedings other than suits. As regards criminal proceedings, no change is needed.

9.41. In the third paragraph, in the first sub-paragraph the word “proceeding” may be retained.

9.42. The third paragraph, second sub-paragraph, will not cover criminal proceedings, while the third paragraph, sub-paragraph (1) would (as at present) extend to criminal cases also. We do not, as a matter of policy, wish to extend the third paragraph, second sub-paragraph, to criminal cases.

9.43. Apart from the points of expression and points of substance discussed above, it is desirable that the structure of section 18 should be revised. In the first place, it would obviously be convenient if the paragraphs are numbered in the usual form.

9.44. Then, the first paragraph of the section mixes up parties and agents. These should be kept separate, for the sake of convenience and neatness.

9.45. The third paragraph of the section deals with two situations,—persons with (joint) interest, and privies. These two should be dealt with separately, since the two stand in categories different from each other.

9.46. In the light of the above discussion, we recommend that section 18 should be revised as follows:

"18. (1) Statements made by a party to the proceeding are admissions.

(2) Statements made by an agent to a party to the proceeding, whom the court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

(3) Statements made by parties to a civil proceeding, where the proceeding is instituted by or against them in their representative character, are not admissions, unless they were made while the party making them held that character.

(4) Statements made by persons who have a joint proprietary of pecuniary interest in the subject-matter of the proceeding are admissions, provided the following conditions are satisfied:

(a) such statements are made by such persons in their character of persons so interested, and during the continuance of the interest of the persons making the statements;

(b) such statements relate to the subject-matter of the proceeding."
(5) Statements made by persons from whom the parties to the civil proceeding have derived their interest in the subject-matter of the proceeding are admissions, if they are made during the continuance of the interest of the persons making the statements."

SECTION 19

9.47. Section 19 deals with statements made by persons whose position or liability it is necessary to prove as against any party to the suit. Statements made by such persons are admissions if such statements satisfy two conditions, namely, (a) such statements should be relevant as against such persons in relation to such position or liability for a suit brought by or against them, and (b) such statements are made whilst a person making them occupies such position or is subject to such liability.

9.48. For understanding the section, it is necessary to refer to the illustration.

9.49. The illustration given by the legislature below the section says, in effect, that where a person who has undertaken to collect rent from a third person is sued for not collecting the rent due from the third person and takes the defence that no rent was due from the third person, a statement by the third person that he owed rent to the plaintiff in the suit is an admission, and is a relevant fact as against the person so sued if he denies that the third person did owe rent to the plaintiff. This is not the precise wording of the illustration; but we have put it in a language which will bring out the working of the section. The principal significance of the section lies in this, that a statement made by a third person becomes an admission, in the limited circumstances mentioned in the section.

9.50. In general, statements by strangers are not relevant as against the parties.1 To this general rule, an exception made, apparently for the reason that if the person whose position or liability is in dispute, though a stranger, has himself made an admission, his statement should be relevant. Of course, a very important condition is that,—as the section provides,—"such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them." This requirement in the section implies that generally, statements made by the third person in his favour would not fall within the section.

9.51. It would appear that, in England, admissions of a bankrupt made before the act of bankruptcy are receivable in proof of the debt of the petitioning creditor, as against the trustee in bankruptcy.2 The position would be the same in India under section 19. Similarly, in England, in an action against the Sheriff, for not executing a process against the debtor, statements of the debtor, admitting his debt to the executing creditor, are relevant, as against the Sheriff.3 The position would be the same in India.

9.52. The above discussion does not reveal need for any change in the section, in its substance. But we are of the view that the section should apply to all "civil proceedings", and we, therefore, recommend that for the word "suit", the word "civil proceeding" should be substituted.

1 Coote v. Braham, (1848) 3 Exchequer 183.
2 Coote v. Braham, (1848) 3 Exchequer 183.
3 Stephen's Digest, article 18; Kempland v. Macaulay, Peake, 95, cited in Woodroffe.
SECTION 20

9.53. Under section 20, statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute, are admissions. The illustration to the section puts the case where the question is whether a horse sold by A to B is sound. A says to B—"Go and ask C, C knows all about it". C's statement is an admission.

9.54. The position in this regard in England is, in substance, the same. Persons to whom one of the parties has asked another party to refer, are described in English text-books as "referees". Stephen even says that admission by a person referred to by a party comes very near to the case of arbitration. Some of the earlier English cases even go to the length of saying that the admission of the referee would be conclusive; but opinion on the subject is not settled. In this respect, section 31 of the Indian Evidence Act is quite clear, and the admission is not conclusive as such, though it can operate as an estoppel. Of course, if the parties agree to be bound by any statement which a third person may make, on a reference, then the statements of such referees may be binding. But this would be by reason of contract, and not by reason of the law of evidence, concerning stolen property, and the list in question was a list of stolen articles which the accused had bought. From certain later cases, however, it would appear that the absence of the accused would not affect the admissibility of the statement of the referee in such cases.

9.55. Reverting to English cases which specifically deal with the admissions of a referee, we may mention an action against executors, where the defendants (executors) had written to the plaintiff that if the plaintiff wished for further information as to the assets, it could be ascertained from a certain merchant. The reply of the merchant was held to be receivable against the executors.

9.56. The section is confined to suits. The principle may not be different in the case of criminal proceedings. The matter arose, but was not conclusively decided, in an English case. The accused told a constable that his wife would make out a list of certain property. A list which was afterwards made out by the wife and handed over to the constable in the presence of the accused was held to be evidence against the accused, Coleridge C.J. however expressly refrained from giving an opinion upon the question if the position would have been different if the accused had been absent. This case related to a trial concerning stolen property, and the list in question was a list of stolen articles which the accused had brought. From certain later cases, however, it would appear that the absence of the accused would not affect the admissibility of the statement in such cases.

9.57. While occasions for applying section 20 in criminal cases are rare, it is proper that for the expression "suit", the expression "civil proceeding" should be substituted. We recommend that the section should be so amended.

SECTION 21

9.58. Section 21 consists of two branches, namely, the positive branch and the negative branch. The positive deals with the persons against whom admissions are relevant and may be proved. It provides that admissions are relevant

---

1 Stephen's Digest, Article 19, note.
3 See also discussion in Akhuri Begum v. Rahmat Hussain A.L.R. 1933 All. 861, 880; (1933) Allahabad Law Journal 1127.
5 R. v. Campbell, (1912) 8 Criminal Appeal Reports 75.
6 Williams v. Innes, 1 Camp 364.
8 Compare recommendation as to section 19.
and may be proved as against the person who makes them or his representative in interest. The negative provides that admissions cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the specified cases.

The excepted cases are three in number. Of these, the first covers admissions made under special circumstances, where if the maker of the admission were dead, the case would fall within section 32. The special circumstances are supposed to be a guarantee of truth, so as to make the admission relevant. The second exception covers the case where the admission consists of a statement of the existence of any state of mind or body, and is accompanied by conduct rendering its falsehood improbable. What justifies this exception is the fact that there is conduct, and not merely a statement—and that conduct renders the falsehood improbable. The third exception covers cases where the admission is relevant otherwise than as an admission. This is only a formal exception.

Illustrations.

9.59. The following illustrations are appended to the section:

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indication that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skillful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

Opening part in complete.

9.60. The opening portion of the section provides that "admissions are relevant and may be proved as against the person who makes them, or his representative in interest". This statement of the law is somewhat incomplete, inasmuch as, under the preceding sections, statements made by certain other
persons are also admissions, in certain situations. For example—(i) statements made by an agent to any party are admissions under section 18, 1st paragraph; (ii) statements made by persons having a joint interest are admissions under section 18, 3rd paragraph, sub-paragraph (1); (iii) statements made by persons whose position must be proved as against a party to the suit, are admissions under section 19; and (iv) statements made by a referee are admissions under section 20.

9.61. All these situations are left uncovered by the opening portion of section 21, because the words “the person who makes them or his representative-in-interest,” if taken literally, would not (for example) cover the principal, or the person jointly interested (not the maker). This part of section 21 should, therefore, be revised in a suitable manner.

9.62. Incidentally, such revision could be more conveniently done, if the section is split up so as to deal, first, with the positive branch—when the use of admissions is permitted—and then with the negative branch—when their use is not permitted. Of course, the negative branch is subject to certain exceptions, which are contained in clauses (1), (2) and (3) of the existing section.

9.63. It would therefore be convenient if the opening words of section 21 are revised as follows:

“21. (1) Admissions are relevant and may be proved against the following persons, that is to say,—

(a) the person who makes them, or his representative in interest;

(b) in the case of an admission made by an agent where the case falls within section 18, first paragraph, the principal of the agent;

(c) in the case of an admission made by a person having a joint proprietary or pecuniary interest in the subject-matter of the proceeding, where the case falls within section 18, third paragraph, sub-paragraph (1), any other person having a joint proprietary or pecuniary interest in that subject-matter;

(d) in the case of an admission made by a person whose position or liability it is necessary to prove as against a party, where the case falls within section 19, that party;

(e) in the case of an admission made by a person to whom a party has expressly referred for information, where the case falls within section 20, the party who has so expressly referred for information”.

9.64. The latter portion of the section may be revised as follows:

“(2) Admissions cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:

(a) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(b) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(c) An admission may be proved by or on behalf of the person making it, when it is relevant otherwise as an admission.”

1If the paragraphs of section 18 are re-numbered as recommended, this should be altered.
2Reference to be altered if section 18, paragraph third is renumbered.
3Illustrations as at present.
SECTION 22

9.65. Under section 22, oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such documents "under the rules hereinafter contained", or unless the genuineness of a document produced is in question.

9.66. The general rule in the Act is that the contents of a written instrument, which is capable of being produced, must be proved by the instrument itself and not by parol evidence. The substance of the section is, thus, in conformity with the other provisions of the Act, which lay down the general rule referred to above. Briefly speaking, these other provisions, so far as is material, require that the party must give notice to produce and must account for the absence of the original, in general.

9.67. In England, the rule laid down in Slatterie v. Pooley is that admissions are receivable to prove the contents of documents without notice to produce and without accounting for the absence of the originals. The principle on which such evidence is received, in England, is that what a party himself admits to be true may reasonably be presumed to be so, and such evidence is not open to the same objection that applies to other parol evidence.

9.68. Thus, the corresponding exception in England, to the rule prohibiting the substitution of oral testimony for the document itself, is wider. The admissions being primary evidence against a party (and also against those claiming under him), are receivable to prove the contents of documents without notice to produce, or without accounting for the absence of the originals.

9.69. However, recognising that such a wide attitude may lead to dangerous consequences, the section, departing from the English law, adopts only a modified rule, and oral admissions are not relevant until the general conditions for the admission of secondary evidence are satisfied.

9.70. The consequences which are liable to follow on the reception of such evidence without there being a case for secondary evidence, were pointed out in an Irish case, where the English rule was criticised. Section 22 is based on the principle underlying this criticism. The section modifies the English law, inasmuch as the admissions in question are admissible only if the conditions for secondary evidence exist. In the Irish case, Pennefather, C.J. observed while commenting on the case of Slatterie v. Pooley—

"Is there no danger of untruth or misrepresentation when used against the party making the admission? That is the ground put by Parke B. in Slattery v. Pooley, and in which I cannot agree, when I know by experience how easy it is to fabricate admissions and how impossible to come prepared to detect the falsehood. Why are writings prepared at all but to prevent mistakes and misrepresentation and why, having taken that precaution, with such writing at hand and capable of being produced, is the same to be laid aside, and inferior and less satisfactory evidence resorted to?"

---

1Sections 59, 64, 91.
3See discussion in Muttukaruppupp v. Ram, (1866) 3 Mad. H.C.R. 158.
4See the observations of Pennefather, C. J., in Lawless v. Quesale, 8 Ir. Law R. 382.
5Lawless v. Quesale, 8 Ir. Law R. 382, 385.
6Slatterie v. Pooley, supra.
In a case which went up to the Privy Council, the plaintiff sued for a settlement of account, and the plaintiff, instead of producing and proving the account current between himself and the defendant, produced evidence to prove the oral admission of the debt. The Privy Council rejected the evidence and held—

"They consider that it is a very dangerous thing to rest a judgment upon verbal admissions or a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one."

There is a parallel provision in the Act under which, when the existence, conditions or contents of the original document have been proved to be admitted in writing by the person against whom it is proved or by his representatives in interest, such written admission is admissible. But, we are not concerned with that provision.

Where the question is of genuineness, the last part of the section permits oral admissions. Although this portion is somewhat cryptically worded, its true meaning is what Norton has stated, which is in these words:

"Or, unless the genuineness of a document produced is in question. The effect of the last clause of this section seems to be that if such a document is produced, the admissions of the parties to it that it is, or is not, genuine may be received."

No changes of substance are needed in the section, but the last portion of the section could be made more clear, by spelling out its true intent as mentioned above. To carry out this object, we recommend that the section should be re-drafted as follows:

"Oral admissions as to the contents of a document are not relevant—

(a) unless the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained; or

(b) except where a document is produced and its genuineness is in question."

SECTION 23

Section 23 provides that in civil cases, no admission is relevant, if it is made upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Under the Explanation to the section, nothing in this section shall be taken to except any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

One of the most important applications of the section is in relation to offers made "without prejudice". It should, of course, be pointed out that the section is not confined to cases of offers "without prejudice". The section comes into play whenever there is an express condition or implication that evidence of the matter stated is not to be given.

In regard to an offer without prejudice, the principle of the section may be thus stated—"Confidential overtures of pacification and any other offer or proposition between litigating parties, expressly or impliedly made without
prejudice, are excluded on ground of public policy. Now, if a man says his letter is without prejudice, that is tantamount to saying, "I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all". As has been said do not 'without prejudice' mean, 'I make you an offer; if you do not accept it, this letter is not to be used against me'.

Rule narrow in the present section.

9.78. The section is sound enough so far as it goes. We would, however, like to point out that the rule in the section is narrow in one respect. It requires—(i) an express agreement prohibiting the giving of evidence, or (ii) circumstances from which such an agreement can be implied. This requirement may not cover all statements made for negotiations. It would, we think, be fair to provide that statements made with a view to, or in the course of, negotiations for a settlement should always fall within this section. At present, in the absence of any express or strongly implied restriction as to confidence, an offer of compromise is admissible.

But it should be noted that the essence of compromise is that the party making it is willing to submit to a sacrifice, or to make a concession, though nothing at the time was expressly said respecting its confidential character. The offer might have been made for the sake of purchasing peace, and without any intention to admit liability as to the extent of the claim.

Old law wider.

9.79. It may also be noted that the old law in India was, to some extent, wider than the present section. In the observations of Mr. Justice Phear in the case of Mohabeer Singh v. Dhujioo Singh; the following statement will be found. "It is a rule which all Courts of Justice find it right to observe that nothing that passes between the parties to a suit in any attempt at arbitration or compromise, should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court; unless this were so, the only thing which could be prudently recommended to suitors would be never to listen for one moment to any proposal to settle the matter or to compromise it, after it had come into Civil Court'.

Question to be considered.

9.80. This proposition was enunciated in respect of a case not governed by the provisions of the Indian Evidence Act, 1872. The question now to be considered is not whether the above statement was a correct enunciation of the law, but whether that ought not to be the law.

Views expressed by Denning, L.J. (as he then was) said in an English case relating to matrimonial relief:

"The rule as to 'without prejudice' communications applies with special force to negotiations for reconciliation. It applies whenever the dispute has gone to such dimensions that litigation is imminent.

"In all cases where the entanglement has reached the point where the parties consult a probation officer, litigation is imminent. It is clear that there is a dispute which may end either in the Magistrates' court or the divorce court. The probation officer has no privilege of his own from disclosure...".

\(^1\text{In re River Steamer Co., (1871) L.R. 6 Ch. 822. 831. 833.}\)

\(^2\text{Mohabeer Singh v. Dhujioo Singh, (1873) 20 W. R. 172 (Cal).}\)

\(^3\text{Emphasis added.}\)

\(^4\text{McTaggart v. McTaggart, (1948) 2 All. E.R. 754.}\)
9.82. In a later English case, the principle stated in *McTaggart’s case* was applied to proceedings before a probation officer in connection with matrimonial relief. It was observed “It is essential, if a reconciliation is to be attempted, with the probation officer as intermediary, that statements made by either party, as soon as the probation officer is asked to act in that capacity, should be treated as privileged. Counsel for the wife suggested that if one applies that principle at such an early stage as in the present case, it tends to prejudice the working of another principle, viz., that a spouse is no longer in desertion if he or she has made a *bona fide* attempt to be taken back, and he argued that if such a *bona fide* attempt is made through a probation officer, it ought to be taken into account.

“There is some force in that argument, but one must bear in mind that, in matrimonial disputes, the State is also an interested party and is more interested in reconciliation than in divorce, and if the rule as to privilege tends to promote the prospects of reconciliation, I think it ought to be applied, although it may make it difficult for the spouse in some ways to prove a *bona fide* attempt to return home. That difficulty can always be got over by the deserting spouse writing a suitable and *bona fide* letter and sending it by registered post to the deserted one.”

9.83. The observations were made in the context of matrimonial relief; but there is, in our opinion, justification for adapting the same approach in other fields also.

9.84. There is, in our view, a fundamental aspect of social policy which should justify the exclusion of any admission made during negotiations for settlement. The general policy of the law is to favour and encourage the amicable settlement of disputes out of court. For that reason, it should not allow, in evidence, as admissions of liability, settlements or offers for settlement. Many such offers would never be made if they were to be treated as admissions of liability. The present narrow provision in section 23 is, as a matter of social policy, somewhat inadequate. One who makes an offer for settlement should at least have an assurance that the offer which he makes will not prejudice his case later, if a settlement is not reached. Without such a protective rule, it would often be difficult to take any effective steps toward an amicable compromise or adjustment.

Men should be permitted to buy their peace without prejudice to them, should the offer not succeed. It is most important that the door should not be shut against compromises. When a man offers to compromise a claim, he does not thereby necessarily admit it, but simply agrees to pay so much so as to be rid of the impending proceeding. There is, therefore, a justification for making a specific provision in regard to settlement or offers for settlement.

9.85. For the reasons stated above, we recommend that the following Explanation should be inserted as Explanation 2, below section 23:

“Explanation 2.—Where an admission is made for the purposes of or in the course of negotiation of a settlement of compromise of a disputed claim, the parties shall be deemed to have agreed together that evidence of that admission shall not be given.”

We may note that this does not affect the operation of Order 23, Rule 3, Code of Civil Procedure, 1908 (as recently amended) since the compromise in writing can be proved.

2*McTaggart’s case. supra.*
3*Existing Explanation may be re-numbered as Explanation 1.*
4*Act 106 of 1976.*
10.1. With section 24 begins a group of sections dealing with confessions, and we propose to devote this chapter mainly to the scheme of the sections concerning confessions.

10.2. There is no statutory definition of the expression "confession" in the Act. Nor is there a separate provision specially making confessions relevant, because relevancy, as such, is in fact dealt with, and is governed, by the general provision in section 17 (and the succeeding sections), whereunder "admissions" are relevant. In the scheme of the Act, confessions are treated as a species of admissions, so far as the basis of their relevance is concerned. The principal object of the sections dealing with the subject (sections 24-30) is to lay down certain special rules regulating the use of confessions. Of course, the above comment relates to relevance, and not to weight. Nor does it deal with the quantum of proof in criminal cases,—an aspect which may bring certain special considerations into play.

10.3. Any admission by an accused of an incriminating fact falls within the scope of sections 18 to 21, Evidence Act, and is, therefore, relevant.1 In Pakala Narayanaswami's case,2 the Privy Council observed that a confession is an admission, in terms, of the offence itself, or at any rate, substantially, of all the facts which constitute the offence. In this sense, a confession is more restricted than an admission. What we want to point out is that the relevancy of confessions having been provided for by sections 17-21, it was not necessary to provide for it again. But special rules of irrelevance had to be provided for. The circumstances under which a confession becomes irrelevant, are, therefore, elaborately dealt with in sections 24, 25 and 26. These are followed by sections 27 to 30, which impose some limitations on the operation of sections 24 to 26, or otherwise make certain provisions by way of clarification or other provisions appropriate for confessions.

10.4. The entire group is followed by section 31—a section dealing with admissions. We may also mention that confessions recorded by Magistrates must comply with the Code of Criminal Procedure.3

10.5. The result of this scheme is that a statement, in order that it may be admissible in evidence with reference to the group of sections now under discussion, must satisfy the following conditions, or possess the special features mentioned below:

(i) it must amount to an admission (sections 17-21).

(ii) if it amounts to a confession (an expression not defined), it must not be excluded by sections 24 to section 26. But this is subject to (iii) below.

(iii) certain restrictions or doubts as to the admissibility of confessions are removed by section 27 to 29.

1Gulam Hussain v. The King, 77 I.A. 65 (P.C.).
(iv) certain special rules are given in section 30, Evidence Act (confession of a co-accused), and section 164 of the Code of Criminal Procedure, 1973.

10.6. It is clear that every admission made by an accused person is not, in the view of the law, a confession; for, if that were so,—that is, if the expression "admission made by an accused person" were identical in meaning with "confession made by an accused person,"—then there would be no occasion for the legislature to change the form of expression, and, after using the word "admission" in sections 17 to 23, to use the word "confession" in sections 24 to 30. Further, it is impossible to hold that admissions mean only statements made by parties to civil proceedings and do not include statements made by parties accused in criminal proceedings, without restricting the language of sections 17 to 23 in a manner at variance with its natural meaning and import, and especially (at variance) with the illustrations (b), (c), (d) and (e) to section 21, all of which refer to statements by accused persons as being admissions.

10.7. Confessions (like all admissions) are an exception to the rule against hearsay. As a general proposition, the rules of evidence exclude most out-of-court statements—either oral or written—if they are offered to prove the truth of the matters asserted in them. However, there are several exceptions to the "hearsay" rule, one of the most important of which permits the prosecution to introduce, in a criminal trial, any relevant out-of-court statement made by the accused. In this sense, confessions constitute an exception to the rule against hearsay.

10.8. There is some controversy as to the theoretical basis in support of admitting such statements. Wigmore, in adopting the approach first put forth by Professor Morgan, grouped, in one exception to the hearsay rule, all statements made by an accused and those made by a party to a civil litigation. So far, he was logical. But he claimed that the major justification for the hearsay rule was to ensure that the side not offering the evidence has an opportunity to cross-examine the original declarant. And, (he added), whenever the declarant was the party against whom the evidence is being offered, the reason for invoking the hearsay rule was absent: If the defendant wishes to contradict the truth of his former assertion, he has only to take the stand. But, this argument could not provide a satisfactory historical explanation for the exception, because, until the 19th century, a party to a civil litigation was not competent to testify, and the opportunity for the defendant to refute his earlier statement was, thus, limited to the possibility of presenting the full story to the court through other witnesses. In criminal cases, again, the accused was not a competent witness until the law was altered by a specific statutory provision—in England (1898) and in India (1955).

1 & (Plowden J).
2 Morgan, "Admissions as an exception to the Hearsay Rule" (1921) 30 Yale L.J. 355.
3 Morgan, "Admissions" etc. (1921) 30 Yale L.J. 355.
4Wigmore, Evidence (3rd Ed. 1940), 1048.
5(a) The Criminal Evidence Act, 1898 (Eng.).
10.9. In one of the American cases, a fairly satisfactory explanation for admitting statements by an accused appears: "Basically, these statements, being relevant, material, and competent, are admissible. The problem is whether any specific rule excludes them, whether there is some idiosyncrasy which denies to them the general basic rule of admissibility otherwise applicable."

10.10. Two principles form the basis of the provisions relating to confessions in England. First, confessions, like other admissions, are received on the presumption that no person will voluntarily make a statement which is against his interest unless it be true.

10.11. But, secondly, the force of the confession depends upon its voluntary character. The object of the rules relating to the exclusion of confessions in England is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed.


"The reason is not *that the law* supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury."

10.13. The admission of such evidence would naturally lead the agents of the police, "while seeking to obtain a character for activity and zeal, to harass and oppress prisoners, in the hope of wringing from them a reluctant confession."

10.14. It should be also noted that the Code of Criminal Procedure specifically prohibits the police from offering threats, inducements or promises to induce confessions. Of course, a substantially similar result is achieved in practice by the Judges' Rules in England, though those rules have no statutory force.

10.15. It will help to a clear understanding of the relevant provisions of the Act if confessions are classified as—(a) those made to Magistrates (briefly, "Magisterial" confession); (b) those made to a person in authority; (c) those made to the police: (d) those made while in police custody; and (e) others. Classes (c) and (d) overlap, to some extent; but they are not identical. For example, a confession made while the accused is in police custody, to a person other than a police officer, falls only within class (d).

(a) Confessions before Magistrates are specifically dealt with in section 164 of the Code of Criminal Procedure, 1973. The effect of the corresponding section of the Code of 1898, as interpreted by the Privy Council in *Nazir Ahmed's case*, is that if a confession is sought to be admitted in evidence, it can be proved only if it is a valid record of the confession under that section.

---

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163.
(b) As to confessions made to a person in authority, section 24 must be especially complied with.

(c) As to confessions made to the police, section 25 is of special importance.

(d) As to confessions made while the maker is in the custody of the police, section 26 is of special importance.

(e) Other confessions, e.g., confessions made to a private person not in authority, have no special rules applicable to them.

10.16. A few more words about the scheme of the sections would be useful. Section 24 is a somewhat general provision, and is intended to ensure that only voluntary confessions are admitted in evidence. Sections 25 and 26 are special rules, relating respectively to a confession made to a police officer and a confession made in the custody of the police officer. The former is completely excluded. But, as regards the latter, a confession made in the immediate presence of the Magistrate is made provable under section 26, even though the accused is, at the time, in the custody of the police.

10.17. The position, therefore, is that confessions, other than confessions to the police, are admissible,—subject to their being excluded by the “appearance” of the vitiating circumstances mentioned in section 24.

10.18. Under section 27, when a fact is deposed to as discovered in consequence of information received from an accused person in the custody of a police officer, the information, in so far as it relates distinctly to the fact so discovered, may be proved, whether it amounts to a confession or not. The fact so discovered is taken as showing that so much of the confession as immediately relates to it is true. Under section 28, if a confession referred to in section 24 is made after the impression caused by the inducement, threat or promise had been fully removed, it is relevant. Section 29 makes it clear that a confession which is otherwise relevant, does not become irrelevant because of promise of secrecy, or because it was made in consequence of deception practised on the maker, or because it was made when he was drunk, or because it was made in answer to questions which he need not have answered or because he was not warned that he was not bound to make the confession. Section 30 empowers the Court “to take into consideration” the confession of a co-accused, in certain cases.


10.20. The scope and applicability of sections 24-27 were lucidly explained in State of U.P. v. Deoman Upadhyaya, by Shah J. (as he then was). He observed—

“Section 27 of the Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions, i.e., of statements made by a person stating or suggesting that he has committed a crime. By section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the Court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By section 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under section 24 and complete under section 25 applies

---

1For this word, see Nazir Ahmed. A.I.R. 1936 P. C. 253. 258 (Lord Roche)
"equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, ‘accused person’ in section 24 and the expression ‘a person accused of any offence’ have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in Narayanswami v. Emperor,1 by the Judicial Committee of the Privy Council, ‘Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation.’ The adjectival clause ‘accused of any offence’ is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate applicability of the ban. Section 26 of the Indian Evidence Act by its first paragraph provides ‘No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against a person accused of an offence’. By this section, a confession made by a person who is in custody is declared not provable unless it is made in the immediate presence of a Magistrate. Whereas section 25 prohibits proof of a confession made by a person to a police officer whether or not at the time of making the confession, he was in custody, section 26 prohibits proof of a confession by a person in custody made to any person unless the confession is made in the immediate presence of a Magistrate. Section 27 which is in the form of a proviso states ‘provided that, when any fact is deposited to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved’. The expression, ‘accused of any offence’ in section 27, as in section 25 is also descriptive of the person concerned, i.e. against a person who is accused of an offence. Section 27 renders provable certain statement made by him while he was in the custody of a police officer, section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. Even though section 27 is in the form of a proviso to section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by section 26 is against the proof of confessional statements.

“Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By section 27, even if a fact is deposited to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By section 26, a confession made in the presence of a Magistrate is made provable in its entirety.

“Section 162 of the Criminal Procedure Code also enacts a rule of evidence. This section in so far as it is material for purposes of this case, prohibits, but not so as to affect the admissibility of information to the extent permissible under section 27 of the Evidence Act, use of answers by any person to a police officer in the course of an investigation under Chapter 14 of

the Code, in any enquiry or trial in which such person is charged for any
offence, under investigation at the time when the statement was made

"On an analysis of sections 24 to 27 of the Indian Evidence Act, and section
162 of the Code of Criminal Procedure, the following material propositions
emerge:

(a) Whether a person is in custody or outside, a confession made by him
to a police officer or the making of which is procured by inducement,
threat or promise having reference to the charge against him and pro-
ceeding from a person in authority, is not provable against him in any
proceeding in which he is charged with the commission of an offence.

(b) A confession made by a person whilst he is in the custody of a police
officer to a person other than a police officer is not provable in a pro-
ceeding in which he is charged with the commission of an offence unless
it is made in the immediate presence of a Magistrate.

(c) That part of the information given by a person whilst in police custody
whether the information is confessional or otherwise, which distinctly
relates to the fact thereby discovered but no more, is provable in a pro-
ceeding in which he is charged with the commission of an offence.

(d) A statement whether it amounts to a confession or not made by a person
when he is not in custody, to another person, such latter person not
being a police officer, may be proved if it is otherwise relevant.

(e) A statement made by a person to a police officer in the course of an in-
vestigation of an offence under Chapter 14 of the Criminal Procedure
Code cannot, except to the extent permitted by section 27 of the Indian
Evidence Act, be used for any purpose at any enquiry or trial in respect
of any offence under investigation at the time when the statement was
made in which he is concerned as a person accused of an offence.

"A confession made by a person not in custody is, therefore, admissible
in evidence against him in a criminal proceeding unless it is procured in the
manner described in section 24, or is made to a police officer. A statement
made by a person, if it is not confessional, is provable in all proceed ings unless
it is made to a police officer in the course of an investigation, and the pro-
ceeding in which it is sought to be proved is one for the trial of that person
for the offence under investigation when he made that statement. Whereas in-
formation given by a person in custody is to the extent to which it distinctly
relates to a fact thereby discovered, made provable, by section 162 of the
Criminal Procedure Code, such information given by a person not in custody
to a police officer in the course of the investigation of an offence is not pro-
vable. This distinction may appear to be somewhat paradoxical. Sections 25
and 26 were enacted not because the law presumes the statements to be untrue
but, having regard to the tainted nature of the source of the evidence, the law
prohibited them from being received in evidence. It is manifest that the class
of persons who needed protection most were those in the custody of the police,
and persons not in the custody of police did not need the same degree of
protection. But by the combined operation of section 27 of the Evidence Act
and section 162 of the Code of Criminal Procedure, the admissibility in evi-
dence against a person in a criminal proceeding of a statement made to a
police officer leading to the discovery of a fact depends for its determination
on the question whether he was in custody at the time when he made it, or
otherwise it is not.

There is nothing in the Evidence Act which precludes proof of informa-
tion given by a person not in custody which relates to the facts thereby
discovered; it is by virtue of the ban imposed by section 162 of the Criminal Procedure Code, that a statement made to a police officer in the course of the investigation of an offence under Chapter 14 by a person not in police custody at the time it was made, even if it leads to the discovery of a fact, is not provable against him at the trial for that offence. But the distinction which, it may be remembered, does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody; submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the ‘custody’ of the police officer within the meaning of section 27 of the Indian Evidence Act. Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer”.

10.21. The principal sections of the Act relating to confessions can be traced to the Code of Criminal Procedure of 1861. That Code itself was largely based on an earlier Regulation of 1817; but we shall concentrate on the Code of 1861. Section 146 of the Code of 1861, repeating an earlier provision, provided as follows:—

“146. No police officer or other person shall offer inducement to an accused person by threat or promise or otherwise to make any disclosure or confession”.

Section 147 of the Code of 1861, markedly reversing the law, as it stood in the earlier Regulation1, provided as follows:—

“147. No police officer shall record any statement, or any admission or confession of guilt, which may be made before him by a person accused of any offence”.

The section was subject to a proviso, allowing a police officer to reduce into writing any statement or admission or confession “for his own information or guidance”.

10.22. But the most important change consisted in the introduction of a new provision, contained in section 148 of the Code of 1861, which, in the most imperative terms, laid down as follows:

“148. No confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence.”

Section 149 of the Code of 1861, going even further in the same direction, laid down—

“149. No confession or admission of guilt made by any person whilst he is in the custody of a police officer, unless it be in the immediate presence of a Magistrate, shall be used as evidence against such person.”


3Section 19(1), Regulation 20 of 1817.
Then followed a distinct proposition of law, contained in a separate section 150, which was as follows:—

"150. When any fact is ascribed to by a police officer as discovered by him in consequence of information received from a person accused of an offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."

10.23. Sections 146 and 147 of the Code of 1861 were purely administrative prohibitions to police officers against employing any inducement, threat or promise for obtaining any disclosure or confession, and against reducing to writing any statements or confessions made by accused persons. The next three sections 148, 149 and 150, however, contained important rules, which perhaps did not properly belong to the province of Criminal Procedure, but to that of Evidence. Sections 148 and 149 must not be understood to contain identical propositions of law. Section 148 laid down a general proposition, against the admissibility of confessions made to police officers. Section 149 carried the principle further, by rendering similar confessions inadmissible, even though not made to a police officer, but made by a person "whilst he is in the custody of a police officer". Then came a general proposition, which extended over an area covered by both the preceding sections, and, under certain conditions, rendered such confessions admissible as would otherwise be inadmissible under these two sections. This general proposition appeared in the form of a separate and independent section 150, laying down that a police officer might "depose to" any confession made by an accused person so far as such confession led to discovery of some fact. The words of the section were general, and could be understood to govern confessions contemplated by both the preceding two sections. For example, suppose the accused said to the policeman: "I concealed the articles which I got in the dacoity A under my stack of straw, and those which got in dacoity B under the floor of my cow-house". As long as the information related distinctly to the fact discovered in consequence of it, it might be received in evidence under section 150 of the Criminal Procedure Code of 1861, even though the confession was made to the police officer and by a person in his custody. But an essential feature of the section was, that the confession must be proved by the deposition of the police officer himself, in order to render it admissible in evidence. In the case of Bishoo Manjee, Jackson J. observed: "The police officer to whom the statement was made was not examined at all, and, therefore, it seems that the admission, so far as it was an admission, is not taken out of the general terms of section 148, which exclude such admissions generally." But, in the same case, another important rule was also laid down, which has a bearing upon the interpretation of section 150, as it originally stood in the Code of 1861. It was held that an admission obtained by a police officer from a prisoner by persuasion and promises of immunity, in contravention of section 146 of the 1861 Code, was not admissible in evidence, even if it led to the discovery of facts. The view had already been previously adopted by a Division Bench of the Calcutta High Court in the case of Queen v. Dharam Dut Ojha. These two cases, therefore, are distinct authorities for the proposition that, notwithstanding the general terms of section 150, it was never taken to qualify the prohibition contained in section 146 (concerned with involuntary confessions).

10.24. Such was the the law before 1869, when Act 8 of that year was passed. The Act amended the Code of 1861, by revising section 150. It substituted,
in its place a section in which the change of language is noticeable. The revised section 150 run as follows:

"150. Provided that, when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence."

10.25. For convenience of reference, sections 148, 149 and 150 of Act 25 of 1861, section 150 as amended by and Act 8 of 1869, and sections 25, 26 and 27 of Act 1 of 1872, are quoted below:

| S.148. No confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence. |
| S.149. No confession or admission of guilt made by any person whilst he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate, such be used as evidence against such person. |
| S. 150. When any fact is deposed to by a police officer discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence. |

| S.25. No confession made to a police officer shall be used as evidence against a person accused of any offence. |
| Sec. 26. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. |
| S. 27. Provided that whereby any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered may be proved. |

This much of historical discussion will be enough for the present purpose.

10.26. We now proceed to a brief discussion of the English law.

The position in England may be very briefly stated in the form of these propositions:

"1. A confession of guilt in a criminal case is only admissible if it was not made in consequence of an unlawful threat, or inducement of a temporal nature made or held out by a person in authority.

1Note the word “or”.
2. Confessions obtained in contravention of the judges' rules or by means of other improper questions, may be excluded by the judge in the exercise of his discretion, although the conditions mentioned in clause I were fulfilled."

10.27. The law of confessions in England has thus two important aspects—(1) Involuntary confessions are excluded in England. (2) Confessions made by the accused in police questioning, where the questioning was in breach of the Judges' Rules, are, at the discretion of the court, excluded.

The English law as to first aspect was laid down in Ibrahim v. The King, in the following terms. This was a judgment of the Privy Council, but has been universally cited as authoritative:—

"It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by person in authority."

10.28. Several theories have prevailed in England as to the basis for excluding involuntary confessions:

(i) The motion that the rule relating to the inadmissibility of such confessions is based on considerations of their possible or probable untruth, was supported by Wigmore. According to him, the question to be asked was, "Was the inducement such that there was any fair risk of a false confession?"

(ii) The other theory rests on a breach of faith or confidence: that is, that a false promise of favour or reward had been made.

(iii) The third theory is concerned with illegality in the method of obtaining the confession.

(iv) The fourth theory is based on the privilege against self-incrimination.

Historical roots of the two doctrines are separate, but, there is a view e.g. dictum of White J. in Bram v. U.S.—that the privilege against self-incrimination "was but a crystallisation of the doctrine as to confessions'.

10.29. In R. v. Baldry, decided in the middle of the nineteenth century, the court discussed at some length the policy of the confession rule, and said:

"The ground for not receiving such evidence is that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false or that the law considers such statements cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to lead such evidence to the jury."

This statement has been cited with approval in subsequent decisions, notably by Lord Sumner in Ibrahim v. R. It rejects the view that testimonial untrustworthiness is at the root of the confession rule.

---

2Emphasis added.
10.30. The actual English cases in which the courts have excluded statements made by persons in custody, show that the question ‘Is the confession likely to be true?’ is not decisive. The approach seems rather to be one of defining proper police practices, and is also affected by considerations which suggest the strong influence of the privilege against self-incrimination, although the language used is that of the confession rule. This is brought out very clearly in a decision of the High Court of Australia, McDermott v. The King. This was an application for leave to appeal from a New South Wales conviction. The police, having decided to charge the prisoner with murder, took him into custody, administered a caution, and then questioned him for an hour, after which he confessed. The prisoner was then formally charged. Counsel for the prisoner argued that the common law doctrine as to the exclusion of confessions was not founded upon nor concerned with the likelihood of falsity or unreliability of the confession. The doctrine was founded upon broad policy. His submission was that the confession should be excluded, as it had been procured by cross-examination of a prisoner in custody by the police in violation of the Judges’ Rules. A further point that was taken was the argument that the custody was unlawful, as it was the duty of the police, having decided to charge the prisoner before the interrogation, to take him before a magistrate. It was argued that a confession obtained from person in illegal custody was inadmissible.

10.31. The High Court of Australia, on the facts, held the confession to be admissible, and held that the confession was voluntary. It was observed that in any even the Judges’ Rules did not bind Australian Courts. But Dixon J’s observations are of interest in regard to the principle to be applied—

“It is apparent that rule of practice has arisen, deriving almost certainly from the strong feeling for the wisdom and justice of the traditional English principles expressed in the precept nemo tenetur se ipsum accusare. ……..

10.32. The English cases on the subject of what is an illegal inducement to confess, are very numerous, and far from consistent with each other. But there can be little doubt that the rule which excludes confessions unlawfully obtained, is regarded as a very salutary one.

10.33. It must be taken to be settled by Reg. v. Thompson, that, in order that evidence of a confession may be admissible, it must be affirmatively proved that such confession was free and voluntary, that is, was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed; but it is also clear that in the absence of inducement, the answers of a person charged to the questions of a police constable, are admissible, subject to the discretion of the Court to exclude answers obtained without compliance with the Judges’ Rules. All questions relating to the admissibility of extra-judicial confessorial statements are of course, to be decided at the trial by the Judge, and not by the jury; and such questions may now be appealed, or reserved for the decision of the Court of Criminal Appeal.

10.34. It is well recognised in England that admissions and confessions are exceptions to the rule against hearsay. If a statement or confession is made by the accused (the statement may be relevant as an admission), evidence of such statement or confession may be given at the trial, if the prosecution is able to prove affirmatively that it was made freely and voluntarily.
The Courts draw a distinction between a moral exhortation and temporal fear. Thus, it has been held,¹ that where an employer advised his suspected employee to tell the truth “so that if you committed a fault you may not add to it by stating what is untrue”, the advice was of a moral character, and not sufficient to render a subsequent confession inadmissible.

10.35. In another English case of Rex v. Wild,² a boy of 13 years was charged with murder, and was told: “Now, kneel you down, I am going to ask you a very serious question and I hope that you will tell me the truth in the presence of the Almighty”. In consequence, the boy made certain statements. These were held not to render it inadmissible.

In the case of Richards³ a girl had been accused of poisoning, and was told by her mistress: “If you don’t tell me all about it, I will send for a constable”. The confession made subsequently was rejected, since the threat would have made obvious to the girl’s mind, the desirability of making a confession.

10.36. The accused has long been entitled⁴ to demand that an involuntary confession should be excluded, and the Introduction to the Judges’ Rules takes care to state that: “The principle (that voluntariness is a fundamental condition of admissibility).................is overriding and applicable in all cases. Within that principle the following rules are put forward as a guide to police officers conducting investigations.”

10.37. Statements by accused persons have been considered involuntary, implicit threats, not only when resulting from an explicit threat, such as - “you had better tell the truth”.

But there seems to be little case law defining the precise scope of “involuntaryness”, - especially that resulting from tacit intimidation. Judges are known to take a dim view of coercion in any form, and the prosecution consequently does not attempt to make direct use of arguably involuntary statements⁵. If there has been no intimidation or promise, but the accused has been tricked into speaking, the statement will be considered “voluntary”;⁶ but case-law indicates that the judge may exclude it as matter of discretion, if the tactics seem, in some sense, “unfair”?

10.38. We shall now deal with the Judges’ Rules. Police investigating a crime, when they wish to question someone held on a charge, must comply with the Judges’ Rules,⁷ which define the right to question at the various stages of investigation.

There is no direct judicial control over the initiation or supervision of police activities or conduct in England. But judicial control is exercised indirectly, through the rules which the judges apply to determine the admissibility of evidence at the trial, and some additional protection is clearly afforded by the law governing the civil wrongs of unlawful imprisonment and malicious prosecution.

³Rex v. Richards, (1832) 5 C & P 318.
⁴Ibrahim v. Rex, (1914) A.C. 599.
⁶(a) Rex v. Firth, (1913) 6 Crim. App. R. 152; (dictum).
  (b) The King v. Robinson, (1917) 2 K. B. 108.
⁷See Reg. v. Hinted, (1898) 19 Cox Crim. Cas. 16 (South-Eastern Cir.).
⁸For Judges’ Rules, see Appendix 4 to this note.
10.39. The fundamental principle underlying the rules applied by the courts is that answers and statements made during the course of police inquiries are admissible only if they have been made voluntarily—"in the sense that they have not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. To assist themselves and provide guidance to the police in applying this principle, the judges have devised their own set of Rules, which are officially known as "the Judges' Rules".

10.40. Evidence obtained in violation of the Judges' Rules will not always be rejected. It was made clear from the beginning that "these rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinate as tending to the fair administration of justice."

10.41. During the late nineteenth century, the Courts had shown great distrust of the police, and were apparently inclined to reject automatically any confession made in police custody. But, in 1909, the Court of Criminal Appeal decisively rejected a strict exclusionary rule, and since that time, despite the adoption of the Judges' Rules, the courts have adhered to the principle of excluding confessions only on a discretionary basis.

Where the basis of exclusion is discretionary, it is natural that there will be a diversity—apparent or real—in approach. In some cases, confessions have been admitted even though the circumstances under which they were obtained prompted strong disapproval. On the other hand, in some cases confessions have been excluded, because the caution was omitted. But courts have often admitted statements even when the caution was lacking, either as a matter of discretion, or on the ground that the rules were not violated, —when, for example, a suspect was "invited" to the police station and therefore not technically "in custody." In one study the proposition was stated that "it is no longer the practice to exclude evidence obtained by questioning in custody." Nevertheless, now that the rules have been clarified, one may expect that the judges will become less willing to overlook violations of the rules.

10.42. In the United States, the rules under which a confession is to be excluded are derived not from one, but from several sources. At one time or other, each of these has assumed prominence.

(a) In the first place, there is the constitutional privilege against self-incrimination. Historically, this has some importance, it being a view widely held that the rule against "coerced confessions" is fundamentally linked up with the privilege against self-incrimination. This is of importance in relation to cases coming from Federal courts.

---

1. The King v. Voisin, (1918) 1 K. B. 531, 539.
8. Williams, Questioning by the police: Some Practical Considerations (1960), Crim. L. Rev. (Eng.) 325, 331.
10. Fifth Amendment.
(b) In the second place, there is the due process clause of the Constitution. This has proved to be the most fertile source of controversies in the last decade or so, in cases coming from State Courts.

(c) In the third place, there is the constitutional right to counsel, as judicially interpreted.

(d) In the fourth place, there is the guarantee against unreasonable search and seizure.

(e) In the fifth place, there is the equality clause of the Constitution, which is of some relevance where counsel was not provided by the State.

(f) Sixthly, there are the Federal Rules of Criminal Procedure imposing the requisite safeguards.

In many cases, more than one of these constitutional and other provisions co-operate, and their combined effect may have to be considered.

10.43. Thus, a number of constitutional prescriptive directives to protect the accused, become relevant. For example, the rule excluding from evidence the fruit of unlawful searches or seizures is implied from the fourth and fifth amendments. The protections furnished by the due process clause of the fourteenth amendment against the use of "coerced" confessions and against the use of evidence obtained through brutality which offends a sense of justice, are made available by the fifth amendment to the accused on trial in a federal court.

10.44. In addition to these constitutional provisions, there is, of course, the general rule that a confession must be excluded from evidence, if it is not voluntary. It is a cardinal principle of American criminal justice that the accused cannot be forced to aid the Government in making the case against him. The guarantees in the Bill of rights emphasise this principle in the constitutional sphere, but the principle would be valid even apart from the constitutional provisions.

10.45. The case law in the U.S.A. as to confessions is so prolific — particularly, recent cases—that even a short review of the decisions of the Supreme Court of the United States would occupy pages. And it must be remembered that the Supreme Court is not a court of general appellate jurisdiction.

10.46. Decisions of the Supreme Court of the U.S.A. in regard to confessions, fall under two broad heads. One line of cases arises from the supervision exercised by the Court over federal officers and inferior federal courts. The second line of cases concerns State Courts. The distinction was important for sometime, though its practical importance has now diminished because of the decisions on the Due Process Clause and its application to the States.

---

14th Amendment (cited, infra), read with 5th Amendment.
5See Malloy v. Hogan, and later cases.
6Sixth Amendment.
7Fourth Amendment.
10(a) Rochin v. California. 1952, 342 U.S. 165;
12Cf. legislative recognition of this principle in a federal statute passed recently—18 U.S. Code section 3501 (a) and (b). (See, infra).
Cases from Federal Courts.

10.46A. So far as cases coming from the Federal Courts are concerned, a confession might be rendered inadmissible because of violation of the Federal Rules of Criminal Procedure one of which requires the arresting officer to take such suspects to the magistrate without unnecessary delay. Confessions secured by Federal officers during the periods of detention were held to be inadmissible in Federal criminal trials, in the case of Mc Nabb v. U.S. This was followed in the later case of Mallory v. U.S. For a long time, the "Mc Nabb-Mallory" rule was a favourite topic of discussion.

Cases from State Courts.

10.47. As to cases from State Courts, the Supreme Court began to deal with the problem of coerced confessions from the point of view of the Due Process Clause (Fourteenth Amendment), and the first important case in this context was of Brown v. Mississippi, where the confessions had been secured through physical torture and beating. In Ashcraft v. Tennessee, the confessions were obtained through psychological coercion, and the same principle was applied. In Brown v. Mississippi, the Supreme Court quashed the conviction of three negroes by a Mississippi Court. The confession which had been admitted by the trial court had been obtained by physical torture. Hughes C.J. stated that a trial was a mere pretence when the State authorities secured a conviction depending entirely on confessions obtained by violence. The Supreme Court has also quashed convictions in cases where confessions had been obtained by other techniques inspiring fear, such as the threat of mob violence.

The invocation of the due process clause in such cases has been explained on the footing that the admission of confessions so obtained would violate the fundamental fairness essential to the very concept of justice. Confessions obtained in this manner carry a very real risk of untrustworthiness, but the Supreme Court does not, in such cases, inquire into the effect that the violence or threat had upon the particular prisoner. Demonstration of the means used to extract the confession suffices to exclude it.

10.48. In 1964, the Fifth Amendment was held to apply to the States by virtue of the Fourteenth Amendment. In the famous case of Gideon v. Wainwright, the Sixth Amendments' guarantee of the right to counsel was also held to be applicable to the States, under the Fourteenth Amendment. After these developments, the scope of interference is expanded.

Thus, the second line of decisions rests upon the constitutional control of the Supreme Court over State tribunals, — in cases in which it is argued that the admission of a confession violates the due process clause of the Fourteenth Amendment to the United States Constitution, in relation to cases from State Courts.

1Rule 5(a), Federal Rules of Criminal Procedure.
6Brown v. Mississippi (1936) 297 U.S. 278.
7White v. Texas (1940) 310 U.S. 530.
8Liszeba v. California (1941) 314 U.S. 219, 236.
1314th Amendment — ‘...nor shall any State deprive any person of life, liberty, or property without due process of law.’
10.49. There have been a number of important developments in recent years in the U.S.A., bearing on the admissibility of a pre-trial confession in a criminal case. Two decisions Escobedo and Miranda—were pronounced during the sixties. The case of Miranda required, as an absolute federal constitutional pre-requisite of the admissibility, in a criminal case, of a confession or other incriminating statement made by an accused in custody to the police, that the police must inform him, prior to interrogation, (i) that he has a right to remain silent. (ii) that any statement which he makes may be used as evidence against him, and (iii) that he has a right to engage counsel. There were four dissenting judgments. It was one of the first rulings of the Warren Court to be slightly modified later. But a substantial part of the propositions laid down still holds good. We shall discuss these cases in some detail.

10.50. In the case of Escobedo v. Illinois, the accused was taken into custody by the Chicago police, and interrogated about the murder of his brother-in-law. Permission to consult his attorney, though requested, was refused. Subsequently, the accused confessed; and this confession was admitted at the trial, where he was convicted of murder. On appeal to the Supreme Court, the conviction was reversed on the ground that the refusal to allow him to consult his attorney had denied him his right to counsel under the Sixth and Fourteenth Amendments. The confession was, therefore, inadmissible. Speaking for the majority of the Court, Goldberg, J. observed:

"Where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment' and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

10.51. Due process of law has become, through judicial interpretation, "a broad umbrella" which covers most of the specific guarantees in First to Ninth Amendments, including the protection against self-incrimination, (Fifth Amendment), guarantee against unreasonable searches and seizures, (Fourth Amendment) and representation by a lawyer when accused of a crime (Sixth Amendment).

In Miranda's case, the Supreme Court brought together several constitutional guarantees. The facts were as follows:

On March 2, 1963, an eighteen-year-old girl employed at the Paramount Theatre in Phoenix, Arizona, was walking to a bus after leaving her job. She was accosted by a man who shoved her into his car, tied her hands and feet, drove to the edge of the town, and raped her. He then drove her back to a street near her home, where he let her out of the car. After hearing the girl's story and patching together pieces of evidence, the police asked Ernesto Miranda if he would consent to answering questions about the case. He agreed to do so voluntarily.

---

1Escobedo v. Illinois. (1964) 12 Lawyers' Ed. 2nd 977 (see infra).
2Miranda v. Arizona (1966) 16 Lawyers' Ed. 2nd 694 (see infra).
Miranda was a twenty-three-years-old eighth grade drop-out, with a police record, including several previous arrests as well as convictions for assault and automobile theft. He consented to appear in a police line up (identification), and, although the girl could not positively identify him, in a subsequent interrogation the police told Miranda that she had named him as her assailant. Miranda then confessed and, when confronted with the girl, acknowledged that she had been his victim. In a written statement, Miranda said that the confession had been made voluntarily and with full knowledge of his legal rights. At his trial, both the oral and the written confessions were admitted into evidence by the judge, over the objections of Miranda’s lawyer. Miranda was convicted and sentenced to serve from twenty to thirty years in prison. On appeal, the Supreme Court of Arizona held that Miranda’s constitutional rights had not been violated.

10.52. A majority of the Supreme Court of the United States, however, disagreed. In summarizing the decision of the Supreme Court, Warren C. J. declared that the government may not use statements obtained from “custodial interrogation” of a defendant unless it can show that his right against self-incrimination had been carefully secured by effective “procedural safeguards”.

The two key phrases, “custodial interrogation” and “procedural safeguards”, were then defined. The former, (“custodial interrogation”) meant “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way.” The latter (“procedural safeguards”), as a minimum include: a warning prior to any questioning (i) that a person has a right to remain silent, (ii) that any statement made by a suspect might be used against him, and (iii) that he has a right to the presence of an attorney, appointed or retained.

These rights may be waived; but the waiver, must be made “voluntarily, knowingly and intelligently.”

10.53. For the purposes of satisfying the above-mentioned requirement that the accused must be in custody before there is a duty to warn him, it does not matter whether he is in custody for the offence under investigation or for an unrelated offence. This was laid down in subsequent case.

10.54. A later case, Harris, modified the ruling in Miranda to a very limited extent. Harris had been indicated in New York for selling heroin to an under-cover police officer on two different occasions. Testifying in his trial, Harris said that he had only made one transaction and that he had sold baking soda, not heroin. The prosecuting attorney for the State, in seeking to impeach the credibility of Harris, read a statement that Harris had made to the police after his arrest, which was at odds with his testimony in court. Under police interrogation, he had admitted to both sales, maintaining that: (1) he was acting as a middle man for the police; (2) he had received money and heroin for the service performed; (3) he had not claimed that he had sold only baking soda. In permitting the prosecutor to read the statement, the trial judge informed the jury that the information contained therein could not be used as evidence of guilt but might be used to impeach Harris’s credibility.

10.55. After being adjudged guilty, Harris claimed that the use of the statement violated his rights as outlined in Miranda v. Arizona, and, for a majority of five, Chief Justice Burger wrote an opinion upholding the use of the statement for purposes of impeachment.

2Harris, (1971) 401 U. S. 222.
The case of Miranda was distinguished. It prohibited the use of an illegally obtained confession as evidence of guilt, but permitted the use of such statements to impeach a defendant's credibility so long as the jury was properly instructed.

10.56. It has also been held,\(^1\) in the U.S.A. that the admission of a pre-trial confession may depend on whether or not it was voluntary. In determining whether the confession made by a person under trial before a State Court is voluntary, the Supreme Court would consider “the totality of circumstances” from an independent examination of the whole record.\(^2\)

Thus, in Bouldon's case,\(^3\) a Habeas corpus proceeding had been taken to attack the conviction for murder. The Supreme Court pointed out that two confessions were, in fact, obtained,—although only the second was actually produced in evidence, and that the question was whether the second confession was properly admitted. The Court said that it would consider the voluntariness of the first confession also, since the second confession must have been the end-product of the earlier one, inasmuch as the accused may have been acutely aware that he had earlier made an admission against his interests, and was, therefore, repeating his ostensibly “unreasonable words of confession.”

10.57. And, in Boyking v. Alabama,\(^4\) the Court noted that the admissibility of confession in evidence at a criminal trial must be based on are liable determination on the issue of voluntariness which satisfies the defendant's constitutional rights.

10.58. A defendant's constitutional rights are violated if his conviction, in a federal or state court, is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. A number of cases\(^5\) have held or recognized, either expressly or by necessary implication that the voluntariness of a defendant's pre-trial confession was the determinative factor in its admissibility in evidence against that defendant in a criminal prosecution.

10.59. Thus, for example, in Sims v. Georgia,\(^6\) the Supreme Court said that a confession produced by violence or threats of violence is involuntary, and cannot be constitutionally used against the person making it.

10.60. Attention may also be drawn to a recent federal statute,\(^7\) which provides\(^8\) that in any federal criminal prosecution, a confession is admissible in evidence if voluntarily given; that it is for the trial judge to determine any issue as to the voluntariness of the confession, and that in so determining, he must take into consideration all the surrounding circumstances, including the time

---

\(^7\)Sims v. Georgia, (1967) 385 U. S. 538, 17 L. Ed. 2d 593;
\(^8\)Olewis v. Texas, (1967) 386 U.S. 707, 18 L. Ed. 2d 527;
\(^12\)Greenwald v. Wisconsin, (1968) 390 U. S. 519, 20 L. Ed 2d 77;
\(^15\)18 U. S. Code, Sections 3501 (a) and (b).
\(^16\)See 22 L. Ed. 2d 872, 879, for details.
elapsing between the arrest and the arraignment of the accused, if the confession was made after arrest and before arraignment, whether the accused knew the nature of the offence with which he was charged or of which he was suspected at the time of making the confession, whether he was advised or knew that he was not required to make any statement and that any such statement could be used against him, whether he had been advised prior to questioning of his right to the assistance of counsel, and whether he was without the assistance of counsel when questioned and when giving such confession. It is further provided that the presence or absence of any of these factors need not be conclusive on the issue of voluntariness of the confession.

With these general observations, we now proceed to consider the sections in our Act relating to confessions.

APPENDIX 1

Section 162, Cr. P. C., 1973

162. (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into written as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872, and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, or to affect the provisions of section 27 of that Act.

Explanation.—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

APPENDIX 2

Section 163, Cr. P. C., 1973

163. (1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Indian Evidence Act, 1872.

(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will:

Provided that nothing in this sub-section shall affect, the provisions of sub-section (4) of section 164.

APPENDIX 3

Section 164, Code of Criminal Procedure, 1973

164. (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.
(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession, and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.
Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

APPENDIX 4

Judges' Rules (England)

In 1964, at the sitting of the court, the revised edition of the Judges' Rules, coming into operation on January 27, 1964, dealing with the admissibility in evidence at the trial of any person of answers and statements made by him to police officers, were announced. Lord Parker C. J.—The origin of the Judges' Rules is probably to be found in a letter dated October 26, 1906, which the then Lord Chief Justice, Lord Alverstone, wrote to the Chief Constable of Birmingham in answer to a request for advice in consequence of the fact that on the same circuit one judge had censured a member of his force for having cautioned a prisoner whilst another judge had censured a constable for having omitted to do so. The first four of the present rules were formulated and approved by the judges of the King's Bench Division in 1912, the remaining five in 1918. They have been much criticised, inter alia, for alleged lack of clarity and of efficacy for the protection of persons who are questioned by police officers; on the other hand it has been maintained that their application unduly hampers the detection and punishment of crime. A committee of judges has devoted considerable time and attention to producing, after consideration of representative views, a new set of rules which has been approved by a meeting of all the Queen's Bench Judges.

The judges control the conduct of trials and the admission of evidence against persons on trial before them they do not control or in any way initiate or supervise police activities or conduct. As stated in paragraph (e) of the introduction to the new rules, it is the law, that answers and statements made are only admissible in evidence if they have been voluntary in the sense that they have not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. The rules, do not purport, any more than the old rules, to envisage or deal with the many varieties of conduct which might render answers and statements involuntary and therefore inadmissible. The rules merely deal with particular aspects of the matter. Other matters such as affording reasonably comfortable conditions, adequate breaks for rest and refreshment, special procedures in the case of persons unfamiliar with the English language or of immature age or feeble understanding, are proper subjects for administrative directions to the police.

JUDGES' RULES

These rules do not affect the principles:

(a) That citizens have a duty to help a police officer to discover and apprehend offenders;

(b) That police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;

(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hinderance is caused to the processes of investigation or the administration of justice by his doing so;

(d) That when a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or inform him that he may be prosecuted for the offence;

(e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

1Judges' Rules as revised in England; (1964) 1 Weekly Law Reports, 152 under Practice Note.

14—131 LAD/ND/77
The principle set out in paragraph (e) above is overriding and applicable in all cases. Within that principle the following rules are put forward as a guide to police officers conducting investigations. Non-conformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

RULES

I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned, a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up any ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refused by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner:

(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he should like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:

"I, ........................., wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

(c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

"I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say be given in evidence."

(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters; he shall not prompt him.
(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following certificate at the end of the statement:

"I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."

(f) If the person who has made a statement refuses to read it or to write the above mentioned certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

V. If at any time after a person has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by rule III(a).

VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these rules.

[His Lordship added:] It will be seen that these rules, which apply in England and Wales, and which will come into force on Monday, January 27, 1964, are designed to secure that only answers and statements which are voluntary are admitted in evidence against their makers and to provide guidance to police officers in the performance of their duties. The admissibility of answers and statements obtained before next Monday will continue to be governed by the old rules.

Copies of these rules are being sent to all judges, recorders, chairman and deputy chairmen of quarter sessions and the clerks of all criminal courts. It is understood that Her Majesty's Secretary of State for Home Affairs is sending copies together with administrative directions, to the police. These rules and the administrative directions will be on sale at the Stationery Office from 11.45 A.M. today."
CHAPTER 11

CONFESSIONS AND ADMISSIONS — SECTIONS 24 TO 31

11.1. In this Chapter, we shall consider in detail the provisions as to confessions, and also section 31.

Under section 24, a confession made by an accused person is irrelevant in a criminal proceeding, if certain conditions are satisfied. The conditions are as follows:

(1) The confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person;

(2) The inducement, threat or promise proceeds from a person in authority; and

(3) The court is of the opinion that the inducement, threat or promise is sufficient to give the accused person grounds which would appear to him reasonable for supposing that he would gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

11.2. The first condition deals with subject matter of the inducement, threat or promise. It must have reference to the charge.

The crucial word in this ingredient is the expression “appears”. The appropriate meaning of the word “appears” is “seems”. It imports a lesser degree of probability than proof. Even so, the laxity of proof permitted does not warrant a court’s opinion based on pure surmise. A prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. This deviation from the normal standard of proof has been designedly accepted by the Legislature with a view to excluding forced or induced confessions which sometimes are extorted and put in when there is a lack of direct evidence.

Secondly, the threat, inducement or promise must proceed from a person in authority. It is a question of fact in each case whether the person concerned is a person of authority or not.

Thirdly, the mere existence of the threat, inducement or promise is not enough, but, in the opinion of the court, the threat, inducement or promise should be sufficient to cause a reasonable belief in the mind of the accused that by confessing he would get an advantage or avoid any evil of a temporal nature in reference to the proceedings against him: “while the opinion is that of the Court, the criterion is the reasonable belief of the accused.”

11.3. The terms in which section 24 is couched, seem to indicate that in the case of an ordinary confession, there is no initial burden on the prosecution to make out the negative, viz., that the confession sought to be proved or admitted is no vitiated by the circumstances stated in the section. However, where the suspicion of the Court is aroused, the standard of proof required to render it irrelevant is indicated by the word “appears” and not by the usual word “proved”. Subject to this, the burden of proving that the confession is involuntary is on the accused, though the burden is light.


202
11.4. The position as to burden of proof is different in England. The question of voluntariness of a confession is for the Judge; and it is now settled that it lies upon the prosecution to establish, and not upon the accused to negative this element, it being the duty of the prosecution to satisfy itself thereon before putting the statement in evidence.

11.5. One of the conditions of the applicability of section 24 is that the inducement, threat or promise should—to put the matter in non-legal words—persuade the accused that he would gain an advantage or avoid any evil in “reference to the proceeding against him.” In England, the restriction that the inducement should have reference to the proceedings, does not apply. If pressure is put upon an accused person which affects his freedom of will, such pressure is a ground for making the confession inadmissible even where the threat is of harm otherwise than in relation to the proceeding.

In England, it is not necessary that the threat or inducement must threaten harm or promise benefit with reference to the particular proceedings or contemplated proceedings. Of course, a promise suggesting that the outcome of a confession will procure some beneficial result in connection with the prosecution will certainly render the confession inadmissible. But it is not, as a matter of law, necessary that the improper inducement or threat must relate to that prosecution. This was laid down by the House of Lords, holding that on a prosecution under the Purchase Tax Act, a confession ought to have been excluded as having been made on account of a threat to prosecute for failure to answer questions at an interrogation which the customs officers to whom the confession was made were not authorised to conduct.

Even apart from this case, the Judges’ Rules also lay down that “it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it should have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression.”

11.6. The above brief discussion does not indicate any need for amending the section.

No change needed.

SECTION 25

11.7. Section 25 bars the proof of a confession made to a police officer as against a person accused of any offence.

This section creates an absolute bar against the admission of such confessions. We are separately making certain recommendations to exclude, from this bar, confessions made after informing the accused of his right to counsel and after complying with certain other safeguards. No textual amendment of section 25 is involved.


See section 26-A (proposed, infra).
11.8. It would be useful to deal with the history of the section having regard to its importance. The following extract from the First Report of the Indian Law Commission is of interest, in this connection:

"The police in the Province of Bengal are armed with very extensive powers. They are prohibited from inquiring into cases of a petty nature, but complaints in cases of more serious offences are usually laid before the police darogah, who is authorised to examine the complainant, to issue process of arrests; to summon witnesses, to examine the accused and to forward the case to the Magistrate or submit a report of his proceedings, according as the evidence may, in his judgment, warrant the one or the other course. The evidence taken by the Parliamentary Committees on Indian Affairs, during the Sessions of 1852 and 1853 and other papers, which have been brought to our notice, abundantly show that the powers of the Police are often abused for purposes of extortion and oppression; and we have considered whether the powers now exercised by the police might not be greatly abridged.

"We have arrived at the conclusion that, considering the extensive jurisdiction of the Magistrate, the facilities which exist for the escape of the parties concerned in serious crimes, and the necessity for the immediate adoption in many cases of the most prompt and energetic measures, it is requisite to arm the police with some such powers as they now possess; and we have accordingly adopted many of the provisions in the Bengal Code on this head.

"In one material point, we propose a change in the duties of the Police.

"By the existing law, the darogah or other police officer presiding at any inquiry into a crime committed within his division is required, upon apprehension of the accused, to "question him fully regarding the whole of the circumstances of the case and the persons concerned in the commission of the crime and if any property may have been stolen or plundered, the person in possession of such property, or the place where it has been deposited. In the event of the accused making free and voluntary confession, it is to be immediately written down."

"Then follow other provisions for preventing any species of compulsion or maltreatment with a view to extort a confession or procure information. But we are informed, and this information is corroborated by the evidence we have examined, that, inspite of this qualification, confessions are frequently extorted or fabricated. A police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not infrequently done by extorting or fabricating false confession; and, when this step is once taken, there is of course impunity for real offenders, and a great encouragement to crime. The darogah is henceforth committed to the direction he has given to the case; and it is his object to prevent a discovery of the truth, and the apprehension of the guilty parties, who, as far as the police are concerned, are now perfectly safe. We are persuaded that any provision to correct the exercise of this power by the police will be futile; and we accordingly propose to remedy the evil, as far as possible,

*Extract from the Indian Law Commission's First Report.*
by the adoption of a rule prohibiting any examination whatever of any accused party by the police, the result of which is to constitute a written document. This, of course, will not prevent a police officer from receiving any information which any one may voluntarily offer to him; "but the police will not be permitted to put upon record any statement made by a party accused of an offence."

11.9. This shows the background in which the section came to be enacted. After careful consideration, we do not think it necessary to disturb the section, except to the extent indicated above.\(^1\)

11.10. Section 26 provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

The Explanation to the section, provides that "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate, under the Code of Criminal Procedure, 1882.

11.11. It is to be noticed that section 26 is in negative terms. It does not provide that every confession made in the immediate presence of a magistrate can be proved as against the accused. There is only a saving for such confessions. Since there is a special statutory provision\(^2\) prescribing how a magistrate is to record the confession, it is only a confession so taken that can be proved and received and admitted in evidence, if the bar under the section is dispensed with.

11.12. It has been stated that confessions made in the immediate presence of a Magistrate may be of two kinds: the confession may be recorded by a competent Magistrate in accordance with the procedure provided in section 164 of the Code of Criminal Procedure, 1973; or it may not be so recorded. It would seem to follow from the decision of the Privy Council in *Nazir Ahmad v. Emperor*,\(^3\) that Magistrates should not associate themselves with the police as regards confessions, unless they record the confession after observing the provisions of section 164 of that Code. Otherwise, the provisions of that section would be rendered nugatory, and a confession not recorded under that section would become admissible by virtue of a wider interpretation of section 26 of the Evidence Act.

11.13. To give effect to the above view, it is desirable to narrow down section 26, by making it clear that only a confession made to a competent Magistrate and recorded by him under section 164 of the Code of Criminal Procedure, would fall within the section. For this purpose, it would be necessary to replace the words "unless it be made in the presence of a Magistrate", by the words "unless it is recorded by a Magistrate under section 164 of the Code of Criminal Procedure, 1973". We recommend accordingly.

11.14. The Explanation to the section 26 speaks of the "Presidency of Fort St. George". These words are obsolete. In fact, if our recommendation to mention section 164 of the Code of Criminal Procedure is carried out, the Explanation can be safely deleted, as under the new Criminal Procedure Code, the power to record confessions is vested only in Judicial Magistrate, or, in metropolitan areas, in Metropolitan Magistrates.

---

\(^{1}\)Para. 11.7, *supra*.


\(^{3}\)For *Nazir Ahmad v. Emperor*, I.L.R. 17 Lahore 629 (P.C).

\(^{4}\)Para. 11.13, *supra*. 
11.15. For the above reasons, we recommend that section 26 should be revised as follows—

REVISED SECTION 26

"26. No confession made by any person whilst he is in the custody of a police officer, shall be proved as against such person, unless it is recorded by a magistrate under section 164 of the Code of Criminal Procedure, 1973."

(Explanation to be omitted)

11.16. At this stage we should deal with one point on which a new section requires to be inserted. A suggestion has been made in the 14th Report of the Law Commission¹ that as the superior officers of the police are today recruited from the same social strata as officers of other departments, a confession made to the officer of the status of the Deputy Superintendent of Police and above should be acceptable in evidence. This relaxation was to be restricted to cases in which such officers themselves investigate and were to be introduced as an experimental measure only in the Presidency towns or places of like importance where investigations can be conducted by superior police officers and where the average citizen would be more educated and conscious of his rights. The change, it was suggested, should be introduced in the three Presidency towns, because the magistracy there is directly under the control of the High Court; as regards the introduction of the change in other areas, it was observed that it should be preceded by the separation of the judiciary from the executive.

11.17. In a later Report of the Law Commission, on the Cr. P. C., the question of confessions made to the police was considered at length, and the recommendations as to confessions were thus stated in the form of propositions.²—

"(1) In the case of a confession recorded by a Superintendent of Police or higher officer, the confession should be admissible in the sense that the bar under sections 25-26, Evidence Act, should not apply if the following conditions are satisfied:—

(a) the said police officer must be concerned in investigation of the offence;

(b) he must inform the accused of his right to consult a legal practitioner of his choice, and he must further give the accused an opportunity to consult such legal practitioner before the confession is recorded;

(c) at the time of the making and recording of the confession, the counsel for the accused, if he has a counsel, must be allowed to remain present. If the accused has no counsel or if his counsel does not wish to remain present, this requirement will not apply;

(d) the police officer must follow all the safeguards as are now provided for by section 164, Cr. P. C. in relation to confessions recorded by Magistrates. These must be followed whether or not a counsel is present;

(e) the police officer must record that he has followed the safeguards at (b), (c) and (d) above.

³Member, Sh. S. P. Sen Verma has a reservation.
(2) In the case of a confession recorded by an officer lower than a Superintendent of Police, the confession should be admissible in the above sense if the following conditions are satisfied:—

(a) the police officer must be concerned in investigation of the offence;
(b) he must inform the accused of his right to consult a legal practitioner of his choice, and he must further give the accused an opportunity to consult such legal practitioner before the confession is recorded;
(c) at the time of the making and recording of the confession, the counsel for the accused must be present. If the accused has no counsel or if his counsel does not wish to remain present, the confession should not be recorded;
(d) the police officer must follow all the safeguards as are now provided for by section 164, C. P. C. in relation to confessions recorded by Magistrates;
(e) the police officer must record that he has followed the safeguards at (b), (c) and (d) above."

It was stated in that Report that the above amendments should apply to the whole of India, and an amendment of the Evidence Act and of sections 162 and 164; C. P. C. on the above lines was recommended.

11.18. In so far as these recommendations concern the Evidence Act, a suitable amendment should be made by inserting a new section—say, as section 26A. We recommend that such a section should be inserted.1

I. INTRODUCTORY

11.19. Under section 27, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

11.20. Before we proceed to consider the problems that have arisen in regard to the section, we would like to discuss the scheme of the section. For this purpose, the discussion in a judgment2 of the Supreme Court, to which we have already referred3, is helpful. In that case—State of U.P. v. Deoman Upadhyay4—Shah J. (as he then was,) after analysing the scheme of the Act, observed:

"Section 27 renders provable certain statements made by him while he was in the custody of a police officer; section 27 is founded on the principle that even though the evidence relating to confessional or 'other statements' made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is ascertained by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. Even though section 27 is in the form of a proviso to section 265, the two sections do not necessarily deal with evidence

1Section not drafted.
3See general discussion, Supra.
5Emphasis supplied.
of the same character. The ban imposed by section 26 is against the proof
of confessional statements. Section 27 is concerned with the proof of in-
formation whether it amounts to a confession or not, which leads to dis-
covery of facts. By section 27, even if a fact is deposited as discovered
in consequence of information received, only that much of the information
is admissible as distinctly relates to the fact discovered. By section 26
a confession made in the presence of a Magistrate is made provable in its
entirety."

11.21. Later, in the same judgment, Shah J. observed:

"Sections 25 and 26 were enacted not because the law presumed the
statements to be untrue, but having regard to the tainted nature of the source
of the evidence, prohibited them from being received in evidence." And still later, Shah J. observed:

"When a person not in custody approaches a police officer investigat-
ing an offence and offers to give information leading to the discovery of a
fact, having a bearing on the charge which may be made against him, he
may appropriately be deemed to have surrendered himself to the police.
Section 46 of the Code of Criminal Procedure does not contemplate any
formality before a person can be said to be taken in custody: submission
to the custody by word or action by a person is sufficient. A person direct-
ly giving to a police officer by word of mouth information which may be
used as evidence against him, may be deemed to have submitted himself
to the 'custody' of the police officer within the meaning of section 27 of
the Indian Evidence Act. Exceptional cases may certainly be imagined
in which a person may give information without presenting himself before
a police officer who is investigating an office. For instance, he may write
a letter and give such information or may send a telephonic or other
message to the police officer."

11.22. These observations explain the broad scheme of the section. We
may now mention, in brief, the problems arising on the section.

The section begins with the words,—"Provided that". There were no such
words in the corresponding section 150, as it stood, in the Code of Criminal
Procedure, 1861 (as originally enacted). But these words were introduced (in that
Code) by the Amending Act of 1869. Since the 'proviso' is not attached to any
other section, difficult problems of interpretation have arisen. The constitu-
tional privilege against self-incrimination has also necessitated an examination
of some aspects of the section. We shall deal with all these points at the pro-
per place.

II. DOCTRINE OF CONFIRMATION

11.23. The section is based on what is usually called the doctrine of
confirmation by subsequent facts. This doctrine might be more felicitously
called the doctrine of confirmation by subsequently discovered facts. It is as old
as the modern confession rule was first clearly enunciated in Warickshall's case.
That case also raised the problem of the admissibility of facts discovered in con-
sequence of an inadmissible confession. In that case, as the result of a confession
otherwise inadmissible, stolen property concealed in the prisoner's lodgings

1Legal Remembrancer v. Lalti Mohan Singh. 11 R. 49 Cal. 167; A. I. R. 1922 P. C. 342;
Santhosh Beldar v. Emperor A. I. R. 12 Pat. 241; A. I. R. 1933 Pat. 149 (S.B.)
2Warickshall's case (1783) 1 Leach C. C. 283, 284.
was found. It was contended that as the property was discovered as the result of an inadmissible confession, the evidence of the actual discovery ought also to be excluded. The contention was rejected by the court, which observed—

“This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source; for a fact, if it exists at all, must exist invariably in the same manner whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as a proof of the fact clearly shows that the fact may be admitted on other evidence; for, as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not”.

11.24. It should be noted, however, that in Warrickshall's case it was held that no part of the otherwise inadmissible evidence could be let in by reason of the discovery of the property. This particular point has given rise to an uncertain body of case law in England. In R. v. Mosey, it was held—as in R. v. Warrickshall—that no part of the confession was admissible, although facts discovered in consequence were admissible. There is a comment in Leach's Criminal cases, following his note on R. v. Mosey, in which he states that it would seem that so much of the confession as relates strictly to the fact discovered should be admitted, as the reason why improperly induced confessions are excluded is the danger of falsity, and the fact that property or some other material fact is discovered shows that so much of the confession as immediately relates to that property or fact is true.

III. HISTORY

11.25. The section, like the preceding sections, is derived from the Code of Criminal Procedure, Act 25 of 1861. We have already traced in detail the history of all the sections. But it will be convenient to reproduce the earlier section again. We therefore cite below sections 148, 149 and 150 of Act 25 of 1861, Section 150 of Act 8 of 1869, and sections 25, 26 and 27 of Act 1 of 1872 in juxtaposition.

<table>
<thead>
<tr>
<th>Act 25 of 1861</th>
<th>Act 8 of 1869</th>
<th>Act 1 of 1872 (Evidence Act)</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. 148. No confession or admission of guilt made to police officer shall be used as evidence against a person accused of any offence.</td>
<td>S.25. No confession made to a police officer shall be used as evidence against a person accused of any offence.</td>
<td></td>
</tr>
<tr>
<td>S.149. No confession or admission of guilt made by any person whilst he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person.</td>
<td>S.26 No, confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved against such person.</td>
<td></td>
</tr>
</tbody>
</table>

*The underlined words will be discussed later.
*para. 11.23 supra.
*R. v. Mosey, (1783) 1 Leach C. C. 265 n.
*See General discussion.
### IV. CONSTITUTIONAL ASPECTS

11.26. We may now consider the constitutional aspects of the section. So far, section 27 has come up for consideration with reference to two of the articles of the Constitution dealing with fundamental rights—Articles 14 and 20(3). Article 14, deals with equality; Article 20(3) deals with the privilege against self-incrimination. As regards Article 14 of the Constitution, the validity of section 27 was attacked on the ground that the section makes an arbitrary distinction between persons in custody and persons not in custody. However, its validity on this point was upheld by the Supreme Court, on the ground that a person who is not in custody, but has committed an offence, would not normally give information to the police without surrendering himself to the police, and that the possibility of an offender who is not in custody (because the police has not been able to get at any evidence against him), giving information to the police leading to the discovery of an important fact, but without surrendering himself, would be rare.

11.27. We may next refer to the provision in Article 20(3) of the Constitution. It provides, “No person accused of an offence shall be compelled to be a witness against himself”.

11.28. The most important ingredient required for the application of this article is of compulsion, denoted by the word “compelled”. The other important ingredient is that indicated by the words “to be a witness against himself”. There is a third ingredient—“person accused of an offence”.

11.29. Now, as to the ingredient indicated by the word “compelled”, it is to be pointed out that section 27, if taken literally, would cover even confessions obtained by compulsion, because,—at least on one interpretation,—section 27 overrides section 24.

11.30. As regards the words “to be a witness against himself”, Article 20(3) applies at the stage of investigation also,—as is shown by the discussion in State of Bombay v. Kathi Kalu. It would, therefore, be a reasonable view to take,

---


2See infra.


4See infra para. 11.32A.
that the validity of section 27 is maintainable only as regards confessions not obtained by compulsion, and that confessions obtained by compulsion would be hit by Article 20(3). Even "Statements" of the accused (not confessions) obtained by compulsion would be hit by Article 20(3). The case law which we discuss below, though not conclusive on this point, can be said to indicate this with reasonable certainty.

11.31. The question obviously could not have arisen in this form before the commencement of the Constitution. Discoveries could, then, prove the truth of a confession, and to admit an involuntary statement violating the standards of section 24 \(^1\) could not raise any question of unconstitutional action. The question could only be one of construction of the scope of section 27 and its relationship with other sections.

The constitutional guarantee, however, made a difference.

11.32. In 1958, the High Court of Allahabad held that the Constitution prohibited the use of a coerced confession even though the confirmation requirements of section 27 had been met\(^7\).

11.32A. The issue was raised in the Supreme Court for the first time in 1961, in the State of Bombay v. Kathi Kalu\(^8\). One of the accused in that case had revealed, under interrogation; the location of several stolen rifles, and after finding the rifles, the prosecution used section 27 to introduce, the statement at the trial. The Supreme Court held, on the facts that the use of section 27 in the particular case was not unconstitutional, since the interrogation alone had not rendered the statement involuntary. The Court took the view, that if the self-incriminatory information by an accused had been given without any threat, that would not be hit by the provisions of Article 20(3), as there was no 'compulsion'. It observed—

"Thus, the provisions of section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion had been used\(^7\) in obtaining the information."

11.33. We shall now refer to decisions of the High Courts relevant to Article 20(3) and section 27. In an Allahabad case\(^1\), it was pointed out that the phrase used in Article 20(3) is "to be a witness", and not "to appear as a witness". It follows that the protection afforded to an accused, in so far as it relates to the phrase "to be a witness", is not merely in respect of testimonial compulsion in the Court room\(^8\), but may well extend to compelled testimony previously obtained from him. For this conclusion, the High Court relied on an earlier Supreme Court case\(^8\), construing Article 20(3). The High Court, therefore, held that Article 20(3) does apply to discoveries under section 27, Evidence Act, if these discoveries are the results of compulsion. The scope of section 27 is, thus, restricted by Article 20(3) of the Constitution, and the discoveries which follow a confession brought about by compelling an accused person\(^8\) cannot be used against him.

\(^{2}\) See e.g.—
(a) Neharoo Mangtu Satnami v. Emperor, A.I.R. 1937 Nagpur 220;
(b) Emperor v. Miari (1909) I.L.R. 31 Allahabad 592.
\(^{4}\) Emphasis supplied.
\(^{5}\) Amin v. The State, A.I.R. 1958 All. 290, 302, 303, para. 47, 48 (Chaturvedi & A. N Mulla JJ.)
\(^{6}\) Emphasis supplied.
\(^{7}\) Emphasis supplied.
11.34. In a Gujarat case1 also, it was observed that proof of the confession under section 27 would be barred by the Constitution, if coercion were proved. On the facts, however, coercion was not proved.

11.35. In most of the cases decided by the other High Courts, the statements were considered voluntary on the facts. Nevertheless, it was recognised that in some situations, section 27 may conflict with article 20(3).

11.36. Thus, the principle that, after the coming into force of the Constitution, the evidence which may otherwise be admissible under section 27 of the Evidence Act may be inadmissible by virtue of Article 20(3) of the Constitution, if it could be established that such evidence was obtained under compulsion, appears now to be accepted.

11.37. Of course, there must be evidence of compulsion. Mere police custody in the absence of further evidence to show that force or compulsion was used, will not suffice to show that the statement was made under compulsion2 so as to attract Article 20(3).

11.38. Also, it is not disputed that an accused is certainly entitled to give any information or evidence against himself. Article 20(3) only lays down that he shall not be compelled to do so, and if he has given the information voluntarily and has not actually been compelled to give the same, the provisions of Article 20(3) are not infringed. Where there is no evidence at all of any compulsion having been resorted to, for the purpose of obtaining an information from the accused leading to discovery, the information given by the accused is not hit by Article 20(3).

11.39. Article 20(3) does not contemplate the suppression of truth simply because the information is given by the accused. Information given by the accused under section 27 is, not in every case,3 compelled testimony.

11.40. Again, where the person making the confession does not stand in the character of an accused person, Article 20(3) does not apply4—for example, where a person is examined under the general provision in section 108, Sea Customs Act, 1879, conferring power5 on a gazetted officer of customs to summon and examine persons in connection with an inquiry into smuggling. But, where the ingredients of Article 20(3) are satisfied, section 27 cannot be availed of. This is clear from the discussion in the various rulings cited above.

11.41. In view of the position discussed above, a suggestion was made to us that it is advisable to exclude, from section 27, cases of coerced confessions by an express amendment. It was stated that Article 20(3) bars statements other than confessions also, and even as regards statements (other than confessions) obtained by compulsion, Article 20(3) could be relevant.

We have, however, come to the conclusion that no such express provision is required. Section 27 will, after the Constitution, be construed in conformity with the Constitution.

---

1Ahmednabi v. The State A.I.R. 1963 Gujarat 159.
6See now the Customs Act, 1962.
V. RELATIONSHIP WITH OTHER SECTIONS

11.42. The next question to be considered under section 27 concerns the inter-relationship of this section with others. Is section 27 an exception to sections 25 and 26, or is it an exception to sections 24, 25 and 26, or to section 24 only, or to sections 24 and 26? This question has been troubling the courts for years. Several views have been expressed on the subject.

(i) According to one view, the section, being placed in Juxtaposition to section 26, is an exception only to that section.1 The words "in the custody of a police officer", which appear both in section 26 and in section 27, also lend support to this view.

A similar view had been expressed by Mahmood J. in his dissenting judgment in an Allahabad case,2 with some plausible reasoning.

11.43. From the observation made by the Privy Council in Pakala Narayanswami's case, it appears that the Privy Council was inclined to that view.

In Pakala Narayanwaswami's case, the main question was whether section 27 of the Act overrides section 162 of the Code of Criminal Procedure. In the course of the discussion of the question, the Privy Council observed—

"It would appear that one of the difficulties that has been felt in some of the Courts in India in giving the words (of section 162) their natural construction has been the supposed effect on sections 25, 26 and 27, Evidence Act, 1872. Section 25 provides that no confession made to a police officer shall be proved against an accused. Section 26—No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person. Section 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police officer, so much of such information whether it amounts to a confession or not, may be proved. It is said that to "give section 162 of the Code, the construction contended for, would be to repeal section 27, Evidence Act, for a statement giving rise to a discovery could not then be proved. It is obvious that the two sections can, in some circumstances, stand together.

"Section 162 is confined to statements made to a police officer in course of an investigation. Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. Section 27 seems to be intended to be a proviso to section 26 which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, e.g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by section 162. Whether to give to section 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by section 27 it does not seem necessary to decide."

11.44. In the case before the Privy Council, the declarant was not in the custody of the police, and no alleged discovery was made in consequence of his statement. Hence no final opinion as to section 27 and section 162 was expressed.

1Devi Ram v. The State A.I.R. 1962 Punj. 70, 72 para. 6 (Khosa C. J. and Shamsher Bahadur J.).
2Queen Empress v. Babulal, I.L.R. 6 All. 509 (per Mahmood J. dissenting).
3Pakala Narayanwaswami, A.I.R. 1939 P. C. 47.
5Emphasis supplied.
11.45. In *Udai Bhan's case,* the Supreme Court observed that section 27 is in the nature of a proviso to section 26, which interdicts the admission of confessional statements made by a person in custody of the police. Section 27 partially removes the ban placed on the reception of confessional statements under section 26. But the removal of the ban is not of such an extent as to absolutely undo the object of section 26. So much of the statement made by a person accused of offence and in custody of a police officer, whether it is confessional or not, as relates distinctly to the fact discovered, is provable. This was the proposition emphasised in that case. It was held, that, the evidence in regard to the discovery of the key as well as the box which the accused handed over to the police, was admissible in evidence under section 277. The "confession" lay in the fact that with the key, the shop of the complainant was opened and, therefore, that portion was inadmissible in evidence and only that portion which distinctly related to the fact discovered, i.e., the finding of the key, was admissible. Similarly, the recovery of the box was provable because there was no statement of a confessional nature in the recovery memo relating to it.

11.46. Another view on the subject is that section 27 can be regarded as an exception to both sections 25 and 26. In one case the Supreme Court observed that section 27 is a proviso to sections 25-26.

11.47. The third view is that the section is a proviso to all the three sections preceding it.

The point was touched, but not decided, in one case in the Supreme Court of Shah J (as he then was) though not specifically dealing with the point, observed that even though section 27 is in the form of a proviso to section 26, the two sections do not necessarily deal with evidence of the same character. Section 27 is concerned with the proof of information leading to the discovery of facts, whether it amounts to a confession or not. Moreover, only that much of the information is admissible as distinctly relates to the facts discovered.

11.48. Hidayatullah J., however, observed in that case, as follows:

"Section 27, which is framed as an exception, has rightly been held as an exception to sections 24—46 and not only to section 26. The words of the section were taken bodily from *Lockhart's case* and footnote to (1783) 1 Cr. Cases, 283, where it was stated:

"But it would seem that so much of the confession as relates directly to the fact discovered by it may be given in evidence, for the risk of rejecting (an) extorted confession is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true.""

---

4 See also *Delhi Adm. v. Balkrishnan* A.I.R. 1972 S.C. 3.
5 (a) *Emperor v. Remis*, A.I.R. 1947 Punj. 152;
(b) *Mathura v. Emperor* A.I.R. 1946 Punj. 210;
(c) In *re Kataru Chinna Papiah*, A.I.R. 1940 Mad. 136.
9 *Lockhart's case*, 1 Leech 386; 168 E.R.
11.49 We need not consider the question which of these views is correct. But, as a matter of policy, the question arises whether a confession caused by an undesirable inducement, threat or promises—and hence inadmissible under section 24—should become admissible under section 27, because a fact was discovered in consequence thereof. We are of the view that the paramount rule of policy embodied in section 24 must override section 27. In this connection we would state that the position regarding confessions dealt with in section 24 differs from that under sections 25—26. Section 24 enacts a rule which should have universal application. That rule is not based on any artificial or peculiar considerations relatable to the supposed excesses of the police. It is intended to discourage the tendering of hopes or promises or the exercise of coercion, in order to induce or compel the making of confessions. These considerations weigh against section 27 overriding section 24. Section 24 is not based merely on the criterion of truth. It is intended to discourage coercion in the widest sense for securing confessions.

11.50. In this connection, we may refer to the observations made by Rankin C. J. in *Durlay v. Emperor*, which point out how a paradox would arise on the contrary view.

"But, though it is now well held that it is an exception to sections 24 and 25, there are elements of *paradox* in that connection.

"The first consequence is that a part of the statement may be given in evidence, although it is under section 24 induced by threat or promise—if something has been discovered in consequence of that part of the statement".

11.51. It is necessary to go to the root of the matter, namely, what is the fundamental policy on which section 24, is based. The Privy Council observed in *Ibrahim's case*—

"The rule excluding evidence of statements made by a prisoner when induced by hope held out or fear inspired by a person in authority is a rule or policy".

These observations apply with great force to section 24.

11.52. The subjective pressure referred to in section 24, which operates on the mind of the person making the confession, may not lead to the creation of facts discovered under section 27. But, in view of the policy underlying section 24, no valid reason remains for admitting in evidence confessions excluded from section 24 even where they fall under section 27.

11.53. The facts of an Allahabad case may be utilised, to illustrate the effect of the view which is taken on the question of the inter-relationship of sections 24 and 27. In that case, a girl named *Misri* was murdered, and certain ornaments which she was wearing were not found on her dead body. The accused woman, whose name was also *Misri*, was suspected and arrested, and kept in custody for 24 hours. She then took the police to a certain place, and pointed out a spot where certain ornaments were found. The Sessions Judge found that while she was in police custody, an inducement was held out to her by a police officer that she would be let off if she produced the ornaments. The Sessions Judge found her guilty, and sentenced her to death. The appeal to the High Court came up before the two Judges, who made a reference to the Full Bench for deciding the question whether evidence was admissible to show that

---


415—131 LAD/ND/77
the accused woman, as a matter of fact, did go to a certain place and there produced the ornaments in question. Counsel for the accused appellant argued, that section 27 could not override section 24, while counsel for the State argued to the contrary. The Full Bench held, that section 27 qualified sections 24 and 25 also; and, on this view, the evidence in question was admissible. With this expression of opinion on the reference, they sent the case back to the Division Bench, which then dismissed the appeal and confirmed the conviction and sentence. No detailed reasons are given by the Full Bench for the view that section 27 qualifies sections 24 and 25 also, except that it rejected the argument of the appellant that in construing section 27, recourse should also be had to section 163 of the Code of Criminal Procedure (Prohibition against torture).

11.54. For the reasons already stated, we take a different view, namely, that section 27 cannot override section 24.

In brief—

(i) on the merits, section 24 should override section 27; and

(ii) whenever external pressure of the nature mentioned in section 24 operates, the whole statement should be excluded.

No amendment of section 24 is required on this point, but the position is as stated above.

11.54A. There is, however, one point on which section 27 should be revised. It is desirable to make it clear that the section is an exception to sections 25—26. This aspect is not now brought out clearly. We recommend that section 27 should be re-drafted so as to provide that it constitutes an exception to sections 25 and 26.

Section 27 also overrides the provisions of sections 162, code of Criminal Procedure, 1973, under which certain statements made to the police during investigation are excluded. But that is already provided in that code.

We may note that, as section 27 now stands, it leaves scope for the view that it overrides only section 26. This is because it is placed immediately after section 26, and uses words reminiscent of that section. However, for practical reasons, it should override section 25 also, because, in practice, statements made under section 27 are always made to police officers, and if section 25, which relates to confessions made to police officers, is not over-ridden, section 27 will have very little to operate on.

11.55. It should also be provided that information given to a police officer is also within the section.

VI. OTHER POINTS

11.55A. A few other points arising out of the section may now be dealt with. The words “so much of such information” in section 27 occasionally present problems of application. But the principle underlying those words is clear enough. The words “relates” and “distinctly”, which occur in the section, avoid undue vagueness. No verbal formula will, so far as can be seen, succeed in improving the position in this regard.

1Para 11.50 supra,
11.56. It was pointed out in the 14th Report of the Law Commission that, consequential on the recommendation made in that Report to admit confessions made to superior police officers in the presidency towns and other specified local areas, there will be no room for the application of the exception embodied in section 27 in such cases. The recommendation in that Report was to exclude such cases, i.e. confessions to senior police officers, in the specified areas.

11.57. We are now recommending a different section for admitting confessions made to certain police officers. Geographically, our scheme has a wider application than that recommended in the 14th Report, inasmuch as the amendment will not be confined to specified areas. But our proposal visualises certain other requirements, relating to the right to consult a lawyer and, in some situations, his presence at the time when the confession is recorded by the police officer. Where those requirements are complied with, the confessions will become admissible irrespective of section 27. But, where those requirements are not complied with, the confession made to a police officer or while in police custody will not become admissible, and the present bar under sections 25-26 will continue to apply. To override that bar, section 27 will be needed. We do not, therefore, propose to modify section 27 in this regard.

VII. RECOMMENDATION

11.58. In the light of the above discussion, we recommend that section 27 should be revised as follows:

REVISED SECTION 27

27. Notwithstanding anything to the contrary contained in sections 25 and 26, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, being information given to a police officer or given whilst such person is in the custody of a police officer, so much of such information whether it amounts to a confession or not, and relates distinctly to the fact thereby discovered, may be proved.

11.59. According to section 28, if such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant.

11.60. This section, thus, forms an exception to the law laid down in section 24. Since section 28 is a qualification of section 24, its proper position in the Act should have been immediately after that section. We, therefore, recommend that section 28 should be renumbered as section 24A and placed after section 24.

SECTION 29

I. INTRODUCTORY

11.61. According to section 29, if 'such a confession' is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been

---

\(^1\)See section 26-A (proposed).

\(^2\)Empress of India v. Pancham I.L.R. 4 All. 198, 201 (per Stuart, C. J.).

\(^3\)See also Queen Empress v. Babu Lal I.L.R. 6 All. 509, 539 (per Mahmood, J.).
the form of those questions, or because he was not warned that he was not bound to make such confession, and that the evidence of it might be given against him.

II. MEANING OF "SUCH CONFESSION"

11.62. The section begins with the words: 
"if such a confession is otherwise relevant; it does not become irrelevant...........".
These words raise an important question, because they are capable of different interpretations:—

(i) They might be taken as referring to the confession referred to in section 24. This is on the reasoning that the preceding section,—
section 28 contains the words "such a confession as is referred to in section 24."

(ii) In the alternative, they may be taken as referring to confessions, not contemplated in sections 24, to 28, that is to say, extra-judicial confessions not made to the police or other person in authority.

11.63. It has been observed in a Patna case, that the section is meant to dispel doubts with regard to extra-judicial confessions made under circumstances similar to those which make judicial confessions inadmissible. According to this view, repugnancy between sections 24 to 28 on the one hand, and section 29 on the other hand, has to be avoided, and such repugnancy "can be avoided only if section 29 is construed not so as to cover the field occupied by sections 24 to 28 of the Act. Section 29 must, therefore, refer to such confessions only as are not governed by or contemplated in the preceding sections, i.e., confessions made not to Magistrates or police officers, or to persons in authority having some relation to the charge against him."

11.64. This view, which was elaborated in detail by Ray, J. in the Patna case, cites in its support the following discussion contained in the Law of Evidence by Chamberlain:

"The rule (rejecting confessions induced by threats and promises by those in authority) assumes that those in authority over legal proceedings ought, in the public interest, to refrain from placing pressure upon the free will of their prisoners. What injury he may suffer at the hands of private persons is none of its concern. So long as the accused is not influenced by a person in authority in certain specified ways, he may be deceived, flattered, whittled, tricked or betrayed into a perfectly admissible confession."

11.65. In a Bombay case, it was observed that the opening clause 'if such a confession', refers to confessions which have been dealt with in the preceding sections. The clause 'postulates that they are admissible under the said sections and that it is with such confessions that section 29 deals'.

It was also observed that before the provisions of section 29 could be invoked, it must appear that the confession in question is admissible under the preceding sections. In other words, it must not have been caused by inducement, threat or promise. The confession, if made by a person while in police custody, must have been made in the immediate presence of the Magistrate, and if

---

2Chamberlain, Law of Evidence.
3Emphasis added.
any inducement, threat or promise was held to the confessor, the confession must have been made after the impression has been removed. Section 29, therefore, assumes that there is no bar to the admissibility of the confession in question arising from the earlier provisions, and the section then proceeds to negative other possible objections and bars that may be raised against its admissibility. This, in effect, means that section 29 applies only to confessions which have not become irrelevant under sections 24 to 28.

11.66. In view of the different shades of view expressed on the subject, two questions arise for our consideration—

(a) what is the correct interpretation of the section? and

(b) How should that interpretation be incorporated, in the opening words of the section, which seem to have caused difficulty?

11.67. It is considered that the approach in the Bombay case, where now referred to, is the correct one, namely, that section 29 comes into operation only in respect of a confession which is 'otherwise relevant',—that is to say, which is not excluded by sections 24 to 27 or by any other provisions of law, and which is made by an accused person. This interpretation gives accurate and full meaning to the words "such a confession" (which are the equivalent of "a confession made by an accused person"), and to the words "otherwise relevant" (which are the equivalent of "a confession not excluded by sections 24 to 27 or by any other provision of law"). It is in harmony with the policy of the exclusionary rules contained in the other sections. At the same time, it tells us what are the non-vitiating factors of a confession, in general. Apart from the special situation of confessions made before Magistrates, this view helps us to bear in mind that the factors enumerated in the section are not to be considered as vitiating factors in themselves.

11.68. In conformity with the interpretation for which we have indicated our preference above, the words 'if such a confession is otherwise relevant' should be replaced by some such words as—"If a confession made by an accused person is not irrelevant or incapable of being proved under sections 24 to 27". Or, a simpler course would be to omit the word 'such'. We recommend that the section should be suitably amended, by adopting either of the two alternatives just now mentioned. We prefer the second alternative, being the simpler of the two.

III. RELATIONSHIP WITH SECTION 164 CODE OF CRIMINAL PROCEDURE

11.69. It remains now to deal with the latter half of section 29, which possesses certain special features. The latter half provides that a confession, otherwise relevant, does not cease to be so merely because............. "the accused was not warned that he was not bound to make such confession and that the evidence of it might be given against him".

At the first reading, this part of the section would seem to conflict with section 164 of the Code of Criminal Procedure, 1898—now section 164, Code of Criminal Procedure, 1973. Section 164 lays down, inter alia, an elaborate procedure for warning the accused where the confession is recorded by the Magistrate.

---

2See discussion as to section 164, Cr. P.C. infra.
3Para. 11.67 supra.
4The conflicting decisions are collected in Rangappa v. The State A.I.R. 1954 Bom. 285, 291, 292.
The material part of section 164 of the Code reads—

"(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him, and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily".

11.70. In judicial decisions, different views have been expressed on the question whether section 29 of the Evidence Act over-rides section 164 of the Cr.P.C. The decisions were rendered with reference to section 164 of the Code of 1898, but, in this respect, the section in the Code of 1973 makes no difference.

(i) The first view on the subject is that section 29 is an overriding provision. This is the Bombay view.3 It was observed in the Bombay case that the Legislature, fully aware of the clear and unambiguous words used in section 29 of the Evidence Act, while introducing section 164(3) in the Criminal Procedure Code (by amendment Act 18 of 1923), did not think it necessary to provide for the supersession or modification of section 29. According to the Bombay view, therefore, non-compliance with section 164(3) [now section 164(2)] does not exclude the confession, and the court is free to accept or reject the confession, if it is voluntary or involuntary, as the case may be.

To the same effect are decisions of the Madras1 and Rajasthan1 High Courts, and also of the Allahabad High Courts.3

(ii) The opposite view was taken by Ray C. J. and Narasimham J. (as he then was), in the Orissa High Court.4 The judgment of the Orissa High Court contains a full discussion of all aspects.

(iii) The Mysore High Court5 takes a middle view, treating the confession recorded without the statutory warning as inadmissible only if the accused is prejudiced thereby.

It is desirable that the matter should be clarified, one way or the other. We are of the view that as a matter of policy, section 164 of the Code of Criminal Procedure must prevail, because it embodies a rule inherently good, and it should not be open to a trial court to disregard non-compliance therewith and admit, a confession recorded in circumstances showing such non-compliance. Hence an exception saving section 164(2), Cr.P.C.6 should be introduced in section 29.

11.71. We have come to this conclusion for the reason that while the absence of a warning by itself may not, in general, be treated as a non-vitiating factor (in regard to a confession which is extra-judicial), the case of a confession purporting to be recorded under section 164 of the Code of Criminal Procedure is different. The confession is recorded judicially. We have in this section, a statutory provisions specifically providing for warning. The whole object of the section is to ensure, as far as is practicable, the voluntariness, or

---

1Section 164 (2), Cr. P.C. 1973.
3Re Vellamooli Goundan, A.I.R. 1932 Mad. 431.
7In re Madegowden A.I.R. 1957 Mys. 50, 52, para. 8 (section 29, however, was not considered).
8Para 11.69 supra.
at least circumstances conducive to voluntariness, in the making of confessions and of these circumstances, the requisite warning is an integral part. Irregularities in the record of compliance with the statutory requirements will, no doubt, be taken care of by the provision in this regard in the Code of Criminal Procedure. But the broad requirement of warning under section 164 is no idle formality. It symbolises the dis-interestedness which one has come to associate with the judicial Magistracy.

11.72. We, are therefore, of the view that it would be better to amend section 29, so as to provide that it will be subject to section 164(2), Cr. P. C. which deals with the requirement of warning. Such an amendment will be faithful to the proper import of section 164 as interpreted by the Privy Council. The Privy Council in *Nazir Ahmed v. K. E.*,\(^2\) observed,—

"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods are necessarily forbidden."

"Although the Magistrate acting under this group of sections is not acting as a court, yet he is a judicial Magistrate and both as a matter of construction and of good sense there are strong reasons for applying the rule in question to section 164. Upon the construction adopted by the Crown, the only effect of section 164 is to allow evidence to be put in a form in which it can prove itself under sections 74 and 80 of the Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this and that it is a section conferring powers on Magistrates and delimiting them. It is also to be observed that if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by sections 164 and 364 would be of such trifling value as to be almost idle. The range of Magistrate confessions would be so enlarged by this process that the provisions of section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case".

11.73. It may be noted that the actual judgment in the Privy Council case cited above was delivered by Lord Roche, and the other members of the Judicial Committee in this case were Sir John Wallis, Ex-Chief Justice of the Madras High Court, Sir Lancelot Sanderson, Ex-Chief Justice of the Calcutta High Court, Sir Shadi Lal, Ex-Chief Justice of the Lahore High Court, and Sir George Rankin, Ex-Chief Justice of the Calcutta High Court.

**REVISED SECTION 29**

11.74. In consonance with the above approach, we recommend that a suitable amendment should be made in section 29, so as to ensure that the section does not render relevant a confession which is recorded by a Magistrate which is inadmissible by virtue of non-compliance with section 164(2) of the Code of Criminal Procedure.

We, therefore, recommend that section 29 should be revised as follows:—

**REVISED SECTION 29**

"29. If.........................a confession is otherwise relevant, it does not become irrelevant merely because—

(a) it was made—

(i) under a promise of secrecy, or

---

\(^1\)Section 463, Cr. P.C. 1973 (see infra).

(ii) in consequence of a deception practised on the accused person for the purpose of obtaining it, or
(iii) when he was drunk, or
(iv) in answer to questions which he need not have answered, or
(b) the accused person was not warned that he was not bound to make such confession and that the evidence of it might be given against him.

Exception: - Nothing in this section shall affect the provisions of subsection (2) of section 164 of the Code of Criminal Procedure, 1973, as to the recording of confessions by Magistrates."

11.75 & 11.76. It is now necessary to refer to a recommendation made in the 14th Report of the Law Commission, to the effect that the rule of practice and prudence which requires corroboration of a retracted confession, should be given statutory recognition, since the rule has achieved the status of a principle of law and has been universally recognised and acted upon. We quote below the relevant passage from that Report.

"41. There is no statutory requirement that the confession of an accused person, later retracted should be corroborated before it is acted upon. In a large number of cases, prisoners who have made lengthy and detailed confessions duly recorded under section 164, Criminal Procedure Code, and have reiterated them in the committing magistrate’s court, reise from these confessions in the court of session. The task of the Judges in such cases is made very difficult. Judicial decisions have therefore laid down the rule that while a conviction on a retracted confession is not illegal, yet prudence dictates that a conviction should be “based on such a confession, only if it is corroborated by independent testimony. The rule of practice and prudence requiring corroboration of a retracted confession has achieved the status of a principle of law and has been universally recognised and acted upon. We would suggest that this rule might be given statutory recognition”.

11.77. We have, however after careful consideration, come to the conclusion that it is better to leave the matter as it is, so that the court may decide the matters on a consideration of all evidence before it, giving such credence to the confession as it thinks fit in the circumstances of the case.

SECTION 30

11.78. Section 30 provides that, when more persons than one are jointly tried for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is ‘proved’, the court may “take into consideration” such confession against such other person also. The section is obviously a departure from the general rule (section 21) applicable to all admissions, whereunder an admission is evidence only against the person who makes it. The reason which is said to have justified this departure, is that, if a person implicates himself (while implicating others), there is some guarantee that the implication is true. It is also said that it is difficult in such a situation to require the court to exclude the statement altogether from its mind, when it comes to consider the case against the other accused.

11.79. The theory is that when a person admits his guilt and exposes himself to the pains and penalties provided for it, there is a guarantee for his truth.

Thus, the assumption underlying the section is, that self-implication takes the place of the sanction of oath, and serves as a guarantee of the truth of the accusation against the other.

11.80. We do not, however, find this reasoning convincing. The present provision, in our view, suffers from several major defects. In the first place, self-implication may be a substitute for oath, but it is not an adequate substitute for cross-examination. It is to be remembered that when A and B are tried together and a confession by A implicating both of them is admitted under section, B has no opportunity of cross-examining A on so much of his confession as implicates B also. It is impossible for B to effectively rebut what A has said, because most of the rebuttal evidence will have to be in the negative, and it is difficult to prove the negative without cross-examination. The difficulty of proving the negative has been the main foundation for the importance which the law has attached to cross-examination. Since B cannot compel A to enter the witness box (A being an accused person himself), cross-examination is ruled out. Thus, the present section practically leaves B in the hands of A so far as A’s confession is concerned.

Moreover, a confession may be true as regards the maker, but untrue as far as it affects others. Such untruth may arise from malice, or revenge or from other circumstances, which one cannot readily catalogue or recount.

11.81. It may be noted that with reference to section 30, a number of suggestions have been received from time to time for its deletion. One of the High Courts made such a suggestion, a few years ago. The High Court pointed out that as the law now stands, there can be no conviction under section 30 without the fullest and strongest corroborations on material particulars.

A suggestion for the repeal of section 30 was made by a Bar Association. Such a suggestion was also made long ago by a Chief Presidency Magistrate, a District and Session Judge, and a State Law Commission. The suggestion by the Chief Presidency Magistrate refers to the fact that section 30 has been described as a needless tampering with the wholesome rule of English Law.

11.82. It may be of interest to note that the Ministry of Law itself forwarded to the Law Commission a note by one of its officers for the repeal of section 30. The note quotes judicial criticism describing the evidence as dangerous material and as needless tampering with the wholesome rule of the English law. It criticises the principle in section 30 as “extraordinary” and as only prejudicing fair trial.

11.83. It may be noted that judicially also, the section has escaped criticism. It has been described as “a needless tampering with the wholesome rule of the English law”, and as a “most unsatisfactory section” by Courts Trouter C. J. In an Oudh case, such evidence was described as “exceptionally dangerous”.

---

1F, 3(1)/55-L. C. Serial No. 56 (High Court of Andhra Pradesh).
3Serial No. 29, File No. 3(1)/55 L.C. Collection No. 1 page 78 (Tripura Bar Association).
4Sr. No. 8 File No. 3(1)/55 L.C. Part 1, page 76 Col. No. 2 (Chief Presidency Magistrate, Madras).
5Sr. No. 8 File No. 3(1)/55 L. C. Part 1, page 103 Col. No. 2 (District Judge, Coimbatore).
7File 3(1)/55-L.C. Part I, Sr. No. 6, Copy of the Notes by Shri S. P. Chatterjee, Attaché, dated 23rd June, 1938 received through the Min. of Law, File No. 80/52/54-L.
9In re : Lilaram A.I.R. 1925 Mad. 805, 807.
Reilly J. observed in a Madras case¹—

"Section 30, Evidence Act, is a very exceptional, indeed an extraordinary, provision, by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that we do not stretch it one line beyond its necessary intention".

11.84. We have already pointed out⁴ that the logical basis on which the section is based is not sound. Apart from this defect, the section, in practice, creates a complication, namely, while the confession covered by the section can be "taken into consideration", it is not technically regarded as "evidence", and the section does not declare it to be relevant within the meaning of section 5, although it is one of the factors which fall within the definition of 'proof'. In view of this weakness, courts have insisted on independent evidence against the accused, and have held that a conviction based merely on the confession of a co-accused would be bad in law⁵. The confession of the co-accused is regarded merely as a material for corroborating other evidence,—and that too a weak material. As has been explained by the Supreme Court⁶, if the other evidence is capable of belief independently of the confession, then, of course, it is not necessary to call the confession for aid; but where the judge is not prepared to act on the other evidence as it stands (even though, if believed, it would be sufficient to sustain a confession), he may call in aid the confession and use it "to lend assurance to the other evidence" and thus fortify himself in believing that which he would not accept without such aid.

11.85. In England, unless there is some common object or conspiracy between them, there is no privity between co-defendants⁷, nor between prisoners jointly indicted⁸. And, the confession of a co-accused is not admissible against the other accused.

11.86. The question has been discussed in the U.S.A. Where two or more of the co-criminals are tried jointly as co-defendants, and the statement of one of them is offered against the maker, even though its contents implicate others than the maker, is it admissible? The question was discussed in Delhi Paoli case⁹, where the Supreme Court held that there was no objection to this, as long as the jury was given a precautionary instruction to consider the confession as evidence only against the defendant who made it.

11.87. However, in 1968, the Supreme Court took a different view in Bruton v. United States¹⁰ even on this narrow use. The basic constitutional doctrine invoked in this case was the right to confrontation. The court held that if the precautionary instructions referred to in the earlier judgment Delhi Paoli case are ignored by the jury, the result is that evidence against the second defendant is offered in the form of the first defendant's confession, and this is so even though, because of the privilege against self-incrimination, the second defendant cannot call the first defendant to the stand. Therefore unless the jury

¹Periyaswami v. Emperor A.I.R. 1931 Mad. 177, 178.
³See the judgment of Jenkins, C. J. in Emperor v. Lalit Mohan, (1911) I.L.R. 38, Cal. 559.
⁵Daniels v. Potter (1830) 4 C.&P. 262.
could be expected to abide by the precautionary instructions, the receipt of one defendant’s confession would impair the right of confrontation and cross-examination on the part of others who are implicated in that confession. This was the basis of the later decision.

11.88. As was pointed out in *Barber v. Page*, one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses.

11.89. Having taken into account all aspects of the matter, we have come to the conclusion that section 30 should be repealed. Soundness of the principle on which it is based is debatable. The supposed substitute for oath is self-implication. Assuming that self-implication is an acceptable substitute for oath, it is, in our view, no substitute for effective cross-examination. And, as we have discussed above, the co-accused can hardly rebut the incrimination against him effectively. This position is a potential source of great injustice in many cases, and practically amounts to a violation of the principle that no man ought to be condemned unheard. The person incriminated by the confession of a co-accused is in a dilemma. If he enters the witness box, he does so at the risk of losing his privilege against self-incrimination by being exposed to cross-examination without restrictions. If he does not enter the witness box, there will be injustice. He may be unable to rebut the allegations made by the confessing accused, since the latter (unless he enters the witness box) would not be available for cross-examination.

11.90 and 11.91. We are, therefore, of the view that even the limited use to which the confession can be put under the section is not justifiable, and we recommend that the section should be repealed.

11.92. One of the requirements of section 30 is that a confession made by one accused affecting himself and some other accused should be ‘proved’. Some controversy appears to exist on the point whether a confession in the course of the trial would come under the section. The word ‘proved’ would seem to indicate a contrary position and justify a narrow view. This narrow view is, in fact, supported by the decisions of some High Courts.  

A contrary view has, however, been taken in some decisions.

11.93. On the present language, the narrower view is correct, that is to say, the section does not apply to a confession made in the course of the trial. However, the point will be academic after reference.

11.94. In short, our recommendation as to section 30 is that it should be Repealed, for the reasons given above.

---

1*Barber v. Page*: 390 U.S. at 721 20 L. Ed. 2d, at 758.
2(a) *Emp. v. Mahadev* I.L.R. 45 All. 323; A.I.R. 1923 All. 322, 325 (Walsh J.).
(b) *R. v. Ashoath* (1878) I.L.R. 4 Cal. 483 (F.B.).
(c) *In re Maharathama* A.I.R. 1931 Mad. 820, 821 (Beasley C. J. and Sundaram Chetty J.).
4*Para. 11.91, supra.*
Section 31—Admissions not conclusive proof, but may estop.

1195. Section 31 provides that admissions are not conclusive proof of the matters admitted, but they may operate as estoppel under the provisions hereinafter contained. It follows that an admission may be rebutted in appropriate circumstances.

In allowing such rebuttal, the law favours the investigation of truth by all expedient methods. The doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, will not be extended beyond the reasons on which it is founded. Therefore, admissions, whether written or oral, which do not operate by way of estoppel, constitute only prima facie and rebuttable evidence against their makers and those claiming under them, as between them and others.

No change is needed in the section.

APPENDIX I


164(1). Any Metropolitan or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial;

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B. Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom, the case is to be inquired into or tried.

APPENDIX II


463(1). If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872, take evidence in regard to such non-compliance, and may if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to Courts of appeal, reference and revision.

1See woodroffe.
CHAPTER 12

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

I. INTRODUCTORY

12.1. Admissions (including confessions) which we have discussed so far, constitute a species of exceptions to the rule against hearsay. We shall now deal with statements made under certain special circumstances by persons who cannot be called as witnesses, these being another species of exceptions to the rule against hearsay. These statements form the subject-matter of sections 32 and 33.

12.2. It is a general rule of evidence that a witness cannot give evidence based on what some other person told him. To this general rule, the Act (as does the English common law of evidence), makes certain exceptions. We are, in this chapter, concerned with an important group of sections embodying such exceptions.

12.3. In general, oral evidence must be direct, in other words, if the evidence refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; and if it refers to a fact which could be perceived by any other sense or in any other manner, it must be evidence of a witness who says he perceived it by that sense i.e. the organ of sense or in that manner.

12.4. It may happen, however, that a witness who has to be present before the Court to give this direct evidence, is dead, or cannot be found or has become incapable of giving evidence by reason of physical or mental injury or disease; or it may be that his attendance cannot be procured without an amount of delay or expense, which, having regard to the circumstances of the case, would be unreasonable.

12.5. The existence of one or the other of such circumstances — briefly, the non-availability of the witness— is a condition precedent for the admission of what could be technically hearsay—a statement made out of court.

12.6. It is, however, also necessary that one other condition should be fulfilled before such statement made out of court can be testified to; and that condition requires the existence of one or the other of certain circumstances, from which the truth of the statement made by the person who is unavailable may reasonably be presumed. When these two conditions co-exist, the law dispenses with direct oral evidence of the fact. That is the rationale of sections 32 and 33—In some form or other, these two conditions are satisfied in most of the 8 cases dealt with in section 32, and also in the case dealt with in section 33.

These two sections contain the most important exceptions to the rule against hearsay. Statements made by persons who cannot be called as witness fall into the following categories:

(1) those made as to the cause of death;

(2) those made in the course of business;

(3) those against the interest of the maker;

---

1See section 60.
2As to section 32(1), see infra.
(4) those giving an opinion as to a public right or custom or matters of general interest;

(5) and (6) those relating to the existence of relationship, or those made in a will or deed relating to family affairs;

(7) those relating to any transaction by which a right or custom in question was created, modified, denied, etc.;

(8) those made by several persons expressing feelings or impressions:

Section 33 adds another category—

(9) those given as evidence in earlier judicial proceedings.

We are not concerned in the present Chapter with sections 34 and 35.

Section 32 and 33—Independent provisions.

12.7. Of course, the two sections (sections 32 and 33) are independent provisions, and it has been specifically held$ that section 32 is not controlled by section 33. For the present, however, it will suffice to say that circumstantial probability of trustworthiness of the statement made out of court, coupled with the consideration of necessity, would seem to constitute the two principal considerations on which sections 32 and 33 are based. The first condition removes, to a reasonable degree, the possible source of untrustworthiness and inaccuracy that may normally lie underneath the bare untested assertion of a person not in court. The second condition recognises the fact that the usual guarantees of truth—the tests of cross-examination and oath—are impossible of being, applied, where the declarant is dead or otherwise not available.

II. SECTION 32(1), OPENING PARAGRAPH—VARIOUS SITUATIONS

12.8. After this introductory discussion, we shall examine some salient points common to all clauses of section 32. The eight classes of hearsay, written or oral, falling under this section, are relevant, when made by a person (a) who is dead, or (b) who cannot be found, or (c) who has become incapable of giving evidence, or (d) whose attendance cannot be procured without unreasonable delay or expense. These alternative situations may be considered:

(a) Death—Death must be strictly proved$.

(b) Statement by persons who cannot be found.

12.9. As regards a statement made by a person who cannot be found, it must be shown that the person cannot be found after reasonable exertion has been made to find him$. Where all that is known is that the witness has failed to attend, it cannot be said that the witness cannot be found$. Where a person suddenly disappeared and the summons could not be personally served, and an enquiry was made in his native village, and it had been found impossible to serve him with the summons, it may be held that he cannot be found$.

(c) Incapacity of the person—Nature of.

12.10. The third alternative situation relates to incapacity. The incapacity must be of a permanent character, and not of a temporary character—it was so held in an early Calcutta case$. But this case has been dissented from in *In re*

---

$See para. 12.6, supra.
$Queen v. Gozalo, 12 W.R. Cr. 80 (Cal).
$Queen v. Luckhy Nardn, 24 W.R. (Cr.) 18, Cal.
$E. v. Nanhe Khan, 2 Cr. I.J. 518 (All).
$E. v. Rochia Mohato, (1880) I.L.R. 7, Cal.
Asgur Hossain	extsuperscript{1}, where it has been held that the incapacity need not be of a permanent character, and something short of permanent incapacity might satisfy the words of the section. However, the fact that a person was ill and was confined to his house, does not make him incapable to give evidence within the meaning of this section. This view is supported by the wide wording of the section, and no change is recommended on this point.

(d) Expenses and delay in securing presence of witness.

12.11. Where the last alternative situation — expense and delay — is relied upon, it ought to appear that the presence of the witness could not be obtained without an amount of delay or expense which the Court considers Unreasonable. To consider a delay and expense as simply useless, is not enough, it must further be found that it is reasonable	extsuperscript{2}. In a case in Madras	extsuperscript{3}, it was held that the mere fact that a witness happens to live at Rangoon is not a sufficient ground.

12.12. In enumerating the persons whose statement becomes admissible under section 32, the opening paragraph of the section 32 mentions persons who are—

(i) dead; or
(ii) who cannot be found; or
(iii) incapable of giving evidence; or
(iv) whose attendance cannot be procured without an amount of delay or expense which appears to the court unreasonable.

12.13. The section, however, omits to include the case of a person who is kept out of the way by the adverse party. We may, in this connection, contrast section 33 (dealing with the relevancy of evidence given by a witness in a previous judicial proceeding); that section specifically includes such a case. There is no reason why such a statement should not be included under section 32 also. We, therefore, recommend that the opening paragraph of section 32 should be amended for the purpose, so as to include such cases.

12.14. There is one other difference in the wording of the two sections, which should also be noted. Section 32 speaks of a person "whose attendance cannot be procured without an amount of delay and expense, which, under the circumstances of the case, appears to be unreasonable". Section 33 speaks of a person whose "presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable". There is no reason why the language of the two sections should differ on this point. We, therefore, recommend that section 32, opening para, should be brought into line with section 33, on this point also.

III. SECTION 32(1) — OPENING PARAGRAPH — OTHER POINTS

12.15. So far, we have dealt with the situations in which the opening paragraph of section 32 applies, or should apply. We shall now deal with certain other points arising out of the opening paragraph. The first point relates to the kind of statements made admissible by the section. The opening paragraph classifies them by using the terms "written" and "verbal". Strictly speaking, the contrast with "written" is more accurately indicated by the word

---

\textsuperscript{1}In re. Asguh Hossain, I.L.R. 6, 774.

\textsuperscript{2}(a) Queen v. Kukhar Santal, 21 W.R. (Cr.) 56 (Cal.).
(b) Noshai Misri v. E., I.L.R. 5, Cal.

\textsuperscript{3}Kadappa v. Thirpathi, 86, I.C. (Mad.).
oral" rather than by the word "verbal". In fact, the Act itself uses the word "oral" at various places, e.g. in section 59 (which allows all facts except the contents of documents to be proved by oral evidence), section 63(5) (which says that secondary evidence means and includes oral accounts of the contents of the documents), and section 92 (which provides that if the terms of any contract etc., are proved under section 91, no evidence of any "oral agreement" or "statement" shall be admitted).

12.16. However, it should be noted that the word "verbal", as used in this context, has received judicial interpretation. The Privy Council has, in a case which arose under section 32 of the Ceylon Evidence Ordinance (14 of 1895), which section was identical with section 32 of the Indian Act,—held that where a woman with her throat half cut, answers questions put to her by signs and nods, such signs are "verbal" statements. The Privy Council observed that the case resembled that of a person who is dumb and is able to converse by means of finger alphabet. The Privy Council pointed out that the section used the word "verbal", and not the word "oral", observing that it was unnecessary to decide whether the nods of assent would have constituted an "oral" statement.

In this position, the wording of the section need not be altered on this point.

12.17. Yet another point arises out of the opening paragraph of section 32. The point is common to all clauses, but, since it has arisen in connection with clause (4), we shall first refer to that clause. Clause (4) provides that the statement of a person not available as a witness may be admitted in evidence, if the statement gives the opinion of the person concerned as to the existence of any public right or customs or matter of public or general interest of the existence of which, if it existed, he would have been likely to be aware and when such statement was made before any controversy as to such right, custom or matter has arisen.

12.18. In relation to this clause, a controversy exists as to the meaning of the expression "all relevant facts", which is used in the opening paragraph of section 32. The precise question is, whether the expression "relevant facts" includes facts in issue.

12.19. To this question, a negative answer was given in a Bombay case. The point at issue was whether, by custom, a widow could adopt a son without the express authority of her husband. A statement by the widow to the effect that she could do so under a custom, was held to be inadmissible, the reason of the court being that the very fact in issue was the alleged custom, and the section applied only to statements of relevant facts.

12.20. It appears to us, with due respect, that this is not a satisfactory position, for several reasons. In the first place, such a view will lead to an anomaly, as the very function of a court is to decide questions about facts in issue: relevant facts are used merely as supplying the material for the decision of facts in issue. Secondly, many of the illustrations to the section—for example, illustrations (a), (i) and (k)—deal with facts in issue, and those illustrations suggest wider than a narrower construction on the point under discussion. Thirdly, it may be noted that the Bombay case referred to above has been

---

Section 32—Opening paragraph—"Relevant Facts".

Section 63(5), 92, etc.


doubted in a later Bombay case,¹ where Chagla J., (as he then was) raised a query on the point. He pointed out that the Privy Council, in Biro v. Ama Ram,² admitted a statement of fact in issue under section 32.

12.21. In view of the consistent usage of the Act in specifically mentioning "facts in issue" and "relevant" facts, it is desirable that the language of section 32 should also be made clearer on this point. The more specific language of sections 7 to 9, 11(1), 17, 35, 36 etc., may be compared.

All these sections speak of facts in issue and relevant facts. An amendment of section 32(1) for this purpose will also secure harmony with the scheme of the Act, as contained in section 5.—the basic section of the Act,—which provides that evidence can be given of facts in issue and of such other facts as are declared to be relevant. Section 5 would seem to indicate a dichotomy between facts in issue and relevant facts; and, in order to prevent a controversy from arising, it is desirable to widen the wording of section 32(1), opening paragraph so as to cover facts in issue as well as relevant facts. We recommend that the paragraph should be amended accordingly.

12.22. Section 32 (1) does not provide that the person whose declaration becomes relevant under this section, should be a person who would have been competent as a witness.

In English law, the declarant (in the case of a dying declaration) must have been competent as a witness; thus, tender age or imbecility will exclude a dying declaration in England.¹ In India, however, it is doubtful whether this rule is applicable.¹ We do not propose any amendment on this point.

12.23. As a result of the above discussion, it will be necessary to amend the opening paragraph of section 32, so as to incorporate the following points:

(i) addition of the case where the witness is kept out of way—compare section 33; and

(ii) verbal change regarding that portion of the opening paragraph which deals with the case of a witness whose "attendance" cannot be obtained—compare the wording of section 33.

(iii) facts in issue should be added.

12.24. The following revised draft of the opening paragraph of section 32 is therefore recommended.

IV. REVISED SECTION 32—OPENING PARAGRAPH

32, Statements, written or verbal, of facts in issue or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose presence cannot be procured without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable, or who is kept out of the way by the adverse party, are themselves relevant facts in the following cases.

¹Jadav Kumar v. Pushpa Bai, A.I.R. 1944 Bom. 29, 30 (Chagla J.).
³R. v. Pike (1829) C & 598.
⁵Para 12.13, supra.
⁶Para. 12.20, supra.
16—131 LAD/ND/77
12.25. Having disposed of the opening paragraph of section 32, we are now in a position to consider the various clauses of the section.

12.26. Under section 32(1), statements made by a person as to the cause of his death, or as to the circumstances of the transaction which resulted in his death, are relevant, where the cause of the person's death comes into question. This is the first exception to the rule against hearsay created by the section. Where a legal system, in its law of evidence, recognises the rule against hearsay, any exception to that rule must be based on some rationale.

12.27. Juristically, the justification in a legal system for admitting such statements is the assumption that a dying man does not die with a falsehood on his lips. Shakespeare had occasion to allude to this aspect. In King John¹, when the wounded Melun finds himself disbelieved while announcing the intended treachery of the Dauphin Lewis, he exclaims:—

"Have I not hideous death within my view, retaining but a quantity of life, which bleeds away, even as a form of wax, Resolveth from his figure, 'gainst the fire? What in the world should make me now deceive, Since I must lose the use of all deceit? Why should I then be false, since it is true, That I must die here, and live hence by truth?"

12.28. We shall revert to this aspect later.²

It should be stated, however, that a person may lose his mental faculty when death is approaching. Thus, in King John³ Prince Henry is made to say:

"Death's siege is now
against the mind, which he picks and wounds.
With many legions of strange fantasies:
Which, in their throng and press to the last hold.

Confound themselves."

12.29. It is, apparently, for this reason that the statements are made relevant only for certain purposes.

We now proceed to consider the clause in detail.

12.30. to 12.33. In England, the conditions on which dying declarations are admitted in evidence⁴ are—(i) the death of the declarant, (ii) that the trial should be for his murder or manslaughter, (iii) that his statement should relate to the cause of his death, (iv) that he should have been under a settled hopeless expectation of death, and (v) that he could have been a competent witness.

12.34. It has been pointed out with reference to the second condition required in England that the first clause of section 32 is widely different from the English law upon the subject of "dying declaration". According to which, this description of evidence is not admissible in a civil case; and even in criminal cases, it is admissible only in the single instance of homicide, that is, murder or manslaughter, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration.

¹King John, Act 5, Scene 4.
²See "Expectation of death" infra.
³King John, Act 5, Scene 7.
⁴Cross on Evidence.
⁶There is no English authority as to causing death by reckless driving.
12.35. In India, however, the declaration is admissible even where the case is not one of homicide. Moreover, under the Indian Act, the statement is relevant whatever may be the nature of the proceeding in which the cause of the death of the person who made the statement comes into question. Illustration (a) to section 32(1) gives an example of a civil, as well as of a criminal case, and, as an example of the latter, it mentions a charge of rape. Even under the previous law, as contained in section 371 of Act 25 of 1861, (The Code of Criminal Procedure), and section 20, Act 2 of 1855, it was held that the rule of English law restricting the admission of this evidence to cases of homicide had no application in India, and that the dying declaration of a deceased person was admissible in evidence on a charge of rape. We do not suggest any change in this regard.

12.36. The statement under clause (2) may relate not only to the cause of death, but also to the circumstances of the transaction which resulted in death. The words “circumstances of the transaction” are wide, and have been considered by the courts on a number of occasions. This was decided in Pakala Narayana-swami v. Emperor.

12.37. That the words “circumstances of the transaction” are not very precise, is illustrated by several controversies that have arisen. Thus, there is some controversy as to how far a statement as to the motive of the person who caused the death can be given in evidence under section 32(1), which allows evidence of a statement as to the “cause of death” or “circumstances of the transaction which resulted in death”. One view on the subject is that such statements are admissible; this view has been taken by the High Court of Patna and by the erstwhile courts of Judicial Commissioners of Nagpur and Himachal Pradesh. In the PATNA case, it was observed:—

“What he has said regarding motive is at two places: firstly in his first information report and secondly in the dying declaration. In the first information report (Ex. 4/1) he says—

“Somra Bhuian is a wizard and cultivator. Nagwa and Sukna are his comrades. They did not want that I should act as a wizard there. This was the cause of the dispute; and in the dying declaration (Ex. 3) he says, “They assaulted me on account of enmity caused by my acting as a wizard.” I do not see how any reasoning can make these statements to be anything other than statements as to the circumstances of the transaction which ended in Kudrat’s death.”.

12.38. and 12.39. The High Court of Madras has taken a different view. The facts were thus stated:

“The appellant who is the Karnam of the village of Ganganabapenthap was charged before the learned Sessions Judge of Visagapatam together with three other persons for murdering one Thalada Ramaswami on the night of 2nd August last. The murder must have taken place on the main road between Gajapatinagaram and Mentada very near to Mentada. There

---

2R. v. Bisnorunjn (1866) 6 W.R. Cr., 75 (1866).
3Pakala Narayanaswami v. Emperor (1939) 1 All. E.R. 396 (P.C.).
5(a) Chintal v. R., A.I.R. 1924 Nag. 115(2);
6A.I.R. 1938 Pat. 52 (Rowland and Varma JJ.).
is ample evidence on the record to show that the appellant and the deceased were on terms of friendship. That has been proved by the village Munsi and there are circumstances in this case which strongly bear that out. But the learned Sessions Judge has relied on certain evidence in this case as proving motive on the part of the appellant to murder the deceased. That motive is derived from statements made by the deceased to his wife and to his wife's sister to the effect that in relation to a law suit in which the deceased's wife's sister, one Pydithalli was concerned, the appellant had accepted a bribe from the plaintiff one Narayanamma in the suit against Pydithalli. The motive is thus entirely derived from statements made by the deceased. These statements are wholly inadmissible. There is nothing in section 32, Evidence Act, which makes them admissible. They are not statements made by the deceased as to the cause of his death or to circumstances of the transaction which resulted in his death. The Judicial Committee in (1939) I M.L.J. 756 has considered the provisions of section 32(1), Evidence Act, in relation to statements of deceased persons who have been murdered. Lord Atkin at p. 763, (1939) I M.L.J. points out that the circumstances must be circumstances of the transaction, general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible.

In this appeal, the deceased's statements provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed his wife's sister in a civil case. They in no way are to be associated with the actual murder. Evidence of these statements should have been excluded.

12.40. In the second Madras case, the statement that was sought to be tendered in evidence was that the accused was on intimate terms with the deceased's sister and the deceased wanted to arrange the sister's marriage to some other person. This was held to be inadmissible.

12.41. We do not propose an amendment on this point, leaving it to be dealt with by the case law.

12.42. to 12.44. Another controversy, traceable to the words "circumstances of the transaction", may be noted. The precise question is whether a dying declaration made by A can be used for the proof of facts relating to the death of B. The controversy has assumed practical importance, and an illustration may be drawn from the facts of a case which was decided by the Rangoon High Court. Simplying the facts, we may state the main circumstances in the case as follows:—

12.45. A, a husband, and B, his wife, were both murdered at the same time, and it was said that accused X murdered the husband and accused Y murdered the wife. A dying declaration made by the wife was put in evidence against the accused, who were charged with being concerned in the murder of both the persons. The objection taken on behalf of the accused was that the dying declaration which was to the effect that accused X murdered the husband A, and accused Y murdered the wife B, was admissible only against the accused Y, who actually attacked the wife, as it can only be admissible in a case where the cause of the wife's death is in question. This argument was rejected by the court, holding that as both the accused were charged with being concerned in the murder of

both the persons, the fact (if it be true) that accused X attacked the husband, A, was part of the transaction which resulted in the death of wife B. The court observed—"it could naturally be said, for example, that had the husband not been attacked, he would have gone to his wife's assistance". Apart from this, and even if the accused had not been charged under section 34, Penal Code (acts done in furtherance of a common intention), the Court thought that the evidence would have been admissible against both. The Court distinguished a number of cases cited on behalf of the accused, the first being a case where in a faction fight two men were tried at the same trial for murdering two men of the opposite side, there being no other connection between the two. The second case cited was one in which a police informer was killed by the police in the course of a dacoity, and the informer made a statement incriminating certain persons as his companions. It was held that the cause of the death of the informer was only indirectly in question between the two and that his dying declaration was not admissible against the other dacoits so as to convict them.

12.46. Kernan and Brandt JJ., observed: "As to its not being admissible except as against the person who actually caused the deponent's death, we are of opinion that this is not so in the case before us. The wording of section 32 of the Indian Evidence Act is comprehensive.......... Here one of the questions was whether the accused, other than P, could be convicted of having been concerned in committing a dacoity in the committing of which murder was caused, and we have no doubt that statement as to what was done by those concerned in the dacoity in which the murder was caused was relevant against those concerned in the dacoity".

12.47. This wide view of the section is shared by the Patna High Court also.\(^1\)

12.48. The Lahore High Court\(^2\) has refused to admit a dying declaration of a person in evidence against members of his own party, in cross-cases for the death of persons of either party, even though the question was which party was the aggressor and who acted in self-defence. This case can, however, be distinguished on the ground that the two cases were tried separately and, therefore, the "cause of that person's death" did not come into question within the meaning of section 32(1). That is to say, a declaration made by A cannot be used in a case in which the issue is not regarding the declarant A's death, but regarding the death of B, a member of the opposite party.

To the same effect is an earlier decision of the Allahabad High Court.\(^3\)

12.49. An earlier Punjab case,\(^4\) holding that a dying declaration is admissible only where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration, decided that the statement of the deceased person, to the effect that another person who had died was stabbed by the accused, is inadmissible under section 32(1). If the death of the declarant is not in issue, the declaration cannot be admitted.

12.50. The controversy, however, becomes acute in a later case of the Allahabad High Court.\(^5\)

\(^3\)Dhan Singh v. Emperor, A.I.R. 1925, All. 227.
In that case it was held that the statement of one dead person is not a relevant fact with respect to the question about the death of another. This view has been dissented from by the erstwhile Travancore-Cochin High Court, on the ground that this would limit the word of the section ("transaction") in an unjustified way. It may be noted that in the Allahabad case already cited, Raghubir Dayal J., rejected the dying declaration of one brother, Girwar Singh, with respect to the attack on Megh Singh, his brother, though the transaction in which both the persons were killed, was, one, as is evident from the following extracts of the dying declaration:

"...............I was sleeping in my field..............Megh Singh went and slept in the field (to keep watch over) Bajra crops. K. R. and B. came and pressed down my younger brother, Megh Singh. When he cried out, I started.............the aforesaid four persons surrounded me and attacked me.............thereafter I got unconscious............they murdered my younger brother, Megh Singh."

12.51. The case related to the murder of both the brothers. The Court observed that section 32 makes a statement of a person relevant only when the statement is made as to the cause of his death or as to any of the circumstances of the transaction etc., and that "it follows that the statement of one dead person is not a relevant fact with respect to the question about the death of another person".

12.52. In view of the above state of the case-law, two questions arise — first, what is the true position and secondly, does the section require any clarification to embody the true position.

12.53. As to the first question, it is suggested that the language of the section is comprehensive enough to justify a wider interpretation. It is true that the proceeding must be one in which the death of the declarant is a matter in issue. But, once this condition is satisfied, the statement is admissible not only for one purpose (cause of his death), but also for another and wider purpose, namely, proof of circumstances of the transaction which resulted in his death. It is well-known that the word "transaction" has always been interpreted widely, not only in general legal phraseology, but also in the parallel language of section 235 of the Criminal Procedure Code, 1898 (section 220 of the Code of 1973). The word "circumstances" has the effect of widening, and not narrowing, the scope of the section. Therefore, undue emphasis should not be laid on the words "his death", in connection with the transaction. As was pointed out in a Lahore case, the word "transaction" does not mean merely the fact of death, but all the circumstances connected with it.

12.54. The English cases that are cited in this connection did not actually lay down a narrower view. In one of the cases, a person was accused of perjury, and what was sought to be given in evidence was a dying declaration by a person who was shot by the accused after conviction. The declaration gave an account of the shooting, and then proceeded to state certain facts relevant to the charge of perjury. This was sought to be given in evidence, in opposition to the order for new trial obtained by the Attorney General. The court held it to be inadmissible, because evidence of this declaration is admissible only where the death of the deceased is subject of the charge, and the circumstances

3En-perum v. Fazl, A.I.R. 1916 Lah. 106.
4Rig v. Mead, (1824) 2 B.C. 605.
of the death are the subject of the dying declaration. This case does not necessarily mean that the dying declaration can be used only in so far as it deals with the central fact of the death of the declarant. It only means that the dying declaration is admissible only in a trial for murder or manslaughter, where death is the subject of the charge.

12.55. In another English case, A was charged for procuring the miscarriage of a woman B. A dying declaration by the woman B as to the circumstances of the case was held to be inadmissible. In this case, also, the rule laid down in simple, namely, that where the charge does not involve the homicide of the declarant, the dying declaration is not admissible.

12.56. Apart from this aspect, namely, that the English case law is not conclusive, the matter could be approached from the point of view of logic also.

12.57. Now, logically speaking, there is no reason why the section should be confined in the manner suggested by the narrower view. Sense of impending death and the necessities of the case, which are the principal reasons for admitting dying declarations, apply as much to the death of the declarant as to the death of any other person.

12.58. Though it would appear that the language of the section is even now capable of a wider construction yet, in order to resolve the controversy, it is desirable to make the necessary clarification on the above point. This could be achieved by adding a suitable Explanation.

We recommend that the section should be so amended.

12.59. Under the Act, the statement is admissible whether or not the person who made it was under expectation of death. This is expressly provided in the clause.

12.60. It may be noted that under the law which was in force prior to the Evidence Act, it was held that before a dying declaration could be received in evidence, it must be distinctly found that the declarant knew, or believed, at the time he made the declaration, that he was dying, or was likely to die. This requirement is not found in the section.

12.61 to 12.63. While recording that the various restrictions imposed by the English law, inter alia. On dying declarations had not been adopted, the Select Committee on the Indian Evidence Bill gave the reason that these restrictions should rather go to the weight of the evidence in question than to its admissibility. As to English law, we may refer to the case of R. v. Woodcock. A man was charged with the murder of his wife, and her statement concerning the cause of her injuries, given on oath to a magistrate, was received in evidence against the accused. The deceased said nothing of her impending death, but the court was satisfied that she must have known that she was on the point of dying. Eyre, C.B., said:

1R. v. Hind (1860) 8 Cox Criminal Cases 300.
2(a) R. v. Premnathana. (1925) 1 I.R. 52 Cal. 9871;
(b) R. v. Degumber, (1873) 19 W.R. Cr. (Cal.).
3Section 371, Act 25 of 1861, and section 29, Act 2 of 1855.
4(a) In the matter of Tesco. (1871) 15 W.R., Cr. 11 (Cal.).
(b) R. v. Bissoninpun. (1868) 6 W.R., Cr. 75, 76 (Cal.).
(c) R. v. Sumber, (1886) 9 W.R., Cr., 2 (Cal.).
6R. v. Woodock, (1789), 1 Leach 500.
"The principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice".

12.64. As a result of the above discussion, it will be necessary to revise clause (1) as follows:—

VI. REVISED SECTION 32(1)

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question.

Explanation 1.—Such statements are relevant whatever may be the nature of the proceedings in which the cause of death of the person who made them comes into question.

Explanation 2.—The circumstances of the transaction which resulted in the death may include facts relating to the death of another person.

12.65. Declarations made in the course of business are dealt with by Section 32(2) in these terms.

"When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money goods, securities or property of any kind or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him."

12.66. It may be noted that expressions referring to the "course of business" occur also in sections 16, 34, 47, 114 and in the illustrations to section 114. Section 16 speaks of a "course of business" according to which "naturally an act would have been done"; section 34 speaks of books regularly kept in the "ordinary course of business". Section 114 speaks merely of "common course of.................public and private business". The phraseology, thus, differs in the various sections. The difference in phraseology does not appear to have caused any difficulty. The applicability of clause (2) depends entirely on the exact meaning of the words "course of business".

12.66A. Clause (2) does not, in terms require that it must be the duty of the person who made the statement to make that statement. The broad category with which the clause begins is expressed by the words—"in the ordinary course of business". What follows is an enumeration of particular situations, of which one relates to statements made "in the discharge of professional duty". This may be described as the illustrative part of the clause. The object of this illustrative part, in reciting the particular cases, is obviously not to restrict the general applicability of the clause.

12.67. The English rule of evidence, of which the case of Brain v. Preece is the best illustration, is briefly and clearly stated in Stephen's Digest of the

1Emphasis supplied.
3Brain v. Preece, 11 and W. 773.
Law of Evidence. “A declaration is relevant when it was made by the declarant in the ordinary course of business, or in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own knowledge.”

The word “or” should now be read as— “and”

12.68. The subject is usually dealt with, in England, (under the corresponding rule of the common law)— under “Declarations in course of duty”. A declaration is relevant when it was made— (i) by a declarant who is dead, and (ii) in the discharge of his professional duty, (iii) at or near the time when the matter stated occurred, (iv) on personal knowledge, and (v) there was no motive to misrepresent.

12.69. It now seems to be accepted in England that the existence of a duty is necessary. The statement of the law, by Stephen¹, requires modification on this point.

12.70. Thus, in an English case, a certain entry ran thus: “April 4th 1825, W. Worsell came as farm-hand; and to have for the half-year 40 s. “Lord Denman, C.J. observed:

“The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the Services had been performed.”

12.71. Again, under English law, as already stated² entries in the course of business must be shown to have been made contemporaneously³ with the facts to which they relate. Amid the hurry and distraction of business, it is argued, the particulars of matters not entered at the time may be forgotten or misstated. The provisions of the Indian Act contain no similar restriction as to the admissibility of this kind of evidence. However, in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact to which it relates.

“The sale of a valuable Cashmere shawl might be entered a day or two after, without any risk of error, while a retail shopkeeper would have some difficulty in remembering on the following morning the particulars of a couple of dozen articles sold at different prices—this single transaction being one or fifty of a hundred similar sales made on the same day”.

12.72. With reference to the second requirement of English law, — the requirement of duty—it has been said⁴ that the duty must not be a general one, involving a variety of acts that may change from time to time, but specific and two-fold— i.e. to do a particular act and to record or report it when done. There must have been a duty to record or otherwise report the very thing⁵. The duty must also be to do the very thing to which entry relates, and then to make a report or record of it.

Finally, the duty must have been actually performed.

¹Stephen’s Digest, quoted in Reg. v. Hoamana, I.L.R. 1 Bom., at p. 616.
²See “English Law—Declarations in the course of duty” infra.
³Stephen’s Digest, quoted supra.
⁵See supra.
⁶The Henry Caxton 3 FD 156 (2 days’ delay fatal).
⁷Woodroffe.
⁸(a) Storia v. Freecia, 5 App. Cas. 347. (Lord Blackburn);
⁹(b) Morey v. Denna, (1905) 2 Ch. 538, 558. (C.A.).
12.73. In English law, as already stated, entries made in the course of business are evidence only of those things which, according to the course of business, it was the duty of the person to enter, they are no evidence of independent collateral matters. In the case of Chambers v. Bernasconi, Lord Denman, delivering the unanimous opinion of the Exchequer Chamber, said: "We are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting facts necessary to the performance of a duty, the statements of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances."

12.74. This restriction on admissibility is also not to be found in the Indian Evidence Act. The statement or entry, in order to be admissible under the Act, must relate to a relevant fact. But it is immaterial whether this fact is connected with the performance of a duty, or is merely an independent collateral matter.

12.75. Under English law, it is essential that the declarant should have had personal knowledge of the matters stated. The Indian section simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business; and although it may, no doubt, be important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which, according to the Indian rule of Evidence, affects the value and not the admissibility, of the entries.

12.76. It may be of interest to consider the question whether, under section 32(2), the statements in books of account kept in the ordinary course of business are sufficient evidence to charge any person with liability. In this respect, section 34 may be contrasted; that section specifically provides that while entries in books of account regularly kept in the ordinary course of business are relevant, such entries "shall not alone be sufficient evidence to charge any person with liability." Under that section, thus, there has to be evidence to prove the transactions which may appear in the books of account.

12.77. Of course, the testimony of the plaintiff himself on oath in support of the entries could corroborate the entries, and suffice to fix the defendant with liability under section 34. In fact, it has been held that such corroboration as is required by section 34, would be best afforded by the evidence of the person who knows the books of account and in whose presence the transaction took place.

12.78. This difference between section 32(2), on the one hand, and section 34, on the other hand, has been noticed by the courts which, in general, held that while the entries under section 32(2) do not suffer from any statutory disability such as is provided in section 34, the court is not bound to accept them without corroboration, that being a matter on which it must exercise a discretion as a fact.

---

1Chambers v. Bernasconi (1834), Crompton, Meeson and Rescoe's Reports, 347, 368.
2See Stephen—quoted supra.
3Reg. v. Harmanata, (1877) 1 I.L.R. 1 Bom, 610, 616, 617.
7See also Duverka Dass v. Babu Jankidas, (1855) 6 Moore Indian Appeals 88.98.
12.79. Having regard to the fact that the person who made the entry under section 32(2) is not available as a witness at the final. We would not like to disturb the present position in this regard by inserting any such disability as attaches to entries under section.

12.80. In this connection, we have taken note of the learned and illuminating discussion by Mukerji J. in Gopeshwar’s case. He observed—

"Section 43 of Act II of 1855 was as follows: “Books” proved to have been kept in the course of business “shall be admissible as corroborative and not as “independent proof of the facts therein stated”. In section 34 of Act I of 1872, the words “regularly kept” are substituted for the words “proved to have been regularly kept” and in the illustration to the section the word used in “shows” and “proves”. It is apparent, therefore, that the law embodied in section 34 of Act I of 1872 is not quite the same as was contained in section 43 of Act II 1855, and this seems to be conceded on all hands. The expressions “corroborative evidence”, “independent evidence” and “substantive evidence” that are found in many of the reported decisions bearing upon section 34 of Act I of 1872 are somewhat out of place in view of the wording of that section and have been handed down to us from the words “corroborative” and “independent” that appeared in section 43 of the old Act and those words as well as the word “substantive” that were used in the decisions thereunder. The present Act deals, amongst others, with the relevancy of evidence and in some instances with the probative value. The plain words of section 34 indicate that the section deals with all entries in books of accounts regularly kept in the course of business: in the first place, making them relevant whenever they refer to a matter into which the Court has to enquire, and next, providing that when such entries are sought to be used as statements for a particular purpose, namely, to charge any person with liability, they shall not alone be sufficient evidence for that purpose. Section 32 clause (2), makes relevant a statement, consisting of an entry, made by a person, who is not a witness before the Court, in books— not necessarily books of account but—kept in the ordinary course of business. A book of accounts may be one of such books, and where an entry appears in a book of accounts it comes both under section 32, clause (2), and section 34. The illustration to section 34 makes it plain that, if the book of accounts is regularly kept in the course of business, the entry will be relevant notwithstanding that the person who made the entry has not been examined to prove the truth of the transaction to which the entry relates and notwithstanding that he is available as a witness. The only material difference as between an entry relevant under section 34 and one relevant under section 32 clause (2), is that in the former case the person who made the entry may be available as a witness, while in the latter case he is not. I find it: very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under section 32, clause (2) from the disability that it imposes on entries relevant under section 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under one section or under the other, are not to be considered as alone sufficient to charge any person with liability. The other view, however, namely that the letter part of section 34 applies only to such entries which are relevant only under section 34 and not under section 32, clause (2) is backed by the high authority of Sir Lawrence Jenkins C. J. in the case Rampyarabai v. Balaji Shridhar3 and has been accepted as correct in other cases (e.g. Daji Abaji Khure v. Gobind Narayan4 Harai1.

2 Emphasis added.
Kukha Mandal v. W. N. Grant\(^1\), Aktowli v. Tarak Nath Ghose\(^2\) and it is perhaps too late to contest it. If this other view is adopted, it should be held that it was intended by the Legislature that where the maker of the entry is available as a witness the entry alone will not be sufficient proof to charge a person with liability but, where the maker is not available as a witness but the entry is relevant by reason of one or other of the conditions mentioned in the opening paragraph of section 32 being present, there is no statutory obligation to look for anything else to find the liability.

"Personally, I entertain grave doubts as to whether this could have been the intention of the Legislature or, if it was, it would not have been declared in much clearer terms. Fortunately, however, in practice we seldom come across a case in which the entry which comes under section 32 clause (2) is really sought to be used alone to charge any person with liability."

12.81 to 12.83. Though we recognise the weight of this comment of Mukerjee J, we think that section 32(2) was intended to leave the matter to the discretion of the trial Judge and, having regard to all aspects of the matter, it is not in our view desirable to amend it by inserting a provision such as is to be found in section 34.

12.84. In regard to the question whether the requirement of the statement having been made “in the ordinary course of business” must be fulfilled even as regards the species of statements which are specifically enumerated in clause (2), there is some obscurity.

12.85. A little analysis will show that the clause is not well-constructed on this point. Entries in books kept in the discharge of “professional duty” are, for example, specifically referred to in the clause. Do they add to “ordinary course of business”, or do they not? It is also not clear whether an acknowledgement etc. (specifically mentioned in the latter part of the clause), must be in the ordinary course of business.

12.86. Most of the cases approach the problem by interpreting the words “ordinary course of business”. They do not analyse the structure of the clause. In an Oudh case\(^3\), for example, a receipt executed by a deceased person, and stating that the disputed property formed the boundary to an adjacent plot, was, without specific discussion, described as a “statement made by a deceased person in the ordinary course of business”, and it was stated that though it was weak type of evidence, yet it was admissible. The person who made this statement was a cousin of the parties. The document was admitted to prove the “reputed ownership” of a certain property.

12.87. In a Madras case,\(^4\) this approach finds a more positive illustration. A person wrote a letter to his wife, making a reference to a family settlement, such as, to tell his uncle that he would execute a mortgage deed in favour of the uncle. This letter was filed to prove the family settlement. It was held that section 32(3) did not apply, because the admissions of liability were only parts or a larger statement asserting a settlement, but section 32 clause (2) would apply, because the statement was made to his wife “in the ordinary course of business”. The point was described as difficult, but the view taken was that the

---


expression "in the ordinary course of business" means "in the way that business, which may be even private or of a trivial nature, is conducted", and has no connection with a course of business which suggests a series of acts of business.

12.88. The view expressed in a Bombay case¹, that the exception extends only to statements made during the course not of any particular transaction of an exceptional kind such as execution of a deed of mortgage, but to transactions of business or professional employment in which the declarant was ordinarily or habitually engaged, was disentangled from in the Madras case.

12.89. The clause, it may be noted, also mentions entries etc. made in books kept in the discharge of professional duty. The significance of this portion is obscure.

12.90. In a case decided by the Supreme Court¹, Panjaji's registers maintained by professional genealogists and containing tables of pedigree, were held to fall within section 32. But the question of "duty" was not involved, and it would appear that the court emphasised the fact that "it is the business of these 'panjikars' to collect this evidence about pedigrees".

12.91. Rejecting the contention that the entry should have been made before a controversy arose, the Supreme Court pointed out that section 32(2) did not contain any such limitation. "It is enough if it was made in the ordinary course of business".

12.92. An Allahabad case² is more specific on this point. In that case, an entry in a diary made by a Sub-Inspector of Police then dead, was regarded as falling within section 32(2), and the High Court observed that "there could be no doubt that the Sub-Inspector made these entries in the discharge of his professional duties".

12.93. In a case decided by the Privy Council,³ an entry made by a Muslim priest in the Marriage register was regarded as relevant under section 32 (precise clause of the section was not referred to), as having been made by the Murtzad in the discharge of his professional duty (the point at issue related to the amount of the dower).

12.94. Theoretically, the clause is capable of various interpretations, so far as the requirement of ordinary course of business is concerned. The first possible interpretation is that these words are not applicable to the specifically enumerated cases. A textual approach to the clause would support this interpretation, because the requirement is not expressly mentioned in those enumerated cases, and also because the specific mention of an entry or memorandum made in a book kept in the discharge of professional duties, in addition to such entry etc. made in books kept in the ordinary course of business, would suggest that at least that part of the clause is intended to travel beyond documents in the ordinary course of business.

12.95. The second possible interpretation of the clause is that (a) the whole clause is subject to the opening portion, which emphasises the necessity of "ordinary course of business," but (b) that expression is to be given a wide

³Abdul Aziz v. Emperor. A.I.R. 1932 All. 442, 443 (Young and Bajpai, JJ.).
meaning, so as to cover not only commercial activities, but all transactions which a person *usually* enters into. This was the view taken in the Oudh and Madras cases. Above referred to.

12.96. While the first and the second interpretations have both the effect of giving a wide scope to the section, their mode of operation varies.

Besides these two interpretations, there is a third possible interpretation, namely, (a) that the whole clause is subject to the opening portion and only statements made in the ordinary course of business are admissible, and further, (b) that the transactions must not be an isolated one, and must be a mercantile one. This was, in substance, the view aken in the Bombay case, already referred to. Under this interpretation, the expression "ordinary course of business" receives a narrow construction.

12.97. The illustrations to section 32 seem to support the first interpretation, as also section 21, illustration (c).

12.98. It is obvious that apart from the fact that there is a veiled conflict between the Bombay and Madras views, there is a reasonable possibility of further conflict developing on the point discussed above. Therefore, a clarification of the position is desirable.

12.99. The question now to be considered is, whether the clarification should be by way of adopting the first interpretation, or whether it should be by way of adopting the second interpretation, or whether it should be by way of adopting the third interpretation. Much can be said on all sides. The first interpretation has the merits of stating the position in fairly clear terms, and avoiding the rather artificial approach which has to be adopted under the second interpretation as to the expression "ordinary course of business". In normal parlance, one does not think of private transactions in family matters as undertaken in the "course of business".

12.100. The second interpretation has the merit of introducing one common thread, so that the specifically enumerated cases will still be subject to the requirements of "course of business".

12.101. The third interpretation has the merit of simplicity, inasmuch as the expression "ordinary course of business" would be used in the natural sense commonly understood.

12.102. It is desirable to remove the obscurity on the subject discussed above, by suitable amendment. But, before suggesting the precise amendment, we have to decide which of the possible interpretations, as listed above, should be adopted. We prefer the first alternative which has the merit of clarity and avoiding artificiality.

12.103. If, it is decided to adopt the first interpretation — and we recommend its adoption — it would be convenient to confine clause (2) to statements made in the ordinary course of business, and to carve out a new clause (2A) to deal with the statements (enumerated in the present clause) which are to be regarded as relevant whether or not they are in the ordinary course of business.¹

The following is a rough re-draft for the purpose of implementing the first alternative:

¹If necessary, corresponding clarifications may be made in illustrations (e), (g) and (h).
[Proposed re-draft of s. 32(2)].

"(2) When the statement was made by such a person in the ordinary course of business: and, in particular, and without prejudice to the generality of the foregoing provisions of this clause, when it consists of any entry or memorandum made by him in books kept in the ordinary course of business:

"(2A) When the statement consists of an entry or memorandum made by such person in the discharge of professional duty or of an acknowledgement written or signed by such person of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him or of the date of a letter or other document usually dated, written or signed by him."

VII. SECTION 32(3)

A. INTRODUCTORY

12.104. to 12.107. Section 32(3) makes a statement relevant — when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

The basis of this clause is the principle that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or needlessly incorrect, and carries its own sanction, even though the other usual sanctions of truth are wanting.

12.108. While English law also recognises this principle, the clause in the Act is wider than the English law, inasmuch as it also incorporates a proposition which English Courts have refused to adopt, namely, the inclusion of statements which would have exposed the maker to a criminal prosecution or to a suit for damages. At common law, the rule on the subject is narrow, and does not include statements which would have exposed the maker to a prosecution or penalty. It was held in the Sussex Peerage case\(^1\) that a declaration by a deceased clergyman, concerning a marriage at which he had officiated—a marriage where the person celebrating would be liable to punishment under the Royal Marriage Act, 1772—was inadmissible as evidence of the marriage. Lord Brougham, who is otherwise known to have been an advocate of a liberal approach in the law of evidence, said, "The rule as understood now is that the only declarations of deceased persons receivable in evidence are those made against the proprietary or pecuniary interest of the maker."

12.109. The ground on which a statement made by a witness who is dead or otherwise not available, which would have exposed him to a criminal prosecution, is admitted, is that a man is not likely to accuse himself falsely of a crime. Of course, it is not possible to state that in every case the statement is more likely to be true than false. This is shown by the conduct of approvers in criminal cases, who, while charging themselves with complicity in a crime, take care to ensure that the major blame is thrown on the other alleged co-participants. However, these are matters which can be taken into account by the court in considering the weight to be given to the particular statement.

12.110. There is, of course, no restriction either in England or in India that the declaration is admissible only where it is against the maker's interest. If admissible, the declaration is admissible as evidence for all purposes.\(^2\) The principle underlying the clause is, as already stated, the improbability of a statement against interest being false.

---

\(^1\) Sussex Peerage case, (1844) 11 Cl. & Fin. 85 (House of Lords).

\(^2\) Taylor v. Witham (1876) 3 Chancery Division 605.
B. RECITALS OF BOUNDARIES

12.111. So much as regards the principle of the clause, we shall now proceed to consider certain matters of detail, arising out of the clause.

There exists a controversy as to whether recitals of boundaries in documents not in pari partas would be admissible under section 32(3) as statements "against the proprietary interest" of the declarant. One view on the subject is that such recitals are admissible, because—

(a) If the deed is one of mortgage of conveyance, the deed amounts to a statement against the pecuniary interests of the mortgagor (being an admission that he is indebted in a certain sum of money and that money is charged on his property) or against the proprietary interests of the vendor (being an admission that he is extinguishing his interest in the property sold); the argument being that the whole document, and not merely the precise fact being against interest becomes relevant, on the principle applied in the English case of Higham v. Ridgway. The leading case based on such a reasoning is a Bombay one—Ningava v. Bharmappa.

(b) A statement by a person that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries in the deed. The aforementioned cases support this view.

12.112. A contrary view has been taken in some cases, on the ground that—

(i) Under section 32(3), it is not the document, but the statement that must be against the interest of the maker.

(ii) A statement that the declarant's property is bounded in certain directions with certain other man's property is not against the declarant's interest, unless one assumes that every person is presumed to own the whole universe in the absence of a statement circumscribing his title. A person may really be presumed to own nothing until he has evidence to show his ownership.

1Higham v. Ridgway (1863) 10 East 109 (see infra).
3(a) Tikka Ram v. Moti Lal, A.I.R. 1938, All. 299; 301, 302 (Recognition of another's title is against interest);
(c) Katabuddin v. Najar Chandra A.I.R. 1927 Cal. 230, 231, 232 (B. R. Ghose & Panton JJ.). This was an obiter since the declarants were examined in the cases);
(d) Thuyagarajan v. Narayan, A.I.R. 1948 Mad. 450 (Wadsworth J.) (Obiter and no conclusive discussion);
(e) Rangaswam v. Innesimuthu, A.I.R. 1956 Mad. 226, 228, Para. 7, 229, Para 11 (reviews cases);
(f) Trimbak v. Ganges, A.I.R. 1923 Nag. 22 (Prideaux A. J. C.);
(g) Rammaddan v. Jelavilekhalari, A.I.R. 1933 Pat. 636, 638 (Dhavle J.) (other).
4(a) Karuppana v. Rangaswami, A.I.R. 1928 Mad. 105, 106 (Jackson, J.);
(b) Re. Paddagum. (1910) M.W.N. 668;
(c) S. Venkatachala v. Narasayya, (1914) M.W.N. 779, there cited.
C. SELECTED CASES AS TO RECITALS OF BOUNDARIES

12.113. We do not propose to summarise all decisions; a few cases which reveal the nature of controversy may be mentioned. Thus, in Abdullah v. Kunj Behari Lal,1 it was decided that recitals of boundaries in deeds of sales and mortgages executed by owners of adjoining plots of land, and describing the disputed land as the tenanted land of the defendants or their predecessors, were relevant under section 32(3), though not under section 32(2) or section 11 or section 13.

With this we could contrast In re Daddapeneni Narayenappa. A single Judge of the Madras High Court held that recital in a document dealing with neighbouring land, that the land in question belonged to the plaintiff, was not admissible.

And two Judges of the Madras High Court differed in Saripalli Venkataramasopala Raju v. Foto Narasayya.2

12.114. In a Calcutta case,3 it was observed—

"The question to be decided is whether the statement by the grantor in the schedule to the lease, that on the boundary of the land demised was the holding of the predecessor of the present plaintiff can be used in evidence against the Defendants although they were not parties to the transaction evidenced by that document. In our opinion the document is admissible in evidence on the principle explained by this Court in the case of Abdullah v. Kunj Behari. In fact the case before us is stronger than the case then before the Court, because it is alleged here that the statement was made by the landlord of the Plaintiff who might be expected to know who was in occupation of the land as his tenant. The case is, therefore, completely covered by the decision in the cases of Ningava v. Bharmappa. Abdul Aziz Mollah v. Ebrahim Molla,4 and Burba Mandari Meghanath."5

12.115. In Abdul Ali v. Syed Hazan Ali,—Another Calcutta case, it was held that such recitals were inadmissible in evidence against a party who was stranger to them, and that the ruling as to the admissibility of the documents in one earlier case—Dwarka Nath v. Mukunda Lal—was obiter.

In another Calcutta case,6 again, it was decided that recitals of boundaries of other lands in documents between their parties were not admissible in evidence.

It was held in the Allahabad case of Natwar v. Alkhu,7 that such a document is admissible in evidence under section 32(b).

12.116. These reported cases will suffice to show the conflict of decisions. It may also be noted that the controversy exists not only amongst the several High Courts, but also within each individual High Court. Thus, the Calcutta

1Abdullah v. Kunj Behari Lal. (1911) 14 C. L. J. 467 (Cal).
2In re Daddapeneni Narayenappa. (1910) M.W.N. 268.
5Burba Mandari v. Meghanath. (1905) 2 C.L.J. 4n.
7Dwarka Nath v. Mukunda Lal. (1907) 5 Cal. L.J. 55.

17-131 LAD/ND/77
High Court, has, in some decisions, excluded such statements, but, in other cases, it has held them to be admissible. The Madras High Court has expressed different views on different occasions.

The Patna High Court admitted such statements in some cases, but excluded them in other cases.

D. COMMENTS ON THE CASE LAW

12.117. We shall later indicate our own view in the matter. But we may first refer to some important points relevant to an appreciation of the value of the judicial decisions. If the ancestry of the judicial decisions taking a view in favour of the admissibility of recitals of boundaries under section 32(3) is carefully analysed, it will be found that almost all the decisions can be traced either to the Bombay case of Ningava, or to the Calcutta case of Leela Nand.

For example, the Bombay case of Ningava was followed. In the Calcutta case of Abdullah v. Kuni Behari Lal. The Calcutta case of Leela Nand and the Bombay case Ningava were followed in the Allahabad case of Natwar v. Akhru. All these cases were subsequently followed in Calcutta in Imam Chamar v. Sirdhari Pandey, and in Ambar Ali v. Isha Ali and in certain other cases, some of which will be referred to.

12.118. Now, the Calcutta and Bombay cases (Leela Nand and Ningava) are themselves subject to comment on the ground of principle, and we shall later give our comments as to the principle. But without meaning any disrespect to the other High Courts, we may state that some of the decisions of the other High Courts, are based on a misconception of what was in issue in Leela Nand's case and what was decided in Ningava's case. Thus, in one of the Calcutta cases, it was stated that documents which dealt with land lying on different boundaries of the land in dispute were admissible under section 32. After noting the uncertainty on the subject in English law, it was stated—“whether such evidence is admissible under the Evidence Act was considered in favour of its admissibility in several cases, the earliest was Leela Nand's case”. The Court with respect overlooked the fact that Leela Nand's case was not directly concerned with recitals of boundaries at all. The statement in issue in Leela Nand related to the amount of rent.

12.119. In another Calcutta case, the High Court observed—

“The statement, though not relevant as on admission may, however, be relevant under section 32(3) as a statement against interest which has been held as evidence against strangers. It was so held in the case of Leela Nand......”. Here also, it was not noted that Leela Nand was a case concerning the amount of rent.

---


3See Soran Loli's case, A.I.R. 1935 Pat. 167, 168 (F. B.) and Hari Ahir's case, A.I.R. 1934 Pat. 617(2) 619 (Wort. J.)


8See, “Mater discussed on the basis of principle”, infra.


In a Madras case, it was stated

"Another ground on which recitals of boundaries of the land are held to be against, is that a statement by the vendor that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries mentioned in the deed."

Now, in so far as this observation refers to the Bombay Case (the case of Ningawa), it may be stated that the Bombay case is not based on the reasoning that a statement limiting boundaries is an admission that the proprietary interest does not extend over other lands. The Bombay case is based on the reasoning that since a mortgage-deed, as a whole, is against proprietary interest, a statement about boundaries, which is a part of the mortgage-deed, is also against interest. The observation in the Madras case, in so far as it seeks to summarise the Bombay case, is, therefore, debatable, with respect.

12.120. In some of the judicial decisions, there is a misconception about the general trend of previous cases. This is illustrated by a Nagpur case, where, after referring to some of the earlier cases, it is stated, "the weight of authority, therefore, seems, to be that such admissions containing recital as to boundaries are admissible under section 32, clause (3) of that Act".

12.121. Now, it should be pointed out with respect, that out of the nine cases referred to in the judgment as to recital were held to be not relevant: in five they were held to be relevant, and in one, two judges of the same High Court differed.

Further, the discussion in the Nagpur judgment itself notes that the later Madras and Calcutta cases were against the admissibility of such recitals. The only other High Courts taking a view in favour of admissibility were Bombay and Allahabad.

12.122. This view was criticised in a later Madras case, where Ramaswami J observed—

"But, with respect to Jackson J, his observation seems to miss the real point. Section 32(3) states that when the statement is against the pecuniary or proprietary interest of the person making it, it is relevant when the person making it is dead, or cannot be found or has become incapable of giving evidence whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the court unreasonable.

"First of all, recitals of boundaries of property, contained in deeds not "inter partes" have been held to be admissible to prove the ownership or possession of adjoining property, on the ground that, when the deed is a mortgage deed, it amounts to a statement against the pecuniary or proprietary interest of the mortgagor, inasmuch as he admits therein that he is indebted in a certain sum of money and that this money is a charge on his property (cases cited) and when the deed is a deed of conveyance, on the ground that it amounts to a statement against the vendor's interest, inasmuch as he admits therein that he is extinguishing his interest in the property conveyed.

---

1Rajgajan v. Inial Mutha, A.I.R. 1956 Mad. 226, 229, Para. 11
2Ningawa, I.L.R. 23 Bom. 63.
3A.I.R. 1923 Nagpur 23.
4The judgment as printed in the A.I.R. mentions clause (2), which is a misprint for clause (3).
5This was the case reported in 1914 Madras Weekly Notes 179
"The mortgage deed or the deed of conveyance having thus been held to be a statement against the pecuniary or proprietary interest of the executant of the deed, on the authority of—'Rieham v. Pideway', (1508) 10 East 109 (7), the document is made evidence not only of the precise fact against interest, but of all the collateral facts mentioned therein, and consequently of the possession or ownership of persons who are mentioned in the deed as possessing or owning the land adjoining the property mortgaged or conveyed 'Rajabhadi Sarkar v. Ganea Charan' A.I.R. 1919 Cal. 499 A.I.R. 1918 Cal. 971; 12 Ind Cus 149 (Cal) — 'Ramsarup v. Bhagwat Prosad', A.I.R. 1920 Pat 696.

Another ground on which recitals of boundaries of the land conveyed is held to be against interest is that a statement by the vendor that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries mentioned in the deed." (Cases cited).

12.123. We have quoted in full the passage in the judgment, for convenience of reference. We may, however, state, with respect to Ramaswami J. that we are unable to see how he has answered Jackson J.’s point. The point made by Jackson J. was, that unless one assumes that every one claims the whole world, recitals of boundaries are not against the interest of the maker. This point has not been answered by Ramaswami J. Rather, the point missed in the exposition by Ramaswami J. is that a mortgage of land A is not a relevant fact at all, when the question is as to land B. In order that any clause of section 32 may apply, the first condition to be satisfied is that that statement must be of a relevant fact. It is only when that condition is satisfied, that an occasion for considering the applicability of a particular clause arises.

E. STATEMENT OF BOUNDARY NOT AGAINST INTEREST

12.124. Not only in a recital of boundary not against interest, but it would also appear that a statement by a person that there is a certain boundary of his land is in his favour, if at all, rather than against his proprietary interest, because he is thereby limiting the amount of land which he is selling. This aspect was referred to by Wort J. in the Patna Full Bench Case, where he said:

"In coming to the decision on the question, apart from the authorities to which I have referred, I think I can do no better than to repeat the language of Jackson J. of the Madras High Court when he says that such a statement can be construed as against the proprietary interest only on the assumption that there are no boundaries to the property of the person who is the maker of the deed and he is the owner of the universe. There must of necessity be some boundary to a man’s land: and the statement that there is a certain boundary of the land which is the subject-matter of the deed, namely, circumscribes the interest which he is selling and therefore circumscribes the interest which the purchaser obtains in a sense that the vendor says: "I sold you this much and no more" and that if that is a true statement of the boundaries, it seems to me it is rather in favour of the person who makes it than against his proprietary interest."

Or, to approach the matter in a different light. — when a person says that a certain other person has got land north or south or east or west of his land, he

2Section 32, opening paragraph.
3See further discussion. Intra.
does not more than describe his own land. As Mohammad Noor J. observed in the Patna case. "Every man's land is circumscribed by some boundary. Every man has a limit to his land." The same Judge pointed out, with reference to the English Case of Higham v. Ridgway, that the statement of the date of birth would, in India, be admissible under section 32(2) as a statement made in the ordinary course of business in books of account, but not necessarily under section 32(3).

F. STATEMENT MUST BE OF RELEVANT FACT — CRITICISM OF BOMBAY CASE

12.125. Apart from our comments on the case law, and apart from the principle, we would state that on the terms of the section also, the narrower view appears to be correct, because it is only statements of relevant facts, (which statements themselves are against the pecuniary interest etc. of the maker), that are admissible under the section. To regard a mortgage deed, which is not, in itself, relevant, as admissible under the section, would not, with respect, be consistent with the terms of the section.

G. ENGLISH LAW

12.126. It should be pointed out that some of the reported cases seem to have been under a mis-conception as to the English law. The general rule of English law is that a statement made by a third person is not relevant. We are not discussing the admissibility of a statement against the maker or his representative-in-interest; but a statement as to boundaries made not inter partes is not relevant in England as a statement against interest.

In fact, in English law, it is an essential ingredient of the relevancy of statements against proprietary interest that the statement must be known to be against the interest of the person who made it, at the time when he made it. A recital of boundaries would seem to fail to satisfy this requirement.

12.127. We cannot help observing that this aspect of the matter seems to have been overlooked in the Bombay case of Ningawa. In that case, the deed was one of mortgage, and contained certain recitals as to boundaries. The deed was construed as amounting to a statement against the proprietary or pecuniary interest of the mortgagor, and it was held that the statement of boundary, which was a part of that deed, was admissible under section 32(3). But, as we have pointed out in the above discussion, before clause (3) of section 32 can be invoked — or, for that matter, before any other clause of section 32 can be invoked it must first be established that the statement sought to be admitted is a statement of a relevant fact.

Now, the mortgage deed as a whole was not a statement of a relevant fact at all, and, for that reason, the fact that the deed was against the proprietary interest of the executant, became of no consequence in attracting section 32(3).

Assuming that the mortgage deed was a document against the proprietary interest of the maker, what requires to be pointed out is that the deed (as a whole) did not constitute a statement as to a relevant fact. The general rule that if a part is relevant, the whole is relevant, was not really applicable. The part, in this case, was a statement of boundaries. We may assume that if a statement in a deed is a statement of a relevant fact, then certain other portions of the deed, which are necessary for understanding that statement, may be brought into evidence, — on the principle that the part renders the rest admissible.

But, in this case, the whole, that is to say, the document of mortgage itself, did not relate to a relevant fact and, with respect to the Bombay High Court, it is not possible to apply a different rule, namely, that if the whole is against the pecuniary interest though not about a relevant fact, then the part thereby becomes a statement against proprietary interest and so becomes admissible.

12.128. In other words, in the Bombay case, that which was regarded admissible as a statement against the interest — the mortgage deed — was not a statement about a relevant fact. The statement as to relevant fact — the recital of boundaries in the mortgage deed — was not (in itself) a statement against interest. Thus, an important condition of section 32 was not satisfied in the Bombay case.

This aspect will be further evident from the facts of the case, which we may now state in detail. The facts were as follows:

In 1893, the plaintiff brought this suit to recover possession of certain land. The defendants denied the plaintiff’s title. The plaintiff tendered, as evidence of his ownership, a registered mortgage — deed relating to adjacent land, executed in 1877 by one Ninga Talwar to one Govind, in which the land now in question was mentioned as one of the boundaries of the land comprised in the mortgage and was described as the property of the plaintiff. Ninga Talwar was dead at the date of this suit. It was admitted that in 1877 there was no litigation between the plaintiff and defendants, and it did not appear that there was any motive on the part of the adjacent owner Ninga to make this statement in the deed on the plaintiffs’ behalf.

On appeal the question was, whether the statement in the mortgage deed was rightly admitted in evidence. The High Court answered the question in the affirmative, for reasons already stated.

12.129. So much as regards the Bombay case. As regards the Calcutta case of Leelomund, the question before the Court was whether the rent payable to the zamindar by the Ghatwal during a certain period was Rs. 75 or Rs. 175. The zamindar relied upon a statement, prepared by the then zamindar many years previously, of the Ghatwali villages in the mahal, in which there was a recital against the name of the property in question that the original rent was so much and the increased rent so much. Mr. Justice Markby held that this statement was inadmissible, he said:

"I cannot bring it under any of the rules of evidence which allow a statement of a deceased person to be put in evidence. It does not appear to me to be a statement in any way detrimental to his interest: on the contrary so far as regards the rate of rent, of course, it would be his interest to state it to be as high as possible."

In appeal, Couch C.J., and Ainalie, J., said:

"We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the mahal of the person making it is reduced or affected; it is against his interest and against his proprietary right. The effect of it is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be not against his interest but in his favour, namely, the amount of the original rent and increased rent payable to him. But when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is

in favour of the person making it rejected, and that which is against his interest accepted. The question, is whether, taking the document as a whole it is against the interest of the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as makes it reasonable to suppose that it was done bonafide, and the statements are true.”

This case thus, did not relate to recitals of boundaries at all. Moreover, if we may say, with respect, this reasoning also suffers from one infirmity. The entire document was not a statement of a relevant fact, even if it be assumed that it was against the interest of the maker.

12.130. Some of the Indian cases rely on the English case of Higham. Illustration (b) to section 32, whose facts recall Higham’s case; is really an illustration under section 32(2), and not under section 32(3), because the illustration does not make any mention of payment of charges, and expressly mentions the requirement of “regularly kept in the course of business”. The question in Higham’s case was whether one William Fowden Jr. was born before or after the 16th April, 1768. To prove that he was born after that date, the plaintiff tendered in evidence entries from the day book and ledger of a man-midwife who had attended the mother of Fowden on his birth and who was since deceased. The entries under 22nd April, 1768 in the day book detailed the charges which were due, and in the ledger entry under 25th October, 1768 the payment of the charges was recorded.

The Court rejected the argument that the word “paid” only should be admitted without the context which explained the circumstances to which it refers. The court, therefore, looked to the rest of the entry including the entry on 22nd April, 1768 to see what demand was discharged by the entry in account. The case does not relate to recitals of boundaries at all.

12.131. It would be interesting to note that even in England, for proving that a certain sport was not within the “waste” of a manor, a declaration by the deceased lord (third person) that he was entitled to the waste up to a certain point (which did not include the place in question) but no further, was regarded as inadmissible, for two reasons, viz., the lord was not in possession of the place and the declaration was not against proprietary interest because, though disclaiming as to one part, he affirmed as to the other.

H. OTHER POINTS

12.132. It is often found that a particular statement bears a dual character, inasmuch as, in one respect, the statement is against the interest of the maker, but, in another respect, it is in his favour, as likely to advance his proprietary or pecuniary interest.

12.133. In this connection, we may refer to statements recording payment of interest or of part of a debt as a statement against interest. Previously, part payment of interest or principal did not, under the Indian Law of Limitation, revive the right to sue for the remainder of a debt. The consideration of the present question was, therefore, of importance only in connection with one class of cases, namely, where a money-bond contained a stipulation—(i) that the

1Higham v. Ridgway, (1808) 12 East 109.
3Indian Limitation Act, 1859.
sum secured thereby shall be payable by instalments, and (ii) that, on default being made in the payment of any one instalment, the whole amount or the aggregate of all the instalments shall become due and payable. Where default was made in the payment of one instalment, the cause of action in respect of the whole amount accrued, and limitation therefore began to run. The obligee of a bond (the creditor), which had become barred by limitation in consequence of the whole amount having become payable on default, might attempt to evade limitation by endorsing the payment of one or more instalments.

Such endorsement had the semblance of being against interest, but was, in reality, quite the contrary. In cases of this nature, if the endorsement was offered as an entry against interest, it ought not to be admitted unless and until it is shown to have been made at a time when it was against the interest of the obligee to make it.

12.134. According to the provisions of the later Limitation Acts, and also under the present Act, the period of limitation for a suit on a promissory note or bond payable by instalments, which provides that if default be made in payment of one instalment the whole shall be due, begins to run when the first default is made, except where the payee or obligee waives the benefit of the provision, in which case limitation begins to run when fresh default is made in respect of which there is no such waiver. Even under these Acts, therefore, it may be often to the interest of the obligee to offer proof of such endorsements (recording payment), so as to make it appear that a debt in regard to which limitation has begun to run, is not barred.

12.135. There is another rule of the law of limitation, relevant to the present topic. Part-payment of interest or of principal revives the right to sue for the remainder of the debt. This rule was first introduced in India by the Limitation Act of 1871. The existing law is in section 19 of the Limitation Act of 1963, which enacts as follows:

“19. When interest on a debt or legacy is before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or his agent duly authorised in this behalf, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.”

12.136. To adopt what Lawton J. said with reference to the corresponding English provision, the sub-section does not change the nature of the right; “it provides that, in the specific circumstances of an acknowledgement or payment, the right shall be given a notional birthday and on that day, like the Phoenix of the fable, it rises again in renewed youth — and also like the phoenix, it is still itself.”

1Limitation Acts of 1871, 1877, 1908.
2Article 37, Limitation Act, 1963.
3(a) Sethu v. Navana, I.L.R. 7 Mad. 577;
(b) Gopala v. Paramma, I.L.R. 7 Mad. 383;
(c) Chami Bash Shah v. Kadam Mandal I.L.R. 5 Cal. 97;
4Section 21, Limitation Act, 1871 (9 of 1871).
The express provision that the payment, whether of interest or of principal, must, in order to create a new period of limitation, have been made before the right to sue had become barred. Appears to require proof of the time of payment. Where the payment is of part of the principal, the proviso to the section of the Limitation Act1 (regarding handwriting of the debtor), will, in most cases, afford a security against fraud. But, where the payment is of interest only, the endorsement could be made fraudulently.

12.137. It would, from the above discussion, appear that such statements would become relevant under clause (3), though, in another respect, they help the maker. Presumably, the court will look to the substance of the matter, in deciding whether they fall within clause (3).

12.138. Another illustration of a statement having a dual character may be considered. The question before the Court in Rajah Leelanund Singh v. Mst. Tulsamal Luckpattee Thakoorain2 was whether the rent payable to the zamindar by the Ghawal during a certain period was Rs. 75 or Rs. 175. The zamindar relied upon a statement, prepared by the then zamindar many years previously, of the Ghawali villages in the mahal, in which there was a recital against the name of the property in question that the original rent was so much and the increased rent so much. Markby J. held, that this statement was inadmissible. He said: I cannot bring it under any of the rules of evidence which allow a statement of a deceased person to be put into evidence.

"It does not appear to me to be a statement in any way detrimental to his interest; on the contrary so far as regards the rate of rent, of course, it would be his interest to state it to be as high as possible." In appeal, however, Couch, C.J., and Aitkens, J., said: "We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the mahal of the person making it is reduced or affected; it is against his interest and against his proprietary right. The effect of its is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be not against his interest but in his favour, namely, the amount of the original rent and increased rent payable to him. But when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is, whether, taking the document as a whole, it is against the interest of the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as makes it reasonable to suppose that it was done bona fide, and the statements are true."

12.139. Just before this passage, there is mentioned of the provisions of the Evidence Act. The judgment of Markby J. was given in April, 1874, and though the evidence had been recorded in or before 1869, it appears that the admissibility of the statement in question was considered with reference to the Act of 1872. And even if Act 2 of 1855 be taken as the Evidence Act then applicable, there is no difference in the principle to be applied. Act 1 of 1872 made no change in the law in this respect.

1Section 19, Limitation Act, 1963 (supra).
12.140. In the result, the only change needed is an amendment to the effect that recitals as to boundaries should not be admissible under section 32(3). The clause should be amended for the purpose.

I. RECOMMENDATION

12.141. The above discussion shows that a clarification is needed on the question whether recitals of boundaries are admissible. We are of the view that recitals of boundaries should not be admissible under section 32(3). Such recitals cannot, without straining the natural meanings of words, be said to be "against interest". They are inserted merely as descriptions.

Moreover, they are not, at the time they are made, known to be adverse to the maker's interest. This consideration, even if it is not implicit in the section, should not be disregarded when taking a decision as to what the law ought to be.

We, therefore, recommend that the following Explanation should be inserted below section 32(3).

"Explanation.—Recitals of boundaries containing statements as to the nature or ownership of adjoining lands of third persons are not statements against pecuniary or proprietary interest within the meaning of this clause."

VIII. SECTION 32(4)

12.142. Section 32(4), makes relevant a statement which gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, when such statement was made before any controversy as to such right, custom or matter had arisen.

12.143. The section broadly follows the common law rule on the subject; though not in every detail. At common law, an oral or written declaration by a deceased person concerning the reputed existence of a public or general right is admissible as evidence of the existence of such right, provided the declaration was made before the dispute in which it is tendered, and, in the case of a statement concerning the reputed existence of a general right, provided the declarant had competent knowledge. The requirement of competent knowledge, as stated in the above proposition, concerning the reputed existence of a general right, was laid down in a case decided in 1835.

12.144. In this context, a "public right" is one affecting the entire population, while a "general right" is one that affects classes of persons, such as the inhabitants of a particular district, the tenants of a manor or the owners of certain plots of land.

Examples of public rights are — a claim to tolls on a public highway, a right of ferry or the right to treat a part of a river bank as a public landing place.

Examples of a general right are — rights of common, and customs of mining for a particular district.

3Pim v. Gurell, 6 M. & W. 234.
5Evans v. Merthyr, Tydfil Urban District Council, (1899) 1 Chancery 241.
The distinction between public or general rights on the one hand, and private rights on the other hand, becomes crucial in this context, because private rights cannot be proved by evidence of reputation. This was established long ago, and has been re-stated recently.

12.145. Both section 32(4) and section 48 admit evidence of opinion in matters of usage. So does section 49. There are, however, slight difference of phrasology in the various sections. Thus, section 32(4) speaks of a “public right or custom or matter of public or general interest”; section 48 speaks of “general custom or right” (which has been defined in the Explanation to the section); and section 49 speaks of “usages and tenets of any body of men or family”. We shall deal with this aspect when we come to section 48.

12.146. Decided cases in India on clause (4) do not furnish many examples of public rights or customs; but one instance of the admission of such statements is to be found in the case of Sivasubramanya v. Secretary of State for India. That was a suit brought by a zamindar to recover certain forest tracts from the Government, on the ground that the tracts were included within the limits of his Zamindari. Both the plaintiff and the defendant relied on certain ayakut accounts, as containing statements of boundaries and furnishing proof of the inclusion of the disputed tracts in the Zamindari limits or in the limits of Government villages respectively.

These accounts were made for revenue purposes to show the sources of revenue in each village. Inasmuch as they were, from time to time, prepared for administrative purposes by village officers, they were said to be admissible as evidence of reputation, provided they are produced from proper custody and otherwise sufficiently proved to be genuine.

12.147. However, a letter of the Collector containing a summary of the statements by zamindars as to the right of inheritance to a zamindari in the district, was rejected as inadmissible as it did not relate to a public right.

The order of the Government or of the executive head of a district is often accepted as conclusive concerning public rights or customs. In large zamindaries, however, questions occasionally did arise somewhat analogous to those which occur in manors in England — for example, as to the zamindar’s right to take dues on the sale of trees or to receive one-fourth of the sale proceeds in cases of involuntary sale, as in execution; or in case of a house sale privately. With the abolition of zamindaries, such questions have lost their importance.

12.148. The Bombay High Court has held that evidence of the nature referred to in clause (4) is admissible to prove only a fact in issue and not a merely relevant fact. In the Bombay case, the question at issue was whether there was a custom amongst a certain caste of Hindus prohibiting the widow from adopting a son, and a statement signed by several members of this caste to the effect that the widow cannot adopt, was sought to be given in evidence. It was held that the statement cannot be admitted.

3To be considered under section 48.
4Sivasubramanya v. Secretary of State for India, I.L.R. 9 Mad. 285.
8Kalan Das v. Bhagirathi, I.L.R. 6 All 47.
This case was dissented from by the Madras High Court in *Raghubhusana v. Vidiavaridhi*, where it was held that a fact in issue is always a relevant fact, and statements of deceased persons, relating to a fact in issue are admissible under section 32, clause (4).

We have already dealt with this point while discussing the opening paragraph of section 32. The amendment recommended in the opening paragraph will take care of the matter.

**12.149. In the above position, no changes are needed in clause (4).**

**IX. SECTION 32(5) AND 32(6)**

**12.150. Section 32(5) makes a statement relevant when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption, the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.**

**12.151. Section 32(6) makes a statement relevant when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.**

**12.152. The two clauses deal with the relevancy of two classes of statements. These are usually treated by English text-writers under a single head, in discussing the admissibility of certain kinds of evidence in "matters of pedigree". There is, however, a distinction between the kinds of evidence to which each clause refers.**

(i) The statement declared relevant by clause (5) is a statement relating to the existence of any relationship between persons, alive or dead. The statement declared relevant by clause (6) is a statement relating to the existence of relationship between deceased persons only.

(ii) Under clause (5), special means of knowledge is a requisite. Under clause (6), it is not necessary that the statement should have been made by a person who had special means of knowledge.

(iii) But it is necessary under clause (6), that the statement must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon a tombstone, family portrait or other thing on which such statements are usually made. This is not necessary under clause (5).

**12.153. Thus, in some respects, clause (6) is narrower than clause (5) while, in some respects, it is wider. Both the statements, in order to be relevant, must have been made before the question in dispute was raised.**

**12.154. Besides the documents and other material things specifically mentioned in clause (6), family bibles, coffin-plates, mural tablets, hatchments, rings armorial bearings and the like, amongst Christians, and books kept up by**

---

1 *Raghubhusana v. Vidiavaridhi*, 34 I.C. 875 (Mad.).
2 See discussion as to section 32, opening paragraph.
3 The language of clause (5) imposes no restriction in this respect.
family bonds of domestic events in the families to which they are attached, and horoscopes among Hindus, are examples of other documents and things on which such statements are usually made.

12.155. There seems to be some obscurity with reference to the precise position under section 32 as to horoscopes. Some of the cases seem to lay down that the maker of the horoscope must be called in court, but such a view would seem to overlook the fact that section 32 applies only where the maker is not available as a witness.

12.156. It has been held by the Madras High Court that a horoscope is inadmissible where the witness producing it was not its writer or a person with special means of knowledge of its correctness. With respect, this reasoning overlooks the fact that what section 32(5) postulates is merely that the maker must have special means of knowledge.

12.157. It will, in no way, affect the admissibility of evidence under section 32(5) and (6) that there are living witnesses who can depose to the same fact: nor is it necessary that the statements should have been contemporaneous with the events to which they relate. On this latter point, Lord Brougham remarked that such a restriction would defeat the purpose for which hearsay in pedigree is set up, by preventing it from going back beyond the life time of the person whose declaration is to be adduced in evidence.

12.158. Of course, the non-availability of the maker must be proved. In a Calcutta case, the chief ground of rejection of the horoscope was the fact that it was not shown that the attendance of the writer was not procurable. In another Calcutta case, which was a suit to set aside a decree on the ground of minority, the horoscope was held to be inadmissible, because it was not shown that the maker could not be called. This reasoning, with respect, is sound.

In a later Calcutta case, a horoscope was admitted under section 32, the other conditions of section 32 being satisfied.

12.159. It appears that sometimes courts do not seem to have noticed the distinction between clauses (5) and (6), namely, that under clause (6), it is not requisite that the maker of the statement should have any special means of knowledge.

12.160. Finally, it may be noted that a horoscope which is not admissible under clauses (5) and (6) of section 32 may be admissible under section 17, if it contains an admission (as defined in section 17) by the parent of the child, which is recorded in the horoscope.

12.161. As to the expression “relationship by blood”, occurring in section 32(5), it is well-established by the decision of the Privy Council in Mohamed Svedol Ariffin bin Mohamed Ariff v. Yeoh Ooi Gark, that the time of one's

---

2 As to horoscopes, see Infra.
3 Sondriffs.
4 A.I.R. 1957 Kerala 103, 105.
7 Satish Chandra v. Mahendra. (1890) I.L.R. 17 Cal. 849 (No special means of knowledge).
birth relates to the commencement of one’s “relationship by blood”, and, therefore, a statement of one’s age, made by a person having special means of knowledge, relates to the existence of such relationship as is referred to in section 32(5). Clearly, therefore, the entry of date of birth in the school register, made on the statement of the mother of a boy, would be admissible under clause (5) of section 32.

Section 32(5) — Restriction imposed on admissibility by English law.  

12.162. With reference to section 32(5), it may be noted that there is one important restriction on the admissibility of this kind of evidence imposed by English law, which finds no place in the Indian Evidence Act. In England, the evidence is not admitted in every case in which the birth, marriage, or death of a person forms the subject of controversy, but only in those cases which directly or indirectly involve some question of relationship, and in which the fact sought to be established is required to be proved for some genealogical purpose. Under the Indian Act, however, the statement is admissible, provided it relates to a fact relevant to the case.

12.163. Under English law, the declaration of an illegitimate member of the family would be inadmissible. In India, it would seem to be admissible, since section 32 contains no such restriction. Section 47 of the Act 2 of 1855 rescinded the English rule on this subject, and admitted the declarations, not only of illegitimate members of the family, but also of persons who, though not related by blood or marriage, were yet intimately acquainted with the members and state of the family. Finally, section 32(5) would include servants, friends, and neighbours, who are excluded under English law.

12.164. The propriety of the extension of the rule at least to illegitimate members of the family cannot be doubted, and the whole section was a strong instance of the tendency of modern reform, which, making admission the rule and exclusion the exception, leaves it to the Court to estimate the weight to be allowed to particular kinds of evidence in individual cases. The rule now laid down in the Evidence Act is still more general in its terms than the section of the Act of 1855, which was directed merely to modify the strict rule of English law.

12.165. The Section renders admissible the statements not merely of persons deceased (whose statements only are admitted in England), but also of persons who cannot be found, or who have become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay and expense which, under the circumstances of the case, appears to the Court unreasonable, if such persons had special means of knowledge of the relationship to which the statement relates.

12.166. It has, with reference to section 32(5), been held that a member of the family can swear in the witness box of what he has been told and what he has learnt about his own ancestors, provided that what he says is an expression of his own opinion, (even though it is based on hearsay derived from dead persons), and is not merely a repetition of the hearsay opinion of others: and provided further, the opinion is expressed by conduct.

12.167. The above discussion does not disclose any need for a change in clauses (5) and (6).

1Bhim Mandal v. Magaram Corain, A.I.R. 1961 Pat. 21, 26
2Section 47, Act 2 of 1855.
3See Woodroffe.
12.168. Under section 32(7), when the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a), it becomes relevant.

Section 13(a) refers to "any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence". Under the opening paragraph of that section, evidence of such transaction is relevant where the question is as to the existence of any right or custom.

12.169. For facilitating an understanding of the various points, it will be convenient to split up section 13. Section 13, opening paragraph, provides for the situation in which the section applies, namely, when the question is as to the existence of any right or custom. Clause (a) of that section deals with the evidence which is admissible if the opening paragraph applies, and admits evidence as to transaction of the nature in question. The question that may arise is whether, for the purposes of section 32(7), the opening paragraph of section 13 — dealing with the situation in which evidence of the transaction becomes admissible is also to be satisfied. Clause (a) of section 13 is referred to in section 32(7). But the question as to the position in this respect, i.e., the applicability or non-applicability of section 13, opening paragraph, has created controversy, in view of the case-law on the subject, which we shall discuss in due course.

12.170. There have been several decisions where section 32, clause (7), has been in issue. Thus, in a Madras case, a recital made in a will that the property dealt with thereunder was the property of the testator, was treated as relevant against third parties.

In a Calcutta case, the plaintiffs claimed recovery of possession of certain lands as their nishkar brahma matter, and also by right of adverse possession. They relied, inter alia, upon a recital of brahma matter in the will of their father, and a recital in a judgment in a previous case which was not inter partes. It was held that the recital in the will was not admissible in evidence under section 32(7) read with section 13(a), and that the recital in the judgment not inter partes was also not evidence. There is no detailed discussion, but apparently what weighed with the Court was the fact that it was sought to be used against a third party.

In another Calcutta case, a statement made by an arbitrator in a previous criminal case between the parties, was held to be relevant under section 32(7). In that case, the previous case also related to the same property.

In yet another Calcutta case, the nature of the tenancy mentioned in a will of the claimant's predecessor was regarded as falling under section 32(7). This Calcutta case does not refer to an earlier one, which seems to take a different view on the point.

---

3Keshav Prasad v. Secretary of State, A.I.R. 1938 Cal. 150, 151 (M. C. Ghosh J.).
In a Madras case\(^1\), a statement of fact made in a will, to the effect that the property was self-acquired, was held to be relevant, although, it was pointed out, that the evidence of this kind required scrutiny in the light of other evidence.

12.171. At this stage, we should refer to a Patna case\(^2\) where several aspects of section 32(7) were dealt with. In a document extending the terms of an usufructuary mortgage, M, the mortgagor, stated that the money under the mortgage was required for the purpose of shraddha of S. The mortgagee was already in possession. The statement of M was held to be admissible in evidence under section 32(7), in order to prove that S was dead by the time that the document was executed. The proceeding now before the Court was not between the same parties, and did not involve the right to mortgage. It is not clear from the judgment whether the same property was involved.

An objection was taken to the admission of this evidence, on the ground that the plaintiffs, against whom the document was not sought to be used as evidence, were not parties, to the transaction. The argument was rejected by the High Court, in these words "..... so far as clause (7) of section 32 is concerned, it only takes the help of section 13(a) in order to indicate the nature of the transaction to which the document containing the statement relates. Not that it (the proceeding) will necessarily be in relation to what can be called to be a transaction as between the parties for the purpose of its admissibility without the help of section 32."

12.172. The High Court further observed:

"The whole of section 13 is never intended to be real for the purpose of interpretation of this clause\(^3\). Had that been so, then the legislature could have simply stated section 13 which would have necessarily included section 13(b) as well. There is certainly a point in referring to clause (a), but not to (b)."

12.173. If the above judgment of the Patna High Court is analysed, it will be found that it requires that a statement admissible under section 32(7), should fulfil the following conditions:

(a) the statement is contained in a document;

(b) the statement is made by a person who is not available by reason of death, etc.

(c) the document relates to what can be regarded as a transaction within the meaning of section 13(a).

These three conditions have been actually enunciated in the judgment of the Patna High Court.

12.174. The Patna judgment\(^4\) can be regarded as also laying down the following points—

(i) the transaction need not be one to which the present parties were parties;

This point has been explicitly discussed and decided in the judgment.

---

\(^1\)Venkataramayya v. Sesammi, A.I.R. 1937 Mad. 538, 547 (Varadacharlar and King, JJ.).


\(^3\)Emphasis supplied.

(ii) the right or custom to which the transaction relates need not be in issue in the proceeding. In other words, section 13, opening paragraph is not attracted.

This point follows from the facts of the case.

(iii) if the document relates to a transaction governed by section 13(a), then any statement, being a statement of a relevant fact, is admissible, even if the statement does not relate to a custom or right etc.

This point follows from the Patna judgment, because the fact sought to be proved by the document in question was the date of the death of S, and the existence of the right or custom was not sought to be proved by the document.

12.175. It should also be noted, in this context, that the opening paragraph of section 32 provides that statements about "relevant facts" are relevant under the section, and no further limitation is laid down.

12.176. The observations of the Madras High Court in another case,1 which seem to imply a wider view of section 32(7), may also be compared, though they were obiter.

12.177. As against this wide view, there is an Oudh decision,2 which seems to limit section 32(7) to statements directly relating to the right or custom. In the Oudh case, a statement, in a deed of family settlement, to the effect that partition had been effected among brothers, was rejected, on the ground that the statement did not fall within section 13(a). The Court also added that, "the statement is obviously in the interest of the person who made it. R, if alive, could not have made use of such an admission in his favour, nor could his sons do so."

12.178. It appears to us that as a matter of policy, some restrictions need to be placed on the relevance of statements under clause (7). In the first place, the right must be in issue and the statement should relate thereto, in order that the statement may be relevant. To this extent, our recommendation takes an approach contrary to what was held in the Patna case3.

Secondly, we think that recitals as to boundaries ought to be excluded4 from admissibility under this clause, if they are not between the parties. Thirdly, the statements should have been made before the controversy arose. Fourthly, however, the proceedings need not be between the parties to the document.

12.179. We, therefore, recommend that section 32, clause (7), should be revised as below:

Revised section 32(7).

(7) When the statement is contained in any deed, will or other document, being a deed, will or other document which relates to any transaction by which a right or custom was created claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence.

Explanation—Such statement is relevant where the question in the proceeding now before the court is as to the existence of the right or custom; but it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies.

---

1Subbarayulu v. Vengama, A.I.R. 1930 Mad. 742 (Curgenven J.) (Obiter).
3Para 4 para.
4Cf as to section 13 and section 32(9).
Exception—Nothing in this clause shall render relevant—

(a) a recital as to boundaries containing a statement as to the nature or ownership of adjoining lands of third persons; or

(b) any statement made after the question in dispute was raised.

XI. SECTION 32 (8)

12.180. Section 32(8) renders relevant a statement made by a number of persons, which expressed feelings or impressions on their part relevant to the matter in question.

12.181. Illustration (n) to the section illustrates this clause. The relevancy of individual feelings is dealt with by sections 6, 8 and 14, and the relevance of individual opinions by sections 45-51. Section 32(8) on the other hand, relates to statements expressing feelings or impressions, not of an individual, but of an aggregate of individuals—as the exclamations of a crowd.

12.182. The exception to hearsay embodied in this clause is justified on the hypothesis that what a number of people said, may be true, if spontaneous and contemporaneous. The word “statement”, as used in the singular, — though not grammatically accurate, — implies that a number of persons must have reacted simultaneously.

It has been observed¹ that “when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses, and is evidence.” Moreover, the expression must be of feelings or impressions on their part, which means that the expression is more in the nature of conduct rather than in the nature of a statement of fact.

12.183. Besides the Spontaneity of the declaration, there is another consideration—the practical difficulty or impossibility of procuring the attendance of all the individuals who composed such crowd or aggregate of persons².

12.184. Illustration (n) is based on the leading English case on the subject of Due Box v. Beresford². In that case, the plaintiff painted a picture, which he designated, “The Beauty and the Beast”, and caused it to be exhibited for money in a public gallery, upon which crowds went to see it. The defendant went and hacked the picture to pieces. The plaintiff sued to recover the full value of the picture as a work of art, and compensation for the loss of the exhibition. The defendant alleged that the picture was a scandalous libel upon his sister and her husband, and, in order to show whether the painting was made to represent these persons, the declarations of the spectators, made while looking at the picture in the exhibition, were admitted in evidence.

12.185. Markby has, with regard to illustration (n) to section 32, observed³ that the case does not belong to section 32 at all. The evidence, he says, would be equally admissible, whether the by-standers could be called or not as witnesses. When the by-standers, on seeing a caricature, call out “there’s X,” and evidence is given of their words, what is relied on is, not their statements, but the fact of recognition: the fact, that is that the caricature at once recalls the person X to the minds of those who see it. This is Markby’s comment.

¹R. v. Ram, (1874) 23 W.R., Cr. 35, 38 (per Jackson, J.).
²Norton, Ev., 193, cited by Woodroffe.
³Du Bost v. Beresford, (1810) 2 Cavenell’s Reports 511, 512: 11 ITR 782.
⁴Markby’s Evidence, page 34, quoted by Field.
12.186. With reference to this comment, we would like to state that though what the by-standers said may amount to recognition, yet their statements represent their impressions, and in that sense, the illustration is connected with section 32. What is referred to is a statement of opinion (though collective), out of court, and this situation had to be provided for expressly as an exception to hearsay - which is the topic dealt with in section 32. No doubt, the statements or cries expressing recognition may also become relevant as part of the same transaction or on the question of identify. But their appropriateness under section 32 is not thereby affected.

12.187. Incidentally, we note that in the English cases, it does not seem to have been proved that the persons who make the observations could not be called.

12.188. Doubtless, the difficulty, if not the impossibility, of ascertaining the names of all the persons who expressed their feelings or impressions, and of calling them all as witnesses, will, in the great majority of cases, be held to occasion an amount of delay or expense, which under the circumstances of the case, will appear to the court to be unreasonable.

12.189. The above discussion does not disclose any need for amending the clause.

12.190. Another exception to the rule against hearsay is to be found in section 33. That section makes the evidence given by a person as a witness in a previous judicial proceeding admissible, if the person who gave the evidence is not now available as a witness. This is the gist of this part of the section, not its exact terms. We have no comments on this part. We may note that we have referred to it earlier, while discussing section 32. The admissibility of such evidence is subject to certain important conditions.

12.191. The first condition requires that the parties must be the same. This is enacted on the grounds of reciprocity, because the right to use evidence, other than admissions, is co-extensive with the liability to be bound thereby. The adversary in the second suit had no power to offer evidence in his own favour in the first suit, and the evidence should not, therefore, be used against him.

12.192 and 12.193. The second condition requires an opportunity to cross examine.

It is the right of every litigant, unless he waives it, to have the opportunity of cross-examining witnesses, whose testimony is to be used against him: it follows that evidence given when the party never had the opportunity to cross-examine is not legally admissible as evidence for or against him, unless (in civil cases) he consents that it should be so used.

12.194. The principle involved in the third condition in requiring identity of the matter in issue; is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining as to the very point upon which their evidence is adduced in the subsequent proceedings.

---

1See section 6.
2Section 9.
3Cunningham's Evidence, 11th Edn. page 95, cited by Field.
4Field.
5See discussion as to section 32, opening para.
(a) Gorachand v. Ram. (1968) 9 W.B. 587 (Cal.);
(b) Gregory v. Dooley. (1870) 14 W.R. 17 (Cal.).
6(a) R. v. Ranl. (1881) I.L.R. 3 Mad. 48, 52.
12.195. We may now consider a few points arising out of the section. While making evidence given by a witness in a previous proceeding relevant, the section does not provide that the evidence should have been taken in accordance with law. This requirement has, however, been implied by judicial decisions.

Thus, in a Patna Case, a deposition sought to be put in evidence under section 33 was excluded, because—

(i) it was not read over in the manner required under section 360 of the Code of Criminal Procedure, 1898; and

(ii) the accused had no liberty to cross-examine the witness.

12.196. The case related to a statement made in the court of the Inquiring Magistrate, and was governed by section 350 read with section 360 of the Criminal Procedure Code, 1898, and section 208 read with Chapter 25 of that Code.

12.197. As has been held in a Calcutta case, the intention underlying section 360 of the Criminal Procedure Code is that evidence should be recorded in such a manner that the accused can hear what is being read and take objection to it.

12.198. The question is, whether it is necessary to add this requirement expressly in section 33. We have come to the conclusion that it is not necessary. Primarily, the section is aimed at "the evidence" i.e. the statement, — and concentrates on the simple proposition that, in certain circumstances, the previous statement of a dead, etc. witness is admissible. The section need not be complicated by bringing in procedural matters as to the recording of the evidence.

12.199. It has been held that a proceeding before a Judge or a Magistrate who has no jurisdiction is coram non judice, and evidence given in such a proceeding cannot, on a retrial before a competent court, be used under section 33. This is also a principle well-recognised in respect of all proceedings, and need not be given statutory effect.

12.200. It is well-known that the heading of a deposition given by a witness usually gives the name, parentage, age, residence and occupation of the witness. The question has arisen whether the particulars so given in the heading can be regarded as a part of the evidence so as to be capable of being used in subsequent judicial proceedings under this section.

This question has received the attention of the Privy Council in one case, where the description of the female witness, containing the name of her husband, which appeared at the head of the deposition, was excluded, for reasons which are stated as follows:—

"As regards the description of the witness in the heading of the deposition, their Lordships agree with the subordinate Judge that it is no part of the deposition proper, that is, no part of evidence given by the witness in solemn affirmation. It may have been elicited by questions put by the Magistrate. It is just as likely that it was filled in by a subordinate official and on the paper when put into the hands of the Magistrate for him to take

---

1Emperor v. Phaguna, A.I.R. 1926, Patna 58, 60.
3(a) Buta Singh v. Emperor, I.L.R. 7 Lahore 396; A.I.R. 1926 Lahore 582
(b) Rami Reddy, I.L.R. 3 Madras 48, 51.
4Macbulyan v. Ahmad Hussein, (1904) I.L.R. 26 All. 108, 118 (P.C.)
5Emphasis added.
down the evidence of the witness. Again, it may have been read over to the
twice by the Magistrate when the evidence of the witness was completed
or the Magistrate may have contented himself with reading over the narra-
tive embodying the evidence, which was all he was bound to do under the
Act.

"In these circumstances, even assuming that there was no slip or
accidental omission in theheading of the document, and that there was no
confusion between the two husbands in the mind of the person who took
down the heading and assuming that the document is admissible . . . . , their
Lordships are of the opinion that it is not entitled to any weight."

12.201. Now, it would have been noticed that the reasoning underlying the
above decision is that the heading of the deposition is not on affirmation and, in
fact, it does not represent any statement on a matter usually contained in the
heading, there is no reason why such a statement cannot be taken as part of the
evidence.

12.202. An analysis of the language of the section would also seem to
yield the same result. What the section provides is that "evidence" given by a
witness (in a judicial proceeding) is relevant. Now, "evidence" as defined in sec-
section 3, means and includes all statements which the Court permits or requires to
be made before it by witnesses, in relation to matters of fact under inquiry.
Though the age of a witness may be a matter of fact directly under an enquiry,
it is indirectly a matter under enquiry, because a court would be very much
interested in knowing these particulars; otherwise, the court would not record
them at all. If the oath is administered before the particulars are recorded, they
can be reasonably regarded as part of the "evidence". The answer, therefore,
seems to depend on the time when the oath is administered.

12.203. In the above position, no change is recommended in the language
of the section on this point.

12.204. Under the proviso to section 33, one of the conditions to be satisfied
before the section can be applied, is that "the proceeding was between the same
parties or their representatives-in-interest". The expression "proceeding", in this
part of the proviso, refers to the first proceeding, as has been settled by the Privy
Council1. It is advisable to give effect to this interpretation, by adding the word
"first" before the word "proceeding". This will make the language uniform with
the second and the third conditions in the proviso, which use the specific expres-
sion "first proceeding".

12.205. It may be noted that the proviso to section 33 inverts the require-
ment of English law, which requires that the parties to the second proceeding
should legally represent the parties to the first proceeding or by their privies in
estate. As observed by the Privy Council2, this inversion is not accidental.

Instead of saying that the parties to the second proceeding should represent-
in-interest the parties to the first proceeding, the proviso employs different
language.

12.206. As the departure from the English law has been held to be deliberate
by the Privy Council, the language of the proviso should be altered for bringing
into line with the English rule, on this point.

1Krishnayya v. Raja of Pippapur, I.L.R. 57 Mad. 11 A.I.R. 1933 Privy Council 202,
which reversed I.L.R. 51 Madras 893; A.I.R. 1928 Madras 994.
2Krishnayya v. Rajah of Pippapur, I.L.R. 57 Mad. 11 A.I.R. 1933 P.C. 202, 60 I.A.
336.
12.207. In the result, the only change recommended is in the proviso, on
the point discussed above.

12.208. The Explanation to section 33 is intended to do away with the
objection that, in criminal cases, the State is the prosecutor.1 The effect of the
Explanation is that the deposition taken in criminal proceedings may be used in
a civil suit, and vice versa, if the specified conditions are satisfied.

12.209. In this connection it is to be noted that the general theory of English
law, which is followed in India also, is that a prosecution is always on behalf of
the Crown or State, and, in that sense, the Crown or State is a party to every
criminal trial or inquiry into an offence. It is on this theory that the Attorney-
General's power to enter a nolle prosequi rests. Of course, public officials are
not the only persons conducting prosecutions. But all prosecutions are theoretically
on behalf of the State.

The general rule in England is that where the statute provides that there
shall be no prosecution as to particular classes of offences created by statute
without the consent of the Attorney-General or the Director of Public Prosecu-
tion15, then only the specified officer can sanction the prosecution. But, in the
absence of such provisions, any private citizen can set the criminal law in
motion.

While the initiation of prosecution is governed by the rules stated above,
the position that all prosecutions are theoretically at the suit of the Crown re-
mains unaffected. In this respect, the position is different in Scotland where a
private person cannot institute proceeding unless he has a personal and peculi-
lar interest and gets the permission of the High Court—which is the reason why,
when a private person sought to prosecute sellers of the book “Lady Chatterley's
Lover”, the court refused, saying “No private complainant can be the keeper of
the public conscience”16. That the Crown is the nominal prosecutor becomes a
matter of practical importance, since the Attorney-General can stop a criminal
case by entering a nolle prosequit.6

Therefore, if the Explanation is read as meaning that a criminal trial or an
inquiry into an offence is a proceeding between the State and the accused, it
would be superfluous, since there has never been any doubt about that theory
for a long time. The real purport of the Explanation is to deal with cases where
the prosecution is conducted by a private person, who has instituted the criminal
proceedings.

The Explanation is intended to obviate any argument to the effect that even
in such a case the State is a party and not the private person mentioned above.
Though the utility of the Explanation can be contemplated even in relation to
cases where the later proceeding is also a criminal one, its more frequent ap-
lication would be found where the later case is a civil one. For example, where
a complainant who was permitted to conduct the prosecution of an accused
person is now the plaintiff or defendant, and the accused in the previous prosecution
is now the defendant or plaintiff, the Explanation would be useful. Of course,
the other conditions mentioned in the section, including the proviso thereto, have
to be satisfied in this case, as in every other case.

2 Norton, Evidence 197, 198, cited by Woodroffe.
3 For example, section 2, Official Secrets Act, 1911.
4 Statement by Sir Hartley Shawcross, Attorney-General, in House of Commons
5 The Times 4th February 1961, cited in Jackson Machinery of Justice (1972), page
155, footnote 1.
12.210. The point to be noted is that the system of prosecution that is followed, in general, is 'public prosecution'. Though the Code of Criminal Procedure has a provision which empowers the Court to permit a private person to conduct the prosecution, that provision is an exceptional one, and resort thereto is comparatively infrequent. Apart from that, even a private complainant, where he is permitted to conduct the case, is not ordinarily described as the 'prosecutor'. For this reason, the expression 'prosecutor' is not very happy in this context. It would, therefore, be desirable to substitute some other expression in its place.

12.211. Moreover, the expression 'prosecutor' is a vague one. We have, for example, to decide whether the benefit of the Explanation to section 33 should be confined to 'complainants'—i.e., persons who make a 'complaint' as defined in the Code of Criminal Procedure, or whether it should also extend to other persons who set the law in motion—e.g., the person who filed the First Information Report.

It is suggested that first informant, as such, has no locus standi in the Court. He is a witness, like any other person, even though he is a very important witness. He cannot be raised to the status of a party, for the purposes of section 33. The fact that he may, in certain cases, be liable for malicious prosecution (civil liability) or for instituting false proceedings under section 211, I.P.C. (criminal liability), is immaterial for the present purpose. Even in a suit for malicious prosecution, a mere informant is not regarded as a prosecutor. He must have specifically named the present plaintiff in the previous prosecution.

12.212. Let us see the legislative usage on this point. Under the Code of Criminal Procedure, evidence is produced by the 'prosecution—a neutral word. Under the same Code, the absence of the complainant (in proceedings instituted upon complaint) on the day fixed for hearing, may lead to certain consequences. Further under the same Code, in a summons case instituted upon a complaint, the complainant has, with the Magistrate's permission, power to withdraw the complaint. These provisions should not be considered as material for the purposes of section 33. Under the same Code, a Magistrate inquiring into and trying a case may permit the prosecution to be conducted by any person (other than certain excluded persons). But, so far as section 33 of the Evidence Act is concerned, even mere permission to conduct the prosecution should not suffice, and it is suggested that it is also necessary that that person must have instituted the proceedings. Then only the expression 'prosecutor' would be apt in the context of section 33.

12.213. The position as to the conduct of prosecution may be briefly stated. Under the code of Criminal Procedure, where a private person instructs a pleader to prosecute a person in any court, the conduct of the prosecution is, nevertheless, by the Public Prosecutor or Assistant Public Prosecutor in charge of the case, and the Pleader has to act under his directions, although he is given power (with the permission of the Court), to submit written arguments after the

---

2As to malicious prosecution, see Mohammad Amin v. Jogendra, A.I.R. 1947 P.C. 108.
8Cf. section 211, I.P.C.
close of the evidence. This provision is also not material for the purposes of section 33, because the private pleader has to act subject to the control of the Public Prosecutor.

It would, therefore, appear that the only material provision is that empowering the court to permit a private person to conduct the prosecution; and, here also, so far as section 33 is concerned, it should be necessary that he instituted the proceedings.

12.214. In our view, the test for the purpose of section 33 should be the fact that the private person has instituted the proceedings plus the fact that he has the potential capacity of conducting the prosecution. In view of what is stated above, we recommend that for the expression "prosecutor", in section 33, Explanation, suitable words indicating the above test should be substituted.

12.215. A rough revised draft of section 33 is recommended below, in the light of what is stated above.

REVISED SECTION 33

33. In a judicial proceeding before a court, evidence given by a witness—

(a) in a previous judicial proceeding, or

(b) in an earlier stage of the same judicial proceeding, or

(c) in any proceeding before any person authorised by law to take evidence,

is relevant for the purpose of proving the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

(i) that the first proceeding was between the same parties or their representatives in interest;

(ii) that the adverse party in the first proceeding had the right and opportunity to cross-examine;

(iii) that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall,

(a) Where the criminal proceedings are instituted by a private person, be deemed to be proceeding between that person and the accused within the meaning of this section, if that person is permitted by the court to conduct the prosecution under section 302 of the Code of Criminal Procedure, 1973;

(b) in other cases, be deemed to be a proceeding between the State and the accused.


As to the expression ‘institute’ criminal proceedings, see section 211 I.P.C.
CHAPTER 13

ENTRIES IN BOOKS OF ACCOUNT

I. INTRODUCTORY

13.1. We propose to devote this chapter to an examination of section 34, which deals with entries in certain books of account.

13.2. Section 34 provides that entries in books of account, made regularly in the course of business, are relevant, whenever they refer to a matter into which the court has to inquire; but “such statements” shall not alone be sufficient evidence to charge any person with liability. There is only one illustration to this section, which is as follows:—

“A sues B for Rs. 1,000/- and shows entries in his accounts books, showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.”

13.3. Examining this section in the context of the general scheme of the Act, we may state that, in a sense, it qualifies the rule in section 21 to the effect that admissions are not relevant in favour of the persons making them. It may also be pointed out that this section is one of the very small number of sections in the Act which specifically provide for the insufficiency of a particular type of evidence. This safeguard seems to have been introduced in view of the consideration that sometimes a party may impose a liability on the other by entries made fraudulently.

13.4. As a general rule, a man’s own statement is not evidence for him, though, in certain cases, it may be used as corroborative evidence. The section is an exception to this rule, — an exception created on the basis of a principle discussed below.

13.5. The principle of admissibility of these entries is the same as the principle underlying the various exceptions contained in section 32, namely, the principle of necessity and the principle of circumstantial trust-worthiness. The principle of necessity, in this context, could be explained by stating that it would be inconvenient if, to begin with, proof in another form was insisted upon, because, in many cases, the maker of the entry, or the person who witnessed the transaction, may not be available, or it may be that different persons witnessed the different transactions — all recorded in one book, — and it would be inconvenient to summon them all for proving the facts recorded in each individual entry. The principle of circumstantial trustworthiness can be explained by referring to two aspects, namely, the difficulty of committing fraud and the ease with which the fraud, if committed would be detected, and the improbability of inaccuracies in such entries.

13.6. As regards fraud, where the books are regularly kept in the course of business, the system of making such entries in the account books with regularity counter-acts the casual temptation to commit a fraud. Moreover, without a systematic and comprehensive plan of false manipulations, it is difficult to make false statements in such books. As regards inaccuracies, the influence of habit prevents inaccuracies. Moreover, often the person making the entry is

2Usman v. Haran (1869) 11 W.R., 526 (Cal.)
3See discussion as to section 32
under a duty to an employer or some other person, so that mistakes would normally be detected. As Tindal C. J. observed in *Poole v. Dicas*, "It is easy to state what is true than what is false; the process of invention implies trouble."

The entries being acts of the party himself, must be received with caution.

13.7. Where it was said that "an account-book is nothing: it is one's private affair and he may prepare it as he likes: the Privy Council remarked, "It is true that there may be accounts to which that description would apply. Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true."

13.8. It will be noted that such entries could be relevant under certain other provisions of the Act also, — for example, section 32(2) as statements made by a person in the ordinary course of business, — or under section 159, to refresh the memory of a witness, if the entry has been made by that witness himself and relates to some transaction concerning which he is now giving evidence.

II. PREVIOUS LAW

13.9. The previous law on the subject was contained in section 43 of Act 2 of 1855, which was as follows:

"43. Books proved to have been regularly kept in the course of business shall be admissible as corroborative, but not as independent, proof of the fact stated therein."

13.10. It has been stated that the present provision in section 34, which declares that the entries shall not alone be sufficient to charge any person with liability, follows the Roman Law under which such entries were deemed *semita probatio* and the suppletory oath of the party was admitted to make it the *full proof* necessary to obtain a decree.

13.11. We have, while discussing section 32, already referred to this section of the Act of 1855. In section 34 of the present Act, the words "regularly kept" have been substituted for the words "proved to have been regularly kept" which occurred in the Act of 1855. It is evident that the Law embodied in section 34 of the present Act is not quite the same as was contained in section 43 of Act 2 of 1855. The expressions "corroborative evidence", "independent evidence" and "substantive evidence", which are found in many of the reported decisions bearing upon section 34 of the present Act, are somewhat out of place in view of the wording of that section, and have been handed down from the words "corroborative" and "independent" that appeared in section 43 of the Old Act (1855) and from those words as well as the word "substantive" that were used in the decisions thereunder. The plain words of section 34 indicate that the section deals with all entries in books of accounts regularly kept in the course of business; in the first place, making them relevant whenever they refer to a matter into which the court has to enquire, and secondly, providing that, when such entries are sought to be used as statements *for a particular purpose*, namely, to charge any person with liability, then they shall not alone be sufficient *evidence* for that purpose.

1*Poole v. Dicas*, 1 Bingam N.C. 649.
2*Berero v. Bejoy* (1867) 7 W.R. 533 (Cal.).
5See discussion as to section 32(2).
13.12. Under the previous Act, account-books would not have been admissible to prove a fact, unless some other evidence tending to establish the same fact had also been given. "But the language" of that Act, as Markby has said, 1 "differs very materially from that of the present Act. That language has not been adopted in the present Act. The only limitation in section 34 is that statements contained in documents of this kind shall not alone be sufficient to charge any one with liability. It appears to me that this change of expression has made substantial alteration in the law."

III. ENGLISH LAW AND ROMAN LAW

13.13. As a general rule, in English common law, books of account are not admissible, 2 except when the entries are (a) against the interests of the maker, or (b) are made in the course of business, and in the discharge of duty. The further condition in both cases is that the maker of the entry must be dead. The Courts of Equity, however, used to act upon such entries, and, in 1852, the Chancery Practice Amendment Act 3 empowered courts of Equity to direct, in cases where they should think fit, in taking accounts, that the books of account in which the accounts required to be taken had been kept, or any of them, "shall be taken as prima facie evidence of the truth of the matter therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."

13.14. Thus, in England, if A sues B for the price of goods sold, an entry in A's shop-books, debitting B with the goods, is not evidence for A to prove the debt. But an entry debiting C and not B with the goods, is evidence against A to disprove the debt, as an admission.

13.15. It may be noted that, under Roman law, the production of the account books of a merchant or tradesman, provided the account books were regularly and fairly kept in the usual manner, was deemed to afford evidence of the justice of the claim. (A similar principle was followed in France and in Scotland.) The evidence was supplemented by the "Suppletory oath."

Under the Roman "Suppletory oath", the Judge, in his discretion, may tender this oath ex-officio to either party—usually the one in whom the judge has greater confidence — on the theory that when the evidence thus for submitted is entitled to some weight, but is insufficient to form a judicial persuasion, the oath will afford the missing portion of proof. 4

IV. CORROBORATION

13.16. We may now consider the aspect of corroboration required under the Corroboration section. Books of account when not used to charge a person with liability (civil or criminal) 5 may be used as independent evidence requiring no corroboration. But, when sought to be so used, they must be corroborated by other substantive evidence. 6

1Belac v. Rash. (1874) 22 W.R. 549 (Per Markby J.).
2(a) Price v. Torrington. (1703) 1 Salk 283;
(b) Drake v. Thompson. (1933) 2 Ch. 344, 352.
3Section 54, Chancery Practice Amendment Act, 1852 (Statute 15 and 16 Victoria).
6Pr. Code Civil, art. 1367, Ital Codice Civile, art. 2736, No. 2
7R. v. Hurdeep. (1875) 23 W.R., Cr. 27 (Cal).
8Dwarka v. Sant, (1895) I.L.R. 18 All 92.
13.17. And in this sense, books of accounts under the present Act, as under the repealed Act, — cannot be used as sufficient evidence of the payment or other items to which the entry refers. Section 34 only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of business. He will have to show further, by some evidence, that the entries represent real and honest transactions.

13.18. As to the nature of the evidence required to corroborate the entries that become relevant under section 34, decided cases furnish some illustrations. It would appear on a study of those cases that there is hardly any scope for laying down hard and fast rules on the subject. Although, in some of the cases, the expression “independent evidence” is met with in this context, that does not seem to be the intention of the section, and all that can be said with reference to the present section is that no presumption of correctness attaches to the entries taken by themselves.

13.19. Thus, no particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in the books of account, if true.

13.20. It has been held by several High Courts—e.g., Allahabad, Rajasthan and Andhra Pradesh and Punjab — that the evidence of the plaintiff himself on oath can suffice to corroborate the entries relevant under section 34. Of course, no categorical rules can be laid down, and regard has to be had to the circumstances of each case when determining the sufficiency of the plaintiff’s statement — or, for that matter, the sufficiency of any other relevant fact — as corroborative evidence under section 34. But the point to be made is that the plaintiff’s evidence can also qualify and suffice as corroborative evidence.

V. INTERPRETATION AND PROCEDURE

13.21. Case law on the section illustrates and elaborates what is meant by some of the important ingredients of the section, — such as, “books of account”, “regularly”, and so on. These judicial decisions do not, however, seem to require any modification in the form or substance of the section.

13.22. There seems to be a misconception in some of the subordinate courts as regards the procedure for utilising the entries to which section 34 applies. In this connection, we may refer to a Nagpur judgment, where it is pointed out that if the witness producing the entry cannot supplement it with his personal knowledge, then it is a waste of time to have its contents repeated out of his mouth. On the other hand, if, after refreshing himself with an entry, the witness is able to remember the details of the transaction, he may certainly read the entry for the purpose of refreshing his memory; but this is not a case of evidence under section 34; it would fall under section 159, so far as his oral evidence is concerned.

1Yesuvadivon v. Subba, 52 I.C., 704 (Mad.).
5Kaga Ram v. Firm Thakar Das, A.I.R. 1962 Punj. 27, 30, para 11
6Mukunda Ram v. Daya Ram, A.I.R. 1914 Nagpur 44, 47.
13.23. The question of absence of entries may be discussed. It has been held in Calcutta in *R. v. Grees Chunder*¹ that though the actual entries in books of account are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter.

13.24. With respect, it is suggested that this decision, if it is to be taken to have ruled that the fact of the absence of an entry is not evidence at all under any section of the Act, is not correct. It has not, in such sense, been followed².

13.25. In *Ram Persad v. Lakpati Koer*,³ during arguments, Lord Davey referred to the above case — *R. v. Grees Chunder*, — and Lord Robertson said: “The Act applies to entries in books of account, but no inference can be drawn from the absence of an entry relating to any particular matter.” But this remark of Lord Robertson must be taken to have been made with reference to the preceding argument of Counsel, where Counsel was discussing section 32(2) and section 34.

13.26. Obviously, section 34 does not apply where there is no entry in the books. Evidence that there is no entry is not, therefore, admissible under this section. However, such evidence may be admissible under other sections of the Act, — as for instance, sections 9 and 11. Thus, in a Calcutta case⁴, evidence having been given of the visit of M to Calcutta, which he denied, the latter’s son was called by the other party to corroborate M’s statement. He deposed that it was usual when a partner of his firm (to which both he and M belonged) made a journey on the firm’s business, to enter in the account-book the expenses of such journey, and he was allowed to produce the account-books of his firm and to state that there was no entry of expenses relative to such alleged visit.

VI. CONCLUSION

13.27. In view of the position discussed above, it is not necessary to amend section 34 in substance. However, a verbal change is required in the section.

Where the section contains the words “such statement”, the proper words are “such entries”, and we recommend that this drafting change should be made.

¹*R. v. Grees Chunder Banerjee*, (1883) I.L.R. 10 Cal. 1024
²Sagurmull v. Manraj, (1900) 4 C.W.N. ccvii.
⁵Sagurmull v. Manraj, (1900) 4 C.W.N., ccvii.
CHAPTER 14

ENTRIES IN PUBLIC RECORDS AND OTHER PUBLISHED WRITINGS

1. INTRODUCTORY

14.1. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact. Under section 35.

14.2. The principle upon which the entries mentioned in section 35 are received in evidence is the official or statutory duty of the person who keeps the book, register or record to make such entries after satisfying himself of their truth.

14.3. It is not that the writer makes the entries contemporaneously, or of his own knowledge. The entry is admissible irrespective of knowledge. In Saraswati Dasi v. Dhanpat Singh, it was observed by the Calcutta High Court (Garth C.J.) that the section is confined to the class of cases where the public officer has to enter in a register or other book some actual fact which is known to him, but this view has not been approved of in Shoshi Bhooshan Bose v. Girish Chander Mitter, where it was held that entries in a register kept by a public servant under a statute are admissible irrespective of personal knowledge.

14.4. The real reason for admitting these entries is that no person in a private capacity can make such entries. They are admissible, though not confirmed by oath or cross-examination, partly because, in some cases, they are required by law to be kept, and in all cases they are made by authorised and accredited persons appointed for the purpose and under the sanction of the official duty, partly on account of the publicity of the subject matter, and, in some instances, of their antiquity. Where it is not shown that it is so made, the entry is in admissible. Moreover, though the facts stated in these entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses.

14.5. With reference to public documents Lord Blackburn said in Sturla v. Frecia—

"I understand a public document to mean a document that is made for the purpose of the public making use of it and being able to refer to it. I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

14.6. Records, says Lord Chief Baron Gilbert, "are the memorials of the legislature, and of the King's courts of justice, and are authentic beyond all

---

2Wrahman v. Phaindrna Nath, (1915) 19 C.W.N. 1038 (copy of another entry).
5See—
   (a) Remarks of the Privy Council in Raja Bommaroote v. Rangassamy, (1885) 6 M.I.A. at page 249;
Gilbert, Evidence 7, 4th Ed.

276
manner of contradiction. They are said to be "monuments veritatis et vetustatis vestigia" as also "the treasure of the king."*

14.7. It may be noted that these rules of evidence are not confined to a particular country. Indian registers of baptism have been admitted as evidence in English Courts. Indian registers of marriages and deaths, kept under the authority of the East India Company, have been admitted in English Courts. Registers of marriages compiled by the Secretary of State for India, from periodical reports transmitted to him by the various religious denominations in India, have also been admitted in the English Courts.

II. ENGLISH LAW

14.8. We may now refer to a few points of difference between English and Indian law on the subject.

(a) In England, it is essential to the admissibility of this evidence that the entries should have been made promptly, or at least without such long delay as to impair their credibility, and in the mode required by law, if any mode has been prescribed.

The Evidence Act contains no such rule, although these points may be of importance in estimating the value of the evidence.

(b) In India, as well as in England, the entry must have been made by a person whose duty it was to make it. The entry will be none the less admissible, even though the person who made it, being alive and capable of giving evidence, is not called as a witness.

(c) The English law speaks only of "official" registers or books. To render any document admissible in evidence as an official register in England, it must be one which the law requires to be kept for public benefit. In India, the book or register might be either a public or an official one, under section 35.

14.9. The Indian Act does not contain any definition of the "public or other official book". But reference may be made to section 74 of the Act, which states what are public documents.

A "public document" has been defined in England to be a document that is made for the purpose of the public making use of it — especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public or all persons concerned in it, may have access to it. Registers kept under private authority for the benefit or information of private individuals are therefore inadmissible.

---

1Co. Litt. 118 a; 293 b.
211 Edw. IV. 1.
3Best, Evidence (1922), page 202, paragraph 218.
4Queen's Proctor v. Fry, 4 P.D. 230.
5Rathliffe v. Rathliffe, (1859) 1 Sw. & Tr. 467.
7Taylor's Evidence, 10 Ed., Sec. 1594; Whitley Stokes, Anglo-Indian Codes, Vol 2, page 829.
10See Baji Nath v. Sukhu Mahan, (1891) I.L.R. 18 Cal. 534.
III. TWO CLASSES OF ENTRIES

14.10. Reverting to section 35, two classes of entries are contemplated by this section. (a) entries by public servants, (b) entries by persons other than public servants. In the case of the latter, the duty to make the entry must be specially enjoined by the law of the country in which the book, register, or record is kept (the section thus includes British, foreign or colonial registers), in the case of entries by the former, it is sufficient for their admissibility that they have been made in the discharge of official duty.

But, in either case, the entry must have been made by a person whose duty it was to make it.

14.11. In England, it has been held¹ that the entries should be made promptly, or at least without such long delay as to impair their credibility. Thus, an entry made more than a year after the event has been rejected. In India, such delays will go to the weight of the evidence.

IV. ILLUSTRATIONS

It may be useful to take a few illustrations from decided cases.

14.12. The Education Code in various States requires the Headmaster of each recognised school to prepare and maintain an admission register of the pupils admitted to that particular school. Of the several particulars to be entered in such a register, the date of birth of the pupils, as stated by the parent or guardian, is an important item. Thus, the admission register is a public record, maintained by the head of the institution, who is in duty bound to maintain such a register containing certain particulars relating to each pupil as required by the Education Code. In making such entries in the admission register the head of the institution, who is a public servant, is merely discharging his official duty. Such entries, therefore, made by a public servant in a public or official register in the discharge of his official duty would be relevant under section 35. The date of birth as entered in such an official record is, therefore, a relevant fact, and can be proved by production of that record. It has been so held in a Patna case².

A similar view was taken by the Kerala High Court³.

14.13. Certified copies from a school register, showing that on 20th June, 1960, K was under 17 years of age, and the affidavit of the father stating the date of her birth, and the statement of K to the police with regard to her own age, all amount to evidence under the Evidence Act. An extract from the register of the school is admissible in evidence to prove the age⁴.

14.14. Entries in the school registers as to age are admissible under section 35, as entries made by a public servant in a public or official register in the discharge of his official duty. When he had any special means of knowledge so

¹With regard to the books recognised as official registers public documents in England, see Ratcliffe v. Ratcliffe. (1819) 1 Sw. & Tr. 467; Queen's Proctor v. Fry. 4 P.D. 230.
²Doe v. Bray. 8 B.C.C. 813.
⁵(a) Maharaj Bharudas v. Krishna Bal. A.I.R. 1927 Bom. 11, 99;
(b) Indian Cotton Company Ltd. v. Raghunath Hari Deshpande. A.I.R. 1931 Bom. 178, 181.
as to make the entry relevant itself does not affect the admissibility of the entry, though it may affect its value. Section 35 stands itself independently of section 32(5).

On the question of age, a Matriculation Certificates is also clearly admissible under section 35.

14.15. Entries in a death register kept at a police station in accordance with the police Regulations made under section 12 of the Police Act (5 of 1861) are also relevant, even though the entries are made in chronological order and not in the prescribed form. A register of death kept by police officers at thanas, under the rules made by the local Government, is a public document within the meaning of section 74 and under section 114, a court is entitled to presume that an entry made in such register was properly made, and a certified copy of such entry is admissible in evidence.

14.16. In the English case of Ratcliffe v. Radcliffe and Anderson, it was pointed out that a register of births and deaths kept under the orders of the East India Company was a public document. Lord Campbell in that judgment speaks of the register having been kept in obedience to directions given by the East India Company in its sovereign capacity. No legislation of the company is referred to as having authorised the keeping of such a register.

V. OTHER PROVISIONS

14.17. Sometimes, special statutory provisions confer a presumptive value on certain entries. Entries in records-of-rights, for example, are covered by specific provisions. The decision of Sir Dinshaw Mulla, in Mahant Krishna Dayal v. Rani Bhubaneswari, may be seen, which has laid down that the entry in the records-of-rights is presumed to be correct until it is proved to be incorrect by evidence. Such a presumption would arise only as to the entries recorded as authorised by some Act or the rules framed thereunder, and not otherwise.

14.18. The same principle would apply in regard to the presumption of correctness of the records-of-rights finally prepared under West Bengal Estates Acquisition Act, 1953, because of a specific statutory provision.

VI. RECOMMENDATION

14.19. The section requires modification only in one point of form. The requirement that the entry must be made in performance of a statutory duty is applicable only to the latter-half of the section. Under the earlier half, the emphasis is on public or official character of the entry and not on its statutory character. We recommend that the section should be suitably split up to bring out this difference between the first-half of the section and the latter-half.

---

3Shib Deo Misra v. Ram Prasad, I.L.R. 46 All. 637.
4Tamuddin Sarkar v. Taiju, I.L.R. 46 Cal. 152.
5Ratcliffe v. Radcliffe and Anderson, (1859) 1 Sw. & Tr. 467.
6See—

(a) Secretary of State v. Kasturi Reddi, (1908) I.L.R. 26 Mad. 268;
19—131 LAD/ND/77
14.20. The revised section should be as follows:

"35. Relevancy of entry in public record, made in performance of duty.—
An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by—

(a) a public servant in the discharge of his official duty, or

(b) any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept.

is itself a relevant fact."

VII. OTHER PUBLISHED WRITINGS—SECTION 36

14.21. While section 35 was concerned with statements in public records and reports, the next three sections are devoted to certain other documentary materials. These materials are of various species, but they all share one feature in common, the feature of publicity and of official authority.

14.22. The subject of relevancy of statements in maps, charts and plans is dealt with by section 36, in these terms—

"36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

14.23. Maps are really statements. In Dwijesh Chandra Roy v. Naresh Chandra Gupta,1 it was observed by S. R. Das, J.—

"A map by itself is nothing but statement made by the maker by means of lines and pictorial representations instead of by word of mouth as to the state or configuration of a particular site and the objects standing thereon. To admit in evidence a map without calling the maker thereof is the same as admitting in evidence statements made by a third party who is not called as a witness. In other words, it amounts to admitting hearsay."

14.24. The section deals with two classes of documents: (a) published maps or charts generally offered for public sale; and (b) maps or plans made under the authority of Government. The admissibility of the first class of documents is justified on the ground that the publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. These are similar to dictionaries etc., to which the court may refer under another provision.2

The admissibility of the second class of documents depends on the ground that, being made and published under the authority of Government, they must be taken to have been made by and to be the result of, the study or inquiries of competent persons; and further (in the case of surveys and the like), they contain or concern matters in which the public are interested.

14.25. It may be noted that under section 83,3 there is a statutory presumption of the accuracy, authority and authenticity in favour of the maps or plans

---

2Section 57, penultimate paragraph.
3Charts are left out by section 83.
purport to be made under the authority of the Central Government or the State Government, unless they are made for a particular cause.

14.26. We shall now deal with a few points on which an amendment may be required. Section 36, in its first half, does not mention "charts". We have not been able to understand why there should be a distinction in this respect between maps, charts and plans. No doubt, one can make a distinction, for other purposes, amongst the three; but the principle on which their relevance is justified, under section 36, namely, that they are published and generally offered for public sale (the first half) or that they are made under the authority of the Government (the second half), should apply equally whether the document is a map or a chart or a plan. Dealing more particularly with "chart", we may state that a chart is of various kinds. Originally, this expression was used more frequently in marine navigation, to denote navigational charts which were used for guiding marines.

14.27. Such a chart was in issue in *In re S. S. Drachenfels*,—a case relating to a chart issued under the authority of the Government. The chart was of the river Hooghly, and the court said that the notes thereon may be referred to as "authoritative". In this case, the note which was material relating to the dangers to be avoided by vessels awaiting orders at the "Sandheads", between the months of April and December, both inclusive.

14.28. The nautical chart, essential to marine navigation, informs the mariner of the nature and form of the sea bottom, and gives the location of channels, aids to navigation, reefs and shoals and sand bars. It affords an accurate graphical guide to hidden dangers and safe channels—knowledge which is necessary for efficient and safe ship navigation. The nautical chart is usually supplemented by official publications called coast pilots or by other types of sailing directions which provide pertinent descriptive details that cannot be shown conveniently on the chart itself.

14.29. Much more recent than the nautical chart is the aeronautical chart, which is essential to air navigation. Whereas a nautical chart is a graphic representation of an area consisting chiefly of water, the aeronautical chart, like a map, most often represents an area that is predominantly land.

14.30. Marine charts mainly indicated under-water conditions, and were similar to what are known as weather charts. Later usage, however, has given a wide meaning to the expression "chart". The expression now indicates many representations, for example, (a) aeronautical charts, (b) a record by curves etc. of fluctuations in temperature etc. (one of the meanings referred to in some of the dictionaries), and, in fact (c) any tabulated information.

14.31. If the important requirement of publicity or authority, indicated by the first, or second half of the section (whichever is applicable), and also the further important requirement that the statement should have been made as to matters usually represented or stated in such maps, charts or plans, are both satisfied, we do not see any reason why, for the purposes of section 36, it

---

5See, for example, *Concise Oxford English Dictionary*.
6These are mere illustrations.
should matter whether the document is a map or a chart or a plan—and, if it is a chart, whether it is a marine navigation chart or aerial navigation chart, or a weather chart or other tabulated information.

14.32. We, therefore, recommend that in both the parts of section 36, there should be an amendment so as to ensure that all these three clauses of documents are covered. This aspect will also require consideration under sections 83 and 87, which deal with maps, etc.¹

14.33. An important condition is indicated by the words, “as to matters usually represented or stated in such maps, charts or plans”. This condition appears to be applicable whether the documents falls under the first half of the section, or whether it falls under the second half of the section. In our view, it is desirable to bring this aspect out more clearly, by a splitting up of the section, and we recommend a suitable amendment.

14.34. Then, there is a verbal change needed to bring out more clearly the connection between the opening words “statements” and the words “as to matters etc.”. The principal object in inserting the requirement expressed by “as to matters usually represented”, etc., is to indicate that a statement made gratuitously by the draughtsman of the map etc. as to a matter which does not normally or ordinarily fall to be dealt with while preparing the map etc., in question, should not be admitted by virtue of section 36. This should be brought out.

VIII. SECTION 37

14.35. Another class of public facts is dealt with in section 37, which is concerned with the relevancy of statements as to facts of a public nature, contained in certain Acts or notifications. It reads—

“37. When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it made in a recital contained in any Act of Parliament of the United Kingdom or in any Central Act, Provincial Act, or a State Act or in a Government notification or a notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty is a relevant fact.”

14.36. It may be stated, at the outset, that this section does not deal with the proof of the Acts and orders referred to in the section. It deals with their relevance for establishing a fact (of a public nature as mentioned in the section).

14.37. In England,² statements contained in any public statute, speech from the throne,³ royal proclamation,⁴ parliamentary journal,⁵ government gazette,⁶ or state paper,⁷ are admissible, even against strangers, to prove facts of a public, but not of a private, nature.

¹To be considered under sections 83 and 87 also.
³R. V. Proue Clin, (1731) 17 State Tr. 625, 636, 639.
⁴(a) R. V. Sutton, (1816) 4 M. & S. 532.
⁵(b) R. V. De Berenger, (1814) M. & S. 67.
⁶(a) A. G. V. Bradlaugh, (1885) 14 Q.B.D. 667 (C.A.).
⁷(b) Forbes v. Samuel, (1913) 3 K.B. 706, 721.
⁸(a) R. V. Holt, (1793) 5 Ter. Rep. 436;
⁹(b) A. G. V. Thackerstone, (1820) 8 Price 89.
¹⁰E.G. an official despatch; see Thelwall v. Costing, (1803) 4 Ep. 266
14.38. Such statements, however, are only prima facie evidence of the facts asserted unless it is enacted that they are to be conclusive. 

14.39. We have no points of major importance concerning the section. But a few changes are required in the section. It may be pointed out that amongst the Acts and notifications mentioned in the section, are: (i) "any act of Parliament of the United Kingdom"; (ii) "notification by the Crown Representative appearing in the Official Gazette etc." and (iii) "Government notification appearing in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty".

14.40. In view of the constitutional changes that have taken place in the country, the provision relating to Acts of the United Kingdom Parliament should be confined to Acts passed before the 15th August, 1947.

14.41. As regards notifications issued by the Crown Representative, it appears desirable to confine it similarly to notifications issued before that date.

14.42. As regards Government notifications appearing in the London Gazette or in the Government Gazette of any Dominion, colony or possession of His Majesty also, the provision should be similarly confined.

14.43. In the light of the above discussion, we recommend that section 37 should be revised as follows:

REVISED SECTION 37

"37. (1). When the court has to form an opinion, as to the existence of any fact of a public nature, any statement of it made in a recital contained—

(a) in any Central Act, Provincial Act, or a State Act, or

(b) in a Government notification appearing in the Official Gazette, or

(c) as respects the period before the 15th day of August, 1947—

(i) in any Act of Parliament of the United Kingdom, or

(ii) in a Government notification appearing in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, or

(iii) in a notification by the Crown Representative appearing in the Official Gazette, is a relevant fact.

IX. SECTION 38

14.44. While section 37 was concerned with published legislation and governmental acts, section 38 is concerned with the relevancy of statements as to "a law", i.e., any law, contained in certain officially published law-books. Under the section, when the Court has to form an opinion as to "a law of any country", any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the courts of such country in a book purporting to be a report of such rulings, is relevant.

(a) R. v. Greene, 1834, 6 Ad. & El. 748;

(b) R. v. Franklin, 1771, 17 State Tr. 625

2This is not a draft.
Amendment needed as to Indian law.

14.45. So far as laws of foreign countries are concerned, the section needs no comments. But, so far as Indian law is concerned, the section, in our opinion, is not appropriate. We shall presently set out our reasons for this comment.

Indian law not a matter of evidence.

14.46. The first observation which we would like to make is, that a question of Indian law is not a matter of evidence, and therefore the terminology of “relevant fact” is not appropriate for such questions. It is well-established that evidence cannot be given of the general law, although evidence can be given of customs which derogate from the general law. Even if it be assumed, for the sake of argument, that what has been stated officially on a matter of law can be used for persuading the court, it is obvious that official expression of views on a matter of Indian law can have no binding effect.

14.47. Foreign law is a question of fact, and therefore, a matter for evidence. We are not, at the moment, concerned with the mechanics of proof of foreign law, nor with the question as to the materials to be used for proof of foreign law. But it cannot be denied that a question of Indian law is a question to be decided by the judge, “Jura novit curia” (The Judge knows the law).

Duty of judge in deciding questions of the law.

14.48. For deciding questions of Indian law, the judge must refer to the materials that are recognised in the Indian legal system as the source of law. These materials—except in the case of custom—cannot be the subject-matter of proof. A book published under official authority is not, according to the Indian legal system, a source of law.

Judge and Jury.

14.49. A question of law is, thus, for the judge and is not subject to evidence. This is precisely the reasoning on which juries in England, which are final judges of fact, are not empowered to determine questions of law. The judge sums up the evidence, spells out the main issues and explains the relevant rules of law which the jury is to apply. In fact, in India, the Code of Criminal Procedure made express provision for such a demarcation of the functions of the judge and the jury, the former being exclusively vested with jurisdiction to determine questions of law.

14.50. Generally speaking, matters of law are determinable by the Judge, and matters of fact by the jury. According to Phipson, in English Courts, although the existence of English law is a question of law to be determined by authorities and argument, the existence of Scots, colonial or foreign law is treated as a question of fact, to be determined by evidence.

Judicial evidence not including questions of law.

14.51. In this connection, we may also refer to the analysis of “judicial evidence” as given by Best. He says—

“The ‘judicial evidence’ may be defined as the evidence received by courts of justice in proof or dis-proof of facts, the existence of which comes in question before them. By fact, here, must be understood the res gestae of some suit, or other matters, to which when ascertained, the law is to be applied; for, although, in logical accuracy, the existence or non-existence of law is a question of fact, it is rarely spoken of as such, either by jurists

---

2Section 292, Code of Criminal Procedure, 1898 (repealed).
3Mechanical Inventions v Austin, (1935) A.C. 346.
4Phipson, Evidence (1963), paragraph 29.
5See also Harman v. Kong, 50 Times Law Reports 114.
6Best, principles of Evidence (1922), page 22, para. 33
or practitioners. By 'law' here, we mean the general law of each country, which its tribunals are bound to know without proof; for they are not bound, at least in general, to take judicial cognisance of local customs, or the laws of foreign nations,—the existence of both of which must be proved as facts."

Best has pointed out that courts are bound to know the 'general law' without proof.

14.52. Secondly, as was pointed out in Aziz Banu's case, by Sulaiman J.—whose observations were approved in a later case by the Privy Council,—it is the duty of the courts themselves to find the law of the land and apply it, and not to depend on the opinion of the witnesses, however reliable they may be. Foreign law, on the other hand, is a question of fact, with which the courts in India are not supposed to be conversant.

14.53. We may also point out, in this context, that under section 57(1), a court is bound to take judicial notice of all laws in force in the territory of India. The Judge can on matters of which he can take judicial notice; consult certain materials. But an Indian law cannot be the subject-matter of "evidence". Expert evidence may be given of foreign law, but not of Indian law.

14.54. We may add that for some time, there was a practice of consulting pundits in matters relating to Hindu law. But this practice was discontinued long ago, and has never been revived. In fact, when a particular subordinate court resorted to any such practice, the higher courts came down upon it, and this was for the reason that Hindu law, being the law of the country, could not be a matter of evidence or of expert opinion.

14.55. In the Shahid Gauj case, Sir George Rankin, sitting in the Judicial Committee of the Privy Council, observed—

"But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth."

14.56. Thirdly, coming to the latter half of the section, we may state that so far as the rulings of Indian Courts are concerned, that, again, is a matter not of evidence. It is a question of authority. The Indian Law Reports Act, section 3, provides that no court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any High Court for any State, other than a report published under the authority of any State Government. We are not, in the present context, concerned with non-official reports. But the use of official Indian law Reports is impliedly dealt with by this provision in the Indian Law Reports Act,—if a provision were at all needed on the subject.

1Emphasis added.
2Aziz Banu v. Mahomed Ibrahim Hussain. (1925) I.I.R. 47 All, 823, 835 (Sulaiman, J).
3Shahid Gauj case, infra.
6Section 45.
8Section 3, Indian Law Reports Act, 1875 (18 of 1875).
14.57. The view taken above may be regarded as obvious; but it appears that the proper scope of the section requires to be clarified. In a Calcutta case, for example, the question arose whether a newspaper report of a judgment of the Supreme Court could be relied upon for deciding a point of law. The High Court held that the report would not be relevant under section 38, because the newspaper could not be regarded as "a book published under the authority of Government". However, the High Court relied on it on the basis of a precedent, in which a report in the "Statesman" has been relied upon in an earlier case.

14.58. It should be pointed out, that in the Calcutta case cited above, the question whether section 38 is appropriate in relation to Indian law, was not examined. But there is a reference to section 38 in the judgment.

14.59. In the circumstances, a clear statement of the scope of the section is needed, and it is desirable that the section is narrowed down, so as to exclude Indian law from its application. To achieve this object, we recommend that in section 38, after the words "any country", the words "other than India" should be added.

Chapter 15

How Much of a Statement to Be Proved

Section 39

15.1. Section 39 reads—

"When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made."

15.2. The principle on which this section is based is that, it would not be just to take a part of a conversation, letters, etc. as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said or wrote on the same occasion.²

15.3. It can also be stated that since the Court expect a witness making a statement not only to state the truth but the whole truth, some such principle is implicit in the obligation undertaken by the witness.

15.4. Distinct matters, of course, cannot be so introduced,³ even though relevant to the case as a whole, if they are not connected with the part given in evidence.

15.5. The principle in English law is that when an admission is tendered against a party, he is entitled to have proved, as a part of his adversary's case, so much of the whole statement, document or correspondence containing or referred to in the admission, and, this is so although such other parts may be favourable to himself;⁴ but the jury may attach different degrees of credit to the different parts. In particular, in relation to interrogatories, the rule is that any party may, at the trial of a cause, matter or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories, without putting in the others or the whole of such answers; provided, always, that, in such a case, the Judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in, that the last-mentioned answers ought not to be used without them, he may direct them to be put in.⁵

15.6. The reason for the admission of evidence explaining the part of the statement was lucidly explained in the American case of Com v. Keyes⁶ in these words:

1⁴ Cf. The Queen's case, (1820) 2 E. & B. 297 (per Abbot, C. J.).
  2⁵(a) Prince v. Sumo, 7 A & E. 627;
  3⁶(b) Davies v. Morgan, (1831) 1 Cr. & J. 587.
  4⁷(a) Thomson v. Auster, (1823) 2 Dow & Ry. 358. 361.
  1⁰ Lyell v. Kennedy, (1883) 27 Ch. D. 1, 15. 29.

287
"Every remark or observation made upon those topics is to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied."

15.6A. Of course, the rule has limitations. As has been observed in another American case,—

"Ten subjects may be talked about in one conversation. When one of the ten is the subject of litigation, it is not competent to put in evidence the conversation about the other nine."

15.7. Again, as Merrick, J in Com v. Keyes, observed:¹

"There is an important limitation to the rule in giving evidence of conversations or of oral statements and declarations. The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of enquiry or investigation. Every remark or observation made upon those topics to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied. But, if, during the same interview between the witnesses and the party, other subjects of conversation or discussion are introduced, remote and distinct from that which is the object of enquiry or investigation, it is obvious that whatever may be said concerning them can have no tendency to illustrate, vary or explain it. Everything pertaining to these additional and extraneous matters should therefore be rejected as irrelevant and useless."

15.8. According to Wigmore,² three general corollaries may be deduced from the principle referred to above—

(i) No utterance irrelevant to the issue is receivable.

(ii) No more of the remainder of the utterance than concerns the same subject and is explanatory of the first part, is receivable.

(iii) The remainder thus received merely aids in the construction of the utterance, as a whole, and is not in itself testimony.

15.9. The aspect of relevance of the utterance is discussed in the American case of Garay v. Nicholson,³ where Cowen, J. observed—

"The rule about the whole being admissible must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under the qualification (mentioned above), and, if not so restrained, might operate as a waste of time; other subjects might be introduced having no connection with the subject-matter of the suit."

15.10. While the principle has been adequately reflected in section 39, the section could be improved in one respect, namely, by an express provision spelling out the rights of the opposite party.

¹Emphasis supplied.
⁴See Wigmore's Evidence, 1905 Ed., Section 2113, page 2860, cited in Field.
15.11. It may be mentioned in this connection that in some American States, there are interesting statutory provisions which deal with the procedure somewhat elaborately. For example, the provision on the subject in California says—

“When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be enquired into by the other; thus, when a letter is read, the answer may be given, and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may also be given in evidence.”

Then, the Georgia Code provides—

“Where either party introduces part of a document or a record, the opposite party may read so much of the balance as is relevant.” “When an admission is given in evidence, it is the right of the other party to have the whole admission and all the conversation connected therewith.”

The Louisiana Code provides that the opponent using a party’s confessions “must not divide them; they must be taken entire.”

According to the Montana law,—

“When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be enquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given.”

The need for the proposed provision could be discussed from several points of view.

15.12. In the first place, the fact that no difficulty has been found in practice is not conclusive, because the suggestion for amendment is not made for meeting any difficulty pointed out in any case law, but because of the obscurity of the position as regards the right of the adverse party. This obscurity is primarily due to the fact that in the present section, there is no mention of the adverse party.

15.13. Secondly, the proposed amendment is essential in the interest of justice, because, if one party uses a statement without referring to the other portions which explain or qualify it, justice requires that the opposite party should have a right to insist that the remainder, in so far as it is necessary for the purpose mentioned above (elucidating the statement already used), should be given in evidence.

15.14. Thirdly, it is not as if the present section gives a discretion to the court which the proposed section takes away. The word “discretion” in this context is not quite appropriate. When the present section provides in effect that the remainder of the statement shall be given in evidence, the use of the words “the court considers necessary” does not indicate an unfettered discretion. If it is a case of unfettered discretion, that is all the more reason, why discretion

---

2Georgia Code, (1895), Section 3241; Wigmore’s Evidence, 1905 Ed., Section 2113, page 2859, cited in Field.
3Georgia Code, (1895), Section 5196; Wigmore’s Evidence, 1905 Ed., Section 2113, page 2859, cited in Field.
4Louisiana Code Pr., (1894), Section 356; Wigmore’s Evidence 1905 Ed., Section 2113, page 2859, cited in Field.
5Montana C.P.C. (1895), Section 3130; Wigmore’s Evidence, 1905 Ed., Section 2113, page 2859, cited in Field.
should not be continued. However, the proper view is that the power of the
court under the present section is to decide—not as a matter of interpretation
—and how much of the remainder of the statement is necessary for understanding
what is admitted.

15.15. Fourthly, we may examine the special situation of police diaries.
Under the Code of Criminal Procedure1 (reference will be made to the old Code
since most of the reported decisions relate to the old Code), a special diary is, in
general, privileged, and it may be used by the court not as evidence in the case,
but to aid the court in the inquiry or trial. Neither the accused nor his agent
is entitled to call for such diaries or to see them. But, if the police diary is
used by the court to contradict the witness or if the police officer uses it for
refreshing his memory, then the provisions of certain sections of the Indian
Evidence Act apply. Those sections are—(a) section 161, which provides that
such writing must be produced and shown to the adverse party who may cross-
examine the witness on it, and (b) section 145, which provides that a witness
may be cross-examined as to previous statements made by him in writing or
reduced into writing without such writing being shown to him or being proved;
but if it is intended to contradict him by the writing, his attention must, before
the writing can be proved, be called to those parts which are to be used for the
purpose of contradicting him.

15.16. Thus, police diaries cannot be used for contradicting, (for example), a
defence witness, and it is precisely because they were sought to be so used that
the Privy Council had to criticise the lower courts in 19172. This judgment of
the Privy Council approves the proposition laid down in an Allahabad Case3,
to the effect that police diaries cannot be used as evidence (except to the extent
indicated in section 172, Cr. P.C.).

15.17. What is to happen if the police officer does use the police diary to
refresh his memory? Section 172, Criminal Procedure Code, provides that the
provisions of the Evidence Act shall apply in such a case. The provisions of
the Evidence Act as to refreshing memory are to be found in sections 159 to
161.

15.18. For our purpose, the material section is 161, which is quoted as
follows:—

"161. Right of adverse party as to writing used to refresh memory.—
Any writing referred to under the provisions of the two last preceding
sections must be produced and shown to the adverse party if he requires it;
such party may, if he pleases, cross-examine the witness thereupon."

15.19. It is obvious that neither section 172, Code of Criminal Procedure,
nor section 161 of the Evidence Act, contemplates that the court should delegate
to the counsel for the accused the power to decide how much of the diary shall
be seen or used by the defence. The defence is entitled to inspect only that
portion of the diary from which the witness refreshed his memory, and not the
entire diary. This was proposition laid down in an Allahabad case4.

---
1Section 172, Code of Criminal Procedure. 1898.
3Queen Empress v. Mannu. (1897) I.L.R. 19 All. 390 (F.B.).
4Queen Empress v. Mannu. (1897) I.L.R. 19 All. 390, 393, 394.
5A.I.R. 1933 Lahore 498, 500.
15.20. With these propositions one can hardly have any reason to disagree. It would seem, however, that in discussing the law on the subject, Edge C.J. in the Allahabad High Court, spoke of the "discretion" of the court. Now, with respect, the use of the expression "discretion", in this context, is not intelligible. None of the sections in the Code of Criminal Procedure or the Evidence Act gives an unfettered discretion. The combined effect of section 172, Code of Criminal Procedure, 1898 and section 161 Evidence Act is, that the accused person is entitled to see the "writing". Whatever that expression may mean, so much of the special diary as is necessary to the full understanding of the portion used, should certainly be allowed to be seen. These sections, in any case, do not contemplate any discretion in the unfettered sense.

15.21. On the question of discretion, it may be pointed out that section 161 of the Evidence Act is couched in mandatory terms. The section provides that the writing referred to "must be produced and shown to the adverse party, if he required it: such party may, if he pleases, cross-examine the witness thereupon." Thus, the adverse party has the right to inspect the document. The discretion is not of the court but of the party, as is indicated by the words "if he requires it".

15.22. In fact, literally speaking, section 39 of the Evidence Act is not applicable to documents used to refresh the memory, because the document used for refreshing memory is not "evidence". at least in so far as the cross-examination in respect of the portions referred to by the witness is concerned.

15.23. The position in England on this point is as follows:

(a) The opponent may inspect the document in order to check it, without making it evidence.

(b) Moreover, he may cross-examine upon it without making it evidence, provided his cross-examination goes no further than the parts which are used for refreshing the memory of the witness.

(c) But, if he cross-examines on other parts, he makes them part of his evidence, the document becomes an exhibit which may be inspected by the jury; and any statement in the document is admissible as evidence of any fact of which direct oral evidence by the witness would be admissible. As to civil cases, this rule is confirmed by Civil Evidence Act, 1968, section 3(2).

15.24. It should be pointed out that the document used by a witness for refreshing his memory is not evidence in the strict sense, even in the scheme of the Evidence Act. Thus, for example, where a medical witness refreshes his memory by the postmortem examination report, the substantive evidence is the oral testimony given by him before the court on oath and in giving such evidence, he refers to the report which he had made.

15.25. If there is any difficulty as regards the use of police diaries by the defence consequential on the use by the prosecution for refreshing the memory of the police, the difficulty arises not from section 39 (or its proposed amendment), but from section 161.

15.26. Fifthly, it may be stated that the practical utility of the proposed provision lies in this, that it will make it clear that if the party relying on a statement does not use the whole thereof (i.e. what is relevant for explaining what is used), the adverse party is not left at its mercy.

15.27. We would with great respect to the Allahabad High Court Full Bench decision, offer the following comments on that judgment:

(i) The discussion in the judgment about section 39 of the Evidence Act was obiter. The principal question at issue in the case was, whether the accused was entitled to copies of statements recorded by the police, which were recorded in the police diary, or whether the fact that the statements happened to be recorded in the police diaries, made them confidential. The question at issue was whether a police officer could refresh his memory (or, if he did so, what are the legal consequences). The question at issue was as to production of statements recorded under section 161, Code of Criminal Procedure, but contained in the police diary. Refreshing the memory was not a matter in issue.

(ii) Edge C.J. in the majority judgment, when discussing section 39, observed

"From section 39 of the Indian Evidence Act, 1872, may be inferred how much—how much only—of the police diary may be seen by the accused, or his agent when the diary is used to refresh the memory by the officer who made it..................",

He said that the accused is entitled to see only the particular entry and so much of the said diary as is, in the opinion of the court, necessary in that particular matter to the understanding of the matter so used and no more. He added, "in such cases, the court must be careful to see that the discretion entrusted to it in deciding what may or may not be seen by the accused or his agent is not abused." Unfortunately, no detailed reasons were given by way of analysing the phraseology of section 39, nor was there any discussion of the English law as to the extent of inspection and cross-examination on the basis of a document used to refresh memory.

(iii) In particular, the view taken as to whether a document is "admitted in evidence" merely because it is used for refreshing memory, was not referred to. There are specific English rulings holding that the document thereby does not become evidence.

(iv) It would also appear that the full implications of section 161 of the Evidence Act, were also not discussed in the judgment. Section 161 of the Evidence Act is not even mentioned in that part of the judgment where section 39 is discussed.

(v) The reasons for applying section 39 of the Evidence Act are not set out in detail.

(vi) It may be noted that in holding that section 39 could be taken as a basis of inference for construing section 172 of the Criminal Procedure Code, Edge C.J. unfortunately did not consider the aspect, namely, that section 162

1Queen Empress v. Mannu, (1897) I.L.R. 19 All. 390, 405 (F.B.).
2The main question in issue is so described in the dissenting judgments of Aikman J. at page 416 and Bannerji J. at page 424 in the I.L.R.
3Judgment, page 405.
4In England, whole document is open to inspection.
5Burgess, (1872) 20 W.R. 20 (Eng.).
of the Criminal Procedure Code (even as it stood then,—that is in the 1882 Code) expressly prohibited statements to the police from being “used as evidence against the accused”, subject to section 27 of the Evidence Act. Section 172, second paragraph, did not make any change in so far as statements under section 162 were concerned. Use of the statements in favour of the accused was, of course, not prohibited by section 162, but, then, section 172 second paragraph, provided then (as it provides now) that the police diaries may not be used as “evidence in the case”. This aspect could at least have been considered before regarding section 39 as applicable.

(vii) Unfortunately, it was also not noticed that in England, when a document is used to refresh the memory, the whole was allowed to be seen by the opposite party. No doubt, the English law did not contain a provision prohibiting the use of police diaries. But, on this point, once the police officer uses the diary to refresh his memory, the law in India would not be different, because all that is to be construed is section 161 of the Evidence Act, the construction whereof cannot be controlled by section 172, Criminal Procedure Code. Once the legislature has, in section 172, Cr. P.C., referred us to section 161 of the Evidence Act, it is section 162,—and only that section—that will govern the right of the opposite party to see and use the document. Such limitations as flow as regards the area of inspection and cross-examination under section 161, Evidence Act would flow from that section only, and not from section 172 of the Code.

It is in this respect that the use of the word “discretion” in the Allahabad case was, at least, avoidable, because section 161 of the Evidence Act gives no discretion to the court. It gives a right to the party, which he may exercise if he chooses. It is the party’s discretion. This point was missed—perhaps because section 161 was not analysed in the judgment.

(viii) The reasons for the view that the court has a “discretion”, are not given in brief or in detail. This may be because this part of the judgment is obiter.

(ix) Incidentally, it may be noted that in so far as the judgment holds that the statements recorded under section 161 become privileged, if they happen to be recorded in the police diaries, it suffers from a weakness. The majority judgment fails to discuss a series of Calcutta cases —all to the contrary and cited before it. It says that it prefers an earlier Calcutta case. But that case merely decided that a witness cannot be compelled to refresh his memory.

On this point, the minority view of P. C. Banerji, J. that such a statement does not legitimately form part of the diary and is not entitled to privilege under section 172, agrees with the Calcutta view.

In one of the Calcutta cases, Trevelyan J., in arguendo observed—

“I do not know of anything more disastrous to the administration of criminal law than that the accused should be debarred from having access to information to which he has a right, and to which he is not absolutely debarred from having access, by some express provision of the Legislature.”

The actual decision was also the effect that the accused was not debarred.

1Sheru Sha, I.L.R. 20 Cal. 642 (reviews cases).
3For legislative developments, see—
   (a) A.I.R. 1928 Pat. 215.
   (b) A.I.R. 1935 Rang. 370.
   (c) I.L.R. 33 Cal. 1023.
   (d) A.I.R. 1935 Sind. 145.
4Sheru Sha, (1893) I.L.R. 20 Cal. 642, 644, (Trevelyan and Rampini, JJ.).
15.28. Having considered all aspects of the matter, we recommend that section 39 should be revised as under:

REVISED SECTION 39

(1) When any statement of which evidence is given—

(a) forms part of a longer statement or of a conversation or of an isolated document, or

(b) is contained in a document which forms part of a book or of a connected series of letters or papers,

then, subject to the provisions of sub-section (2), the party giving evidence of the statement shall give in evidence so much, and no more, of the statement, conversation document, book or series of letters or papers as is necessary in that particular case to the full understanding of the nature and effect of the statement and of the circumstances under which it was made.

(2) Where such party has failed to give in evidence any part of the statement, conversation, document, book or series of letters or papers which is necessary as aforesaid, the other party may give that part in evidence.
CHAPTER 16

JUDGEMENTS—SECTION 40

16.1. We shall now proceed to consider the provisions relating to judgments. Introductory
These are contained in sections 40 to 44.

16.2. The basic principles underlying these sections are as follows:

(1) It is a matter of public policy that subject to statutory rights of appeal
and the like, the judgments of a competent court of law, acting within
the scope of its jurisdiction, should be final and conclusive as between the parties
concerned.\(^1\)

(2) A judgment, besides being conclusive, may bar fresh proceedings on the
same matter\(^2\).

(3) While the first proposition is concerned with the parties, certain types of
judgments which pronounce upon status are conclusive against all persons\(^3\).
Briefly, these are judgments in the exercise of probate, matrimonial, admiralty
or insolvency jurisdiction.

(4) Other judgments, orders and decrees relating to matters of public nature
are admissible, but they are not conclusive proof of what they state\(^4\).

(5) In other cases, the judgments, orders and decrees are inadmissible\(^5\),
except where the existence of such judgment, order or decree is a fact in issue
or is relevant under some other specific provision of the Evidence Act\(^6\).

As regards the “other provisions” of the Act, the provision most often
discussed in this context is section 13 of the Evidence Act, but that is also
confined to “transactions” showing the exercise of a right and the like.

(6) Certain vitiating factors can, however, be proved to destroy the effect
of judgments which are conclusive or relevant\(^7\).

16.3. We shall now discuss the individual sections in this group. Under
section 40—

“The existence of any judgment, order or decree which by law prevents
any Court from taking cognisance of a suit or holding a trial, is a relevant
fact when the question is whether such Court ought to take cognisance of
such suit, or to hold such trial.”

16.4. The section has a two-fold application. In civil cases, it becomes
applicable usually when a specific statutory provision precludes the Court from
trying a suit. This could be for a variety of reasons, e.g.—res judicata, and
numerous procedural provisions in the Code of Civil Procedure relatable to
previous judgments. In criminal cases, the pleas of previous conviction, previous

\(^1\)Section 11, Code of Civil Procedure, 1908.
\(^2\)Section 40, Evidence Act.
\(^3\)Section 41, Evidence Act.
\(^4\)Section 42, Evidence Act.
\(^5\)Section 43, Evidence Act, earlier half.
\(^6\)Section 43, Evidence Act, later half.
\(^7\)Section 44, Evidence Act.

295
acquittal, and other pleas in bar, contained in the Code of Criminal Procedure or Special Acts, may bring the section into play.

16.5. It may be noted that even in criminal cases there may be judgments which bar the trial not of the whole case, but of a particular issue, known as issue estoppel.

Section 40 — "holding a trial";
Trial of issues.

16.6. The principle of the section does not need further comments, and we shall now proceed to deal with a point of detail. While providing that the existence of any judgment, order or decree, which, by law, prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial, section 40 does not, in terms, deal with the case where a subsequent court, though not precluded from trying a suit, is precluded from trying a particular issue. But, obviously, the section should be construed widely, so as to cover such cases also. The section has to be read along with the provisions relating to res judicata, as embodied in the Code of Civil Procedure, and other provisions where relevant. That Code bars the trial, not only of suits, but also of issues which have been previously decided between the same parties. We have also referred above to "issue estoppel" in criminal cases.

16.7 to 16.11. In view of what is stated above, it appears desirable to make the language of section 40 clear on this point, by providing that "suit" and "trial" in the section include part of a trial or part of a suit. In Gajju Lal v Fateh Lal, Wartag C.J. gave an extended meaning to the words "holding a trial", and made these observations: "But I cannot doubt that it was intended to include all judgments which by law operate to prevent a court, whether civil or criminal from taking cognizance of suit or trying any particular issue. The words "holding a trial" are amply large to admit of this construction .........." At the same time, he criticised the language of the section in these words: "It is true, that section 40 might have been clearly wordedc. It has, in fact, much the same defect as section 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of Sorojo Monee v. Suddanundd.

16.12. In view of this judicial criticism of the language of the section it is desirable that the section should be widened by suitable amendment on the above point. Accordingly, we recommend that section 40 should be suitably revised. The following is a rough redraft.

REvised SECTION 40

"The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or issue or holding a trial or determining a question, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or issue, or to hold such trial or determine such question, as the case may be."

SECTION 41

I. Introductory

16.13. Section 41 reads—

"A final judgment, order or decree of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which

---

1Section 11, Code of Civil Procedure, 1908.
2See Discussion as to "issue estoppel" supra.
4Emphasis added.
confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

16.14. Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation.

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.”

16.15. The topic to which this section relates is dealt with under the head of “judgments in rem” in many text books and commentaries, but that expression, which is even otherwise not very appropriate, has been deliberately avoided by the legislature.

16.16. In an early Madras case,1 Holloway J., and in a Calcutta case,2 Barnes C.J., elaborately reviewed the law regarding judgments in rem and how far they were admissible in evidence. Peacock, C.J. observed—

“...... the effect of a decree in a suit for a divorce, vinculo matrimoni is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive or even prima facie evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a decree between A and B were granted upon the ground of adultery of B with C, it would be conclusive as to the divorce, but it would not be even prima facie evidence against C that he was guilty of adultery with B, unless he were a party to the suit.”

16.17. The Calcutta case3 was followed with approval in a Madras case.4 Stone J., as he then was, observed:

“Though it be necessary as a step to making a declaration which will operate in rem to find a fact, that finding will not bind third parties in subsequent proceedings.”

“This statement has my respectful concurrence. Applying the principle stated therein, it follows that the order of adjudication of a debtor as insolvent operates in rem, but the finding on which it is based is not binding on third parties in subsequent proceedings even though that finding was necessary and formed the basis of the order.”

---

1Yarakalamma Nagamma v. A. Naramma, (1864-65) 2 M.H.C.R. 276.
4In re an Advocate, A.I.R. 1931 Mad. 441.
16.18. The Select Committee, in their Report on the Indian Evidence Bill, remarked as follows:

"For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments *in rem*, we have adopted the statement of law by Sir Barnes Peacock in 7 W.R. 338."

16.19. It may be noted that the section is not confined to civil cases. In English law, a judgment *in rem* is strong *prima facie* evidence, in a criminal case, on behalf of the person in whose favour such judgment was given; but it is not conclusive:

II. ORDERS IN LUNACY

16.20. The section thus makes judgments in the exercise of probate, matrimonial, admiralty or insolvency jurisdictions relevant, and also conclusive proof of certain facts. The section does not mention judgments in the exercise of lunacy jurisdiction. This jurisdiction is exercised under the Indian Lunacy Act, sections 37 to 45 (for Presidency Towns) and sections 62 to 66 (for areas outside Presidency Towns). It has been held in a Madras case that while an order in lunacy is not a conclusive judgment, because it does not fall under section 41, it is still relevant and binding upon the parties thereto and those who claim under them, just like any other judgment of a Civil Court. In that case, a person who had been found to be a lunatic after inquisition executed a deed of assignment of the mortgage after the inquisition. The assignee of the mortgage brought a suit on the mortgage against the mortgagor, and the defence of the mortgagor was that the assignment in favour of the plaintiff gave him no right to sue, because it was executed at a time when the lunacy order was in force and when the management of the lunatic's property was entrusted to a Manager appointed by the court. The trial court considered the order in lunacy to be incorrect, holding that the order had been procured to defeat a suit brought against the person adjudged to be lunatic by a creditor on a promissory note. Accordingly, the trial court held that the person concerned was never insane, and therefore the assignment was valid. The High Court, however, held that it was not open to the person concerned (lunatic) to contend that the order finding that he was a lunatic was incorrect, therefore, the plaintiff, who claimed by an alienation from the lunatic, was bound by the order. The High Court observed—

"As to this, however, although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in section 41. Evidence Act, it is still relevant and binding upon the parties thereto and those who claim under them, just like any other judgment of a Civil Court."

16.21. Relying upon two English cases, the High Court held that a court cannot recognize, as valid, a deed executed by a lunatic during a period during which his adjudication as lunatic was in force. In the later English case, relied upon by the High Court, the reason given for such a view was that it could not

---

1Report of the Select Committee in the Gazette of India. dated 1-7-1871. Part V, page 273.
2Phipson (1963), para 1341.
3Indian Lunacy Act, 1912.
(b) See also *Padmabati Dassi v. Boromalil* 24 C.W.N. 378.
5In re Walker, (1905) 1 Chancery, 160.
6In re Marshall, (1920) 1 Chancery, 284.
7In re Marshall, (1920) 1 Chancery, 284.
be right that the Crown, or the “Committee” who represents the Crown (here the 
court), should have the control and management of the lunatic’s estate, and at 
the same time she (the lunatic) should have power to dispose of her estate as 
she thinks fit.

16.22. With respect to the Madras High Court, we have not been able to 
persuade ourselves to agree with the reasoning on which the Madras decision 
is based. It must be pointed out that, in the Madras case, the person who was 
the assignee of the mortgage under the assignment executed by the alleged 
lunatic was not a party to the lunacy proceedings, and even if he claimed through 
the lunatic, what is more relevant to be pointed out is that the lunacy court was 
not competent to try the present suit, which was brought by the plaintiff on 
the mortgage. Moreover,—and this is important—the mortgagors were not parties to 
the lunacy proceedings and, therefore, the earlier proceedings were not between 
the same parties as the present suit. The view of the Madras High Court that 
“though the order in lunacy does not fall within section 41, it is still relevant 
and binding upon the parties thereto and those claiming under them just like 
any other judgment of a civil court”, is, with respect, an incomplete statement of 
the relevant law, because—

(i) the judgment which is now made to be binding must, if the relevancy 
is to be attributed to the principle of res judicata be a judgment of a 
competent court;

(ii) further, the principle of res judicata does not apply where the parties 
are not the same;

(iii) if the judgment is to be regarded as relevant under any other provi-
sion of the law, that provision is not referred to in the decision of 
the Madras High Court, and, on the facts, none seems to be applicable.

16.23. One of the essential conditions prescribed by section 11 of the Code 
of Civil Procedure, is that the Court which tried and decided the earlier suit 
must have been a court competent to try the subsequent suit. The importance 
of the condition relating to the competency of the earlier court to try the subse-
quent suit, has been particularly emphasised by the Privy Council in Gokul 
Mander v. Padmanand Singh, where, in considering the scope of section 13 of 
the Code of 1882 (corresponding to section 11 of the present Code), it was ob-
erved as follows:—

"Under section 13, C.P.C., a decree in a previous suit cannot be pleaded 
as res judicata in a subsequent suit unless the Judge by whom it was made 
had jurisdiction to try and decide, not only the particular matter in issue, 
but also the subsequent suit itself in which the issue is subsequently raised. 
In this respect, the enactment goes beyond section 13 of the previous Act, 
10 of 1877, and also, as appears to their Lordships, beyond the law laid 
down by the Judges in the Duchess of Kingston’s case. They will further 
observe that the essence of a Code is to be exhaustive on the matters in 
respect of which it declares the law and it is not the province of a Judge 
to disregard or go outside the letter of the enactment according to its true 
construction."

16.24. This test was not satisfied in the Madras case. The fact that the 
now plaintiff, that is, the assignee of the mortgage, claimed his title from the 
lunatic, is not in itself sufficient to make the order in lunacy relevant, since

section 43 of the Act clearly provides that judgments, orders and decrees other than those mentioned in sections 40, 41 and 42 are irrelevant unless their existence is a fact in issue or is relevant under some other provision of the Act.

16.25. As regards the English cases referred to in the judgment of the Madras High Court, it is to be pointed out that the reasoning on which the English cases are founded is quite different from that of res judicata, and the English cases proceed on the footing that the person adjudicated as a lunatic is incompetent to transfer the property. At least, this is the gist of the English cases relied on in the Madras judgment. The truth of the matter is that if a judgment is within the category of res judicata, it is not only relevant, but it is a bar to any re-opening of the matter decided. On the other hand, if the judgment does not fall within the principle of res judicata—either because there is no identity of parties, or because the court is not competent or for any other reason—then the judgment is totally irrelevant. In India, there is no midway position, so far as the doctrine of res judicata is concerned, between a judgment which is not relevant at all, and a judgment which is a bar in toto—(We are not discussing section 41, Evidence Act, concerned with certain judgment affecting status). A judgment, if res judicata, is conclusive between the parties; but there is no category of judgments (with reference to res judicata) which are relevant but not conclusive. The view taken by the Madras High Court, treating the judgment relevant on the principle that a judgment binds the parties, does not fit in with the content of section 11, C.P.C., or section 40, Evidence Act.

16.26. Apart from the English cases cited in the Madras judgment, we have also looked at other English decisions relevant to lunacy. It is settled, in England, that the old inquisitions and former master’s orders in lunacy, are admissible, though not conclusive, evidence of the lunacy of the person to whom they refer. Their admissibility is not based on any principle analogous to res judicata, but under a category similar to public reports relating to matters of public interest.

16.27. In Harvey v. R. it is noted that by the Lunacy Act in England, it is specifically provided that a master’s order is a prima facie evidence of the Lunacy. The rubric under which English text books deal with judgments in lunacy is that of “inquiries, certificates, assignments and reports made under public authority and in relation to matters of public interest”.

16.28. Even in England, it is doubtful whether, in the absence of statutory provisions, as under the Lunacy Act, a quasi judicial inquisition into a matter not of a public nature would, at the present day, be regarded as admissible, particularly because, after the decision in Hollington v. Hewithone, the category of judgments admissible but not conclusive has been narrowed down.

16.29. It may be observed here that in one of the English cases, it was said that there are two kinds of judgments in rem, one of which is conclusive against all the world, and the other of which is not; an example of the latter was said to be an inquisition in lunacy “which has always been allowed to be read in a subsequent suit between third parties, as evidence of the lunacy, though it is not conclusive and may be traversed.” But this enumeration of judgment

---

1Faulder v. Silk, (1811) 3 Camp 176, 13 R.R. 331.
3Section 116 of the Lunacy Act, 1890 (Eng.).
5Hill v. Clifford, (1907) 2 Ch. 236, 244.
in rem does not seem to have been pursued in later English cases. The definition given in an earlier edition of Halsbury,1 which has been adapted in an English case, is—"a judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it) or a party to the litigation." In India, however, the matter is dealt with in section 41; and unless the matter is of a public nature relevant to the inquiry (section 42), a judgment, order or decree would be irrelevant (section 43).

16.30. The English concept of judgments in rem has not been fully adopted into our Act, and instead of adopting the terminology used in the English common law on the subject, a specific enumeration of the judgments which are to be regarded as conclusive is given in section 41. We cannot, therefore, travel beyond that section and bring into existence a new class of conclusive judgments under the category of judgments in rem.

16.31. For these reasons, it appears to be inconsistent with the scheme of the Act to follow English decisions based on the English concept of judgments in rem without considering our scheme. It may be noted that the earlier English case2 relating to lunacy was based on the principle that certain judgments on a status or condition are receivable in evidence against a third person, but not conclusive.

16.32. On a consideration of all aspects of the matter, we think that the correct position should be incorporated in the section. We therefore recommend that section 41 should be clarified by expressly providing that an order adjudging a person lunatic does not fall within the section.

III. ORDERS REFUSING PROBATE

16.33. Some controversy exists on the question how far an order refusing the grant of probate falls under section 41, which provides that final judgment etc. of a competent court in the exercise of probate etc. jurisdiction which "confers upon or takes away from any person any legal character....................." is relevant, where the existence of any such legal character etc. is relevant. The difficulty seems to have been caused by certain observations in a Madras case,3 which are as follows:

"The judgment of the probate court refusing probate takes away from the executors named in the will the legal character of executors, and from the legatees and beneficiaries their legal character as such, and such result is final as against all persons entrusted under the will."

16.34. It may, however, be noted that the actual question in that case was not one directly concerning section 41. There was no previous judgment of a probate court which came for interpretation. The facts of the case were, that an application had been made previously under the Guardians and Wards Act, 1890 on behalf of the widow of a person, for a declaration that she was the guardian of the person and property of the minor son of that person. The application had been opposed by X and Y, who claimed to be testamentary guardians of property appointed by the will. The court found the will to be a forgery, and made orders accordingly. Thereafter, X and Y, filed the present application for probate of the will under the Probate and Administration Act,

---

3Faulder v. Sik. (1811) 3 Camp. 176, 13 revised Reports 771.
1881, which was opposed by the widow. One of the contentions was that the question of the genuineness or otherwise of the will was res judicata. The court rejected the contention, on the general principle of probate in support of the plea of res judicata is a judgment of a competent probate court. In the courts of the observations which led to this conclusion, the court observed:

"In our opinion, the judgment of a probate court granting or refusing probate is a judgment in rem and therefore the judgment of any other court in a proceeding inter partes cannot be pleaded in bar of an investigation in the probate court as to the factum of the will propounded in that court."

16.35. In a Bombay case, a judgment had dismissed an application for probate on the ground that the execution of the will was not proved. The judgment was held not to bar a suit by the same applicant as a person who was a beneficiary under the will, for a declaration that the property of the deceased belong to them. The court observed: "From a refusal to grant probate, it, by no means, follows that in the opinion of the court, the will propounded is not a genuine will of the testator."

16.36. The correct position seems to have been clearly laid down in a subsequent Bombay case. In that case, the probate court had refused the probate of the will on the ground that the testator was not of sound mind. (See the facts given in the Order of Reference.) The question was, whether this finding was conclusive against the defendants (claiming to be executors under the will), against whom the widow of the testator brought the present suit as executor de son tort. The Full Bench gave its answer to the question in the following words:

"With regard to the first question referred, we are of opinion that section 41. Evidence Act, is not applicable to the judgment of the Appellate Court. The finding of a court that an attempted proof has failed is not a judgment such as is contemplated in that section. The only kind of negative judgment which is contemplated is that which expressly takes away from a person the legal character which has up to that time subsisted. That is not the case with the judgment in question here."

16.37. It appears to be desirable to make the position clear, and to adopt the view expressed in the later Bombay case. We recommend that section 41 should be amended for the purpose.

SECTION 42

16.38. Section 42 provides that judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

16.39. This section also forms an exception to the general rule that no one shall be affected or prejudiced by a judgment to which he is not party or privy. The reason for the exception is that in matters of public right, the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding.

1Ganesh v. Ram Chandra, (1887) I.L.R. 21 Bombay 563, D.B.
2Kalyan Chand v. Sita Bai, I.L.R. 38, Bombay 309, A.I.R. 1914 Bom. 8, 15 F. B.
3Kalyan Chand v. Sita Bai, (Para. 16.36 supra).
4Gujju v. Fatteh, (1880) I.L.R. 6 Cal. 171, 183, (per Pontifex, J.)
16.40. The general rule is that judgments are not evidence against strangers. Discussing the exception to this general rule, Taylor says: "The one exception, that judgments are not evidence against strangers, which has just been referred to, arises in the case of adjudication upon subject of a public nature, like customs, prescriptions, tolls, boundaries between parishes, counties or manors, rights of ferry, liabilities to repair roads or sea walls, moduses, admissible adjudications, which for this purpose are regarded as a species of those who litigate the first, or be under strangers."" 

"If the litigants in the second suit be strangers to the parties in the first, the judgment, however, will not be conclusive."

16.41. Some misconception seems to prevail as to the effect of a decree framing a scheme under section 92 of the Code of Civil Procedure.

16.42. A suit under section 92 of the Code is a suit by members of the public interested in the trust for safeguarding the interest of the trust,

16.43. It is sometimes stated — as was done in a Madras case that the decree in the scheme suit is, or has the effect of, a judgment in rem, and it prevents any one, whether a party to the suit in which the decree was passed or not, from asserting any rights vested in him which conflict with or attack the

16.44. In Allahabad case also, it was stated that the judgment is one in rem. But, strictly speaking, this is not appropriate.

16.45. Section 41 gives conclusive effect to a judgment of competent court only in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction. A judgment passed in a suit under section 92, C.P.C., is not a judgment in the exercise of any such jurisdiction, and is not covered by section 41. Having so observed, Desai J. in an Allahabad case, stated that it may be relevant, but "it will not have conclusive effect." He also said, in the course of the discussion, that it is a judgment in rem.

16.46. But, with respect, such a view is not accurate. The true position is that the suit contemplated by section 92 is a representative suit, that is, a suit

---

1Taylor, cited in Field on Evidence, page 2274.
3Reed v. Jackson, (1881) 1 East. 357.
5Id.
6B.N.P. 233.
7Brisco v. Lorne, (1838) 3 M. & P. 308.
10Henobill v. M'Kenna, (1845) 8 Ir. L.R. 43.
12R. v. Haughton, (1853) 22 L.J. M.C. 89.
14Croughton v. Blake, (1843) 13 L.J. Ex. 78.
15Reed v. Jackson, (1801) 1 East. 357;
16Croughton v. Blake, (1843) L.J. Ex. 78.
18Paras 7 and 12 (Gentle, C. J.).
20Anjuman Islamia v. Latafat Ali, A.I.R. 1950 All. 109, 118, 119 (per Desai J.)
which is prosecuted by individuals not for their own interest, but as representatives of the general public, in order to secure a proper administration of a public trust.

16.47. The decree will operate as res judicata under section 11, Explanation VI, of the Code of Civil Procedure. Explaining the scope of the plea of res judicata under section 92, the Supreme Court has held that a decree in a suit under section 92 will operate as res judicata on all persons who have the same interest as the plaintiffs. Persons who claimed a right in themselves, to the exclusion of other classes, will not be bound by the decision, since they do not belong to the class of persons represented in the suit under section 92.

The above discussion does not disclose any need for amending section 42.

SECTION 42A (PROPOSED TO BE ADDED)—RELEVANCY OF PREVIOUS CONVICTION IN CIVIL CASES

16.48. We shall now consider a topic not dealt with in the existing sections of the Act. It relates to the relevancy, in civil cases, of previous convictions. There being no specific provision on the subject in the Act, it will be useful to have a look at the common law.

I. GENERAL RULE

16.49. The general rule at common law is that a judgment given by a criminal court is not relevant in a civil case for proving the facts decided in the judgment. Thus, if A has been convicted of grievous hurt by causing fracture of B's bone, then, in a subsequent civil suit by B for damages for assault against A, the previous judgment of the criminal court is not relevant.

16.50. This rule, as settled in England by the case of Hollington, may, so far as India is concerned, be taken as settled by the Supreme Court in Anil Behari's case. In that case, the question arose in a civil case whether one C had murdered the testator (the civil case being a proceeding for revocation of probate). The court held that the conviction and sentence passed on C in a criminal trial was no evidence of the fact that C was the murderer. In England, the law has been modified by statute, to which we shall refer later.

II. CASE LAW

16.51. Prior to the decision of the court of Appeal in Hollington's case, there were some decisions of the (English) Divorce Court which lent support to the view that a previous judgement founded on the adultery of X could be used in a subsequent proceeding as evidence of adultery, even though the parties are not the same in the subsequent proceeding.

(a) Anand Rao v. Ramdas, A.I.R. 1921 P.C. 123;
(b) Bapugonda v. Vinayak Sadashiv, A.I.R. 1941 Bom. 317;
(c) Indu Bhushan v. Kiran Chandra, A.I.R. 1940 Cal. 376.
See below — "English case law."
Sections 11 to 13, Civil Evidence Act, 1968 (Eng.) infra.
Hollington's case, infra.
The relevant cases were—

(1) *Partington v. Partington,* in which a co-respondent in a suit for divorce filed on the ground of adultery of the wife, put in evidence by way of defence, a decree in a former suit in which the husband had himself been found guilty, as a co-respondent, of adultery (the parties were entirely different). Horridge, J., admitted this evidence, (counsel for the husband does not seem to have raised an objection to the admission).

(2) *O'Toole v. O'Toole*—Evidence of the conviction of the respondent for perjury, in falsely swearing that he had not sexual intercourse with a woman was, after some hesitation, admitted by Hill, J. (on the authority of Partington's case cited above), to prove the commission of adultery by him.

(3) *Little v. Little*—In this case, the wife was the petitioner for divorce on the ground of adultery, and Hill J. admitted evidence of a finding of adultery against the husband in a former divorce suit in which he had been co-respondent (The question of admissibility does not appear to have been argued).

16.52. The Court of Appeal, however, in *Hollington v. Hewthorn,* disapproved of the principle underlying the first case (Partington) cited above. In Hollington's case, damages were claimed in respect of a collision between two motor cars. The first defendants, Hewthorn and Co., were the owners of a car involved in the collision and driven by the second defendant, Pall. The plaintiff wanted to tender, as evidence of negligence, a conviction of the defendant Pall of careless driving at the time and place of the collision. The court of Appeal held that the conviction was inadmissible in evidence. The judgment of Goddard L.J. gives detailed reasons for the conclusion which can be summarised as follows:

(a) The evidence in question is not legally relevant.

(b) The issues in the criminal and Civil proceedings are not identical.

(c) The evidence in question is opinion evidence.

(d) The evidence is hearsay.

(e) If a conviction is admitted, evidence of acquittal will have also to be admitted which would be preposterous.

(f) The authorities were against admissibility. (As regards the last reason given by Goodard, L.J., it may be noted that in a number of cases *it had been held that a conviction in criminal court is not admissible in a civil suit.*)

16.53. There is one matter of detail which may also be mentioned. Where the criminal court has convicted a person of adultery, and that person subsequently becomes the defendant to a matrimonial cause founded on adultery, the common law rule is that the matrimonial court has to again record the same evidence and decide the question afresh. (This applies to other matrimonial cases.)

---

1 *Partington v. Partington,* (1924) Probate 34.
2 *O'Toole v. O'Toole,* (1926), 42 T.L.R., 245.
3 *Partington,* supra.
4 *Little v. Little,* (1927), Probate 224.
7 *Castrique v. Imrie,* (1870) 4 H.L., 414, 434.
8 *Layman v. Latimer,* (1878) 3 Exchequer Diversion 362, 354.
III. CRITICISM OF THE GENERAL RULES

16.54. The usual ground on which the rule of the common law mentioned above is supported is, that the previous judgment was not between the same parties. The rule was criticised by Bentham, on the ground that the theory that the Crown is the prosecutor in a criminal case is only a legal fiction. The "substantial" prosecutor, said Bentham, may be a private person, and therefore the fiction loses its force for the purpose of the subject under discussion. This criticism, however, would not be valid in India, where the State is usually the real prosecutor as well.

16.55. The real justification for considering a change in the law is the fact that a criminal trial usually requires a stronger degree of proof. Hence, if a conviction is made relevant in a later civil case, there is no serious hardship.

16.56. A reference may also be made to the discussion made in another study. Two points have been urged there in favour of admitting evidence of previous conviction, viz., the very strong probative value possessed by the evidence, and the amount of time which would thereby be saved. Against admissibility, the point made there is the danger of such evidence being treated in practice as virtually conclusive. The suggestion made there regarding the admissibility in civil cases of convictions, can be stated in a simplified form, as follows:—

1. A conviction following a plea of not guilty and made by a superior court should be admissible.

2. A conviction following a plea of guilty should not be admissible, as it does not possess the high probative value which results from the circumstances of proof beyond reasonable doubt.

3. A conviction following a plea of not guilty or a denial, but not made by a superior court, should be admissible, only if the Judge is satisfied that its admission would be in the interest of justice.

4. In all jury cases, where a conviction is admitted under the above rules, the Judge should warn the jury of the temptation to regard, and the dangers of regarding, the conviction as conclusive.

16.57. It may be noted that Wigmore has criticised the common law rule, saying that in numerous situations it is unreasonable and impracticable to ignore the evidential use of a judgment in another proceeding involving the same fact as in the present case.

IV. ENGLISH ACT OF 1968

16.58. In England, by statute, the common law rule has been changed, and the following provisions have been inserted on the subject by the Act of 1968.

---

2See Civil Evidence Act, 1968, infra.
6Sections 11 to 13 Civil Evidence Act, 1968.
11. **Conviction as evidence in civil proceedings.**

(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall [subject to sub-section (3) below] be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere—

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purpose of any other proceedings made conclusive evidence of any fact.

(4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of sub-section (2) above, a copy of that document, or of the material part thereof, purporting to be certified or the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or party unless the contrary is shown.

(5) Nothing in any of the following enactment, that is to say—

(a) section 12 of the Criminal Justice Act, 1948 (under which a conviction leading to probation or discharge is to be disregarded except as therein mentioned);

(b) section 9 of the Criminal Justice (Scotland) Act 1949 (which makes similar provision in respect of convictions on indictment in Scotland); and

(c) section 8 of the Probation Act (Northern Ireland) 1950 (which corresponds to the said section 12) or any corresponding enactment of the Parliament of Northern Ireland for the time being in force,

shall affect the operation of this section; and for the purpose of this section any order made by a court of summary jurisdiction in Scotland under section 1 or section 2 of the said Act of 1949 shall be treated as a conviction.

(6) In this section “court-martial” means a court-martial constituted under the Army Act, 1955, the Air Force Act, 1955 or the Naval Discipline Act, 1957 or a disciplinary court constituted under section 50 of the said Act of 1957, and in relation to a court-martial “conviction”, as regards a court-martial constituted under either of the said Acts of 1955, means a finding of guilty which is, or falls to be treated as a finding of the court
duly confirmed and, as regards a court-martial or disciplinary court constituted under the said Act of 1957, means a finding of guilty which is, or falls to be treated as, the finding of the court, and "convicted" shall be construed accordingly."

"12. Findings of adultery and maternity as evidence in Civil proceedings.

(1) In any civil proceedings—

(a) the fact that a person has been found guilty of adultery in any matrimonial proceedings; and

(b) the fact that a person has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom, shall [subject to sub-section (3) below] be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that he committed the adultery to which the finding relates or, as the case may be, is (or was) the father of that child, whether or not he offered any defence to the allegation of adultery or paternity and whether or not he is a party to the civil proceedings; but no finding or adjudication other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been found guilty of adultery as mentioned in sub-section (1)(a) above or to have been adjudged to be the father of a child as mentioned in sub-section (1)(b) above—

(a) he shall be taken to have committed the adultery to which the finding relates or, as the case may be, to be (or have been) the father of that child, unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court, in the matrimonial or affiliation proceedings in question shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Sub-section (4) of section 11 of this act shall apply for the purposes of this section as if the reference to sub-section (2) were a reference to sub-section (2) of this section.

(5) In this section—

"matrimonial proceedings" means any matrimonial cause in the High court or a county court in England and Wales or in the High Court in Northern Ireland, any consistorial action in Scotland, or any appeal arising out of any such cause or action;

"affiliation proceedings" means, in relation to Scotland, any action of affiliation and ailment;

and in this sub-section "consistorial action" does not include an action of ailment only between husband and wife raised in the Court of Session or an action of interim ailment raised in the sheriff court."
"13. Conclusiveness of convictions for purposes of defamation actions—

(1) In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that he committed that offence: and his conviction thereof shall be admissible in evidence accordingly.

(2) In any such action as aforesaid in which, by virtue of this section, a person is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which that person was convicted, shall, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, be admissible in evidence for the purpose of identifying those facts.

(3) For the purposes of this section a person shall be taken to stand convicted of an offence if but only if there subsists against him a conviction of that offence by or before a court in the United Kingdom or by a court-martial there or elsewhere.

(4) Sub-sections (4) to (6) of section 11 of this Act shall apply for the purposes of this section as they apply for the purposes of that section, but as if in the said sub-section (4) the reference to sub-section (2) were a reference to sub-section (2) of this section.

(5) The foregoing provisions of this section shall apply for the purpose of any action begun after the passing of this Act, whenever the cause of action arose, but shall not apply for the purposes of any action begun before the passing of this Act of any appeal or other proceedings arising out of any such action."

V. CASE LAW ON THE ENGLISH ACT OF 1968

16.59. A few cases interpreting the English Act of 1968 are discussed below:

Stupple v. Insurance Co. Ltd., decided with reference to section 11 of the Civil Evidence Act, 1968 (U.K.), was a case of action for conversion based on a conviction for robbery. It was stated by Buckley, L.J., that he could not discover any measure of the weight which the unexplored fact of the conviction should carry. Lord Denning M.R., on the other hand, in the same case, considered that the conviction was 'a weighty piece of evidence of itself'. In the absence of an over-riding majority view, Stirling J. in Wright v. Wright, followed Buckley L.J.'s view.

16.60. The reversal of the common law rule in England appears to have helped the person pleading the conviction in a number of cases. In Wauchoe v. Mordecai, the plaintiff was knocked off his bicycle by the defendant opening his car door on the road. The defendant was convicted of a breach of the Motor Vehicle Regulations. The previous conviction furnished evidence of the facts.

16.61. In another English case, the respondents' conviction for incest has admitted as evidence to support the Wife's petition for divorce on that ground.

VI. AMENDMENT IF NEEDED

16.62. The question that now arises for consideration is whether the law in India should be changed—

(a) so as to admit a previous conviction as evidence of commission of the act constituting the evidence; and, if so,

(b) the weight to be attached to such conviction.

16.63. There seems to be a dilemma. If the previous conviction is made merely prima facie evidence, but not conclusive, the later court would obviously be free and bound to allow evidence to be offered by the convicted person to rebut his conviction and prove his innocence.

16.64. This would provoke the opposite party to produce further proof of the guilt itself. Such a situation would sometimes take away much of the advantage that is likely to result from the proposed admissibility of the conviction,—saving of time.

If, on the other hand, the conviction is made conclusive, then, there is danger of injustice ensuing, if no scope for rebuttal is allowed. The difficulty thus presents itself in the shape of a dilemma,—if the previous conviction is not conclusive, it does not save time; if it is conclusive, it may work injustice.

16.65. Defending the judgment in Hollington v Hewthorn,1 one learned author2 forcefully put the point thus—

"Manifestly there is no way in a given case of determining the probative value of a conviction to establish the truth of the propositions on which it was based. If there were no other evidence, we might indulge in a presumption and to settle the matter. But if there is other evidence on the question, what effect should be given to the fact that another jury on an unknown state of the evidence arrived at a given conclusion? The present jury, if it really considers the matter, must either blindly accept the conclusion of the first jury or ignore it because there is no rational alternative."

VII. CONCLUSION

16.66. It was suggested to us that for the difficulty of the right to be attached to the conviction in any particular case, a possible solution may lie in admitting the conviction as evidence that the defendant committed the offence, but admissible evidence to the contrary should still be allowed. In this way, the admission in evidence of the conviction would at least serve the purpose of putting the defendant at his peril, if he declined to give evidence to the contrary. In other words, the conviction should be made evidence, but it should be rebuttable by contrary evidence.

16.67. The following rough draft of the provision that could be inserted was suggested:

"42A. (1) Where the fact3 that a person committed an act constituting an offence is in issue or is a relevant fact in a suit or proceeding other than

---

1Hollington v. Hewthorn, (1943) 1 K. B. 587.
3This is wider than section 13, Explanation 2.
a trial for that offence, a conviction of that person for that offence is relevant to show that he committed that act:

Provided that

(a) a conviction shall not be so admissible unless it appears to the court that its admission is in the interests of justice;

(b) nothing in this section shall preclude the production of any evidence showing that such person did not commit such act.

42A. (2) Where, in any proceedings in a Court in India in its jurisdiction in respect of a matrimonial cause, a person has been found guilty of adultery, the decree or order of the court reciting or based upon that finding shall, in any subsequent proceedings in a Court in India in its jurisdiction in respect of a matrimonial cause, be admissible against such person as evidence of the adultery, notwithstanding that the parties to the proceedings in which the finding is tendered are not the same as the parties to the proceedings in which the decree or order was made.”

The following points were urged in support:—

(i) Theoretical—The present opposite party cannot object on the ground of harassment—since he was not a party to the earlier criminal prosecution.

(ii) Practical—There may be a case where fresh evidence is discovered, showing innocence of the convicted person.

(iii) Juristic—Both parties should be allowed to give evidence about a fact.

(iv) Legislative Policy—The evidence Act avoids making one fact conclusive proof of another fact, except in a very small number of cases.

(v) Overall view—The suggested amendment is a happy compromise between the present rigid position (conviction is not relevant at all) and the other possible extreme position (conviction is conclusive proof).

(vi) As to the suggested provision regarding matrimonial causes, the situation is this—the co-respondent in a divorce action is now the principal respondent. His wife will not be required to prove adultery by him again.

After considerable discussion, we have decided not to recommend any such change.

SECTION 43

16.68. Under section 43, “Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.”

16.69. This section can be said to incorporate a general exclusionary rule in regard to judgements. If a judgement, order or decree, is not relevant either under the group of sections immediately preceding or under some other provision, and is not a fact in issue, it is not admissible. That is the general rule.

16.70. It should, of course, be noted that a judgement may become relevant by reason of the provisions of some other law. For example, there is the question of judgments relevant to an agreement of indemnity. When A gives an indemnity in favour of B, and a judgment has been obtained against A, that judgment would not be rendered relevant by sections 40 to 42 to prove the wrong
committed by A. But, it should be noted that under the Indian Contract Act, the promisee, in a contract of indemnity, acting within his authority, is entitled to recover, from the promisor, the damages which he may be compelled to pay, etc. In view of the wide language of this section of the Contract Act, the position substantially is this—that the judgment becomes relevant, even though not between the same parties, if A has been compelled to pay.

As to contracts of guarantee, see section 126 of the Contract Act, and for joint and several promisee, compare section 43 of that Act.

16.71. The only change required in section 43 is a consequential one,—the insertion of a reference to the new section which we have recommended to be inserted in regard to judgments of previous conviction.

SECTION 43A (NEW)

SUMMARY OF PLEADINGS IN JUDGMENT

16.72. We may now refer to a suggestion made by the Civil Justice Committee, relating to the summary of pleadings contained in the judgement. The Civil Justice Committee said—

“Section 35 relates to the relevancy of any entry in the public record in the performance of a duty. In a decision reported in Tripurna Seethapati Rao Dora v. Rakkan Venkanna Dora the Madras High Court held that the summary of pleadings given in a judgment is not relevant evidence as to the content of these pleadings. The pleadings in old suits are often not available, and the only evidence available to prove their contents is, not infrequently, the recitals thereof in the judgments in such suits. Such recitals are entries in public records relating to a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty.

“Rule 4 of Order 20 of the Code of Civil Procedure requires a concise statement of the case to be given in the judgment, and this usually takes the form of a summary of the pleadings. It is difficult to see why such recitals cannot be treated as coming within the purview of section 35. Even if they are not covered by section 35 as it stands, it should be made to embrace them. Otherwise, valuable evidence of a reliable character will be lost, letting open the door for perjured testimony. The possibility of the summary being not altogether accurate affects its weight and not its admissibility.”

16.73. We agree with this reasoning, in substance, and are of the view that the law should be amended as above but only in regard to summaries of pleadings. We would prefer to put it in a new section—say, section 43A,—and recommend that a new section should be inserted as follows:

“43A. The summary of pleadings in a judgment is relevant to prove the gist of the pleadings or other documents, unless the pleadings are part of the record in the proceeding in which the judgment is tendered in evidence.”

1Section 125, Indian Contract Act, 1872.
2Section 126 read with section 128.
3Section 42A (proposed).
5Tripurna Seethapati Rao Dora v. Rakkan Venkanna Dora
SECTION 44

I. INTRODUCTORY

16.74. Where judgments are relevant and have been proved accordingly, they can still be challenged, and their evidentiary value destroyed, on certain grounds. Under section 44—

"Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party was delivered by a court not competent to deliver it, or was obtained by fraud or collusion."

The section, thus, mentions three grounds of attack, namely—

(1) incompetence of the court;
(2) fraud;
(3) collusion.

The first and third grounds have not raised many questions. But the second fraud requires detailed discussion.

II. FRAUD

16.75. The principle on which a judgment can be set aside on the ground of fraud was discussed in Bandon v. Beacher.1 Lord Brougham there quotes the language of Mr. Solicitor General Wedderburn summing up all the authorities, viz: "A sentence is a judicial determination of a clause agitated between real parties upon which a real interest has been settled; in order to make a sentence there must be a real decision. Of all these exequient and collusive suits; there is no Judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question."

16.76. Where there are two or more courts having jurisdiction to entertain the suit to set aside a decree on the ground of fraud, then it is not necessary that the plaintiff should seek relief only in the court which passed the decree.

16.77. Even a court having concurrent jurisdiction over the second suit can set aside the judgment. The case of Carew v. Johnston2 is an instructive illustration of the power which a Court of concurrent jurisdiction will assume in a matter of this kind. The judgment in this case set aside,—(a) a decree for foreclosure on sequestration in 1777 against an absent mortgagor, who was known by the plaintiff to be of weak and feeble understanding and incompetent to conduct his affairs, where advantage had been taken (in taking the accounts) of the estate of the defendant and of his absence and of his having no one to manage his defence, and (b) a sale made in 1780 in pursuance of such decree to the person under whose directions the proceedings were taken. These were set aside as fraudulent, on an original 'bill' filed for that purpose by the heir of the mortgagor in 1785.

16.78. Lord Redesdale, in the course of his judgment, said—

"On the whole I think it is impossible for me to hold the decree, which has been pronounced, conclusive on the party. If I should be of opinion that the party has brought himself completely within the saving of the Act,

---

1 Lord (of) Bandon v. Beacher, (1835) 3 Cl. & Fin. 479 (Lord Brougham).
I cannot pay any attention to the decree. I must treat it as a nullity; but if I should think that he has not brought himself precisely within the saving of the Act by the allegation in his bill, then I must decide on the ground of unconscientious advantage being (by means of a Court of Justice) taken of the imbecility or the absence of this man, by which gross injustice has been done, and in fact a fraud practised on the Court. That would not be a ground for relieving against trifling errors or little inaccuracies, but it will be a ground for relieving against palpable injustice, such as could not have existed, if anybody had appeared for this man to state his right, and the Court or the Master had entered into considerations of the subject, and acted upon the instruments which were the foundations of the proceedings."

III. PERJURY

16.79. In one respect, the scope of fraud is uncertain, namely, as to perjury. Can perjury be treated as a species of fraud, and thus operate as a ground for questioning a judgment? Most courts take a negative view on the point, and rule out perjury as a ground for questioning a judgment under the head of ‘fraud’.

16.80. The reasons for the negative view have been given by various High Courts, including Madras, Calcutta and Allahabad.

16.81. The reasons were thus stated by Sadasiva Ayyar J. in a Madras case.

“The passion for litigation, wherever it exists in this country, is likely to turn into almost incurable mania and the doctrine of res judicata would become practically useless if Lakshmi Charan Shaba v. Nur Ali is followed in Indian Courts.”

16.82. It should be noted, however, that the matter is not so simple, and there is scope for a different view in the matter. In fact, a different view has been taken—though it is in a minority.

16.83. A brief historical discussion would be of interest.

In equity, there was a collateral action, known as “action of review”, by which even a judgment of a superior court could be questioned between the parties and set aside on certain grounds. The action was originally called “review of action concerning judgment”.

16.84. As regards judgments of the common law courts, the Chancery courts, before the fusion of law and equity, found an indirect means of rendering a fraudulent judgment useless, namely, by issuing an injunction against the decree-holder, who had obtained the decree by fraud, restraining him from executing it.

---
(b) Mohomed Doloub v. Mohammed Saleiman, (1894) I.L.R. 21 Calcutta 612.
4Kadivelu Nair v. Kuppuswami Naicker, 1919 Mad. 1044, 1046.
16.85. Even after the merger of law and equity, the action of review is, in substance, taken as having survived, although the grounds on which review would be granted have been the subject-matter of some controversy, particularly in relation to the ground of false evidence.

In several English cases, the judgements were reviewed and reversed on the specified ground.

16.86. As late as 1914, text book writers on Chancery Practice devoted long sections to actions for review and actions to set aside a judgment of fraud; though the latter action is merely a species of the former.

16.87. It may also be noted that as late as 1946, an action was brought in the High Court to review a judgment on the ground of fraud though the action did not succeed on the merits.

16.88. Halsbury states the present law as follows:—

"A judgment, which has been obtained by fraud, either on the court or of one or more of the parties, can be impeached by means of an action which may be brought without leave and is analogous to the former Chancery suit to set aside a decree obtained by fraud.

An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the court."

16.89. A learned writer,—D. M. Gordon K. C.—has, after discussion the position, expressed the view that review of judgment by the action of review is permissible where there is new evidence, and states the law as follows:—

"Fraud as a ground for review is no exception to the rule that review can only be based on new evidence. This evidence, whether fraud is alleged or not, must be—

(a) evidence newly discovered since the trial;
(b) evidence that could not have been found by the time of the trial by exercise of reasonable diligence,
(c) evidence so material that its production at the trial would probably have effected the outcome; when the fraud charged consists of perjury;
(d) the evidence must be so strong that it would reasonably be expected to be decisive at a rehearing, and if unanswered must have that result."

Subject to these limitations, he is of the view that perjury could be a ground of attack.

16.90. After some discussion, we have come to the conclusion that change is not desirable.

---

1Preston v. Preston, (1884) 9 Pr Divn. 70, 210.
2Re Scott & Alvarez's Contract, (1895) 1 Ch. 596
16.91. We may now refer to a comment of the Civil Justice Committee, relevant to section 44, which was as follows:

"Under section 44 of the Evidence Act a party may show that any judgment relevant under sections 40, 41 and 42 was delivered by a court not competent to deliver it or was obtained by fraud or collusion. At one time, it was held that consent gave no jurisdiction in any case. A party to a judgment could show in a collateral proceeding that it was not binding on him on the ground of want of jurisdiction even if he had not appealed against it.

But, according to section 21 of the Code of Civil Procedure, an objection as to jurisdiction relating to the place where the suit is instituted is not allowed to be taken in any court of appellate or revisional jurisdiction, unless the same was urged duly in any court of first instance at the early possible opportunity, and in all cases, where issues are settled at or before such settlement, unless there has been a consequent failure of justice.

"Under section 44 as it stands, this objection can be taken in collateral proceedings and the judgment can be objected to. This is anomalous. Under the Court Fees Act of 1870, 'every question relating to valuation for the purposes of determining the amount of any fee on a plaint or memorandum of appeal shall be decided by the court in which such plaint or memorandum, as the case may be is filed and such decision shall be final as between the parties to suit, and an appellate court can deal with such a dispute only if it had been decided by the Court in which such suit was instituted wrongly to the detriment of the revenue. An objection by reason of the over-valuation or under-valuation of a suit or appeal in a court of first instance or in a lower appellate court which had not jurisdiction with respect thereto shall not be entertained by an appellant court unless (a) the objection was taken in the court of the first instance at or before the hearing at which issues were first framed and recorded; or in the lower appellate court in the memorandum of appeal to that court, or (b) the appellate court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits:

"Mere non-competence, even if there is an error as to pecuniary jurisdiction, is not thus a ground for vacating a decree on appeal. There is, therefore, no point in a person being allowed to object to a judgment being proved against him on the ground of want of pecuniary or territorial jurisdiction, where he had not taken such objection in the proceedings in which the judgment was passed or in appeal therefrom. The use of such judgment is calculated to prevent frivolous defences being taken, ignoring the judgment of a court otherwise competent. It should not be left to a litigant to lie quietly when a judgment is passed against him and ignore it on the ground that the court which passed it had no pecuniary or territorial jurisdiction. The recommendation we take leaves unaffected other grounds of want of competency of the tribunal which passed such judgment."

16.92. The Civil Justice Committee wound up the discussion, with the following recommendation:

---

2 Section 11 of the Suits Valuation Act.
"We recommend that section 44 should be so modified as to enable courts to admit, in evidence, judgments if not reversed, or set aside, even though the court that passed them had no territorial or pecuniary jurisdiction to do so."

16.93. We agree with the reasoning of the Committee, so far as defects of territorial jurisdiction are concerned. Pecuniary jurisdiction covered on the provision in the Suits Valuation Act.

In this connection, we may note that the Amendment made recently to implement the Law Commission's Reports on the Code of Civil Procedure has inserted the following section after section 21 in that Code:\(^1\):—

"21A. No party to a suit shall be allowed to question the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigation under the same title, on any ground based on an objection as to the place of suing.

Explanation.—The expression "former suit" means a suit which has been decided prior to the decision in the suit in which the validity of the decree is questioned, whether or not the previously decided suit was instituted prior to the suit in which the validity of such decree is questioned.

16.94. This amendment will, in substance, achieve the object which the Civil Justice Committee had in mind.

V. A VERBAL POINT

16.95. We may now mention a verbal point concerning section 44. While providing that a party may challenge on the ground of fraud etc., a judgment etc. which is relevant under sections 40, 41, 42, section 44 does not mention section 43,—presumably because section 43 is a negative provision. But, if a new section\(^2\) is added to deal with previous convictions, that section may be mentioned in section 44 also. We recommend that section 44 should be so amended.

16.96. We are also recommending the insertion of another section\(^3\), which also may be mentioned in section 44.

VI. RECOMMENDATION

16.97. In the light of the above discussion, we recommend that section 44 Recommendation. should be revised as below:

REVISED SECTION 44

'44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41, 42 or 43A, and which has been proved by the adverse party,—

(a) was delivered by a court not competent to deliver it, or

(b) was obtained by fraud or collusion.

GROSS NEGLIGENCE OF GUARDIAN AND ITS EFFECT ON JUDGMENT

I. THE PROBLEM

16.98. We now proceed to another matter relevant to judgments and decrees, which has created controversy. The controversy relates to the following question: Where there is gross negligence on the part of the next friend or guardian

\(^1\)See proposed section 42-A.
\(^2\)See proposed section 43-A.
ad litem of a minor, though fraud or collusion is not proved, can the minor avoid the decree on the ground of such negligence? The question can arise in regard to all persons under disability. For brevity, only minors will be referred to.

16.99. There are two views on the subject. According to the majority view, the minor can avoid the decree passed against him in such cases. This is the view taken by the High Courts of Allahabad, Calcutta, Kerala, Lahore, Mysore and Patna. This is also the view expressed, though obiter, by the High Court of Delhi.

16.100. A later Kerala case held that the ground of gross negligence was not available in the case of a suit relating to a joint family in which the karta represents the coparceners. But the decision does not affect the proposition laid down by that High Court in the earlier case.

16.101. The contrary view has, however, been taken by the Bombay High Court. In the leading Bombay case on the subject, it was held that under English law, an infant cannot challenge a decree properly passed against him on the ground that his guardian ad litem was guilty of gross negligence in suffering the decree, and there is no reason why such a cause of action should lie in (British) India. Hence gross negligence (apart from collusion) on the part of the next friend or guardian-ad-litem of a minor litigant cannot, according to the Bombay view, be made the basis of a suit to set aside a decree obtained against the minor.

16.102. As the matter has come up before the High Courts more than once, a discussion of some of the decisions would be helpful in order to appreciate the amendment recommended on the subject.

II. THE CASE LAW

16.103. The Allahabad High Court, in a full bench decision, held that gross negligence was a sufficient ground to avoid a decree in the case of a minor represented by a guardian. The negligence must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented. The direct result of the negligence must be a serious prejudice to the minor. The decree can be avoided where the negligence is so gross as to amount to a clear violation of the duty cast upon the guardian, although not brought to the notice of the court at the time.

16.104. As regards the Calcutta High Court, though an early Calcutta case denied the right, the judgement in Lalta Sheo Churn Lal v. Ramanandan Doby recognised the right; and that view was maintained in a later case in Mohesh Chandra v. Manindra Nath. The current Calcutta view can be thus stated:

---

See case law reviewed, infra.
2See case law reviewed, infra.
6See case law reviewed, infra.
7See case law, infra.
9Krishna Das v. Vithoba, A.I.R. 1939 Bom. 66; and other cases reviewed, infra.
11For details of the recommended amendment, see infra.
“Gross and culpable negligence on the part of the guardian-ad-litem is a sufficient ground to enable the infant to set aside a decree obtained against him. The minor’s right to bring such a suit is an exception to the ordinary rule according to which a decree can be set aside only on grounds of fraud and collusion and is based on the broad principle of justice, equity and good conscience. Neither section 2 nor section 44 of the Evidence Act, nor section 11, Code of Civil Procedure, bars such a suit”.

16.105. In the leading Calcutta case\(^1\), a decree was declared to be not binding because of neglect to prosecute the suit with due care on the part of the next friend of the minor. The decree was one striking off the suit for default of appearance.

16.106. In a later Calcutta case\(^2\), B. K. Mukherjee J. held that section 44 is permissive, and not prohibitive. While it allows a party to avoid a judgment by proving fraud or collusion, it does not destroy his right to challenge it on the ground of gross negligence.

16.107. He held that gross and culpable negligence on the part of the guardian-litem is a sufficient ground to enable the infant to set aside a decree obtained against him. Neither sections 2 and 44, Evidence Act, nor section 11, Civil Procedure Code, bars such a suit.

16.108. The negligence of the guardian, in order to be a good ground for avoidance of the decree, must be of such a character as to justify the inference that the minor’s interests were not at all protected and in substance, though not in form, the minor went unrepresented in the trial court\(^3\).

16.109. The failure on the part of the guardian to defend the suit when there is a perfectly good defence available, resulting in serious loss of rights of the infant, amounts to gross and culpable negligence.

16.110. But the minor cannot apply for review of judgment on the ground of culpable negligence on the part of the guardian ad litem, for a review on the ground of negligence cannot, strictly speaking, be said to be ejusdem generis with an error apparent on the face of the record or discovery of new and important evidence.

16.111. In the Delhi High Court, the following observations occur in one Delhi view case\(^4\).

"……………… If a next friend or guardian ad litem of a minor enters into a compromise on his behalf with the permission of the court under Order 32, Rule 7 of the Code, the compromise and the decree based thereon would be as much binding on the minor as it is on the adult parties, unless the minor can show that the next friend or his guardian ad litem was guilty of fraud or negligence. The onus of proving fraud or negligence on the part of the next friend or guardian-a-litem would be upon the minor, and for this purpose he has to make clear and distinct allegations in his pleadings and to substantiate them.”

In this case, there were no allegations or inference of fraud; but the above dicta show the view which the judiciary would take.

---

\(^1\) Lala Sheo Churan Lal v. Ramu Nandan Dobey, (1894) I.L.R. 22 Cal. 8 (Case of next friend).
\(^2\) Mahesh Chandra v. Manindra Nath, A.I.R. 1941 Cal. 401, 404, 405
\(^3\) Emphasis supplied.
\(^5\) Emphasis supplied.
16.112. In the Delhi case the compromise was sustained as a family arrangement, which was drawn up to end a long drawn family litigation. The plaintiff, who was a minor, had been represented by his father as next friend. The father, in his statement to the court under Order 32, Rule 7, Code of Civil Procedure represented that the compromise was for the benefit of the minor, and the court had agreed with it.

16.113. The principle laid down in the observations quoted above, therefore, did not apply on the facts. But the principle has been stated in clear terms which include negligence.

Kerala and Lahore.

16.114. This is also the Kerala view.

The Lahore High Court, in a full bench case, held that a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian ad litem, even if he has not succeeded in proving fraud or collusion on the part of such a guardian. The discussion in the judgment is instructive and we shall revert to it later.

Madras.

16.115. In Madras the leading case is that of Chunduru Punnayay v. Rajam Viruna. That decision has been followed in Mohomed Shadak Koyi v. Venkata Komaraj and later in Egappa Chettiar v. Ramanandan Chettiar. The current Madras view can be thus stated:

"It is open to a minor to challenge a decree passed against him on the ground that his guardian had been grossly negligent in the conduct of the suit in which the decree was passed even in the absence of fraud or collusion".

Patna.

16.116. In a Patna case a decision of Bennett and Beever JJ the following observations occurs:

"A minor is not bound by any proceedings taken against him during his minority unless he was a party thereto. Whether a minor was or was not a party to any such proceeding depends, in my opinion, upon whether or not he was effectively represented therein".

16.117. It was observed that there was nothing in Order 32 of the Code of Civil Procedure to indicate that, provided the letter of the order is followed, the minor will be bound by the decision, although in fact he was never effectively represented in the proceedings. Nor can such an intention, which is against the dictates of justice, equity and good conscience, in that it would open the door to undetectable fraud whereby many minors would be deprived of their rights and inheritance, be implied. "When, therefore, any question arises as to whether a person is bound by any decree or order of a Civil Court passed during his minority, the proper and only test in my opinion, is whether he was so effectively represented in the proceedings.......... as in justice, equity and good conscience to justify, in the circumstances of the particular case, the conclusion that he was in fact a party to these proceedings." A full Bench Case of that High Court reaffirms this view.

---

16.118. We have so far dealt with the majority view. The Bombay full Bench case takes a contrary view. It is mainly based on the reasoning that this is not the English law. However, as has been pointed out, after full discussion, in the Patna case, there are several English cases recognising the remedy.

The Bombay Full Bench follows an earlier judgment of Beaumont C.J. The Full Bench ruling was followed in a later case.

16.118A. The matter has not been directly decided by the Privy Council. There is an old Privy Council decision, in a case on appeal from the Cape of Good Hope, in which Lord Mynford observed:

"If His Majesty were to dismiss this appeal on account of the neglect of their guardians to bring it to a decision, when the infants attain their full ages they would have a right to revive it. Infants were not to be prejudiced by the neglect of their guardians. On the contrary, according to the Civil Law, as laid down in the Digest, lib.4 1, i.e. minors, although defended by their guardians or curators, may afterwards, on their causes being heard, be released from judgments pronounced against them".

16.119. The observations of the Judicial Committee in Venkata Seshaya v. Kottiswara Rao are sometimes misunderstood as negating the majority view, but all the case decided was that negligence is not the same thing as fraud.

16.120. The matter has not directly come up before the Supreme Court. In Bhorandoo's Case, Base J. held, on the facts, that the decree of compromise could not be challenged. But he observed that if the minor is properly represented, the decree is binding on him "unless the minor can show fraud or negligence on the part of his next friend or guardian ad litem".

III. ENGLISH LAW

16.121. According to the English law, gross negligence as well as fraud prevents the operation of the bar of res judicata.

16.122. In Macpherson on Infants we find the following passage:

"An infant plaintiff, though thus favoured in the course of the suit, is as much bound by a decree and by all the proceedings in a cause as a person of full age, and cannot, nor can his representatives, open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud and collusion, which will annul the proceedings of the Courts of Justice as much as any other transactions."

16.123. In Simpson on the Law of Infants we find the following statement of the law:

"A decree may also be impeached where there has been gross negligence by the next friend in the conduct of the infant's case, or new matter discovered since the date of the decree".

References:

5Orphan Home v. Van Rompen, (1825) 1 Knapp. 84 cited in A.I.R. 1950 Pat. 97.
6Emphasis supplied.
9Macpherson on Infants, page 386, quoted in I.L.R. 22 Cal. 8, 11.
16.124. In the case of In re Houghton, Sir R. Malins V. C. says:—

"The question which I have to decide is whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience.

"The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and who will protect her interests."

16.125. There are other English cases also, which have been exhaustively discussed in the judgment in the Patna case.9

16.126. The brief result of the above discussion is that the majority of the High Courts have taken the view that the gross negligence of a guardian is a ground for setting aside the decree. In holding so, they have mainly based this right on the principles of justice, equity and good conscience. They consider section 44, as it stands at present, as a permissive provision, and not as a prohibitory one. The minority view is to the contrary.

IV. THE PRINCIPLE

Aspect of justice.

16.127. So much as regards the case law on the subject. Examining the matter from the angle of principle, we may state that the aspect of justice is an important one. Prima facie, one would have thought that if a minor is not effectively represented in the original litigation, then he is not represented at all, and the case is not dissimilar to the case where a decree has been passed against a minor without any representation. Thus, the considerations of justice are in favour of adopting the minority view.

V. NEED FOR AMENDMENT AND POSSIBLE OBJECTIONS

16.128. The above discussion would seem, prima facie, to justify an amendment of the law and adoption of the majority view.

16.129. No doubt, a proposal which is theoretically desirable must also be tested on the touchstone of feasibility. If there are serious practical difficulties likely to be created by an amendment, that consideration cannot be lightly brushed aside. In this case, fortunately, no serious problems have arisen so far, in those jurisdictions where the majority view is the prevailing law. In Calcutta, for example, ever since the decision of Amer Ali7 reported in 1895, this has been the law, and as was pointed out by Meredith J. in the Patna case3; this has not caused practical difficulty of a serious nature Meredith J. said in the Patna case3:

"Then, with regard to the statement that Indian Judges have underrated the danger and inexpediency of destroying the finality of decrees duly obtained in suits against minors, I would only say that, taking for example Calcutta, the right of minors to question the finality in suitable cases for gross misconduct has been uniformly recognised for over 50 years, but the skies have not fallen."

1In re Houghton (1874) I.L.R. 18 Eq. 573, 576.
2Emphasis supplied.
16.130. We may now consider several possible objections to the proposed amendment. One objection raised to the proposed amendment is that third parties should not be penalised for the default of the guardian. This objection was anticipated, and effectively met, by the discussion in the judgment of Mahajan J. in the Lahore case. His observations as to likelihood of prejudice to third parties are instructive—

"Judgments inter partes cannot ordinarily be subject to a collateral attack except in cases of fraud and collusion and the question is whether in view of the special protection that law gives to infants, gross negligence of a guardian ad litem ought not to be placed on the same footing as a plea of fraud and collusion. The principle on which a judgement can be collaterally attacked on the plea of fraud is that the Court was unable to do justice, having been misled or deceived. It is said that fraud and justice do not stand together. The classical quotation on this point is that fraud is an extrinsic or collateral act with vitiates the most solemn proceedings of Courts of Justice. In cases of fraud and collusion blame, however, does not rest alone on the guardian, it also rests on the opposite party, while in the case of gross negligence by a guardian the opposite party may be thoroughly innocent. This circumstance, however, in my judgment cannot stand in the way of the extension of the same principle to the case of a minor whose property has gone into the pocket of his adversary merely by reason of a complete thoughtlessness on the part of his guardian and as a result of a breach of duty on his part, and that but for such dereliction of duty the opposite party would never have got that property. No litigant has any right to profit by or to deprive a minor of his property simply by reason of the fact that the person entrusted with the duty to protect the interests of a helpless infant has misbehaved. Misbehaviour of a trustee of a minor can confer no rights on his opponent which in law and justice he does not possess. A court is precluded from administering justice because of the gross negligence of the person entrusted with the duty of protecting the minor’s interest and if this circumstance causes failure of justice, surely it cannot be said that rules of adjective law could stand in the way and so result in the perpetuation of injustice. The rule of finality of judgments and the proposition that there cannot be a collateral attack on them are, after all, matters of adjective law and based on considerations of expediency and cannot obstruct the administration of justice. To avoid a judgement on the ground of fraud and collusion is a well-recognised substantive right of a litigant, and so far as I can see such a substantive right exists in the case of minor litigants on the ground of gross negligence of a guardian as they have to depend for representation of their cases on others. In other words, on the ground of gross negligence of guardians they have a right to have the judgment vacated."

16.131. Another point raised by way of objection to the proposal is that the minor can sue his guardian for negligence. This argument presupposes (a) that the minor has such a cause of action, and (b) that it is adequate.

16.132. The argument that a minor’s remedy is against the guardian, was met in these words by Mahajan J. (as he then was) in the Lahore case already referred to—

"In the first place, a suit for damages against a court official guardian or the mother or some distant uncle may be purely an illusory remedy...... A guardian ad litem appointed by a court, on the other hand, undertakes an onerous duty and it cannot be said that he guarantees some skill in the

2Hikkar Hussain v. Beant Singh, A.I.R. 1946 Lah. 233, 244.
discharge of his duty. His indifference in the conduct of the minor's case may not make him liable in tort for damages. Be that as it may, the remedy of a suit of this nature can seldom be suggested. It would certainly frighten away all cautious persons from undertaking responsibility for the conduct of cases on behalf of or against minors and a stage might be reached when no one, except court ahmad or court reader, who knows nothing about the facts of a case, has to be entrusted with the duty to protect the minor and he can never satisfactorily discharge that duty."

16.133. Apart from what Mahajan J. has stated, we may appoint out that even assuming that the minor has a remedy against the guardian, that is not a conclusive argument against the law recognising the right to question the decree. That remedy may not be adequate in the circumstances, either because the guardian is a man without means or because the decree is of such a nature that monetary compensation cannot be an adequate recompense.

Rationale.

16.134. The true rationale of the proposed amendment is that a minor is not bound by any proceedings taken against him during his minority unless he was a party thereto an effectively represented therein.¹

16.135. In the English case of Bennet v. Lee,² it was pointed out that an infant has to make the best defence the nature of the case will allow, for, when infants come of age, they are certainly entitled to put in a new answer and to make a better answer if they can. It was pointed out in that case that the infant cannot, in justice, be refused from putting in a better answer and making the best defence he can.

Whether gross negligence should not be a defence.

16.136. Another objection raised to the proposal is that a suit may be brought to set aside a decree, but gross negligence should not be a defence to the decree. In answer to his objection, it may be stated that if a judgment can be set aside on the score of want of effective representation, the ground should be available to both the sides.

16.137. It may be noted that in some cases, judgements have been ignored³ because of gross negligence, though there was no affirmative suit to set them aside.

In a Bench decision of the Madras High Court⁴ Shankaran Nair and Spencer JJ. held that a minor is not bound by a decree in a suit against him, if he is able to show that his guardian was guilty of gross negligence in the conduct thereof. In that case, a guardian deliberately set up the false plea of adoption, and neglected to put forward the rights of the minor under a will to the adoptive father, though he was aware of that will. It was held that decreeing of the properties in the suit in favour of the testator's widow, on a finding that there was no adoption, would not operate as 'res judicata' against the minor in a suit subsequently brought by him for recovering one half of the properties under the will in view of the gross negligence of the guardian in not putting forth the one half share under the will.

(b) Subbana v. Narasamma. A.I.R. 1915 Mad. 384 (Collateral attack).
16.138. In Seton's judgments and orders\(^1\), it is stated that in case of gross negligence, the infant plaintiff has been allowed to show cause against a decree dismissing his bill, and this applies to infant defendants also.

16.139. If a suit can be brought, then there is all the greater reason for allowing it as a ground of defence. The party questioning the judgment, merely says that it should be disregarded for the purpose of the litigation in question, i.e., that it should be excluded from evidence.

In other words, it should be open to the minor—

1. by a regular suit to set aside the judgement founded upon the gross negligence, or
2. to bring a fresh suit on the same subject, the relief claimed being a substantive one, or
3. if a suit is filed by the adversary in reliance on the judgment, to ignore the judgement on the ground of gross negligence.

16.140. It has been stated that there are other cases in which judgment can be questioned. But we may state that if there is any obscurity or conflict revealed by judicial decisions in relation to any particular ground, these also could be considered. We may say that we have found none except those already discussed.

16.141. Another objection raised was that even an instrument may be cancelled on the ground of fraud, and that case would not be covered by the proposal. Now, it may be pointed out that section 44 occurs in the group of sections dealing only with judgments. The question of cancellation of instruments is outside the scope of that group of sections. If a judgment is relevant, section 44 tells us what evidence can be adduced to destroy its effect. Sections 40-44 are not concerned with instruments in general, emphasis has been placed on the fact that section 44 does not mention gross negligence.

16.142. So much as regards the merits of the proposed amendment. The placing of the proposed amendment is a matter of detail. One reason for dealing with this subject making by an amendment of the Evidence Act, is that in the minority view\(^2\).

VI. SUMMARY

16.143. To summarise the discussion—

(i) The proposed amendment is legally sound;
(ii) it is in conformity with justice;
(iii) from the point of view of law reform, it is desirable that an amendment should be made; and
(iv) the amendment can be made appropriately in the Evidence Act.

16.144. As to persons under disability other than minors, the same provision should apply. Order 32, Rule 15, Civil Procedure Code, provides—

The provisions contained in rules 1 to 14 so far as they are applicable, shall extend to persons adjudged to be of unsound mind\(^3\) and to "persons

---

\(^2\)For example, see the dissenting judgment of Boys J. in *Straj Fatma v. Mahmood Ali*, A.I.R. 1952 All. 293.
who though not so adjudged are found by the Court on inquiry, by reason of un-soundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.”

Recommendation. 16.145. In the light of the above discussion, we recommend the insertion of a new section as follows:

"44A. Party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41, 42, 42A or 43A and which has been proved by the adverse party—

(a) was passed in proceedings wherein the party first mentioned or his predecessor in interest, being a minor or other person under disability, was represented by a next friend or guardian for the suit, and

(b) was the result of misconduct or gross negligence on the part of the next friend or guardian for the suit, leading to prejudice to the interests of the party first mentioned or his predecessor-in-interest, as the case may be".
CHAPTER 17

OPINION OF EXPERTS

I. INTRODUCTORY

17.1. The difficult but important question of expert evidence is dealt with in section 45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts.

Such persons are called experts.

17.2. There are three illustrations appended to the section. Illustration (a) relates to a case where the question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant under the illustration.

Illustration (b) relates to a case where the question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

Under illustration (c), where the question is whether a certain document was written by A and another document is produced which is proved or admitted to have been written by A, the opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

17.3. Sir James Stephen, in his 'Digest of the Law of Evidence', prefaced Chapter V in it on 'Opinions, when Relevant and When Not' with Article 48, which runs thus:

"48. The fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this Chapter."

17.4. The very next Article — Article 49 — sets out the important exception relating to opinions of experts, in the following terms:

"49. When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

Such persons are hereinafter called experts.

The words 'science or art' include all subjects on which a course of special study or experience is necessary to the formation of an opinion, and amongst others the examination of handwriting."
17.5. Section 45 creates an exception to the rule against evidence of opinion. It is sometimes suggested that, in the English usage of the 18th Century, the word "opinion" had the primary meaning of "notion" or persuasion of the mind without proof or without certain knowledge, and not the modern use denoting belief, inference or conclusion, well or ill founded. Accordingly, the early English decisions prescribing opinion were designed to reject evidence not based upon personal knowledge: but not evidence of belief.

Wigmore takes the view that until the beginning of the 19th Century, any witness was permitted to express his inference or conclusions from his own direct personal knowledge or observation. But, thereafter, — certainly so far as lay witnesses were concerned — the distinction between "fact" and "opinion" became established. It is, in many respects, a clumsy formula. "The rule in its stark simplicity might be interpreted as excluding all value judgments, that is to say, all statements not being factual propositions susceptible of some sort of empirical proof or disproof. The rule, if it is to be given any purely logical meaning at all, must be interpreted as excluding at least all inference drawn from perceived data. Even if value judgments are saved by construing the rule as having application only to factual propositions, the rule would seem to purport to exclude all such propositions in the formulation of which inference by the witness has played some part".

However, the general rule still holds good.

17.6. Identity of handwriting was added in the section, by an amending Act. The words 'finger impressions' were added by Act 5 of 1899, in consequence of the decision of the Calcutta High Court in R. v. Fakir Mohammad, where it was held that the comparison of a thumb impression must be made by the Court itself, and that the opinion of an expert was not admissible under section 45. Under the amended section, evidence may now be given of finger impressions by an expert.

17.7. As regards finger-prints, it may be noted that in India, there are statutory provisions which authorise the police and the court to take fingerprints etc. of the accused, for purposes of comparison.

17.8. A police officer is authorised by the Identification of Prisoners Act, to take measurements (including finger-prints, foot-prints, and photographs) from any person arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards. There is also power in a magistrate to direct any person to allow his measurements or photographs to be taken for purposes of any investigation or proceeding under the Code of Criminal Procedure. Under section 73 of the Evidence Act, the court may direct any person present in court to give finger impressions or specimen handwriting for the purpose of comparison by the court.

II. COGNATE PROVISIONS

17.9. Besides this section, 45 there are other statutory provisions which are of relevance of the evidence of experts, — e.g., in the Cr. P.C. and also in the Workmen's Compensation Act and other special Acts. We need not go
into details thereof. In our Report on the Workmen’s Compensation Act, we have had occasion to consider several other aspects of the subject, which were relevant to that Act. In the present discussion, we shall deal only with those points which are important for a consideration of section 45.

III. HISTORY OF EXPERT EVIDENCE

17.10. For a proper appreciation of the nature and importance of expert evidence, a brief history would be useful. The origin of expert evidence — in the form in which it is now admitted — is interesting. In the beginning, before jury trial was much developed, there were two modes of using expert knowledge in England.

(i) to select the Jurymen such persons as were by experience specially fitted to know the class of facts which were before them, and (ii) to call to the aid of the court skilled persons whose opinion it might adopt or not, as it pleased.

17.11. This was at a time when juries were not only judges of fact, but also witnesses. When they became mere triers of fact, i.e. when their two functions were thus separated, and “opinion” and “fact” became demarcated, nevertheless the use of experts, “being established and convenient”, remained unaffected, even though other opinion evidence disappeared. In other words, when, as a result of this change in the functions of the jury, the courts evolved the rule against the admission of opinion and hearsay evidence, the use of experts remained as a means of assisting the jury to interpret matters of fact bearing scientific implications.

17.12. The procedural changes that evolved as a result of this development are of interest. Experts were no longer summoned by the court (as before), but by the parties. Moreover, experts became “witnesses”, and ceased to occupy the position of special jurors.

That, in substance, is the present position.

IV. QUESTIONS FOR CONSIDERATION

17.13. Coming back to the provisions of section 45, we first note that Questions several questions arise for consideration with reference to expert evidence.

(a) What matters are appropriate for expert evidence?

(b) Who is an expert, and what are his qualifications?

(c) Who summons the expert, — the party or the court?

(d) What questions should be put to the expert?

(e) Supply of copies of opinion.

17.14. All these are of practical value. But the major problem concerns the nature of the evidence of the witness in court, and the manner in which his evidence can best be presented so as to furnish the maximum assistance to the court.

---


17.15. These questions show the scope for review of the law relating to expert evidence.

The reasons for justifying a review of the law are two-fold. First, the ever widening range of scientific and technical knowledge provides the courts of law with new or improved means for the investigation of truth. The question is, whether, the law has kept pace with this development in the field of science, and makes the fullest use of this knowledge. This is a question relating to the matter of expert evidence. Secondly, even apart from developments in particular fields of science, the rules of procedure and evidence should be such that the evidence of experts which reaches the court is of a quality that would assist the court in the best possible manner in the ascertainment of truth. The question is, whether the rules on the subject, particularly in so far as they relate to the conditions under which expert evidence is recorded, are best suited to achieve this end. This pertains to the manner of utilising expert evidence.

17.16. To make matters concrete, one may refer to some features of expert evidence, such as, distrust of the evidence of experts resulting from a suspicion of partisanship, effect of leniency and provocative cross-examination of experts, conflicting testimony of experts on both sides, and the consequential need for providing for appointment of an independent expert by the Court.

The last mentioned question has received considerable attention in recent times, in foreign countries.

V. MATTERS APPROPRIATE FOR EXPERT EVIDENCE

17.17. Coming to the matters on which expert evidence can be given, one would have thought that the words “science or art” are wide enough to cover all branches of specialised knowledge. However, occasionally, doubts have arisen in this regard.

17.18. Thus, a doubt has been raised whether, under section 45, evidence of experts about palm impressions or foot-prints can be admitted. The section does not expressly include foot-prints or palm impressions. Some courts have, in practice, admitted in evidence, the opinion of such experts.1,2,3

17.19. A view has, however, been expressed4 that it is the facts which the experts observed which are important, and not the opinion.

17.20. The science of foot-prints has progressed considerably since the time when the Indian Evidence Act was enacted. The words “foot prints” refer not only to size, shape and other characteristics, but also to impressions of the papillary ridges of the foot and toes. Footprints are identified on the same principles as finger prints are identified (i.e. on the basis of digit and ridge characteristics). Therefore, footprints should be treated on the same footing as finger prints.

In an unreported Madras case5 Govinda Menon and Muck J.J. admitted expert evidence as to footprints.

1(a) Sidik v. Emperor, A.I.R. 1942 Sind., 11, 13;
(b) Ganesh v. State, A.I.R. 1955 Assam 51, 54, paragraph 18 (D.B.);
2Emperor v. Rohu Lal, I.L.R. 52 Rom, 323; A.I.R. 1928 Rom, 58;
17.21. The fact that foot-marks corresponding to that of the accused were found near the spot of occurrence is relevant. Evidence of skilled persons, who are in a position to identify foot-marks is admissible in England and in America. Though foot-prints are not mentioned in the section, evidence of footprints experts has been admitted,—with the caution that there should be other evidence to bring home the offence to the accused. The Madras view, however, is that if it is to be used, the court must satisfy itself by a comparison.

17.22. We are of the view that it is desirable to clarify the position by an express provision.

17.23. The next question pertains to palm impressions. The position as to palm impressions is substantially the same as the position regards footprints. In a Bombay case, the palm impressions and the opinion of the expert as to similarity or dissimilarity of photographs of palm impressions, were held to be admissible.

17.24. The value of such evidence, of course, depends on the circumstances of the case. It has, for example, been held by the Supreme Court, that evidence about footprints is only one circumstance to be considered with others.

It is desirable to clarify the position on both the matters, namely, palm impressions and footprints.

17.25. Apart from these two matters, there is one important matter in regard to which some amendment appears to be needed. A controversy has arisen under section 45, whether opinions of experts about typed documents are admissible under this section. One high Court has taken the view that while a witness may be asked to explain points in favour of the view whether two documents have or have not been typed on the same machine, the court cannot treat the opinion of the witness as an independent testimony. The Supreme Court had occasion to consider the question in *Hunumanth Govind Nargundkar v. State of Madhya Pradesh*, where the following observations were made:

"Next, it was argued that the matter was not typed on the office typewriter that was in use in those days, namely, article B, and that it had been typed on the typewriter Article A. It is true, that evidence of certain experts was led. The High Court rightly held that opinion of such expert was not admissible under the Indian Evidence Act, and as they did not fall within the ambit of section 45 of the Act, this view of the High Court was not contested before us. It is curious that the learned Judge in the High Court, though he held that the evidence of the expert was inadmissible, proceeded nevertheless to discuss it and placed some reliance on it."

17.26. One could regard these observations as not laying down a definite view on the subject. But the words "rightly held" could be construed as approving the negative view.

---

5(a) *Buchha Babu v. Emperor*, A.I.R. 1933 All. 162, 169;
(b) *Jhabwal v. Emperor*, A.I.R. 1933 All. 690, 705.
(1952) S.C.R. 1091.
7Emphasis supplied.
17.27. It is for this reason that the point requires consideration. It has been contended that no matter typed on two typewriters gives the same impressions, and that, while a layman may not be able to make out the difference between the matter typed on two typewriters, an expert would be able to notice it. It has, therefore, been suggested that such evidence should be admitted. A typewriter, it is stated, is now commonly used in making false documents, documents are type-written, instead of being written by hand. The evidence of an expert regarding typed documents is therefore of importance, and needs to be considered at par with evidence of an expert on hand written documents1.

17.28. We may state that section 45 admits expert evidence as to “matters of science or art”. The expression “science or art” has received liberal construction, and must be taken to include all subjects in which special study is necessary for the formation of an opinion.2 In general, the test to be applied is whether previous habit or study is necessary for obtaining competent knowledge of the nature of the subject matter.

17.29. It would appear that it is possible for an expert to identify the typed matter as typed or not typed by a particular machine. Machines manufactured by manufacturer A have types different from those manufactured by manufacturer B, and even as between machines manufactured by the same company, differences remain in the typewriter characters, which can be discerned by experts. The differences, it is stated, increase with the working of the machine, because the machine develops individual characteristics on use3. From the information officially made available, it would appear that there are experts as to typewriters and typewriting in several countries.

17.30. The U.K., the United States of America, France, Japan, Spain, Switzerland, Federal Republic of Germany and Brazil are amongst them. Evidence of identity or otherwise of typewriters is also allowed in law courts in America4.

17.31. We, therefore, recommend that section 45 should be amended so as to include identity of typewriting.

VI. QUALIFICATIONS OF EXPERTS

17.32. The next aspect which may be briefly mentioned, pertains to the qualifications of experts. On this point, the section is wisely elastic. The section does not lay down that the expert must hold an academic degree or belong to a particular profession. Specialised knowledge or experience, however acquired, will suffice5. The section seeds no change on this point.

VII. WHO CAN SUMMON EXPERTS?

17.33. We shall now discuss the question of summoning experts. It is axiomatic that an expert, like any other person, can be produced by the party, or may be summoned through the Court by a party which desires that the expert should give evidence as its witness. The matter is governed, in general, by appropriate provisions in the two procedural Codes, and we need not go into them. However, in relation to expert witnesses, certain peculiar problems arise, which deserve consideration.

---

1Suggestion of the C.B.I.
2Stephen's Digest, Article 49. (supra).
6As to foreign law, see infra.
17.34. The use of a neutral expert has been widely recommended in the U.S.A. by leading authorities, including Wigmore,1 Morgan,2 Mc Cormick3 Learned Hand4 and others.

17.35. The matter has received considerable attention in the U.S.A. The ordinary practice is that the expert called by a party is compensated by the party. The natural result is, in many cases, a "battle of experts, with the judge or jury understandably disposed to believe that each expert might have testified with equal positiveness for the other side had he been called by it." This unduly favorable aspect of criminal trials has led to provisions in some States and in the Federal Courts, empowering the Court to call expert witnesses5. We shall refer to some of them later.

17.36. In England there are several provisions in force under which the assistance of persons with specialised experience or knowledge can be obtained by the court in Civil 10 11 12 13 and in Admiralty14 cases. There are, also, similar provisions for criminal cases15.

17.37. For the present purpose, the most important provisions are those contained in the Rules of the Supreme Court in England relating to "Court Experts"16. The salient features of those provisions may be summarised as follows:

(i) In any case which is to be tried without a jury involving any question for an expert witness, the court may, in its discretion, at any time on the application of any party, appoint an independent expert to be called the "court expert."

(ii) The court expert can be appointed to inquire and report upon "any question of fact or of opinion not involving questions of law or construction."

(iii) The report of the court expert, so far as it is not accepted by all parties, shall be "treated as information furnished to the Court"

---

1See Impartial Medical Expert (1960-61) 34 Temp. L.Q. 337.
2Wigmore, Evidence, S. 563.
5Learned Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harv. L. Rev. 40, 56.
9See infra.
10Judicature Act, 1925, section 98 and order 36, rule 3 and Rule 43, R.S.C. (Assessors).
12Judicature Act, 1925 section 70; order 37, R.S.C. and Order 36, rule 44, R.S.C. (Commissioners); Order 35, Rule 19, R.S.C. (Certificates).
13Section 15, Administration of Justice Act, (1956); Order 36A R.S.C (Official Referees and Special Referees).
14Order 75, Rule 23(2) and Rule 26, R.S.C. (Admiralty cases).
15Section 9(1) (d) and (e), Criminal Appeal Act, 1907.
16Order 40, R.S.C. 1965 ("Court Expert").
and shall be given such weight as the court may think fit". Copies of the report shall be forwarded to the parties.1

(iv) Any party shall be at liberty, within fourteen days after receipt of a copy of the report (or such other time as the Court may direct), to cross-examine the Court expert "on his report".2

(v) The Court expert shall, if possible, be a person agreed between the parties and failing agreement shall be nominated by the Court. Questions submitted or instructions given to him shall be settled by the parties or, failing agreement, by the Court.3

(vi) Any party shall be at liberty, after notice, to produce with regard to the question submitted to the Court Expert, one expert witness or (with the leave of the Court) two or more expert witnesses.4

17.38 and 17.39. With the object of eliminating the evils of bias and partisanship, a Model Expert Testimony Act5 has been drafted in the U.S.A. by the National Conference of Commissioners on Uniform State Laws. Its important provisions are given below:—

(1) The operative provision of the Act is as follows:—

"Section 1.—Court empowered to appoint Expert witnesses.—Whenever, in a civil or criminal proceeding, issues arise upon which the Court deems expert evidence is desirable, the Court, on its own motion, or on the request of either the State or the defendant in a criminal proceeding, may appoint one or more experts, not exceeding three on each issue, to testify at the trial." 6

(2) As regards notice to the parties, the Model Act provides—8

"Section 2.—Notice when called by Court.—The appointment of expert witnesses by the Court shall be made only after reasonable notice to the parties to the proceeding of the names and addresses of the experts proposed for appointment."

(3) Parties can appoint private experts after notice. On this point, the Act provides9.

"Section 3.—Notice when called by parties.—Unless otherwise authorised by the Court, no party shall call a witness, who has not been appointed by the court, to give expert testimony unless that party has given the court and the adverse party to the proceeding reasonable notice of the names and address of the expert to be called."

(4) Before appointing expert witnesses, the Court may seek to bring the parties to an agreement as to the experts desired, and if the parties agree, the experts so selected shall be appointed10.

(5) The subject-matter may be inspected and examined by the experts.11

---

2Order 40, Rule 4, R.S.C. 1965.
4Order 40, Rule 6, R.S.C. 1965.
7Model Expert Testimony Act, section 1.
8Model Expert Testimony Act, section 2.
9Model Expert Testimony Act, section 3.
11Model Expert Testimony Act, Section 5.
(6) The Court may require each expert which it has appointed to prepare a written report on oath upon the subject he has inspected and examined.  

(7) The Court may permit a conference and joint report by expert witnesses.  

(8) An expert witness may, under the Model Act, be asked to state his inferences based on—  
(a) personal observation, or  
(b) evidence introduced at the trial, seen or heard by him, or  
(c) his technical knowledge.  

Without first specifying hypothetically in the question the data on which these inferences are based. But he may be required, in examination-in-chief or in cross-examination, to state the data on which his inferences are based.  

(9) There is a provision for the compensation of expert witnesses appointed by the Court, and also for the disclosure of fees paid by a party to a private expert.  

17.40. The report of the American Bar Association Committee on Impartial Medical Testimony (August, 1956) records this conclusion.  

"We are satisfied from our observations of the New York and Baltimore experience that the introduction of impartial medical experts of the highest standing into those cases where the parties are in dispute as to the medical facts has the following wholesome and beneficial results:  

1. It improves the process of finding the medical facts, vastly increasing the likelihood of reaching the right result.  
2. It serves to relieve court congestion by bringing about the settlement of many cases which would otherwise have to be tried and which by their nature would entail lengthy trials.  
3. It has a prophylactic effect upon the formulation and presentation of medical testimony in court.  
4. The modest cost involved in the payment of independent experts is a positive economy in effecting a large saving in court operation."  

5. Rule 22 of the U.S. District Court for Eastern District of Pennsylvania (Impartial Medical Experts) provides as follows:  

(c) If the case proceeds to trial after such examination and report, either party may call the examining physician or physicians to testify or the trial judge may, if he deems it desirable to do so, call the examining physician or physicians as a witness or witnesses for the court, subject to questioning by any party.  

17.41. In 1961, the Supreme Court of Illinois adopted Rule 17-2 entitled "IMPARTIAL MEDICAL EXPERTS", and containing this provision applying to the Illinois State trial courts.  

---

1 Model Expert Testimony Act, Section 6.  
2 Model Expert Testimony Act, Section 7.  
3 Model Expert Testimony Act, Section 8.  
4 Model Expert Testimony Act, Section 9.  
6 The plan also shortens the length of trials where settlement is not achieved by securing agreement of the parties to many medical issues which are disputed prior to receipt of the report.  
7 (1960-61) 34 Temple Law Quarterly, 389.  
8 See (1960-61) 34 Temp. L.Q., 289, 389.
“When in the discretion of a trial court it appears that an impartial medical examination will materially aid in the just determination of a personal injury case, the court, a reasonable time in advance of the trial, may on its own motion or that of any party order a physical examination where a physical condition is in issue. Should the court at any time during the trial find that compelling considerations make it advisable to have an examination and report at that time, the court may in its discretion so order.

(a) In any personal injury, death, survival or malpractice case in which prior to the trial thereof, a judge shall be of the opinion that an examination of the injured person and a report thereon and/or testimony by an impartial medical expert or experts on the facts involved would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties and after giving counsel a hearing if such hearing be requested by either counsel, order such examination report, and/or testimony. The examination will be made by a member or members of a panel of examining physicians designated for their particular qualifications by the Medical society of the State of Pennsylvania after consultation with the Court. Copies of the report of the examining physicians will be made available to all parties.

(b) The compensation of the expert or experts shall be fixed at the termination of the case by the judge ordering the examination and shall be paid by the losing party, unless the court otherwise directs. Such judge may direct the deposit, by the moving party, of security which may be used for the payment of such compensation in the discretion of the Court.

17.42. These enabling provisions permitting the court to appoint experts and obtain their Reports show the modern trends on the subject.

VIII. QUESTIONS TO BE PUT TO EXPERTS

17.43. As a general rule, the opinions of experts are admissible not only where they rest on the personal observations of the witness himself, and on facts within his knowledge, but also where they are merely founded on the facts as proved by other witnesses at the trial. The question whether the expert ought to be asked to give his opinion on hypothetical questions, has been frequently discussed in academic literature. The present position on this point seems to be this. An expert may give his opinion upon—

(a) facts proved by himself;
(b) facts proved by other witnesses;
(c) hypotheses based upon the evidence.

But his opinion is not admissible as to—

(i) facts stated out of court which are not before the court; or
(ii) facts which have merely been reported to him by hearsay; or
(iii) purely speculative hypothetical questions having no foundation in the evidence adduced.

17.44. The meaning of the last mentioned rule has been thus explained—

“In examination-in-chief it would tend to confusion if facts were assumed in hypothetical questions which did not bear upon the matters under inquiry or which were not fairly within the scope of any of the evidence. The testimony must tend to establish the facts embraced in the question. The Court should not, however, reject a question which, Counsel

---

1Woodroffe, Law of Evidence (1941) page 453.
2Woodroffe, Law of Evidence (1941) page 453.
claims, embraces facts which the evidence tends to prove, simply because in its opinion the facts assumed are not established by a preponderance of the evidence. The question is properly allowable if there is any evidence tending to prove the facts assumed; it will not be allowed if the evidence does not prove or tend to prove the fact assumed. So, in a case involving the value to the plaintiff of a contract which the defendant had broken, a question which did not accurately state the terms of the contract was held inadmissible\(^1\).

Hypothetical questions have been allowed in India, in several cases\(^2\).

The facts of a Calcutta case\(^3\) Raghun v. Q. E. illustrate the necessity of putting hypothetical questions. In that case, the Assistant Surgeon had actually seen the dead body, and had performed the post-mortem examination. The Court observed that his evidence, as that of a medical expert, was, therefore, admissible, “first, to prove the nature of the injuries which he observed on the dead body; and, secondly, as opinion-evidence with respect to the manner in which those injuries were inflicted, and the cause of death.”

Dr. Shaw, another medical expert, who was called to give his opinion, had not seen the dead body, and had not made the post-mortem examination. The Court held, that Dr. Shaw was in the position of an “expert witness who could give nothing but opinion-evidence.” The Court observed, that the general rule as to evidence of this kind is that the questions must be put to the witness hypothetically, put in this way:

“Assuming such and such facts to be true, what is your opinion on the matter?” “Assuming such and such an injury, an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?”

The High Court added—

“The facts thus hypothetically stated to the witness would, of course, be the facts which the evidence of the other witnesses in the case attempted to prove, and as to which it was for the jury to find whether they had been proved or not.”

In another Calcutta case\(^4\), the facts were as follows:

During the trial, Dr. Mackenzie, the Police Surgeon, was called to give evidence as to the cause of death, and in the course of his evidence he stated the various marks and indications he found when making the post-mortem examination, and gave it as his opinion that death was due to asphyxia caused by strangulation. This opinion was challenged by counsel for the defence, and Dr. Mackenzie was cross-examined to show that death had not been caused as alleged. Subsequently, the prosecution called another witness, Dr. Macleod, who had not been present at the post-mortem and had not been called before the Magistrate, nor had he had anything to do with the case, the defence having been previously furnished with a statement of what Dr. Macleod was called to prove.

---

\(^1\)Lawson's Expert Evidence, 222 and Rogers, Expert Testimony 64, 68 cited.
\(^3\)Raghun v. Q. E., (1882) I.L.R. 9 Cal. 455, 463.
Dr. Macleod was put in the box. The appearance of the body as spoken to by Dr. Mackenzie, together with the signs spoken to by him as having been noticed by him when making the post mortem examination, were put to him, and he was asked this question—"upon these facts what in your opinion would be the cause of death."

Counsel for the accused objected to the question. The objection was to the effect, that such a question was admissible only when the facts were admitted and the question was purely relating to medical science. Here the facts were not admitted, and the only question that could be put was, what are the usual indications of death by strangulation.

The court rejected the objection, relying upon Raghun’s case, because the question did not involve the truth of the evidence.

In a case before the Bombay High Court (arising out of an appeal against the decision of the Commissioner for Worker’s Compensation), it was argued that the Commissioner should not have accepted the evidence of a doctor who had not examined the patient and whose evidence was based on probabilities. The High Court rejected this objection, and observed, —

"But an expert is entitled to answer all hypothetical questions put to him. The only safeguard which we must apply is that the hypotheses are correctly put to the expert."

Hypothetical questions are allowed in England. Also.

It appears that hypothetical questions have been the subject matter of some criticism in the U.S.A. The view of Wigmore may be referred to on this point.

"The hypothetical question must go.............. The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason.

"In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction. No partial limitation of its use seems feasible, by specific rules. Logically, there is no place to stop short; practically, any specific limitations would be more or less arbitrary, and would thus tend to become mere quibbles. How can the extirpating operation be performed? By exempting the offering party from the requirement of using the hypothetical form; by according him the opinion of using it—both of these to be left to the trial Court’s discretion; and by permitting the opposing party, on cross-examination, to call for a hypothetical specification of the data which the witness has used as the basis of opinion. The last rule will give sufficient protection against a mis-understanding of the opinion, when any actual doubt exists............"

4See “English cases” infra.
In the Model Act on Expert Testimony framed in the U.S.A., the provi-
sion as to the questions to be put to an expert witness is as follows:

"9. EXAMINATION OF EXPERTS"

(1) An expert witness may be asked to state his inferences, whether these
inferences are based on the witness’ personal observation, or on evidence
introduced at the trial and seen or heard by the witness, or on his technical
knowledge of the subject, without first specifying hypothetically, in the question,
the data on which these inferences are based.

(2) An expert witness may be required, on direct or cross-examination, to
specify the data on which his inferences are based.

The object of the section in the Model Act has been thus explained:

"The aim of this section is to remedy a major evil. The courts have
supported the proposition, when an expert has testified to the facts, that
no hypothetical question is necessary. The courts also generally tend to
permit an opinion based upon the truth of a particular witness’ testimony,
and some have even gone to the length of permitting an opinion to be
based upon all the facts given in evidence where they are not in conflict.
The statute proposed goes one step further and would permit an opinion
in all cases irrespective of conflict, insuring, however, a full and complete
elucidation of the underlying premises through cross-examination for the
benefit of the jury. The expert states his opinion as formulated from his
attendance upon the testimony given or from a draft of the testimony
which he has read. Upon cross-examination the particular facts which he
has considered, together with the weight and construction he has put upon
them, can be dissected and examined. Although this has not been the
regular practice, it is not without the confirmation of the courts. See
Beckwith v. Sydebotham, 1 Camp. 116, 170 Eng. Re. 897 (1807); Com-
monwealth v. Johnson, 188 Mass. 382 (1905). There is here no attempt to
obstruct or limit the jury in its determination of the ultimate fact. It may
be urged that the opinion admitted cannot be completely destroyed, regardless
of the result of the subsequent cross-examination. This contention
has little weight, for surely counsel can be relied upon to inform the jury
the extent to which the expert’s view is supported by the facts. It should
be observed, also, that under the system of hypothetical examination it is
common to cut out, as far as possible, all facts which might lead to an
adverse response and so frame the question that the resulting answer sup-
ports counsel’s view. How can it be said that an opinion based upon all the
facts compares unfavourably in effect with a palpably erroneous one
forced from the premise of distorted facts?

The principal objection to the hypothetical question, aside from the
fact that it is expensive and tedious, is that in practical effect it achieves
just what it was designed to remedy. It has been termed by Justice Hodnes
"a logical necessity but a practical incubus". The longdrawn-out hypothe-
tical question, instead of assisting the jurors, confuses and misleads them
until they are forced to abandon expert opinion entirely and decide the
issue upon other grounds.

[The Note then quotes the suggestion made by Wigmore].

In the English case of *Beckwith v. Sydebotham*¹, Lord Ellerborough English case
allowed shipwrights to testify concerning the seaworthiness of a ship. He

¹Model Expert Testimony Act, section 9.
²Model Expert Testimony Act, Commissioners’ Note.
said that where there was a matter of skill or science to be decided, the jury
might be assisted by the opinion of those peculiarly acquainted with it in
their professions or pursuits; as the truth of the facts stated in them was
not certainly known, their opinion might not go for much; but still it was
admissible evidence. In cross-examination, they might be asked what they
would think on the state of facts contended for by the other side.

View of Cross.

Lord Ellenborough was, in *Beckwith v. Sydebotham*, referring to a
difficulty that is encountered in the reception of all kinds of expert
evidence. "In the vast majority of cases, the witnesses will not have perceived
the occurrences with which the case is concerned. In *Beckwith v. Sydebo-
than*, for instance, the shipwrights had not examined the ship whose sea-
worthiness was in issue; therefore their opinion had to be based on assumed
facts. It is for the court to determine which party's version of the occur-
rences in issue is to be accepted. Accordingly, every effort must be made
to call upon the expert to give an opinion on the veracity of the ordi-
nary witnesses in the case, or the validity of any inference concerning the
existence of a disputed fact. This can only be done by forming a series of
hypothetical questions—a procedure which, however necessary it may
be, certainly complicates the issues in a particular case."

Conclusion regarding hypothetical questions.

We have taken note of this criticism, and also of the provision suggested
in the U.S.A. on the subject. It appears to us, however, that in the cases
are conflicting as to how an expert may be asked the very question which
the jury have to decide; but the weight of authority appears to be as
follows: (a) Where the issue involves other elements besides the purely
scientific, the expert must confine himself to the latter, and must not give
his opinion on the legal or general merits of the case; (b) Where the issue
is substantially one of science or skill merely, the expert may, if he has
himself observed the facts, be asked the very question which the jury have
to decide. If, however, his opinion is based merely upon facts proved by
others, such a question is improper, for it practically asks him to deter-
mine the truth of their testimony, as well as to give an opinion upon it;
the course is to put such facts to him hypothetically, but not en bloc,
asking him to assume one or more of them to be true, and to state his
opinion thereon: where, however, the facts are not in dispute, it has been
said that the former question may be put as a matter of convenience,
though not as of right."

Position in India.

So far as the position in India is concerned, the language of section 45 is
wide enough to cover opinion as to facts in issue. In India, the objections to a
hypothetical question would not be so strong as elsewhere, as the trial
in India is by the Judge and not by jury. A Judge is not likely to
be mislead or confused by hypothetical questions. Moreover, there are
occasions when a hypothetical question is useful and may even be a necessity,
as in the case of conflicting evidence when it is not possible to say what version
will or will not ultimately be accepted by the Court as true. Further, a hypo-
thetical question need not always be complex; it can be a simple one, requiring
only a small number of assumed facts. Although we are not recommending
any new provision on the subject, the above is the correct position in our view.

Ultimate issues and expert evidence.

Another interesting matter concerning the questions that can be put to an
expert witness is this—can the expert be asked to give an opinion on the very
matter which is to be decided by the Court (i.e. the fact in issue)?

---

1*Beckwith v. Sydebotham*, (1807) 1 Camp 116, supra.
In England, the law on the subject has been thus stated—

IX. NOTICE

While other procedural changes are not needed there is one point on which there is scope for improvement. It is fair that where a party wishes to call an expert particulars of his opinion i.e. the gist thereof should be supplied so that cross-examination can be conducted efficiently

X. RECOMMENDATION

We have now completed our discussion of section 45. The question of foreign law is proposed to be dealt with later2, since it requires fuller examination. In the light of the above discussion, we recommend that section 45 should be revised as follows and the following new section inserted:—

REVISED SECTION 45

"45. Opinions of experts.—(1) When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to the identity of handwriting, finger impressions, footprints, palm impressions or typewriting, the opinions, upon that point, of persons specially skilled in such foreign law, science or art, or in questions as to the identity of handwriting, finger impressions, footprints, palm impressions or typewriting, as the case may be, are relevant facts.

(2) Such persons are called 'experts', (Illustrations as at present).

Section 45A (New)

— Supply of copy

(1) Except by leave of the Court, a witness shall not testify as an expert unless a copy of the report has, pursuant to sub-section (2), been given to all other parties.

(2) When any party intends to adduce expert evidence, he shall, within a reasonable time before the date of the trial, provide to all other parties a report which—

(a) identifies the person proposed to be called as an expert;

(b) states the subject-matter on which the expert is expected to testify;

(c) states the substance of any facts and the opinions and inferences to which the expert is expected to testify; and

(d) provides a summary of the grounds for each opinion.

1Phipson, Evidence (1967) 1 Compt. 116. Supra.
2See infra.
3Illustrations as at present.
CHAPTER 18

FOREIGN LAW

I. INTRODUCTORY

We shall now deal in detail with one of the matters mentioned in section 45, namely foreign law. This matter was reserved for further discussion when we considered section 45, in view of its importance. Section 45, it may be recalled, allows evidence of opinion to be given by experts, on the subjects enumerated in the section, which include foreign law. It is obvious that local courts cannot command extensive knowledge of foreign law, and that explains the necessity of taking evidence. Many other countries have similar rules. In *A. G. v. A. R. Arunachalam Chettiar*, the expert opinion of Shri K. Rajah Iyer and Shri Bhashyam was produced in the District Court in Colombo.

It may be pointed out that section 45 is not the only provision relevant to foreign law. Under section 38, where the court has to form an opinion as to the law of any country, any statement of such law contained in a book printed under the authority of the Government of such country and purporting to contain any such law, is relevant.

Secondly, under the same section, any report of the ruling of the courts of such country, contained in a book purporting to be a report of such rulings, is relevant. In respect of both these kinds of evidence, there is a presumption as to genuineness of the report which has to be drawn under section 84, if the conditions laid down in that section are satisfied.

Thirdly, amongst the facts of which the court must take judicial notice under section 57, certain items are mentioned, and these include certain species of foreign legislation.

Fourthly, foreign law may be ascertained by a special statutory procedure, contained in two British statutes of 1859 and 1861, to which we shall refer later. Incidentally, it may be mentioned that in a very early case, the Court of Chancery of England requested the Supreme Court of Calcutta for opinion on a question of Hindu law under one of these statutes.

Fifthly, other special Acts sometimes contain provisions relevant to the ascertainment of foreign law.

With reference to section 38 of the Evidence Act, it may be mentioned that, while law reports, in order to be relevant under that section, need not be published under the authority of Government, other books relevant under that section, that is, statements of law, must be published under the authority of Government. For this reason, a statement of law, not contained in a law report and not published under the authority of Government, but contained in an unauthorised translation of the Code Napoleon,—a statement as to what the French law was,—was rejected by the Calcutta High Court.

---

1Chapter 17, supra.
3See Bhashyam & Adiga on Negotiable Instruments, under section 137.
4See sections 38, 57, 84 and British Statutes cited infra.
5Robins v. Princess Victoria. 1 Jurist Old Series 179, referred to by Woodroffe under section 38.
Almost all these provisions, while resting on the theoretical postulate that foreign law is a question of fact, seek to introduce a qualification thereto for practical reasons. It may also be mentioned that while the English theory is that the relevant foreign law must be proved, like other matters of which no knowledge is imputed to the Judge "by appropriate evidence, i.e., by properly qualified witnesses," there is an exception where the parties agree to leave the investigation of the foreign law to the Judge and to dispense with the aid of witnesses.

In connection with foreign law, there is an interesting aspect relating to the powers of appellate courts. Though the general rule is that appellate courts are slow to interfere with trial courts on questions of fact, the rule applies with particular force only as regards the assessment of the relative veracity of witnesses and the judgment of the weight of evidence. This general rule is not applied with so much severity in relation to foreign law. In regard to foreign law, the inference of fact depends on written material and an appellate court, not being at any particular disadvantage in comparison with the trial court, is free to review the decision of the trial court, according to the view taken by Simon, P in an English case.

II. VARIETIES OF PROCESSES

We shall now deal in some detail with the processes for ascertaining foreign law. The content of the relevant foreign law must be ascertained in each case, but the process of ascertaining is not uniform. In some countries, the courts alone assume this task ex-officio: in others, the courts and the parties co-operate in this endeavour; in common law countries, the burden of proving foreign law falls exclusively upon the parties.

It would appear that in certain continental countries and certain South American countries, a judge has power to commence investigation un-assisted by the parties. In Germany, for example, it appears that foreign law requires proof only to the extent to which it is unknown to the judge, and the Judge can use the own sources of information.

18.8 The position is the same in substance, in Sweden. The Swedish Code on Judicial Procedure (Rattegnagabalk) article 35:2, provides as follows:

"Proof of circumstances that are generally known is not required. Nor is proof required as to legal rules. If foreign law is to be applied and if its contents are not known to the court. The court may direct a party to present proof thereof."

Somewhat similar provisions are to be found in a few other Scandinavian countries.

III. QUALIFICATIONS OF EXPERTS

After this introductory and brief comparative discussion, we address ourselves to the specific points requiring consideration. We first take up the question of the qualifications required of an expert in foreign law. Section 45 does not lay down that the expert must be a person who has taken a formal

5 Article 35:2, Swedish Code of Judicial Procedure.
6 See Code of Judicial Procedure (Finland) 17.3 (to the same effect): cf. Code of Judicial Procedure (Norway), S, 191 (the court may request that the parties submit detailed proof of foreign law).

23-131 LAD/IND/77

Agreement by parties to leave the question to the Judge.
degree or undergone an academic course of study in foreign law. Now does it require that he must be a practising lawyer. In England, some controversy arose, in the past, in regard to persons who can be regarded as experts in foreign law. In Brystow v. Sequeville, for example, a jurisconsult adviser to the Prussian consulate in London, who had studied law in Leipzig and knew that the Code Napoleon was in force in Saxony, was not allowed to give evidence concerning the Code Napoleon. Certain observations in the judgment suggest that it is essential to call a practitioner in every case. But other English authorities have taken a wider view.

Persons who have been held sufficiently qualified to give evidence as to foreign law include—(a) a former (as opposed to present) practitioner in the jurisdictions is question, (b) some one who was qualified to practise in that jurisdiction although he had never done so, (c) a Governor-General, (d) an embassy official, and (e) the Reader in Roman Dutch law to the Council of Legal Education.

So far as civil proceedings are concerned, section 4(1) of the Civil Evidence Act, now finally disposes of the proposition in issue in Brystow v. Sequeville by declaring that a person suitably qualified on account of knowledge or experience is competent to give evidence of foreign law irrespective of whether he has acted or is qualified to act as a legal practitioner in the country in question.

In India, in view of the wide and unqualified language used in section 45 the controversy is not likely to arise.

IV. PROCEDURE

We now turn to a question of procedure, relevant to evidence of foreign law. Suppose a party wants to urge, upon principles of conflict of law, that the law of a foreign country governs all or part of the particular controversy. how and when is the party to make this contention known formally, and how then is he to go about proving the content of the foreign law?

This is a question which may arise. On the one hand, foreign law is not a “fact” in the ordinary sense. But, on the other hand, evidence thereof can be given. A question of foreign law cannot be assimilated to a question of domestic law in all respects. There is, therefore, need for what is called a “functional treatment.” In this connection, it is of interest to note that the Federal Rules of Civil Procedure in the U.S.A. provide for notice, in the following terms:

“A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice.”

---

1Brystow v. Sequeville, (1850) 5 Exch. 275.
3Barford v. Barford and McLeod, (1918) Probate 140.
4Cooper-Kind v. Cooper-Kind, (1900) Probate 65.
5In the Goods of Dist Aly Khan, (1889) 6 P.D. 6.
6Brailey v. Rhodesia Consolidated Ltd., (1910) 2 Ch. 95.
7In collecting these cases, assistance has been taken from Cross on Evidence.
8Section 4(1), Civil Evidence Act, 1972 (Eng).
9Brystow v. Sequeville, (1850) 5 Exch. 275 (supra).
10Benjamin PauIian, Note in 81 Harvard Law Rev. 613.
11Note in 81 Harvard Law Rev. 613, 614.
12Rule 44.1, Determination of Foreign Law (earlier half), Federal Rules of Civil Procedure.
We are of the view that this is a useful provision, which should be adopted for civil cases, having regard to the consideration just now mentioned.\(^1\)

Questions of foreign law may arise frequently in Indian courts. A few examples may be taken in relation to negotiable instruments. In an early Madras case,\(^2\) for example, a promissory note was void for want of registration according to the law of that State, but it was valid according to the law in British India. In a suit filed by the payer of the promissory note in British India upon the note, it was held that the liability of the maker was governed by the law of the State of Pudukkota, that being the law of the place where the note was made the lex loci contractus. Since the note was void according to that law, the defendant was held not liable to pay the amount mentioned in the promissory note.

The rule of foreign law was successfully invoked in this case. Illustration of a case where an unsuccessful attempt was made to invoke a rule of foreign law is to be found in a Bombay case.\(^3\) In that case, a promissory note was executed by the defendant, a resident in British India, at a place in the Nizam’s territory, in favour of the plaintiff. The note did not bear the stamp required under the stamp law of the Nizam’s State. The defendant challenged the maintainability of the suit on the ground of non-compliance with the stamp law of the place of its issue. This contention was rejected, on the ground that the stamp law of the Hyderabad State did not make the note void, but merely provided that it should not be receivable as evidence\(^4\).

Again, by section 26 of the Negotiable Instruments Act, 1881, the capacity of parties to enter into a contract of negotiable instruments is governed by the “law to which it is subject”.\(^5\) Apparently, this means the law of the domicile. Now, when the instrument is drawn in a foreign country where the age of majority is, say, twenty-one years, and the person drawing the instrument is, say, of the age of twenty years, and the instrument is payable in India, the question may arise as to the capacity of the drawer.\(^6\) A somewhat similar situation arose in an Allahabad case.\(^7\) A cheque was drawn and payable in India, and was endorsed in India by a European British subject domiciled in England, who was under twenty years of age. The cheque was dishonoured. It was held by the lower Court that the person endorsing the cheque was not liable to be sued on the instrument, because—

(a) the capacity of the endorser was governed by the law of domicile by reason of section 11 of the Indian Contract Act; and

(b) by the law of the domicile (English law), he was a minor and, therefore, he was not liable to be sued on the instrument even though he had reached the age of majority (eighteen years) under the Indian law.

In the High Court, the matter was decided on other grounds. But the case is referred to here as illustrating a fact situation which may possibly arise.

---

1. See draft amendment, infra.
4. Also see *Venkatakrishna Reddy v. Raja of Gapur*, I.L.R. 63 Mad. 968.
6. As regards capacities of the parties in mercantile contracts in general, see T. S. Ramarao, “Private International Law in India” (1955), Indian Year Book of International Affairs, 219, 251.
In some of these cases, foreign law was invoked by the defendant. It may be noted that such a controversy can also arise in the case of application of the foreign law when relied on by the plaintiff. For example, in the case of a promissory note which is alleged to be void for want of registration according to the foreign law, the plaintiff may sue under the specific Relief Act to get the instrument declared void. In such a suit, if the plaintiff is going to take the stand that the law applicable is foreign law, it is proper that the matter should be pleaded clearly, so that the opposite party may have notice of the question likely to be raised.

Questions of foreign law may arise in other fields of law. For example, there may be a question whether the Hindu law as applied in India and the Hindu law as applied elsewhere are the same — for instance, the law relating to the pious obligation of the son in relation to a mortgage which is executed by a father not for family necessity or benefit, but for a purely personal purpose, in consideration of debt which was not antecedent to the creation of the mortgage.

Then, questions have arisen as to the law applicable to the assignment of an actionable claim, such as, an insurance policy.

An example can also be drawn from the field of matrimonial law. A person may petition for restitution of conjugal rights or other matrimonial relief, in respect of a marriage. The marriage may be void or voidable by Indian law, but is regarded by the petitioner to be valid by the law of a foreign country (which is regarded as applicable to the marriage). In such a case, the plaintiff himself relies on the foreign law, and it is proper that he should be made to notify to the other party the question of foreign law which is going to be raised.

In all these cases, the conduct of the litigation would be facilitated if the party going to rely on foreign law notifies the other party.

V. CONSTITUTIONALITY OF FOREIGN LAW

The difficulties which face the courts and the parties when seeking to ascertain and to prove foreign law are well known, but a special problem which may arise in the course of this process has attracted little attention, especially in Anglo-American law.

The special problem has its basis in the hierarchical structure of rules in certain legal systems. According to English law and according to a number of other legal systems, a rule once established, cannot be challenged as to its validity. According to a few other legal systems, however, such as those of India, Canada, Germany, Italy and the United States, the process of ascertaining the rule applicable in a particular case may present two separate questions, which must be examined consecutively. The first concerns the content of the rule which applies in the circumstances. The second is whether the rule so ascertained is valid or invalid according to the overriding principles of the foreign constitution within the framework of which the relevant rule of foreign law operates.

Thus, for example, in a case involving matrimonial property relations, it may be found that the law of country X applies. The relevant rule of that country is clear. Yet, one of the parties may argue that it violates the principle

---

1Compare facts in Palaniappa v. Parikalpa Chetty, I.L.R. 17 Mad. 262, supra.
4See Dr. K. Lipstein in (1967) British Yearbook of International Law at page 265.
5Dr. K. Lipstein in (1967) British Yearbook of International Law at page 265.
of the equality of the sexes as laid down by the constitution (of the foreign country) the law of which is applicable and has been proved, and that the rule itself is accordingly, invalid. In these circumstances, the question arises whether the courts of the country where the action is brought may take it upon themselves to pass upon the validity of the rule of foreign law in the light of foreign constitutional law. On a lower level, the same problem is posed, if the rule of foreign law is to be found in a delegated legislation and if it is contended that such legislation contravenes an enabling Act of the lex causa of the foreign country.

Finally, it may be contended that the applicable rule of foreign law violates a precept of public international law and that the constitution of the foreign country concerned, by an express provision, invalidates all provisions of its domestic law which are contrary to principles of public international law accepted by the State.

This is, in broad terms, the problem that could arise.

Dr. Mann, after discussing the authorities, observes in this connection—

"The sound method is to put a judge who has to apply foreign law in the position of his foreign opposite number and therefore to allow him to inquire into the validity of foreign legislation within the limits set by the foreign law. There are countries where the privilege to examine the constitutional validity of legislation is reserved to special courts whose decisions are binding on all courts of ordinary jurisdiction; in such cases the English Judge cannot, of course, assume the task of that special court, but must treat the statute in the same way as the regular judge of the foreign country would do."

"On the other hand, the fact that the lex fori precludes the judge from examining the constitutional validity of his own country's legislation does not put him under a disability to do so in a case where foreign law applies; where such rule exists, e.g. in this country (England) or in France, it has its foundation in the municipal constitutional law of the country, but cannot be described as having a procedural character so as to impose itself even where foreign law is applicable.

"Attention may be drawn to the fact that the validity of Russian decrees was to some extent examined in Russian Commercial and Industrial Bank v. Comptoir D'Escompte de Mulhouse, (1925) A. C. 112, 125 per Lord Cave; Princess Paley Olga v. Weisz, (1929) 1 K. B. 718, 731 per Sankey L.J., page 735 per Russell L.J., page 735 and counsel's argument on page 720."

We do not suggest any change in the law in this regard. The above discussion merely describes the position.

VI. BRITISH STATUTES AS TO EVIDENCE OF FOREIGN LAW

One of the modes of ascertaining foreign law may now be dealt with. We may note that in a previous Report of the Law Commission dealing with British statutes applicable to India, the Commission made a recommendation that the

---

1Dr. K. Lipstein in (1967) B.Y.B.I.L. at p. 265.
2See, e.g. the Constitutions of the German Federal Republic, Art. 100; Constitution of Italy, Arts. 134, 136; Constitution of Austria, Arts. 89, 140.
4Fifth Report (British Statutes Applicable to India), page 45, entry 55.
question of incorporating in our law the provisions of the British statutes, should be considered.

The substance of the recommendation was that the provisions as to ascerta-
intainment of British law and foreign law, contained in the two British statutes,
should be engrafted in our law. The two British statutes were the British Law 
Ascertainment Act, 1859 and the Foreign Law Ascertainment Act, 1861. The
former is meant for British Dominions; the latter is meant for foreign countries,
and is founded on international conventions between U.K. and foreign countries.

Under the statutes cited above, an Indian Court can refer a question of
British or foreign law to a superior Court outside India. In order that our Courts
may easily understand that they possess this power, the Evidence Act, it was
recommended, should refer to the statutes cited. It was also pointed out that so
far as the statute of 1861 is concerned, a fresh arrangement between India and
the foreign countries would be necessary, if we want to enact a similar law of
our own.

Now, the statutes cited have not been repealed by the British Statutes
(Application to India) Repeal Act. Therefore, it is desirable to adopt the
relevant provisions, with such modifications as are appropriate. We are of the view
that the provisions of these statutes are useful, and should be adopted in sub-
stance. Whether they should be incorporated in the Evidence Act or elsewhere,
is a matter of detail, which we leave to the draftsman. Our own view is, that
separate legislation would be more convenient, having regard to the detailed
nature of the provisions that may have to be incorporated.

VII. POWER OF THE COURT

We have another suggestion to make with reference to foreign law, which
concerns the power of the court. Foreign law is usually proved by experts, but
the Evidence Act is silent as to the power of the court to investigate the ques-
tion. Such a power appears to be needed, in the interests of justice. It need not
be a duty, but there should be a power exercisable in appropriate cases.

The rule in the U.S.A. on the subject may be usefully cited.9

The Court, in determining foreign law, may consider any relevant material
or source, including testimony, whether or not submitted by a party or admissible
under Rule 43. The court's determination shall be treated as a ruling on a ques-
tion of law.10

VIII. RECOMMENDATION

In the light of the above discussion, we recommend—

(a) insertion of a provision requiring that notice to be given where a party
in a civil case desires to raise a question of foreign law;

(b) incorporation of the substance of the British Statutes of 1859 and
1861, into our statute law;

---

1The British Statutes (Application to India Act, 1960) (58 of 1960).
2Rule 44.1, (latter half) (Federal Rules of Civil Procedure): 34 L. Ed. 2d. page ccvi.
3Rule 43, refers to testimony.
(c) insertion of a provision enabling the court to look at the relevant material relating to foreign law, where it considers such a course necessary in the interests of justice.

The second point mentioned above may be preferably inserted in a separate law. The first and third could be inserted in the Evidence Act, as section 45B somewhat on the following lines:

(1) A party to a suit or other civil proceeding who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice.

(2) The court, in determining a question of foreign law, in any case may, after notifying the parties, consider any relevant material or source, including evidence, whether or not submitted by a party, and the decision of the court shall be treated as a decision on a question of law."

1Para 18.33, supra.
We have disposed of the important questions relating to opinion evidence. We shall deal in this chapter with certain other provisions as to opinion evidence. The first such provision is contained in section 46. Facts, not otherwise relevant, are relevant under section 46, if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

The illustrations to the section are as follows:

(a) The question is, whether A was poisoned by that poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that person, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.”

The principle underlying section 46 could be better understood, if some of the reasons for admitting expert evidence are recalled.

(1) The use of witnesses being to inform the tribunal respecting facts, their opinions are not, in general, receivable as evidence.

(2) The rule, however, is not without its exceptions. The rule is based on the presumption that the tribunal is as capable of forming a judgment on the facts as the witnesses. When circumstances rebut this presumption, the rule naturally gives way, and the opinions of specially skilled persons are receivable in evidence.¹

(3) Now, the foundation on which expert testimony rests is the supposed superior knowledge or experience of the expert in relation to the subject-matter upon which he is permitted to give an opinion as evidence.

(4) The opinion of such person gains weight if the supporting circumstances are proved. The reverse is also true.

That is the rationale of section 46, and we do not think that the section needs any change.

SECTION 47

The sections which we have so far discussed embrace a variety of matters on which opinion evidence can be given. Certain particular matters appeared to the draftsman of the Act to deserve special treatment in regard to opinion evidence. These are dealt with in section 47 et seq.

Section 47 provides that when the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the hand-writing of the person by whom it is supposed to be written or signed that it was or was not written or signed by the person, is a relevant fact.

¹Best, Evidence, Paragraphs 511-513.
Under the Explanation to section 47, a person is said to be acquainted with the handwriting of another person when he has sent that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

These various facets are illustrated by the illustration to the section, which reads:

"The question is, whether a given letter is in the hand-writing of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

"The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write."

The principle underlying the section is this — the opinion or the belief of a witness is admissible, because all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is, in its nature, comparison. It is the belief which a witness entertains, upon comparing the writing in question with an example formed in his mind from some previous knowledge, which is the basis of his evidence.

Viewed in this light, the section is intelligible enough, and needs no change. Change not needed.

SECTION 48

Section 48 deals with another matter on which opinions are relevant. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right of persons who would be likely to know of its existence if it existed, are relevant under the section. The expression "general custom or right" is explained as including customs or rights common to any considerable class of persons.

Thus, as the illustration to the section tells us, the right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

The section is satisfactory, in so far as it goes. But one point deserves consideration. In our discussion § of section 32 (4), we pointed out that while there are three sections — section 32 (4), section 48 and section 49 — which admit evidence of opinion in matters of usage, there are slight differences of phraseology in the various sections. Thus, section 32(4) speaks of a "public right or custom or matter of public or general interest"; section 48 speaks of "general custom or right" (which has been defined in the Explanation as including customs or rights common to any considerable class of persons); and section 49 speaks of "usages' and tenets of any body of men or family".

It would appear that section 32(4) can be taken as the widest of all the three, and that the expression "matters of .......... general interest" in section 32(4) would include general customs or rights dealt with in section 48.

1Taylor, Evidence, para 1869, cited in Woodroffe.
2See discussion as to section 32(4), supra.
The question that arises is, whether the three sections are meant for different kinds of customs or rights, as indicated by the different phraseology employed in the three sections.

According to English law, there is a distinction between "public rights" and "general rights".

Public rights are those common to all members of the State, — for example, rights of highway and ferry or of fishery in tidal waters. General rights (in England) are those affecting any considerable section of the community — for example, questions as to boundaries of a parish or manor. In the case of public right, all persons concerned may be presumed to be competent to make a declaration, but, in the case of general rights, the declarant must have possessed competent knowledge by residence in or other connection with the locality. In India, both the matters are covered by section 32(4), and that clause merely requires probable means of knowledge. Hence, the distinction, which is known to English law, is not of practical importance for India.

In this position, section 32(4) — which uses the widest language — needs no change; but the question is of significance for the purposes of section 48. Since that section does not express itself in the phraseology employed in section 32(4), the question naturally arises, whether section 48 is intended to be narrower than section 32(4). We have not been able to think of any reason why section 48 should not provide for the admission of an oral declaration expressing an opinion as to the existence of a public custom or right. Perhaps, the expression "general custom and right", as explained in the section, would include all public customs and rights. However, it is advisable to have uniform language in section 32(4) and section 48, since it can be presumed that a different position is not intended. We, therefore, recommend that the language of section 48 should be brought in line with section 32(4) in this respect.

The section should, therefore, be revised as follows: —

**REVISED SECTION 48**

"48. When the Court has to form an opinion as to the existence of any general or public right or custom or any matter of general or public interest, the opinions, as to the existence of such custom or right or such matter, of persons who would be likely to know of its existence if it existed or of that matter, as the case may be, are relevant.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

**ILLUSTRATION**

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section."

Under section 49, when the court has to form an opinion as to—
(a) the usages and tenets of any body of men or family,
(b) the constitution and government of any religious or charitable foundation, or
(c) the meaning of words or terms used in particular districts or by particular classes of people,
the opinions of persons having special means of knowledge thereon are relevant facts.
It may be noted that the section deals with opinions, and not with specific facts. Specific facts concerning usages could fall under section 13, if the conditions of that section are satisfied.

The section needs no change. It may, however, be remarked that with the disappearance of Judges not knowing the local language, occasions for resort to the section would be infrequent,—at least in the last case mentioned in the section.

SECTION 50

Under section 50, when the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.

The proviso provides that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act (4 of 1869), or in prosecutions under sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).

The opinion is to be evidenced by conduct of the witness, and there is an additional guarantee of its trust-worthiness,—the existence of a special knowledge of the subject. These two considerations justify the special provision contained in the section.

The proviso to the section is needed because strict proof is required in all criminal cases1. In proceedings under the Indian Divorce Act also, marriage is the main act to be proved before jurisdiction can be shown or relief granted.

The proviso, as it stands at present, mentions only the ‘Indian Divorce Act’. We are of the view that the proviso should be extended to cover other enactments, comparable to the Indian Divorce Act.

Further, as to bigamy, the proviso mentions a prosecution under section 494, Indian Penal Code only. It should be extended to cover similar provisions in other enactments2.

We recommend that the section should be amended as above. The revised section could be somewhat on the following lines:—

REVISED SECTION 50

“When the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings—

(a) under the Indian Divorce Act, 1869, or any other enactment providing for the dissolution of marriage, or

(b) in prosecutions under sections 494, 495, 497 or 498 of the Indian Penal Code or under any other enactment providing for the punishment of bigamy.

(Illustrations as at present)


2See for example section 17 Hindu Marriage Act, 1955 section 44, Special Marriage Act, 1954.
SECTION 51

Under section 51, where the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant. Thus, as is provided by the illustration to the section an expert may give an account of experiments performed by him for the purpose of forming his opinion.

The principle underlying section 51 is that the correctness of the opinion or otherwise can usually be better estimated when the grounds upon which it is based are known. The value of the opinion may be greatly increased or diminished by the reasons on which it is founded.

The section needs no change.
CHAPTER 20

CHARACTER—SECTIONS 52-55

We now come to four sections in the Act which deal with evidence of character. Evidence of good or bad character may become relevant under other provisions of the Act—e.g., sections 14 and 15; but in these other provisions attention is focussed on the relevance of a fact under some other head. The facts are not relevant as showing character, but for some other reason. For example, a fact may be relevant as showing notice or past relations between the parties, and the like. The revelation of character is incidental in such cases. Sections 52 to 55, on the other hand, deal with the question of relevance of facts when sought to be given in evidence directly as showing character.

The arrangement of matter in these sections may at first sight appear to be haphazard; but it is not really so. Facts relevant to the principal issues are first dealt with (sections 52-54), followed by a section (section 55) dealing with facts relevant to the quantum of damages. The common thread, of course, is character. By way of a broad statement of the approach shown in these sections, it can be stated that the law leans against evidence of bad character.

Further, in civil cases, it also leans against evidence of good character.

Dealing, first, with civil cases, section 52 provides that the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

The principle underlying section 52 is this. Evidence of character is excluded in civil cases as being too remote and, at the best, affording but slight assistance towards the determination of the issue. Such evidence is foreign to the point in issue, and only calculated to create prejudice.

This general principle is sound enough and caused no serious difficulty. Hence, we see no reason to disturb the section.

SECTION 52-54

As regards evidence of character in criminal cases, the law is to be found in sections 53-54. Under section 53, in criminal proceedings, the fact that the person accused is of a good character, is relevant.

Under section 54, in criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character—in which case it becomes relevant.

There are two Explanations to section 54. The first Explanation makes it clear that this section does not apply to cases in which the bad character of any person is itself a fact in issue.

The second Explanation provides that “a previous conviction is relevant as evidence of bad character.”

1Taylor Evidence, section 354, quoted in Woodroffe, Commentary on section 52.
2Roscoe, N.P. Evidence, 87 quoted in Woodroffe, Evidence, Commentary on section 52.
The first Explanation to section 54 is self-explanatory. The second Explanation, which is rather cryptic, is really intended to convey the idea that if bad character is relevant or in issue, then a previous conviction is relevant as evidence of bad character. Before the second Explanation can apply, it must first be established that the case is one in which evidence of bad character is relevant. If that is established, then the Explanation permits one particular species of fact to be proved as evidence of bad character. Thus, the operation of the second Explanation is conditional. It does not operate as an independent source of relevance of facts with which it deals.

In this context, it may be noted, that section 54, as originally enacted, allowed a previous conviction to be admissible in all cases. The relevant portion of the section ran as follows:

"In criminal proceedings the fact that the accused person has been previously convicted of an offence is relevant..........."

This part of the section was found to be rather harsh, and it was also pointed out by a Full Bench of the Calcutta High Court that this was not the English law. In fact, not with standing the apparently wide language of the section, the Calcutta High Court had, in an earlier case, refused to allow a previous conviction in evidence, because the section also contained words prohibiting evidence of bad character (as at present).

In 1891, the section was amended so as to bring it in conformity with the English law on the subject, that is to say, a previous conviction is not admissible, except where evidence of character is relevant by virtue of some independent and separate rule.

The present rule is, thus, narrower than what it was before 1891. We may now briefly consider the rationale of the present rule. The rationale of the English rule was thus explained by Stephen:

"A man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, where as the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few — perhaps only to one or two persons."

This observation of Stephen explains why, in general, evidence of bad character is excluded. It may be noted that, even in those cases where the character of a person might, according to common concepts, help us in arriving at a conclusion on the question whether it was probable that person acted in the particular manner, the law excludes it. Evidence of character is excluded in such cases, not because it has no probative value in logic, but for other reasons. It is the policy of the law that the judge who has to determine questions of fact should not base his conclusions on the character of the parties as an aid in determining the probability of their having acted in a certain way. In civil cases, one can state that character is excluded for reasons of convenience, but, in criminal cases, there is the additional consideration of prejudice.

Evidence of good character is, however, allowed to be given in criminal cases on grounds of humanity for the purpose of raising a presumption of innocence, and as tending to explain conduct. But evidence of bad character is,

---

2Roshun v. R. (1880) I.L.R. 5 Cal. 768.
in general, excluded as being too remote, and as tending to prejudice the accused (as stated above). Guilt must be established by proof of the facts with which the accused is charged, and not by presumptions to be raised from the character which he bears.

This is the general rule. The exceptions to this general rule are, first, where the character is itself a fact in issue, as distinguished from cases where evidence of character is tendered in support of some other issue. Being a fact in issue, it must necessarily be provided for.

Secondly, where the accused has, by giving evidence of good character, challenged an enquiry, it is as fair that such evidence, like any other should be open to rebuttal, as it is unjust that he should have the advantage of a character which, in point of facts, is underserved. Both these exceptions are, in substance, incorporated in section 54—though they do not appear in the form of "Exceptions".

This position has come to be established only after some fluctuations. Thus, in England, previously, the prosecution used to attack the prisoner's character without reserve. But, since the last decade of the seventeenth century, the common law rule has been that the prosecution can tender evidence of the bad character of the prisoner only when he has set up his good character, and thus offered a challenge to the prosecution (unless bad character is a fact in issue).

The above discussion does not disclose any need for amending section 53, which permits evidence to be given of good character.

Even in regard to section 54, there is no need to disturb the substance. But some points of detail may be mentioned. A Bombay case holds that if evidence is relevant under section 14 or section 15, it is not inadmissible merely because it might show previous misconduct. In other words, section 54 would not control the independent operation of other sections. Reference was made by the High Court to the English case of Harrles— a decision of the House of Lords, wherein it was held that acts by way of similar transactions in the past are admissible, to show intention or to rebut a possible defence of the act being accidental.

The High Court also pointed out that as the House of Lords was dealing with English law, a discretion in the court to reject such evidence was recognised, but it was doubtful whether, under the Indian Evidence Act, where any evidence is relevant and satisfies the conditions laid down in the various section, the court can possibly exclude it only on the ground that it may deepen the suspicion against the accused.

We agree with the view taken by the Bombay High Court. The point does not, however, involve any amendment of section 54, and is really relatable to the interpretation of the scope of sections 13-14.

2(a) R. v. Tuberfield, 10 Cox 1;
(b) Amritt v. R., (1915) I.L.R. 42 Cal. 957.
(b) See also R. v. Hampden, (1894) 9 St. Tr. 1053, 1103.
5E.g. Makin's case, (1894) A.C. 57.
8Harrles v. D.P.P., (1952) 1 All E.R.1044 (H.L.) which followed the principle in Makin's case (1894) A.C. 57.
There is, however, a verbal point concerning section 54, which should be considered. It arises out of the words "unless evidence has been given that he has a good character", which occur in the section which permitting evidence of bad character in such cases. These words could be regarded as ambiguous. They may be taken — (i) as confined to the evidence of good character given directly by witnesses for the defence, or (ii) as also covering evidence of good character elicited in cross-examination from the witnesses for the prosecution. The first is a narrower view than the second.

The scope of the section should be made clear in this regard. It appears to us that the wider view should be adopted.

In other words, evidence in rebuttal should be permissible even as regards answers elicited in cross-examination, which tend to show the good character of the accused. Justice requires that if statements are elicited in the cross-examination of prosecution witnesses, — that is to say, where, in such cross-examination, evidence of good character of the accused has been given, — the case should be regarded as falling within the excluding words "unless evidence has been given that he has a good character", in section 54.

We recommend that the section should be amended for the purpose. The object could be achieved by adding, after the words "unless evidence has been given that he has a good character", the words "Whether through witnesses for the defence or through cross-examination of witnesses for the prosecution or in any other manner".

SECTION 55

So far, the sections dealing with character were concerned with the principal issues, i.e., issues concerning the facts on which the existence of liability depends. Character may, however, affect the quantum of relief also. Under section 55, in civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is, therefore, relevant. The principle underlying this part of the section is that in suits in which the damages are claimed, the amount of damages is itself a fact in issue, being concerned with the "extent" of the liability.

The above comment relates to the main parts of section 55. The section also contains an Explanation, — entirely unconnected with the main paragraph — which provides that in sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but, except as provided in section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown. The Explanation really serves all the sections dealing with character.

The Explanation has the effect of (i) including both reputation and disposition within the expression "character", but (ii) excluding particular acts by which reputation or disposition were shown, except as provided in section 54. The last mentioned refinement became necessary because, by section 54, in certain cases, a previous conviction — which is really a particular fact showing character — becomes relevant.

As to libel actions, our recommendations is that in a suit for damages for defamation for injury to the reputation of a person, evidence of character should relate to that aspect of that person's character to which the libel relates. This is in furtherance of our approach to section 12.²

²See discussion as to section 12.
CHAPTER 21

JUDICIAL NOTICE

I. INTRODUCTORY

21.1. Facts must, as a general rule, be proved by "evidence". That is, by the statements of witnesses and the production of documents. To this general rule, there are three important qualifications—(a) facts presumed, (b) facts judicially noticeable, and (c) facts admitted. These classes of facts need not be proved. In this Chapter, we shall confine ourselves to facts of which judicial notice is to be taken.

21.2. In enumerating the categories of facts which need not be proved, some writers do not mention facts presumed. And some writers emphasis that in the case of a presumption, the basic facts have to be proved. It may, however, be pointed out that even in the case of facts which are presumed, the party in whose favor the presumption is made enjoys the advantage that he need not prove that particular fact. Whether the presumption is mandatory or discretionary with the court, and whether it is rebuttable or irrebuttable, this position remains valid. It is for this reason that Cross and Wilkins have, in their outline of the Law of Evidence, stated that ""No evidence need be given of facts of which the court will take judicial notice, all presumed facts or all facts which are formally admitted."

21.3. Moreover, it may be noted that there may be cases where in order to create a particular presumption, no particular fact need be proved by evidence. For example, a presumption that an order purporting to be made by a particular authority in exercise of a statutory power shall be presumed to have been made by that authority does not require the previous proof of any particular basic fact. The production of the particular order is enough. Even if technically the production is regarded as a basic fact, it is obvious that the fact that the order was made by a particular authority in such a case is one which need not be established by other evidence, and its importance in the trial is, far greater than the basic fact.

21.4. In dealing with the matters of which evidence is necessary, Phipson in his Law of Evidence states that no evidence is required of matters which are either admitted for the purposes of the trial or judicially noticed. But, at another place, while discussing judicial notice, he says—"Apart from presumptions and matters of which the court can take judicial notice, all questions of fact must be decided on evidence and the evidence must be given in open court or in such a way that the parties can deal with it."

1See infra.
2Section 56.
3Section 58.
4Woodroffe, Law of Evidence (1941).
5Cross, Law of Evidence.
6Cross & Wilkins, Outline of the Law of Evidence (1975), page 36, Article 9.
8Phipson, Law of Evidence (1963), page 24, para 41.
21.5. The same author, in his Manual of the Law of Evidence, states—

"No evidence is required of matters which are—
(a) presumed; or
(b) formally admitted; or
(c) Judicially noticed."

21.6. Since the effect of most presumptions is to establish a fact without proof of that particular fact, it is legitimate to regard a presumed fact as a fact of which no evidence is required. When one considers the fundamental question — what facts must be proved — one cannot, either in theory or in practice, disregard the fact that if there is a presumption in respect of a particular fact, it need not be proved. The law does not require proof of that which is presumed, although, in most cases, the presumption can be displaced. From some fact which is proved, admitted or judicially noticed, another fact is presumed if the law so provides.

21.7. In general, for taking advantage of a presumption, some basis fact may have to be established. But, so far as the fact presumed is concerned, no proof is needed. This aspect — that proof is not needed — is fairly clear from section 4 of the Act also, which, inter alia, provides that where (under any section of the Act) the Court may presume a fact, the Court may regard it as proved.

21.8. Ordinarily, the Judge is bound to discard all previous knowledge of private facts but is it in the nature of things that many general subjects to which an advocate calls attention should be of so universal a notoriety as to need no proof.

"Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications, that they require no proof. The Court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed."

'Universal notoriety' is a term—which is vague, and scarcely susceptible of definition. "It must depend upon many circumstances; in one case perhaps upon the progress of human knowledge in the fields of science, in another upon the extent of information on the state of foreign countries, and in all such instances upon the accident of their being known or having been publicly communicated" "Still more must the limits very (in reality, though perhaps not so apparently), according to the extent of knowledge and previous habits of the Judge."

21.9. In general, facts of which judicial notice is taken are those which can be reasonably taken as so well-known that their proof ought not to be required.

21.10. Historically, the trial of fact in a common law trial² has been competent to find adjudicative facts in the absence of formal court-room evidence, where the facts are part of the ordinary thought and experience of reasonably educated persons in the community. This attribute of the relevant facts has

¹Phipson, Manual of Law of Evidence (1972), page 17
²Woodroffe.
³Woodroffe.
⁴Woodroffe.
been variously expressed: “the common knowledge of the great majority of mankind”\(^1\), “known to intelligent persons generally”\(^2\), what everyone is familiar with”\(^3\), “and notorious and clearly established”\(^4\).

21.11. Various rationales have been offered to explain the power of the Court to come to a finding about well-known facts without formal evidence. One is that the facts which a court will notice judicially are “so notorious or clearly established that evidence of their existence is unnecessary”. Srahorn\(^5\) and Wigmore\(^6\) both find its basis in the usefulness of simplifying and shortening trials by assuming as true (at least provisionally), what all reasonable people believe to be true. Thayer\(^7\) agrees that judicial notice is useful for this purpose, but he sees it as ultimately grounded in the psychological processes of human beings who cannot begin reasoning without some store of accepted knowledge.

21.12. Professor Morgan\(^8\), pursuing this argument, demonstrates the necessity to judicial fact — determination, of the assumption that the trier of fact, as a reasonable human being, has a fund of commonly-accepted knowledge pre-existing before the present trial. He denies that the court, as a social institution to settle factual issues reasonably entertained, can be used as a forum for sham issues where the disputed facts are part of this fund\(^9\), or are otherwise accepted as indisputable by reasonable men. He, therefore, delimits judicial notice of facts (in his first branch) to those matters which are so notoriously accepted as not to be the subject of dispute among reasonable men.

21.13. The second branch according to Professor Morgan is — “those matters capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible to men in the situation of the court”\(^10\).

21.14. Indisputable facts will be judicially noticed and no fact which is properly noticeable judicially can be the subject of adversary dispute at the trial. According to Professor Morgan’s reasoning, determinations of facts made without courtroom evidence, but falling within the limits of judicial notice, cannot be properly objected to. His logic places these facts outside the scope of rational dispute and therefore, beyond treatment by any trial procedure. The litigants, for their part, must be satisfied with a settlement based on what all reasonable men, including themselves, would accept as true. On the whole, this explanation of the rationale of judicial notice appears to be satisfactory.

II. SCOPE AND EFFECT OF JUDICIAL NOTICE

21.15. It may be stated that judicial notice is quite distinct from conclusive proof. When one fact is made to be conclusive proof of another, then it cannot be rebutted. But when a fact is judicially noticed, evidence contradicting it is not ruled out, at least according to the better view. Discussing this aspect in some detail, E. M. Morgan wrote\(^11\)—

“If taking judicial notice of a matter means that it is indisputable, it must follow that no evidence to the contrary is admissible. If evidence

\(^3\)Lumley v. Gye, (1853) 2 Al. & Bl. 216, 266, 118, E.R. 749, 768 (Q.B).
\(^6\)Thayer, Evidence (1906), pages 278-280, 300; cited by Stanley Schiff.
\(^7\)Morgan, “Judicial Notice”, (1944) 57 Harv. L. Rev. 269, 272-274.
\(^8\)Fund of commonly accepted knowledge.
to the contrary of what is judicially noticed is admissible, it must follow that the basis of judicial notice is not the prohibition against presenting moot issues and against maintaining a claim or defence on a false issue; its basis must be only convenience in trial, and the applicable considerations must be almost identical with those governing the allocation of the burden of proof.”

21.16. After expressing this view, Morgan examined the American authorities on the subject—

What say the authorities? Certainly the learned Dean Wigmore and his famous predecessor and preceptor, Thayer, leave no doubt as to their views. The latter (Thayer) says specifically that taking judicial notice ‘does not import that the matter is indisputable’, and the former (Wigmore) declares: ‘That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so; the opponent is not prevented from disputing the matter by evidence, if he believes it disputable.’

Morgan then added—

“Judicial expressions to the same effect can be found. For example, Mr. Justice Graves, speaking for the majority of the Supreme Court of Missouri, said:

“Judicially noticing facts, like many presumptions entertained by the courts, is but a rule of evidence, and if the question is a disputable one, or can be disputed, evidence so disputing is competent and should be admitted”.

“Some courts, however, have insisted that when a matter is in the domain of judicial notice, it is outside the domain of dispute by evidence. Witness the Supreme Court of Errors of Connecticut: ‘Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence’.”

Conclusion.

21.17. We have given attention to what Morgan has said, and we are of the opinion that the former view is correct, namely, judicial notice of a fact does not necessarily rule out the tendering of evidence on the same subject. Section 57 also could be so construed, there being no express or implied provision to the contrary in that section. On this point, therefore, an amendment is not considered necessary.

21.18. In England, the question whether judicial notice is “evidence”, has been debated. The Court of Appeal, speaking through the Lord Chief Justice, (Lord Goddard) expressed the opinion in Davey v. Harrow Corporation that judicial notice may be taken of a practice of the Ordnance Survey. In that case, the plaintiff, who sued for damages for nuisance and an injunction in respect of encroachments on his premises by the roots of trees standing on adjoining land, failed in the Queen’s Bench Division, it being held that the trees were not on the property of the defendants; but further evidence was allowed

---

1Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) 308.
2Wigmore, Evidence (3rd ed. 1940) section 2567 (Italics in original).
in the Court of Appeal, where the appellant was successful. The reserved judgment of the Appellate Court was primarily concerned with recognition of the tort of nuisance in relation to natural growth; but, on the question of ownership of the trees, the court considered various conveyances, which described the parcels by reference to the ordinance survey, as well as the evidence of an officer from the Survey office. The court expressed the view that, in future, judicial notice might be taken of the official practice by which, where a boundary hedge is delineated on an Ordnance Survey map by a line, the line indicates the centre of the existing hedge.

21.19. In the words of Lord Goddard, "courts in future can take notice of this practice of the Ordnance Survey as at least prima facie evidence of what a line on the map indicates". This dictum seems to assume—(a) that judicial notice can be equated with evidence, and (b) that a matter judicially noticed is rebuttable by evidence. As to (a), he is presumably referring to the probative effect of the facts noticed.

21.20. Stephens and other authors regarded judicial notice as a form of proof, and, even though he changed the heading of the chapter in his Digest, on judicial notice, still refers to "facts proved otherwise than by evidence". 'Judicial notice' has been included as a mode of proof by other authors and the usage is unobjectionable, so long as "proof" is understood in a wider "proof" may be used, the phrase "judicial notice" does not include evidence.

21.21. We shall now come to the sections proper which deal with judicial notice. Section 56 provides that no fact of which the court will take judicial notice, need be proved. This is an introductory provision, needing no change.

III. SECTION 57—IMPORTANCE

21.22. Section 57 lists certain facts of which judicial notice has to be taken: The list of matters made judicially noticeable by section 57 is not exhaustive. It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself or so distinctly recorded by public authority, that it could be superfluous to prove it.

21.23. Thus, in one Orissa case \(^1\), a suit was filed by the consignor for the recovery of the price of goods lost in transit while in the custody of the Railway Administration. The Orissa High Court held that it could take judicial notice of the riots and disturbances that took place in several parts of the Andhra territory consequent on the fast and death of Poti Shriramulu in connection with the formation of Andhra State. But the High Court further held that the Railway was not absolved from liability in the absence of proof that the wagon in which the consignment was kept was looted by the mob.

IV. SECTION 57(1)

21.24. We now proceed to section 57 (1). The law generally makes a distinction between "law and fact" in the sphere of evidence as in many other spheres.

---


\(^2\)E.g. Morgan, Some Problems of Proof under the Anglo-System, (1950) page 36.

Judges have always had the responsibility of making their own investigation of the law, relying, usually, on the presentation by counsel of cases and statutes as an aid to their task. In this sense, judges have always taken judicial notice of the law. This is the principle underlying section 57(1), which provides that the Court shall take judicial notice of all laws in force in the territory of India.

21.25. However, certain laws are contained in source material which is assumed not to be readily available to the judge or, if it is available, the judge may not have the skill to comprehend its contents, and therefore, for purposes of proof, these laws have been characterised as facts. This is, for example, true of foreign law, of which judicial notice is not taken. How far is this true of statutory instruments? That is the question that arises under section 57(1).

21.26. The words "Laws in force" in section 57 (1) would, presumably, include statutory orders, rules, regulations, bye-laws and notifications and schemes of a general nature in force in India. There are rulings of the Supreme Court\(^1\) and other Courts,\(^2\) giving a wide meaning to the expression "law" as occurring in article 372 of the Constitution or generally. The definition of "Indian law" in the General Clauses Act, 1897, could also be seen in this connection, by way of analogy.\(^3\) It includes instruments.

21.27. In a Madhya Bharat case,\(^4\) it was held—

"Judicial notice can be taken of a notification issued by the Government or any competent authority in the exercise of delegated power of legislation:

"(b) that judicial notice cannot be taken of a notification issued by any authority in the exercise of its executive functions;

(c) Under the last paragraph of section 57, Evidence Act, a Court has a discretion to refuse to take judicial notice of a notification made in the exercise of delegated power of legislation, unless the notification is produced."

21.28. It cannot be disputed that in the eye of law, a notification properly issued has the force of law.\(^5\)

21.29. The contrary view, expressed or assumed in some cases,\(^6\) is not likely to prevail after the Supreme Court decisions cited above.\(^7\) Though the definition of "Law" given in article 13(1)(a) of the Constitution does not apply to the Indian Evidence Act as such, the general principle that statutory instruments of a general nature properly made by a competent authority have the force of law, would appear to be sufficient for placing a wider construction on the expression 'law' as occurring in section 57(1).

---


\(^4\) Section 3(29) read with section 4A, General Clauses Act, 1897.


\(^7\) Collector of Cownpore v. Jugal Kishore. A.I.R. 1928 All. 355;


21.30. However, some practical questions do arise in this context. What should the proper practice be when judicial notice is to be taken of notifications, rules and other statutory instruments issued under various Acts? No doubt, speaking in the abstract, the expression "law" should (as mentioned above) be construed as so as to include statutory instruments, at least those statutory instruments which partake of the character of general mandates. But the practical application of the section is, in this regard, not easy.

21.31. Since statutory instruments now figure more often in courts than was the case when the Evidence Act was enacted, this question has an importance of its own. Recent cases show the increasing practical importance of these instruments, in relation to the law of evidence.

21.32. For example, in a Kerala case, the question arose relating to a notification which was required to bring a law into force. Should the court insist on the notification being produced and proved in the ordinary course, or should the court itself find out, by resort to the appropriate books or documents, whether the notification had been issued? This was one of the questions to be considered.

21.33. The High Court held that:

"It is clear from section 57 of the Evidence Act that, in all cases where the court is bound to take judicial notice, the court may resort for its aid to appropriate books or documents of reference. Therefore, if that were necessary, the court should have looked into the Gazette or other book or document of reference for the purpose of ascertaining, whether or not the law here in question had been brought into force. It is only where a document of reference for the purpose of deciding such a question is not readily available that the question of the court calling upon the party concerned to produce it would arise."

21.34. The High Court did not accept the contention that a notification bringing the relevant Act into force would have to be "proved" in the ordinary sense, by tendering the notification in evidence.

21.35. Incidentally, it may be noted that a legislative provision for bringing an Act into force by notification is regarded as "conditional legislation", and not as "delegated legislation" in the strict sense. The notification in question in the Kerala Case was of the type of conditional legislation. However, this distinction does not appear to be material with reference to the topic of judicial notice. A notification bringing an Act into force should be regarded as a "law" for this purpose. It is the final formality that puts life into the Act.

21.36. In a Delhi case, the question arose if the court should take judicial notice of the 'Rules of Business' framed under article 166(3) of the Constitution. In this case, the State Government of Maharashtra had given consent of the State Government to the functioning of the Special Police Establishment of the C.B.I. in its State. The petitioner raised the objection in the High Court that the 'Rules of Business' framed under article 166(3) of the Constitution, on the competence of the Chief Minister to accord the said consent, were not produced in the court by the prosecution. The High Court held that the 'Rules of

---

1 The Executive Officer, etc. v. Devassy, (1971) K.L.R. 33, 37 (F.B).
2 Emphasis supplied.
business' made under Article 166(3) of the Constitution would have to be taken judicial notice. They are not a "fact" which has to be proved by primary evidence.

21.37. In a Punjab case, the question arose regarding the Bye-laws of a Municipal Committee framed under section 188 of the Punjab Municipal Act, 1911. The trial court did not admit in evidence a copy of an extract from the register of Births maintained by the Municipal Committee in pursuance of Bye-laws for the reason that such bye-laws had not been proved.

21.38. The matter came up in revision before the Punjab & Haryana High Court. It was held—'the 'Bye-laws' were framed by the Municipal Committee in exercise of the powers conferred on it by clause (c) of section 188 of the Act. They have thus the same force as that section itself and, being provisions of a legislative character, must be held to constitute a 'Law' within the meaning of section 57 of the Indian Evidence Act, and no question of the petitioners being asked to 'prove' them arises. The Court must take Judicial notice thereof which means that the court is itself duty-bound to hunt them up and apply them to the facts of this case even though the parties or their counsel fail to produce them.'

21.39. In a Kerala case, it was held that if what is required to be proved in terms of the notification under a parent Act is the accession of a person to the office of a Food Inspector, then that was a matter of which the court was bound to take judicial notice under section 57, clause (7), of the Evidence Act, the fact of his appointment having been notified in the official gazette. That fact was asserted in the complaint, so that it was not as if the court was not made aware of it. If the court had any doubt on the point, it was its duty to resort to the appropriate document of reference, namely, the official gazette, or if it could not readily find this document, to call upon the complainant to produce the document. Not having done so, and the fact of the complainant's appointment as Food Inspector not having been challenged, it was not open to the court to say, after the close of the trial, that it would not take judicial notice of the complainant's appointment as Food Inspector; the least it should have done was to call upon the complainant to produce the gazette notification, and, it was only if he failed to do so that it could have refused to take judicial notice.

21.40. We have referred to these cases to show the nature of the questions raised. Similar questions are likely to arise in other High Courts. In order to avoid further controversy, it appears to be desirable to add an Explanation to section 57, incorporating, in substance, what was held by the Kerala High Court in the first case cited above. That appears to be the most convenient view.

21.41. The true position is this. Two extremes have to be avoided. Under the last paragraph of the section, the Court is given a discretion to refuse to take judicial notice of any fact unless the person calling upon the court to take judicial notice of such fact produces any such book or document as it may be necessary to enable it to do so. Thus, the Court is entitled to demand production of such books or documents. At the same time, they may be otherwise accessible for its reference; and in such cases, the Court should at least make reasonable efforts.

21.42. In view of the above considerations, a clarification is desirable. The following is a rough draft of Explanations, which could be added at the appropriate place in section 57 so as to clarify the position:

"Explanation 1.—Where, by virtue of this section, the court is bound to take judicial notice, and the question relates to the existence, extent, commencement, or terms of a statutory instrument, the court shall, for the purpose of deciding the question, resort for aid to appropriate books or documents of reference if such books or documents are readily available, before calling upon the party concerned to produce such books or documents."

"Explanation 2.—'Statutory instrument' means a rule, notification, by law, order, scheme, form or other instrument made under an enactment."

V. SECTION 57 (2) to 57 (6)

21.43. Section 57(2) requires the court to take judicial notice of all public Acts passed or hereafter to be passed by the Parliament of the United Kingdom and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed. We recommend that this provision should be confined to Acts of Parliament of the U. K. passed before the 15th August, 1947, for obvious reasons.

21.44. Section 57(3) requires the court to take judicial notice of the Articles of War for the “Indian” Army, Navy and Air Force. A point has been raised whether the word “Indian” should be omitted. It does not, however, appear to be necessary to make any such change. It may be noted that the word “Indian” was substituted for “Her Majesty’s” by the Adaptation of Laws order, 1950.

21.45. Section 57(4) reads:

“(4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province or in the State.”

This sub-section should also be confined to the pre-independence period in so far as it relates to authorities which have ceased to function.

21.46. Section 57(5) requires the court to take judicial notice of the Accession and Sign Manual of the sovereign for the time being of the United Kingdom. This sub-section should also be confined to the pre-independence period.

21.47. Section 57(6) is as follows:

“57(6). All seals of which English courts take judicial notice; the seals of all the Courts in India, and of all courts out of India, established by the authority of the Central Government or the Crown representative; the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India.”

1Cf. the Law Commission’s Report on the General Clauses Act, 60th Report, discussion relating to section 3(60A), and draft clause at page 102.

2Compare section 37 and discussion relating to it.

3See Englishman Ltd. v. Laipatrai. (1910) I.L.R. 37 Cal. 760, 775, 787
21.48. So much of section 57(6) as requires the court to take judicial notice of all seals of which the English Courts take judicial notice, and all seals which any person is authorized to use by an Act of Parliament of the United Kingdom, should be confined to the pre-independence period. Mention of seals of courts established by the Crown Representative should also be so confined.

21.49. As a result of the above discussion, in so far as it relates to section 57(2), (4), (5) and (6) the following re-drafts of these sub-sections are recommended:

Revised section 57 (2)

57 (2) All public Acts passed by parliament of the United Kingdom before the 15th day of August, 1947, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed, before that date.

Revised section 57 (4)

(4) The course of proceeding of Parliament of the United Kingdom before the 15th day of August, 1947, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province before the said date or a State.

Revised section 57 (5)

57(5) The accession and the sign manual of the sovereign for the time being of the United Kingdom of Great Britain and Ireland in relation to any act done before the 15th day of August, 1947.

Revised section 57 (6)

(6) The following seals that is to say—

(a) all seals of which English courts take judicial notice in relation to any act done before the 15th day of August, 1947;

(b) the seals of all the Courts in India;

(c) seals of all Courts out of India, established by the authority of the Central Government;

(d) seals of all courts established by the authority of the Crown representative in relation to any act done before the 15th day of August, 1947;

(e) seals of courts of Admiralty and Maritime Jurisdiction and of Notaries Public;

(f) all seals which any person is authorised to use by an Act of Parliament of the United Kingdom, in relation to any act done before the 15th day of August, 1947.

VI. SECTION 57 (7)

21.50. Under section 57(7), the Court is bound to take judicial notice of:

"(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any State—if the fact of their appointment to such office is notified in any Official Gazette."

We have not been able to understand why this did not specifically mention officers holding office in India.
21.51. We recommend that the sub-section should be revised as follows:—

"57(7). The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in India or any State, if the fact of their appointment to such office is notified in any official Gazette."

SECTION 57 (8) TO 57 (13)

21.52. We have so far considered important matters of which judicial notice is taken. Section 57, sub-sections (8) to (13), deal with various other matters of which judicial notice must be taken. Since these sub-sections do not raise any controversies, it is unnecessary to discuss them.

SECTION 57—SECOND PARAGRAPH

21.53. The second paragraph of section 57 empowers the court to refer to appropriate sources of reference for the purpose of taking judicial notice, and also on all matters of public history, literature, science or art. It need no comments.

SECTION 57—THIRD PARAGRAPH

21.54. The third paragraph of section 57 makes it clear that a court may refuse to take judicial notice in the absence of sufficient material. This paragraph is in accordance with the English case of Von Omeron v. Dowick, in which Lord Ellenborough declined to take judicial notice of the King's proclamation the counsel not being prepared with a copy of the Gazette in which it had been published. In Reg. v. Withers, it became a material question to consider how far the prisoner owed obedience to his sergeant, and this depended on the Articles of War, which were not produced at the trial. The Judges were of the opinion that the articles ought to have been produced. On that ground, the Court refused to take judicial notice.

21.55. These English cases raise interesting questions as to statutory instruments. We have had occasion to consider the position regarding statutory instruments when discussing section 57 (1). No further comments are needed on the subject.

1Von Omeron v. Dowick, (1809) 2 Camp. 44.
3See discussions as to section 57(1), supra.
CHAPTER 22

CERTIFICATE OF THE GOVERNMENT AS TO CERTAIN MATTERS CONCERNING INTERNATIONAL RELATIONS

SECTION 57A (New)

I. INTRODUCTORY

22.1. There are many judicial proceedings in which the result often depends upon the proof of an "International fact"1. When the need arises to prove such facts, a certificate of the Government can be obtained by the court on these matters which involve international relations. The statements made in such certificates are usually treated as conclusive. Such certificate is known, in England, as the "Foreign Office Certificate" or "Executive Certificate". In recent times, information is sought from the Commonwealth Relations office also2 in England. In India also, such a certificate can be obtained in appropriate cases3. In view of the importance of the subject in modern times, it appears to be desirable to consider the matter at some length. We shall deal with four aspects of the subject—

(a) The nature of international facts.

(b) Provisions in Indian Statute law on the subject.

(c) Effect of the Foreign Office Certificate.

(d) Form of the Certificate.

After discussing these aspects, we shall make our recommendation as to the amendment to be made in the act.

II. NATURE OF INTERNATIONAL FACTS

22.2. International facts — i.e. facts involving international relations or possessing an international aspect—are of various kinds. For example, it may be necessary to prove that a foreign government is recognised by the government of the forum or that a state of war exists between the countries concerned, or that a foreign country is independent, or under suzerainty or subject to protection, or that movable and immovable property is owned by, or in the possession of, a foreign government, or that a named defendant is a diplomat4.

22.3. The question of obtaining a foreign office certificate could arise on most of these facts, but it has frequently arisen in connection with diplomatic privilege. There are, at present, statutory provisions on the subject, but, for a long time, the matter was governed by judicial practice. There is early English authority for the view that it was for the defendant himself to establish, by evidence, his right to diplomatic privilege. But, with the beginning of the nineteenth century, the procedure became established that the court should apply to the Crown for a statement concerning the defendant's status, where diplomatic privilege was in issue.

2Sayece v. Ameer Ruler etc., (1952) 2 Q.B. 390.
3See section 6, Foreign Jurisdiction Act, infra.

370
22.4. Similarly, after some hesitancy in other cases, the same principle was applied in relation to the status of foreign states. In the words of Shadwell, V.C.:

"I have had communication with the Foreign office and I am authorised to state that the Federal Republic of Central America has not been recognized as an independent government by this country. I conceive it is the duty of the judge in every court to take notice of public matters which affect the government of the country." The House of Lords finally established in Duff Development Co. Ltd. v. Kelantan that it was "the settled practice of the court to take judicial notice of the status of any foreign government, and for that purpose, in any case of uncertainty, to seek information from a Secretary of State, and the information so received is conclusive".

22.4A. The rational of consultation with the executive in such matters is manifold. First, though the existence of a new state or a new Government is a question of fact, it is one involving important political considerations, and is, therefore, primarily to be determined by the political, and not by the judicial, organs of the State. Secondly, it is often stated that the courts must act in union with the "will of the national sovereignty", which is expressed in external affairs through the Executive alone. Thirdly, there is the question of avoiding conflict in the national interest. For example, if a Government is recognised only by the courts of a particular state, and not by its Executive, it could thereby recover in that State property which it was contrary to national policy to hand over. This would be anomalous. As Lord Atkin observed:

"Our State cannot speak with two voices... the judiciary saying one thing, the executive another."

Fourthly, considerations of evidentiary convenience are also relevant to the principle of consultation of the Executive. According to Lord Sumner, British courts act on the best evidence available, and the best evidence, in this regard, is a statement by the appropriate Secretary of state on behalf of the Crown.

22.5. This is not to imply that this position has been accepted on all hands without comment. The deference of British and American Courts to the attitude of the Executive in connection with sovereign immunity has not escaped criticism. The American Department of State "Suggestion" (or Certificate) can go so far as to "suggest" immunity from jurisdiction in the case of a foreign State or Government, and this may be binding on an American Court. This position has sometimes been regarded as unsatisfactory.

However, it appears that some kind of consultation with the executive in these matters is almost unavoidable, and there does not appear to be any other more practicable alternative.

---

1 Taylor v. Taylor, (1828) 2 Sim. 213, 220.
3 The Arantisza Mendi, (1939), A.C. 256, 264 (Lord Atkin).
5 See Nieholl v. Sultan of Honore, (1894) 1 A.B. 149.
III. PROVISION IN THE CODE OF CIVIL PROCEDURE AS TO RECOGNITION OF FOREIGN STATES

22.6. There are some statutory provisions in India which may be noted. In the Code of Civil Procedure,1 a specific provision is found in section 87A (2) on the subject of recognition of foreign States, in these terms—

"87A. (2) Every court shall take judicial notice of the fact—
(a) that a State has or has not been recognised by the Central Government;
(b) that a person has or has not been recognised by the Central Government to be the head of a State."

The normal practice is to consult the Government of India in such matters.

The question of recognition of a foreign state came up before the Bombay High Court2 a few years ago. The plaintiff company—the Dyn Industrial Undertaking Ltd.—was carrying on business in fertilizers. It entered into some contracts with the defendant—the German Democratic Republic—for the sale and supply of certain goods to the Republic. The plaintiff filed a civil suit on 5th June, 1969, for a sum of Rs. 20 lacs, being the balance of the price of the goods supplied to the defendant. One of the pleas taken by the defendant was, that the defendant was a sovereign independent State. As the suit was filed without the prior consent of the Government of India as contemplated by section 86 of the Code of Civil Procedure, 1908, the suit was liable to be dismissed.

In this connection, one of the questions which arose for the consideration of the Court, was whether the German Democratic Republic was recognised by the Government of India. The High Court decided the point in favour of the defendant, and enunciated the following principle of law:—

"It is not for the court to pronounce any opinion on the point whether the Government of India has recognised a foreign Government as a sovereign State. The court has to ascertain this fact on the information made available to it by the Government of India, and for that purpose, necessary evidence can be allowed to be adduced even at the stage of appeal."

IV. OTHER PROVISIONS IN INDIAN STATUTE LAW

22.7. It should be noted that section 97A (2) of the Code of Civil Procedure, 1908, to which we have referred above,2 is not the only procedural provision concerning foreign relations. There are other situations in which a court may take judicial notice of international facts, or in regard to which special statutory procedural provisions may apply. For example, section 6 of the Foreign Jurisdiction Act of 1947, enacts3—

"6. (1) If in any proceeding, civil or criminal, in a court established in India or by the authority of the Central Government outside India, any question arises as to the existence or extent of any foreign jurisdiction of the Central Government, the Secretary to the Government of India in the appropriate department shall, on the application of the court, send to the court the decision of the Central Government on the question, and that decision shall for the purpose of the proceeding, be final."

1Section 87A(2), Code of Civil Procedure, 19.
2The German Democratic Republic v. The Dynam Industrial undertaking Ltd., (1971) 73 Bom. 1 183.
3Para 22.6, supra.
4Section 6, Foreign Jurisdiction Act, 1947. (previously entitled "Extra Provincial Jurisdiction Act").
"(2) The court shall send to the said secretary, in a document under the seal of the court or signed by a judge of the court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be returned to the court by the Secretary and those answers shall on production thereof, be conclusive evidence of the matters therein contained."

22.8. Reference may now be made to judicial approach on the subject. In Hardeo das Jagnanath v. State of Assam, the court sought an executive certificate as to two matters:

(1) whether the Dominion of India exercised extra provincial jurisdiction over certain territories on 15th April, 1948, and

(2) whether the Dominion of India had extra-provincial jurisdiction on that date to extend the Assam Sales Tax Act, 1947 to that territory.

In view of the insufficiency of material, the court thought it proper to avail itself of the procedure indicated by the Foreign Jurisdiction Act.

22.9. Besides such provisions, there may be other questions on which a certificate can be sought from the Government. It is not our intention to enumerate all these questions exhaustively. But we may mention that the Supreme Court, in one case, consulted the Central Government where the question was whether Pondicherry was an acquired territory of India within the meaning of article 1(3) (c) of the Constitution.

As to immunity claimed by a person on the ground that he is a diplomatic representative, a Central Act makes the view of the Central Government, as communicated by the Secretary to Government in the Ministry of External Affairs, conclusive proof.

V. EFFECT OF THE CERTIFICATE

22.10. It will be convenient now to consider the effect of the "Foreign Office Certificate" (as it is usually termed). In England, its effect is to substitute the view of the British Government for an independent judicial determination, on the facts, of the claim to be entitled to the particular status.

For example, on the question of the status of a sovereign, the words of Lord Esher in the decision of the Court of Appeal in Mighell v. Sultan of Johore, have been accepted as authoritative: "Once there is the authoritative certificate of the Queen through her Minister of State as to the status of another sovereign, that in the courts of this country is decisive."

Presumably, the same principle will apply to other matters involving international relations on which a certificate can be appropriately obtained from the Government.

VI. FORM OF THE CERTIFICATE

22.11. We have so far described the document as a certificate. A "certificate" on the above mentioned matters is a formal document. But a formal statement by the appropriate Secretary of State, tendered to the court, is not the sole method of conveying the views of the Executive. The Law Officers

---

3Section 9, Diplomatic Relations etc. 1972 (43 of 1972).
4Mighell v. Sultan of Johore, (1894) 1 A.B. 149, 158.
may appear, either by invitation of the Court or on an intervener,\(^1\) to inform the court of the attitude of the Crown. Also, letters sent by the Foreign Office to the Solicitors acting for one party to the proceedings, and submitted to the court, will be regarded as sufficient evidence of the Crown’s views.\(^3\)

**VII. RECOMMENDATION**

22.12. The above discussion will show the importance of the subject under consideration. While it is not necessary to incorporate in the Evidence Act any comprehensive provisions as to matters involving foreign relations on which views of the Government can be obtained by the court, we consider it desirable that section 87A(2) of the Code of Civil Procedure, 1908, to which we have referred above,\(^3\) should be transferred to the Evidence Act, for the following reasons:

(a) It is a rule of evidence, and properly belongs to the Evidence Act.

(b) The Evidence Act already contains provisions as to judicial notice.

(c) Such a rule is needed for criminal cases also.

22.13. We, therefore, recommend the insertion of a new section, say, section 57A in the Evidence Act, on the same lines as section 87A (2) of the Code of Civil Procedure. That sub-section should, in consequence, be deleted from the Code.\(^3\)

The section to be inserted in the Evidence Act will be as follows:—

“57A. Every court shall take judicial notice of the fact—

(a) that a State has or has not been recognised by the Central Government;

(b) that a person has or has not been recognised by the Central Government to be the head of a State.”

---

\(^{1}\)See—

(a) *The Fargens*, (1927) Probate 311.


\(^{3}\)See, e.g., *Bunce de Bilbao v. Rey*, (1935) 2 K.B. 176, 181.

\(^{3}\)Section 87A(2) Code of Civil Procedure, 1908, to be deleted
CHAPTER 23

FACTS ADMITTED

SECTION 58

23.1. Section 58, in its main paragraph, provides that a fact need not be proved “in any proceeding” which the parties or the agents agree to admit or which, before the hearing, they agree to admit by any writing under their hands, or which, by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings. The principle on which this section is based is that a court sits to decide only disputed facts. Facts not in dispute need not, therefore, be proved.¹

23.2. The principle, however, is subject to certain qualifications. Even where a fact is admitted, the court has a discretion to require proof of that fact. This is the substance of the proviso to section 58. This is a qualification to the general principle that facts not in dispute need not be proved.

23.3. Another qualification to this general principle, though not given in so many words in the section, is recognised in relation to criminal prosecutions. Although the matter is not totally beyond doubt, section 58 does not seem to apply to criminal prosecutions. The language of the section is, in many respects, not quite appropriate so as to apply to criminal prosecutions. In particular, the reference to “agents” suggests a narrower view, in this regard. The proviso to the section also is reminiscent of Order 8, rule 5 of the Code of Civil Procedure, 1908. Order 12, rule 6 of that code also deals with admissions.

23.4. The view that criminal prosecutions are excluded from section 58 could be supported on two grounds—first, that its language is not appropriate for criminal prosecutions are already stated,² and, secondly, on the ground that the general principles of jurisprudence require that in a criminal prosecution, the prosecution must make out its case by evidence.³

For example, Mohideen Abdul Kadir v. Emperor⁴ is an authority in support of the view that such an admission by the accused made in answer to questions put by the court under section 342, Code of Criminal Procedure, 1898, could not be utilised by the prosecution to fill up a gap in its own evidence.

In an Oudh case,⁵ it was observed that section 58 makes no exception in respect of criminal trials, and the criminal courts do not, as a matter of practice.

¹Burjorji v. Muncherji, (1881) 5 Bom. I.L.R. 143, 152.
²Para 23.3.
³See—
   (b) Rangappa v. Emperor, A.I.R. 1936 Madras 426; I.L.R. 59 Madras 349;
   (c) Annavi v. Emperor, A.I.R. 1916 Mad. 851(2); I.L.R. 39 Madras 449, and the cases discussed there.
⁵Bhalan v. Emperor, A.I.R. 1926 Oudh 245.
insist on every fact which is admitted by the accused being proved by the prosecution, but, under the proviso, the practice is to insist on proof of all really essential facts. In this case, although the accused had admitted that there was a daecity and that he took part in it the court held that this admission could not be accepted as a substitute for proof that a daecity did, in fact, take place.

In a Madras case, it was held that no consent or admission by the Counsel of the accused to dispense with the medical witness, could relieve the prosecution proving by evidence the nature of injuries received by the deceased and the fact that the injuries were the cause of death. It was observed by the Court that "it is an elementary rule, that except by a plea of guilty, admissions dispensing with proof as distinguished from admissions which are evidential, are not permitted in a criminal trial". Because of lack of medical evidence in the case and other circumstances, the conviction of the accused was set aside by the High Court.

The same view has been taken in a Calcutta case. The accused was charged under section 161 of the Indian Penal Code (bribery). The cross-examination of the witness was incomplete, when he fell ill seriously. The statement of the witness recorded by the Court prior to the framing of the charge was admitted under section 33 of the Evidence Act, and the defence counsel did not object to it. The High Court held that this statement was not admissible, making the observation that the law makes no provisions for an admission by counsel in a criminal case. No admission by counsel can relieve the prosecution of the duty of satisfying the court by proper evidence, that a witness was seriously ill and could not be examined.

There is a Bombay decision which has applied section 58 to criminal cases. But in that case, the ruling is confined to an admission made at the appellate stage.

23.5. While discussing this point, we may also refer to an analogous principle, namely, that in criminal cases, consent does not dispense with compliance with procedural requisites, where the non-compliance constitutes an illegality. In Reg. v. Bertrand, the Judicial Committee of the Privy Council, in a very elaborate judgment, pointed out the inadvisability of basing a conviction upon evidence which, but for the consent of the accused's counsel, should not have been admitted. This decision was followed in Queen v. Bholanath Sen where it was pointed out that no conviction should be based against the accused upon anything that he said or consented in the course of the trial.

Queen v. Bishonath Pal; Jungi Khan v. Hur Chunder Rai; and Queen v. Rashoonath Dass are to the same effect. The decision in Rangaswami v. Emperor is in favour of the same view.

5Queen v. Bholanath Sen, (1876-77) I.L.R. 2 Cal. 23.
6Queen v. Bishonath Pal, (1869) 12 W.R. 3 (Cr).
7Jungi Khan v. Hur Chunder Rai, (1871) 16 W.R. 69 (Cr.)
8Queen v. Rashoonath Dass, (1875) 23 W.R. 59 (Cr.)
23.6. In view of the above position, it is desirable to make the language of the section specific on the question of its non-applicability to criminal prosecutions. We, therefore, recommend that criminal prosecutions should be excluded from section 58, by an express provision. The object could be achieved by adding, after the words "in any proceeding", the words "other than a criminal prosecution".

23.7. The question of the use of admissions in matrimonial causes has also come up occasionally before the courts. Although it used to be sometimes said that admissions cannot be made use of in matrimonial cases, that does not seem to be the position now. It would appear that the position in this regard is settled by a judgment of the Supreme Court. In that case, the petition was for the annulment of a marriage under section 12(1) (d) of the Hindu Marriage Act, 1955, on the ground of the pre-marital pregnancy of the wife. An admission of pre-marital intercourse had been made by the wife. The majority in the Supreme Court held that under section 58 of the Evidence Act and Order 3, rule 5 of the Code of Civil Procedure, 1908, where there was no reason for supposing that the parties are colluding, there was no reason why admissions of the parties should not be treated as evidence just as they are treated in other civil proceedings.

The majority of the Supreme Court also held:

"It is true that in divorce cases under the Divorce Act of 1869, the court usually does not decide merely on the basis of the admissions of the parties. This is a rule of prudence and not a requirement of law. That is because parties might make collusive statements, admitting allegations against each other in order to gain the common object that both desire for personal reasons. A decision on such admissions would be against public policy and is bound to affect not only the parties to the proceedings, but also their issues, if any, and the general interest of the society. Where, however, there is no room for supposing that parties are colluding, there is no reason why admissions of parties should not be treated as evidence just as they are treated in other civil cases. The provisions of the Evidence "Act and the Code of Civil Procedure provide for its accepting the admissions made by the parties and requiring no further proof in support of the facts admitted."

The majority added—

"Section 58 of the Evidence Act, Inter alia, provides that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit it the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading. Rule 5 of O. 8, C.P.C. provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability."

"Both these provisions, however, vest discretion in the court to require any fact so admitted to be proved otherwise than by such admission."

Further, the majority observed—

"That in proceedings under the (Hindu Marriage) Act, the court can arrive at the satisfaction contemplated by section 23 on the basis of legal evidence in accordance with the provisions of the Evidence Act and that it

is quite competent for the court to arrive at the necessary satisfaction even on
the basis of the admissions of the parties alone. *Admissions are to be
ignored on grounds of prudence only when the court, in the circumstances of
a case, is of the opinion that the admissions of the parties may be collusive.*
If there be no ground for such a view, it would be proper for the Court to
act on those admissions without forcing the parties to lead other evidence to
establish the facts admitted, unless of course, the admissions are contradicted
by the facts proved or a doubt is created by the proved facts as regards
the correctness of the facts admitted.”

23.8. On this point, on the whole, no change is required.

23.9. In the result, the only change needed in section 58 is as regards
criminal prosecutions, as already stated².

¹Emphasis supplied.
²See para 23.6, supra.
CHAPTER 24

ORAL EVIDENCE—GENERAL DISCUSSION

SECTION 59

24.1. So far, the sections of the Act, which we have discussed, dealt with facts which can be proved, facts which cannot be proved, and facts which need not be proved. The mode of proof of facts which can be proved is now dealt with in the Act, first, in relation to oral evidence, and next, in relation to documentary evidence, followed by provisions relating to cases where documentary evidence is supposed to exclude oral evidence.

24.2. As to oral evidence, section 59 provides that all facts, except the contents of documents, may be proved by oral evidence. Of course, "oral evidence" does not necessarily mean evidence orally given by word of mouth. Although the expression "oral evidence" is defined in the Act in terms of "statements", a person unable to speak because of permanent or temporary disability can give evidence in writing or by signs. Any method of communicating thoughts which the circumstances of the case or the physical condition of the witness demand, may, in the discretion of the Court, be employed. Thus, a deaf mute may testify by signs, by writing, or through an interpreter. So, where a dying woman, conscious, but without power of articulation, was asked whether the defendant was her assailant, and if so, to squeeze the hand of the questioner, the question and the fact of her affirmative pressure were held to be admissible in evidence. The statement in this case, no doubt, was not "evidence" given in Court; but the principle is the same. In fact, the Act has expressly provided for giving evidence in Court by signs etc., and evidence so given is deemed to be oral evidence.

24.3. The proposition enacted in section 59,—namely, all facts, except the contents of documents, may be proved by oral evidence,—is a proposition of law which is obvious. But it appears that in several cases anterior to the passing of the Act, it was debated, and the matter had to be judicially considered. It would be useful to refer to a few cases.

Thus, oral evidence, if worthy of credit, is sufficient without documentary evidence, to prove a fact or title; such as, boundaries; the existence of an agreement, e.g., a farming lease; the quantity of the defendant's land and the amount of its rent; the fact of possession; a prescriptive title; and pedigree; and

---

3Section 3.
5Section 119
6The old cases have been taken from Woodroffe.
8Ranee Surat v. Rajender, (1868) 9 W.R. 125.
11(a) Sheo v. Goodur, (1867) 8 W.R. 348; (b) Thukoor v. Syud, (1867) 8 W.R. 341; (c) Gobind v. Anund, (1866) 5 W.R. Cr. 79.
12Meharban v. Muhbooh, (1867) 7 W.R. 462 (Cal.).
adjustment of accounts'. Discharge of an obligation created by writing can also be proved by oral evidence.¹

This is so even though there be a written receipt which is not produced.

In short, (as the section now declares), all facts, except the contents of documents, can be proved by oral evidence.

24.4. Even the exception regarding "contents of documents" calls for a comment. The section is not very happily worded,² in so far as it implies a mandatory rule that the contents of documents can never be proved by oral evidence. In certain circumstances, the contents of documents may be proved by oral evidence, that is to say, when such evidence of their contents is admissible as secondary evidence, by a specific provision.³ However, this is a minor point, not calling for amendment.

24.5. In the result, section 59 may be left as it is.

¹See criticism by Woodroffe and by Ratanlal.
²See section 63, clause (5).
CHAPTER 25
ORAL EVIDENCE—HEARSAY

SECTION 60

I. INTRODUCTORY

25.1. Section 60 is one of the most important sections of the Act. It incorporates, in substance, the rule against hearsay. This, it does in wording which may, at first sight, appear somewhat indirect and cumbersome; but the purport is fairly clear.

25.2. In all cases whatever, oral evidence must be direct; that is what section 60, in its opening portion, provides. This part of the section, thus, lays down a general principle. The next part of the section elaborates and spells out this general proposition, by stating that if the oral evidence refers to a fact which could be seen, then it must be the evidence of a person who says he saw it. Similarly, if the oral evidence refers to a fact which could be heard, then it must be the evidence of a person who says or heard it. The same rule applies where the fact is one which could be perceived by any other sense or in any other manner. Lastly, in the case of oral evidence which refers to an opinion or to the grounds on which the opinion is held, it must be the evidence of a person who holds that opinion on those grounds.

25.3. These propositions, spelling out the general principle referred to above, are followed by two provisos. The first proviso is in the following terms:

"Provided that the opinions of the experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable."

25.4. This proviso is obviously a qualification of what was stated earlier in the section as to the evidence of opinion. Where the proviso applies, the evidence need not be that of the very person who holds the opinion. It could take the shape of a quotation from the work. That is the gist of the first proviso.

II. REAL EVIDENCE

25.5. Under the second proviso to Section 60, if oral evidence refers to the existence or condition of any material thing other than a document, "the Court may, if it thinks fit, require the production of such material thing for its inspection." This proviso, in a sense, permits the court to supplement the oral evidence relating to a material thing by its own inspection. It appears to have been inserted by way of abundant caution, lest it should be argued that by virtue of the main paragraph of the section, only the evidence given by word of mouth is admissible.

25.6. According to Cunningham

1Cunningham, Evidence, page 67.
“By way of securing that the Court shall, in every instance, have before it the best possible means of forming an opinion, it is provided that when the evidence refers to the existence or condition of any material object the Court may require it to be produced for inspection. Such inspection is frequently indispensable in order to the proper understanding of the oral evidence, and enables the court to draw important inferences as to the truthfulness of the witness”.

25.7. The second proviso essentially deals with what is called “real” or material evidence.

Wigmore called this species of evidence “Autopic Preference”—i.e. a fact being evidenced autopically when it is offered for direct perception by the senses of the tribunal, without depending on any conscious inference from some testimonial or circumstantial fact (it is autopsy by the Court, but autopic preference by the party).

Wigmore further remarked:

“With reference to this mode of producing persuasion no question of relevancy arises. Res ipsa loquitur. The thing proves or disproves itself. No logical process is employed; only an act of sensible apprehension........... Bringing a knife into Court is, in strictness, not giving evidence of the knife’s existence. It is a mode of enabling the Court to reach a conviction of the existence of knife, and is in that sense a means of producing persuasion, yet it is not giving evidence in the sense that it is asking the Court to perform a process of inference........... It is thus, evidence, in the sense that evidence includes all modes, other than argument, by which a party “may lay before the tribunal that which will produce persuasion”.

Further, according to Wigmore—

“It is unnecessary, for the present purposes, to ask whether this is not, after all, merely a third source of inference (additional to testimony and circumstantial evidence) that is, an inference from the impressions or perceptions of the tribunal to the objective existence of the thing perceived. The law does not need and does not attempt to consider theories of metaphysics........... for the purposes of judicial investigation, a thing perceived by the tribunal as existing, does exist.”

25.8. In connection with real evidence, reference may be made to an English case where the interesting question arose as to what procedure should be adopted by a court when a request is made for screening a film which is alleged to be obscene. Lawton L.J. had occasion to explain real evidence—

“What is a trial on indictment in English law? It is a proceeding before a judge and jury in which the prosecution tries to prove by evidence that a specified crime has been committed. The procedure allows for speeches by counsel and an accused, if he is unrepresented, and for a summing-up by the judge, but what matters is the evidence. This can take a number of forms: it can be oral; it can be written; and it can be what lawyers sometimes call real—that is, an inanimate object. In addition, a jury can be taken to see a place or something which cannot be brought into court—a common example is a motor car which has been brought to the vicinity of the court and is

---

2Wigmore, Evidence (1904), Vol. 2 section 1150, cited by Best, Evidence (1922), page 602.
"looked at by the jury outside the courtroom. When evidence is given orally, all in court hear what is said. When written evidence is produced, it may, or may not be read out. In most cases part of what is written is read out, but not the whole. When a piece of real evidence is produced, a witness has to say from where it came. This having been done, the jury looks at the exhibit. Usually the judge does too and counsel in the case may do so. The exhibit, however, is not shown to other persons who may be in court. They may be able to see what the article is: it may be a pistol or a knife. Sometimes they cannot; and if what is produced is a folder containing photographs (a common form of exhibit), they will not know what the photographs show unless either the judge, counsel or a witness describes them. The jurors have a duty to look at exhibits and to give them such significance as they think proper. Sometimes jurors have to use mechanical or electrical devices to appreciate what is of importance about an exhibit. Jurors with defective eyesight use their spectacles. Whatever is used is no more than a means by which the jurors look at and assess the real evidence which has been produced. The members of the public in court have no right to claim to be allowed to look at the exhibits. A film put in evidence has to be looked at by a jury, and a screen and a projector are necessary to enable them to do so. Members of the public in court have no more right to see a film than they have to see any other exhibit; and the circumstances may be such that it would be impracticable, even impossible, to show the film in the court-room itself."

25.9. Lawton L.J. further said: 1

"As judges have differed as to how judicial discretion should be exercised in this class of case it may be helpful if we give some guidance. We appreciate that some judges may be of the opinion that the showing of what are alleged to be indecent films in a crowded court is undesirable. The fact that persons with a taste for the nasty may come into court to see the display is of no importance. What does matter is the danger that the presence of such people may create an atmosphere of tension and result in gasps, giggling, and comments which may make the jury's task more difficult. The probability that prurient-minded persons may be present in court creating an undesirable atmosphere should not, however, be allowed to obscure the fact that the public generally are interested in cases of this kind and not for unworthy reasons. Concepts of sexual morality are changing. Whenever a jury in this class of case returns a verdict whether of guilty or not guilty, intelligent readers of newspapers and weekly journals may want to know what kind of film was under consideration. Experience during the past two decades has shown that every acquittal tends to lead to the greater exposure to public gaze of what previous generations thought seemly only in private, if seemly anywhere. Members of the public have to depend on the press for information on which to base their opinions; but if allegedly indecent films are always shown in closed courtrooms, the press cannot give the public the information which it may want and which is necessary for the formation of public opinion. If the public learns through the press what kind of films some jurors are adjudging not to be indecent, it may say "enough is enough"; but if it does not know, persons with a taste for pornography may suggest and convince some that obscenist prosecuting authorities are trying to impose a form of film censorship which might have satisfied standards of sexual behaviour which have long been abandoned; a slide into public licentiousness may result. It follows, so it seems to us, that

"normally when a film is being shown to a jury, and the judge, in the exercise of his discretion, decides that it should be done in a closed courtroom or in a cinema, he should allow representatives of the press to be present. No harm can be done by doing so: some good may result."

III. PROVISOES TO SECTION 60—CASE LAW

25.10. We may now deal with some cases relating to matters of detail.* A case which went up to the Supreme Court† illustrates the first proviso. In that case, the petitioner Mahendra was married to the respondent—Sushila—on 10-3-1947. In April, 1947, the husband went abroad. The respondent gave birth to a child on 27-8-1947, i.e. after 5 months and 17 days of the marriage.

25.11. The husband filed a petition under section 12(1)(d) of the Hindu Marriage Act, 1955, for declaring the marriage to be void, on the ground that the wife was pregnant by someone other than the petitioner at the time of the marriage. The defence of the wife, in the beginning, was that the pregnancy was postmarital. Later, her plea was that she became pregnant through the petitioner in December, 1946 or January, 1947, as a result of sex relations with the petitioner before marriage.

25.12. The trial court allowed the petition and declared the marriage as void, but, on appeal by the wife, the High Court of Bombay reversed the decision of the trial court, and dismissed the petition of the husband on the facts. The matter came up before the Supreme Court in appeal under article 133(1) (c) of the Constitution.

25.13. One of the questions which fell for consideration before the Supreme Court was the date when the pregnancy commenced, i.e., whether it commenced before the marriage or after marriage. There was also the question of quickening of the child, since that fact had been mentioned by the wife in her letters to the husband after marriage. Both the parties produced their medical witnesses on the question of the quickening of the child. This evidence turned out to be conflicting. Dr. Ajinkya was the expert witness summoned by the petitioner. Dr. Mehta was the expert witness produced by the wife.

25.14. For coming to its own conclusions on the above questions, the Supreme Court referred, inter alia to the opinions of medical experts, expressed in "Obstetrics and Gynaecology" by Dugald Baird, and "Manual of Obstetrics" by Eden and Holland, and also "Medical Jurisprudence" by Modi. After referring to these medical authorities, and preferring the view of Dr. Ajinkya who had more experience than Dr. Mehta, the Supreme Court held that the pregnancy was of a longer duration than one starting on or after 10-3-1947 (when the couple was married). It was, therefore, premarital. The husband's appeal was allowed. This case illustrates the procedure regarding the opinions of experts expressed in their treatises, under the first proviso to section 60.

IV. SECTION MANDATORY

25.15. The point discussed above relates to the proviso. We shall consider later a few other points concerning the provisos. But we may, at this stage, refer to a few other aspects of section 60.

*relating to proviso.
25.16. The provisions of section 60 are mandatory. Since the word 'must' is used in the section, it follows that oral evidence must, in all cases, be direct. A similar approach prevails in other common law jurisdictions. A Privy Council case, decided on appeal from Singapore, illustrates this. The evidence of what a person who was not alleged to have any authority to represent the defendant, had said in the absence of the defendant, was not objected to by the defendant's counsel, but, still, it was held that the failure of an advocate to object to the admission of evidence cannot so alter the character of testimony as to convert, into corroborative evidence, that which the law regards as merely fit for rejection as hearsay.

25.17. As regards Indian decisions, we may note that in the case of Sirish, it was held by the Privy Council that it is not up to a Judge to exercise a dispensing power and to admit hearsay evidence which is not admissible by the statute. In an earlier Privy Council case, the witness was testifying on the question whether the appellant was of age, and was mentioning certain signs of puberty. When, however, asked how the witness knew this, the witness replied "Through her father". The Privy Council held that the repetition by the witness of the statement made by the father was no evidence of the substantive fact of the girl’s puberty. This case also furnishes another illustration of hearsay evidence. In the course of the examination (on commission) of certain witnesses at Mecca, one of the witnesses of the plaintiff was asked, in re-examination by the person appearing for the plaintiff, the question: "Did you hear from anybody that A was of age?". He gave the following answer: "I heard from my wife who heard from the mother of A". The Privy Council, pointing out that this was hearsay, observed: "The evil consequences of admission of such evidence as this is not merely that it prolongs litigation and increases its costs, it may unconsciously be regarded by the judicial mind as corroborative of some piece of evidence legally admissible and thereby obtain for the latter an undue weight and significance."

25.18. It is, thus, clear from the scheme of the Act that hearsay evidence is inadmissible, in the absence of specific exceptions. The exceptions are to be found in the Act or in other laws. Other exceptions cannot be added by the judiciary.

V. EXCEPTIONS

25.19. We need not, at this stage, enumerate all the exceptions to this general rule against hearsay. The section itself has two provisos, and we may also state that sections 17-39 of the Act contain a few exceptions to the rule. Again, in section 55 of the Act, "character" is defined as including reputation. Opinion as to character is, thus, permissible, since "reputation" may sometimes be based on hearsay.

25.20. As an example of an exception to the rule against hearsay contained in other laws, we may note that under the Code of Civil Procedure, affidavits in interlocutory applications, may contain statements based on belief and not on personal knowledge. There are certain provisions in the Code of Criminal Procedure also, which, in substance, modify the rule.

---

VI. IMPORTANCE OF FACT BEING RELEVANT

25.21. While on the subject of exceptions to the rule against hearsay, we may point out that even where, by virtue of an exception to the rule, evidence of some fact can be given by reporting a statement made by a non-witness, it is necessary that the person who reports the statement should have himself heard the statement. This is explicit from the language of the section. In this sense, even where a fact can be proved by "hearsay" evidence,—in the sense that the provision in the section that the witness must have seen the fact is modified by virtue of a specific exception,—it is still necessary to comply with another part of the section, namely, if the evidence refers to a fact which could be heard, then the evidence must be the evidence of a person who says that he heard it. While a reported fact, if otherwise admissible, can be given in evidence, (say, by virtue of, the rule permitting evidence of admissions and confessions), the person giving evidence must still comply with the rule that he must have himself heard the statement. In other words, oral evidence must, in all cases, be direct,—which is what the general proposition given in the section seeks to lay down.

25.22. It should be pointed out, in this connection, that section 60 should be read with section 5, which, in effect lays down that evidence may be given only of facts in issue and of relevant facts. When section 60 provides that oral evidence must be direct, and that, if the evidence refers to a fact which could be seen, then the evidence must be the evidence of a witness who says he saw that fact, the section assumes that the evidence relates to a relevant fact. The words "refers to" are crucial in this connection. The fact to which the evidence refers, must be a relevant fact.

25.23. If the evidence refers to an irrelevant fact, it is excluded by section 5, and, for this reason, wherever section 60 mentions the word "fact", one must also read the word "relevant" as qualifying the "fact". If some such reading is not resorted to, section 60 may not fully achieve its object. If A, a witness in a trial for an offence of theft, has been told of the theft, by B, and A reports in court what B told him, A's evidence can be said to refer to a fact which could be heard, and further, A is a person who says he heard that fact. Section 60 would, then be literally satisfied,—but it is not the intention of the legislature that A's evidence should be admissible in such a case. It is only when one reads the word "relevant", that by the combined operation of sections 5 and 60, such evidence is excluded. In the hypothetical case put forth above, (i) the relevant fact is theft, and (ii) A does not say that he saw the theft. It is because of the co-existence of these two ingredients that the evidence is excluded. These two ingredients flow from section 5 and section 60, respectively.

25.24. This aspect of the matter was discussed in an article on hearsay evidence, published a few years ago in Australia. It is stated in that article—"The hearsay rule does not forbid the proof of what somebody said out of court. What it does forbid is the proof of a fact by telling what somebody said about that fact out of Court, a very different matter. Whether the evidence in a particular instance is admissible or not depends upon the question what fact it tends to prove. If for example, the question is who was driving a certain car when an accident took place, a witness cannot give evidence that somebody told him A was driving it. But if the question is who told A to drive the car, the evidence of a witness who heard the instructions given, whether in the presence of the opposing party or not, stands on a quite different footing."

*This discussion is intended to meet the criticism of section 60 made by Markby, quoted by Woodroffe.

"That fact is one about which he can speak from his own knowledge. If the evidence is not relevant to the issue, that may make it inadmissible: but assuming it to be relevant, it cannot be rejected on the ground that it is hearsay. If somebody told the witness to go for a doctor, or to pay a bill, or to shut the door, he may lawfully say so, provided it is part of the relevant history of the case."

VII. DOCUMENTS

25.25. This is one aspect of section 60. We may now refer to another aspect of the section. This relates to documentary evidence. It may be noted that there is no provision in section 60 in relation to documentary evidence. The reason for this seems to be that documents come on the record only when they are "produced". In section 3, when defining "evidence", the expression 'documentary evidence' is defined as "documents produced for the inspection of the court". "Production" is also an ingredient of primary evidence, as defined in section 62. Now, in most cases, the person producing the document would also be required to give oral evidence, and the provisions of section 60 would then be attracted. Of course, a witness may be summoned simply to produce a document; but, even in that case, another witness will have to be called to prove the document;—so that if he purports to testify to the facts mentioned in the document, on the strength of the statements made in the document, he will be giving oral evidence which would not be "direct", and he would thus be contravening section 60. This, perhaps, accounts for the absence of a provision in section 60 as to documentary evidence.

25.26. There is no doubt that a recital in a document is hearsay. "Correctness of recitals in a document must be proved by calling the person who signed or wrote the document, and not by proving the signature or handwriting of the person who signed or wrote it."3

25.27. A document is not admissible in evidence in the absence of oral proof of its authorship and nature. As regards authorship, the fact that a person's name appears on such a document, is no proof that he signed it. That must be proved by specific evidence.

25.28. This is done in most cases by producing the writer himself, but where the writer are the accused persons and could not give evidence, some persons it has been held, should be produced who actually saw the signatures being written, or a person who is acquainted with their handwriting, to prove those signatures. Or the signatures could have been proved by comparing the handwriting or the signatures in question with any writing proved to the satisfaction of the Judge to be genuine.

25.29. Again, as regards facts stated in a document, their truth must be proved by independent evidence, except in the case of admissions or other facts relevant by virtue of a specific provision.

25.30. Thus, in a Calcutta case, it was observed that "recitals to the effect that the predecessors-in-interest of the executants of the kahalas were holding the lands in proof of the right claimed by the defendants,—namely nishkar right,—were not admissible, and that to allow such a recital to be

---

3This was the position before 1955.
used as evidence against the plaintiff, who was no party to the two documents, would really be letting in hearsay evidence in matters in which hearsay is not admissible under the Evidence Act."

On the same principle, a newspaper is no proof of the facts reported.¹

VIII. EXPERTS

25.31. We have, so far, dealt with the basic principle underlying section 60. We shall discuss later the question whether any changes are required in the basic principle. At this stage, however, we would like to dispose of certain matters which, we think, are not of very considerable importance from the point of view of difference with the basic principle.

25.32. It will be convenient first to consider a point concerning the opinions of experts. Section 60 requires that opinions—whether of experts of others—must be proved by calling the person holding the opinion. The effect of this provision, taken literally, is that the experts must be summoned in every case.

25.33. In an Andhra case,² the question was about the admissibility of certain documents, which were opinions of an expert who was the senior Marketing Development officer. These documents had been admitted by the lower court. This was a case where a confiscation order had been passed by the Excise Authority under the Central Excise and Salt Act, 1944, on a charge that the plaintiff had transported different category of tobacco than the one he was permitted to. The Subordinate Judge, relying on the opinion of the Senior Marketing Development Officer on two exhibits, without calling the expert, held that the charge had been proved. On appeal, the Andhra Pradesh High Court observed:

"While the plaintiff did not raise any objection to these documents, he could only be said to have waived the proof of it and not the relevance. Under the Evidence Act, hearsay evidence is inadmissible and these documents can have no higher value than hearsay evidence. Statements made by persons not examined in Court are only admissible in evidence if they fall within section 32 of the Evidence Act or could be used for the purposes of contradiction or corroboration when the person making them is examined, under section 145 or 157 of the Evidence Act. Sections 56 to 58 of the Evidence Act provide that facts admitted need not be proved. Chapter IV lays down requirement of oral evidence. Section 60 provides that oral evidence must in all cases whatever be direct and if the oral evidence refers to an opinion or to the grounds on which the opinion is held, it must be the evidence of a person who holds that opinion on those grounds. Expert’s evidence cannot be an exception to this rule unless the statute so provides, as in the case of chemical examiner’s report etc. under the Criminal Procedure Code".

The documents in question were, therefore, held to be inadmissible.³

⁶(a) Lim Yum Hong & Co. v. Lam Choon & Co. A.I.R. 1928 Mad. 609.
25.34. In a Madras case, the question related to the admissibility of a questionnaire answered by a doctor in respect of the last illness of the life assured. The questionnaire, and the answers thereto given by the doctor, were admitted in evidence without the doctor being examined. It was held that those were not admissible in evidence. The facts spoken to in them (which were relevant to the issues in the suit), could be proved only by giving oral evidence of them in the Court. The contention in that case, that the documents were properly admitted in evidence because the plaintiffs permitted them to be marked by consent, was held not to make any difference to the non-admissibility of those documents.

25.39. But this does not appear to be the law in India. Having regard in writing to a party cannot prove itself, and that unless the expert stepped into the witness box, so as to enable the opponent to cross-examine him in reference to that opinion, the opinion expressed by him in a communication to one of the parties cannot be treated as evidence under the Evidence Act.

25.36. Thus, the present position is well settled, and it is not our intention to suggest any radical alteration. But it appears to us that a modification of the present position to a limited extent is desirable, having regard to certain practical considerations. We have in mind the case where, under the present law, it is mandatory to call the expert even to prove the fact that he recorded the particular opinion and the opinion purports to be given by a government or other official expert. This mandatory requirement, flowing from section 60, causes, in many cases, a waste of time, and we are of the view that in suitable cases the court should have a discretion to dispense with this requirement. Need for change.

25.37. Accordingly, we recommend that the court should, for reasons to be recorded, have a discretion to dispense with the summoning of the expert for proving the opinion. This discretion would be appropriately exercised, for example, where the expert happens to be an employee of the Government or a university or a recognised institution. The provision recommended by us will not cause any serious injustice, because the right of a party to summon the expert for cross-examination will remain unaffected by any such amendment; if necessary, it could be expressly provided that the parties shall have a right to call the witness for cross-examination. Where the opinion of the expert is one tendered by a party himself, then, of course, he will not have any such right subject, of course, to section 154. Recommendation as to the summoning of experts.

The following is a rough draft:

"Provided further that the opinion of an expert expressed in writing, and the grounds on which such opinion is held, may be proved by the production of such writing, if the following conditions are fulfilled, namely,—

(i) the expert is an employee of the Government or of a local authority or of a university or other institution engaged in research and has been consulted by the Court either of its own or on application,

(ii) the expert recorded the opinion in the course of his employment, and

(iii) the court, having regard to the circumstances of the case, considers it desirable in the interests of justice that the opinion of the expert and the grounds of his opinion should be proved by production of such writing, subject to the right of either party to summon the expert for cross-examination.

---

EVIDENCE AS TO AGE

25.38. We shall now deal with one question on which there is, at present, no provision in the Act by way of exception to the rule against hearsay. It relates to evidence given by a person of his own age. How far a person can give evidence as to his own age, has always been debatable. Wharton states the law in America thus¹:

"Section 264.—Age.—A witness is competent to testify as to his age and date of birth .................."

25.39. But this does not appear to be the law in India. Having regard to the words of section 60, a person cannot be allowed to give evidence of his own age, because a person cannot, with seriousness, assert that he "saw" the event of his birth.

25.40. There is no direct Indian case on the point, but a somewhat analogous question arose in Debi Prasad's case.² The plaintiff Debi Prasad claimed title to the properties left by one Gopal Das, his maternal uncle, who died in 1924. His contention was that Gopal Das had died intestate, and he (the plaintiff) was the nearest heir of the deceased, and was entitled to the properties left by the deceased. The plaintiff's claim was resisted by Shyam Behari Lal, who claimed to be the adopted son of the deceased. According to him, he had been adopted by Gopal Das on the day of his birth in 1892. This was denied by the plaintiff.

25.41. The trial court accepted the claim of the plaintiff, but, in appeal, the High Court reversed the decree of the trial court and dismissed the suit. The matter came up before the Supreme Court by special leave. The principal question before the Supreme Court was whether the adoption pleaded by Shyam Behari Lal was true and valid.

25.42. The Supreme Court observed that Shyam Behari Lal himself could not speak to that adoption. "His evidence is at best 'hearsay'." The adoption was, however, upheld on the basis of considerable documentary evidence produced by Shyam Behari Lal.

25.43. In this connection, it may be noted that the recital of the date of birth in an application for the appointment of a guardian is not, by itself, admissible in evidence upon the mere production of the document.³ Even the certificate of guardianship issued by the court, which mentions the age of the ward, is not admissible⁴ to prove age. It is not a public register etc. admissible under section 35.

25.44. Of course, where a specific clause of section 32 applies, the position is different. If the conditions recited in section 32(5) are satisfied, that is, a person who had made this statement had special means of knowledge of the relationship and he is now dead or cannot be found, a statement in the petition for

---

¹Wharton, Criminal Evidence, Section 264, quoted by Field, in his commentary on the Evidence Act under section 32, Vol. 3, page 1825.
(c) Kishorilal. A.I.R. 1942 Cal. 438.
guardianship about age will be admissible, because it relates to the “existence of a relationship”, within the meaning of section 32(5) as interpreted by same High Courts.

25.45. The position in England is substantially the same. The general rule appears to be that evidence by a person of his own age is hearsay. Of course, there may be exceptions to this general rule, recognised on specific grounds. In R. v. Walker, for example, the question was whether A was an infant at the time of making a certain contract. It was held that an admission by A that he was so, is receivable against him, although necessarily founded on hearsay. This was because it was an admission. It is this exception which proves the rule.

A suggestion was made to insert a new section—say, as section 60A,—as follows:

“60A. Notwithstanding anything contained in section 60, a witness may give evidence about his age and date and time of birth.”

We have, however, after some discussion, come to the conclusion that such an amendment may sometimes be abused.

1(a) Dhanmull v. Ramchander, (1897) I.L.R. 24 Cal. 265.
2See discussion as to section 32(5).
3(a) R. v. Walker, (1884) 1 Cox. 99; Phipson, (1963), para 692.
(b) R. v. Simmonds, (1850) 4 Cox. 277; Phipson (1963), para 692.
Chapter 26

HEARSAY—WHETHER BASIC CHANGES NEEDED

1. INTRODUCTORY

26.1. In this chapter, we propose to consider the fundamental question whether any basic changes are needed in the rule against hearsay. In general, the rule prohibits the use, at the trial, of a statement made out of court where the use is of a substantive character—i.e. to prove the truth of its contents. There are various definitions of the rule: but it is not necessary to discuss them for the present purpose, since the difference between the various formulations is one of detail. The statement as to the rule, made above, represents, in a broad sense, an area as to which there is no serious controversy.

Hearsay—Caricature by Dickens.

26.2. In the Pickwick Papers, Dickens¹ has caricatured a trial involving the rule excluding hearsay. But the caricature is rather of the Judge than of the rule. This is the dialogue—

"I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up if you please, Mr. Weller."

"I mean to speak up, Sir" replied Sam. "I am in the service of that 'ere gen' I man, a very good service it is."

"Little to do, and plenty to get. I suppose?" said enough to get, sir, as the soldier said when they order him three hundred and fifty lollies." replied Sam.

"You must not tell us what the soldier, or any other man, said, sir, interposed the judge, its not evidence."

"Very good, my Lord," replied Sam.

This has been described, as a "golden sentence" about the law of evidence³ though Charles Dickens did not love lawyers overmuch and had little practical experience of the law⁴.

Examples from some other countries.

26.3. It may be noted that the rule against hearsay is not confined to the Anglo-American system of law. In some form or another, substantially the same effect is achieved by the provisions in force in many other countries. In Czechoslovakia, for example, examination of the witness in court is insisted upon by reason of the principle of "Directness and orality", which means that the court shall decide according to evidence put forward before it, and draw inferences from sources nearest to the facts to be ascertained.⁵ There is also the principle of objective truth, which means that all legally important circumstances should be ascertained in harmony with the objective reality; and this principle, as expressed in the Constitution of Czechoslovakia, states that the real state of the affairs must be ascertained.⁶

¹The account of Bardell v. Pickwick.
²Note in (November 1932) 74 Law Journal 309.
³Note in (November 1932) 74 Law Journal 309.
⁴Chang, Criminology (1976), Volume 1, page 248.
⁵Chang, Criminology (1976), Volume 1, page 248.
⁶
26.4. It would appear that in Japan, a written statement, either of a witness or of the accused, to the police or the public prosecutor is admissible in evidence only if the defendant and the defense counsel give consent for its submission to the court. The implications of this seems to be that hearsay evidence is not admissible in the absence of such specific exceptions.

26.5. The most important reason for prohibiting hearsay is the apprehension that the absence of an opportunity for the adversary to challenge the perception, memory and veracity of the original declarant will affect the quality of the evidence.

26.6. We shall examine in detail later the rationale of the rule. But the reason stated above may be said to summarize its important features. With this addition that while, in general, contemporaneous cross-examination is considered necessary provide an effective opportunity to test the truthfulness of the statement, on the other hand, the fact that the declarant is before the court, is also not to be brushed aside.

26.7. There is also another aspect of the rule against hearsay, namely, that upholding convictions based on unsworn hearsay testimony is a practice which runs counter to the notions of fairness, on which our legal system is founded. In the United States, even before the Constitution, the doctrine developed at common law that a hearsay statement could only be used as corroboratory and confirmatory of other evidence, and "a hearsay statement by itself, can condemn no man".

26.8. After all is said and done, the essential principle against hearsay seems to be that the judiciary should be furnished with trustworthy data. And if matter which cannot be impartially considered and fairly valued is allowed to go on the record, then this function of the judiciary is impaired. Of course, where the data otherwise relevant are available only through statements which could not be subjected to the normal tests of truthfulness, it becomes important for the law to determine how far they should be accepted, and, in coming to a decision as to how far they should be accepted, the law has to strike a balance between the need for bringing the truth to the fore on the one hand, and the need not to expose the judicial agency to any danger of being misled as to facts, on the other hand.

26.9. There is something innately unfair, and reminiscent of trial by affidavit. Unfairness in a process that allows the prosecutor to build a case with hearsay while the defendant is forced to scramble about and exhaust his own, often scarce, resources to attempt to produce the declarants.

26.10. The sanctity of oath as a powerful stimulus to the speaking of truth may be a matter of debate, inasmuch as a deliberate promise by a witness to tell the truth may not necessarily be performed by the witness. But it cannot, in general, be denied that effective and competent cross-examination can expose wilful falsehood as also the faults of memory and perception.

1 Chang, Criminology (1976), Volume 2, page 619.
3(a) Bridges v. Nixon. (1945) 326 U.S. 135, 154;
II. VARIOUS DEFINITIONS OF HEARSAY

26.11 So much as regards theoretical aspects of the rule. We shall now consider the rule in detail. We have stated above that hearsay is variously defined. According to Morgan: 1

"an utterance offered for a purpose which required the Trier (of fact) to treat the utterer as a witness is hearsay unless the utterer was, when making it, subject to all the conditions prescribed for witnesses."

26.12. A shorter definition is that: "The rule excluding hearsay forbids the use of extra judicial statements 2 for the purpose of proving the truth of their content." 3

26.13. Another adequate working definition of hearsay would be: "Extra judicial assertions offered for the purpose of proving the truth of their contents." "Extra judicial" is to be understood as including any legal proceeding except the one in which the assertion is offered.

26.14. Phipson 4 has stated the rule thus: "Oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the matters stated." This formulation overlooks two matters at the periphery of hearsay, about which more will be said shortly. First, it excludes conduct from the ambit of the rule, and, secondly, it allows a witness to re-iterate his own previous statements, a concern of the rule against narrative.

26.15. It would be more accurate to say that hearsay is an utterance offered for a purpose which requires the court to treat the utterer as a witness when the utterer was not subject to the conditions prescribed for witnesses.

The statement challenged as hearsay must be tendered for proving the truth of the contents.

26.16. When A testifies that he saw C strike B, A's credibility is relied on in proof of the truth of such fact: if, however, A testifies that D told him that C struck B, A's credibility gives support only to the fact that D made that statement 5. If A is giving evidence as to what D said, then A is in the same position as if he were reporting any other fact within his knowledge. But, as to the truth of the contents of D's statement, A's oath and his liability to cross-examination are not in any way a guarantee of D's credibility and so, the latter, not being under oath nor subjected to cross-examination, his statements are rejected as being untrustworthy. 6 This is the reason why the term "hearsay" is properly applicable only, where a third party's out-of-court statements are offered to prove the truth of their contents. Its use in a wider sense, so as to include any statement made out of court by a person who is not called as a witness, is, accordingly, improper. It shows a lack of understanding of the basic reason for the exclusion of hearsay."

---

1 Morgan, "Hearsay Dangers" (1948) 62 Harvard Law Review.
2 This could be changed to "assertions".
6 Baker, Hearsay Rule (1930), page 2.
26.17. The case of Subramaniam\(^1\) illustrates this. This was an appeal, by special leave, by Subramaniam, a rubber tapper, from an order of the Supreme Court of the Federation of Malaya (Court of Appeal at Kuala Lumpur), dated 12th September, 1955, dismissing his appeal against a judgment and order of the High Court of Johore Bahru, whereby he was found guilty on a charge of being in possession of twenty rounds of ammunition without lawful authority, contrary to regulation 4(1) (b) of the Emergency Regulations, 1951, and sentenced to death. It was common ground that on 29th April, 1955, at a place in the Rangam District in the State of Johore, the appellant was found in a wounded condition by certain members of the security forces; that when he was searched, there was found around his waist a leather belt with three pouches containing twenty live rounds of ammunition.

26.18. The defence put forward was that he had been captured by terrorists, that all material times he was acting under duress, and that at the time of his capture by the security forces he had formed the intention to surrender, with which intention he had come to the place where he was found. He gave evidence describing his capture and sought to give evidence of what the terrorists said to him, but the trial judge ruled that evidence of the conversation with the terrorists was not admissible unless they (the terrorists) were called. The judge said that he could find no evidence of duress, and in the result the appellant was convicted.

26.19. Mr. L.M.D. De Silva, giving the judgement of the Privy Council, said that the trial judge was in error in ruling out peremptorily the evidence of conversation between the terrorists and the appellant. Evidence of a statement made to a witness by a person who was not himself called as a witness might or might not be hearsay. It was hearsay and inadmissible when the object of the evidence was to establish the truth of what was contained in the statement. It was not hearsay and was admissible when it was proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

26.20. Statements could have been made to the appellant by the terrorists which, whether true or not, might (if they had been believed by the appellant) reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes within section 94 of the Penal Code of the Federated Malay States. Thus, a complete, or substantially complete, version according to the appellant, of what was said to him by the terrorists and by him to them had been shut out, and their lordships had to consider whether, in the circumstances of this case, that exclusion of admissible evidence afforded sufficient reason for allowing the appeal. We would also like to point out what was in issue was the factum of the oral threat. The appeal was allowed.

III. RATIONALE OF THE RULE—SCHEMATIC PRESENTATION

26.21. We may now consider in detail the rationale of the present rule. The main objection against hearsay is that is mediate proof and presents four peculiar risks—

(i) want of sincerity in the original declarant;

(ii) inaccurate use of language by the original declarant;

(iii) want of memory in the original declarant; and

(iv) want of perception in the original declarant.

\(^{1}\)Subramaniam v. Public Prosecutor. (1956) 100 Solicitors' Journal 566; 1 I.L.R. 965 (P.C.).

\(^{2}\)See infra.
Structural analysis of hearsay rule.

26.22. It has been said¹ that there exists a rather simple way of schematizing all of this, in terms of an elementary geometric construct that serves to show its several related elements. The construct might be called the “Testimonial Triangle”.

26.23. We may, for our purposes, put the triangle thus. (The original declarant is X. His utterance is A).

B (belief of person responsible for A)

(1) ambiguity
(2) insincerity

C

(3) erroneous memory
(4) faulty perception

A (Utterance of original declarant) (Conclusion to which B points in the mind of X)

(Declarant X)

26.24. If we use the diagram to trace the inferential path which the trier must follow, we begin at the lower left vertex of the triangle, which represents the declarant’s (X’s) act or assertion. The path first takes us to upper vertex (B), representing X’s belief in what his or her act or assertion suggests, and then takes us to the lower right vertex (C), representing the conclusion. When “A” is used to prove “C”, along the path through “B”, a traditional hearsay problem exists, if X is not before the Court and the use of the act or assertion at A as evidence is disallowed upon proper objection—in the absence of some special reason to permit it.

26.25. It is, of course, a simple matter to locate to four testimonial infirmities on the triangle to show where and how they might impede the process of inference. To go from “A” to “B”, the declarant’s belief, one must remove the obstacles of (1) ambiguity and (2) insincerity. To go from “B” to “C” one must further remove the obstacles of (3) erroneous memory, and (4) faulty perception.

IV. WEAKNESS

26.26. When a statement made by a person out of court is admitted, the nominal witness is the person reporting the statement; but the real witness is the person whose statement is so reported.

26.27. This point has been lucidly illustrated by Morgan.² Let us assume that the utterance of a witness, as understood by the Trier of fact is, “Declarant told me that he had perceived F,” F being the fact said to have been perceived. Here the personal experience of which witness speaks is not the perception of the fact F, but the auditory perception of words uttered by the Declarant. To determine, from the utterance of witness, that Declarant spoke those words, the Trier has to go through certain mental processes, and when he has reached the conclusion that Declarant did speak those words, he has done nothing more than find that Declarant in the presence of witness made a statement of a specified content. Declarant is not now speaking under oath, subject to a penalty for perjury, at a public hearing in the presence of Trier, and subject to cross-examination by Adversary. Furthermore, none of these conditions existed at the time when Declarant made the utterance. Yet, the Proponent is asking Trier to rely upon Declarant’s use of language, his sincerity, his memory, and his


perception; and if Trier is to find that F occurred or existed, he must treat Declarant in all respects as a Witness. In short, for this purpose, Witness is merely the means of getting to Trier the statement of Declarant, and Declarant is the real witness upon the issue of the occurrence of existence of fact F.

26.28. Apart from any other consideration, there is always the weakness of testimony as to oral utterances. One's assertion of what another said is subject to a special weakness,—the risk of a defective perception of words uttered orally.

26.29. The specific features of weakness in such a case are:—

(i) the perception of the words may be imperfect, either by perceiving words differently from the reality, or by perceiving a part of them only;

(ii) the memory of them may be imperfect;

(iii) the narration of them may be different;

(iv) no data are available for determining which of these is the source of error and for checking possible error.

26.30. The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Sincerity is, in fact, an aspect of the three already mentioned. Now, in order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo-American tradition has evolved three conditions under which witness will ideally be required to testify—

(1) under oath,

(2) in the personal presence of the trier of fact, and

(3) subject to cross-examination.

26.31. These three are no idle formalities. Their object is to bring the truth before the Court. They are not satisfied in the case of hearsay evidence.

26.32. Traditionally, the demeanour of the witness has been believed to furnish the trier and the opponent with valuable clues. The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. Willingness to falsify may reasonably become more difficult in the presence of the person against whom it is directed.

26.33. In short, hearsay is excluded because it is considered not sufficiently trustworthy. Where there are special circumstances which give a guaranty of trustworthiness to the testimony, hearsay is admitted, even though it comes from a second hand source.

Footnotes:

1(a) Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948), 62 Harv. L. Rev. 177, Selected Writings on Evidence and Trial 764, 765 (Fryer ed., 1957);

(b) Shintage, "Cross-examination — A Judge's Viewpoint" (1948), 3 Record 12;


2Federal Rules of Evidence, Note of the Advisory Committee, 34 L. Ed, 2d. cli (151).

3Universal Camera Corp. v. N.L.R.B., (1951) 340 U.S. 474, 495-496; 71 Cl. 455; 95 L. Ed. 436.


5Federal Rules of Evidence; Note of the Advisory Committee, 34 L. Ed, 2d. page cl. (150).
26.34. We have referred above to the aspect of mediate proof. Certain authors deal with the objection to hearsay as an objection relating to the media of proof. Thayer (and Greenleaf) wrote of hearsay under the heading of "Media of Proof",—an arrangement that has been followed by Wills. In Greenleaf's Treaties, the excluding rules are dealt with in Part II, "The Rules which govern the Production of Testimony". The argument is that hearsay is rejected because testimony at second hand is not the proper way of proving the particular facts. A cannot be called to prove that B told him as to a certain fact, because A is not the right medium of proof; B is.

26.35. Several reasons have been put forth to justify the rule against hearsay evidence. These are—

(a) Dangers arise from the repetition of statements.
(b) Reception of hearsay would result in the undue protraction of trials.
(c) There are possibilities of fraud.
(d) The rejection of hearsay encourages stronger for weaker proofs.
(e) Its exclusion prevents surprise and unfair prejudice to the parties.
(f) Its exclusion prevents the jury from being confused and misled.

26.36. But the most important consideration seems to be the fact that it is second-hand or derivative, and its consequential weakness.

V. RULE STATED IN TERMS OF RELEVANCY

26.37. So much as regards the weakness of hearsay. Stephen preferred to state the rule in terms of "relevancy", but Stephen's work states most rules in terms of relevancy, and has been criticised frequently on that basis.

VI. ORIGIN

26.38. The origin of the hearsay rule resides in the adversary theory of litigation, which depends on the right of the adversary to cross-examine the witnesses produced by his opponent and thereby test their credibility. Professor Morgan\(^1\) has pointed out that a person's description of a past event might be incorrect because of five possible dangers: the danger that the person did not have personal knowledge of the event; the danger that the person did not accurately perceive the event; the danger that the person when he describes the event, does not recall an accurate impression of what he perceived; the danger that the language the person uses to convey his recalled impression of the event is ambiguous or misleading; and, the danger that the person describing the event might not be giving an honest account of his knowledge. All of these dangers may be explored by effective cross-examination and the adversary is denied the opportunity of exposing imperfections of perception, memory, communication and honesty and challenging the person's testimonial qualification of first-hand knowledge, if the description is not given at the trial by the person with alleged first-hand knowledge of the event but through the testimony of another person reporting that person's description.

\(^2\)Greenleaf, referred to by Baker, Hearsay Rule, pages 16-17.
\(^3\)Stephen, Digest of the Law of Evidence, Article 15.
26.39. The theory of the adversary system is that in the contest between
the parties, each is interested to demonstrate the strength of his own contention,
and to expose the weakness of his opponent and that the truth will emerge as
a result of such contest. "The purpose of furnishing the safeguard of oath and
cross examination, therefore, is not to aid the parties to suppress the truth, but
to enable them to avoid the risk that the trier will be misled into mistaking the
false for the truth."

VII. CONSTITUTIONAL ASPECT

26.40. In some countries, the rule against hearsay may have a constitutional
aspect. For example, in the United States, certain aspects of the rule against
hearsay are recognised in the Constitution, inasmuch as the concern for reliabil-
ity and the focus on the importance of cross-examination, which constitute some
of the principle reasons for excluding hearsay, also seem to be the hallmark of the
Sixth Amendment. The amendment ensures to each defendant the right
"to be confronted with the witnesses against him". The Sixth Amendment is
also intended to ensure that the trier of fact has a satisfactory basis of evaluat-
ing the truth of the statement made before him.

26.41. A constitutional reassessment of every established hearsay exception
the question arises—for example, in relation to the "co-conspirator" exception
would obviously not be attempted by the court even in the U.S.A. But, where
(analogous to our Section 10)—it may become necessary to consider how far
the exception is in harmony with the confrontation clause.

VIII. EXCEPTIONS

26.42. In course of time, several exceptions to the rule against hearsay have
evolved. Their broad rationale is this. If the statement was made under
conditions which indicate that the court trying a question of fact could give it
appropriate probative value, the statement might be received although the adver-
sary was denied the opportunity to cross-examine and expose the possible
defects attributable to the other dangers of perception, memory and communi-
cation attendant on a description of a past event.

26.43. The existing hearsay rule, with its numerous exceptions, is, thus, a
product of conflicting theories: the adversary system of litigation and dis-
trust of the ability of the court to properly evaluate the evidence—when given
in the form of hearsay (on the one hand) and the need for obtaining the truth
(on the other hand). Hearsay ordinarily lacks the guarantee of truth. But
exceptions to the hearsay rule have been recognised where, in addition to the
necessity of receiving cogent evidence in cases where no other evidence is avail-
able, circumstances in which the hearsay statements were made are such as to
give them the guarantee of trustworthiness.

26.44. In Sugden v. Lord St. Leonards, Cockburn C.J. and Jessel, M.R.,
formulated the general principles on which the accepted hearsay exceptions
were based. They were concerned with post-testamentary statements, of a de-
ceased testator, but the discussion is of general interest. Cockburn, C.J., in
particular, pointed out that such statements were usually made honestly and that.

---

1E. Morgan, "Hearse Dangers" (1948), 62 Harv. L. Rev. 177, 185.
as in the case of the other exceptions for declarations made by deceased persons, the testator had peculiar means of knowledge and might be supposed to have been without a motive to falsify.

26.45. It may be true to say, of the position in England, that no single principle will explain all existing exceptions at common law, and that judicial refinements of the exceptions over a long period of time have added little to the clarity,—many of the exceptions may be viewed as solely the product of history. But, in India, the law on the subject is codified, and all exceptions to the rule against hearsay derive their force from statutory provisions. While some of the exceptions, as found in the codified law in India, may not have been couched in very satisfactory language, and while a few of them are rather widely expressed, it cannot be said that they are the mere products of history. The haphazard and justified development of the exceptions, which has produced a highly technical and often unsatisfactory rule elsewhere, is not found in India.

IX. CRITICISM

26.46. It would be apparent from the above discussion that the general pattern at common law was to recognise exceptions to the rule against hearsay where it was not possible to comply with the three ideal conditions—oath, cross examination and personal presence of the witness in court—so that his demeanour could be observed. But the rule as such survived, the solution evolving being a general rule which excludes hearsay but which is subject to specific exceptions under special circumstances.

26.47. Of late, however, there has been considerable criticism of the rule and it is convenient, at this stage, to note the principal grounds of criticism. These grounds may be said to refer to (a) the court, (b) the witnesses and (c) the shape of the law.

(a) The one principal ground of criticism has been that where the person who knew the facts is not available by reason of death or otherwise and his knowledge is excluded from the cognizance of the court, then the rule results in injustice. It is sometimes stated that the rule deprives the court of material which would be of value in ascertaining the truth. This is really another way of stating the above aspect.

(b) Then, the rule, it is stated, often confuses witnesses and prevents them from telling their story in the witness box in the natural way.

(c) Thirdly, the rule adds greatly to the technicality of the law of evidence, because of its numerous exceptions, in addition to those provided in the statutory provisions.

X. TRENDS IN REFORM AND CONCLUSION

26.48. One or more of these objections have been found to be acceptable and treated in some countries as indicating the need for reform.

26.49. Of course, there is a difference of opinion as to the direction which reform of the hearsay rule should take. Since the multiple goals of the rules of evidence, such as, determination of truth, certainty of result, administrative trial efficiency, and fairness to the parties, seem to clash most uncompromisingly at the hearsay rule, perhaps these differences of opinion will never be resolved.

---

2Sections 32 to 35, for example.
3E.g. see discussion as to section 32, supra.
5Section 32(1) and 32(7), for example.
26.50. Three possible solutions may be considered:

(1) abolish the rule against hearsay and admit all hearsay;

(2) admit hearsay possessing sufficient probative force, but with procedural safeguards;

(3) revise the present system of class exceptions.¹

As regards the first course (admission of all hearsay), we have not been convinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant. The rule against hearsay, notwithstanding all that has been said against it, is based on sound principle, and we cannot conceive of its total abolition. Every rule restricting the scope of legally admissible evidence necessarily leads to the exclusion of matter which may have some probative value. In that sense, it is a restrictive rule. In a few cases, a restrictive rule may even shut out truth. The question whether a particular restriction is or is not sound, depends on a balancing of considerations.

26.51. We are of the view that the particular rule under consideration (hearsay) is justified, on a balance of considerations, and departure therefrom should be made only where there is a circumstantial guarantee of trustworthiness, coupled with necessity. This rules out the first course, namely abolition.

26.52. As regards the second course (abandonment of the system of class exceptions in favour of individual treatment in the setting of the particular case, accompanied by procedural safeguards), we note that that course has been suggested in the U.S.A.,² but not adopted. Admissibility would then be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force.³

26.53. Procedural safeguards to accompany it would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate courts to deal with evidence on the basis of weight.

26.54. We do not, however, favour this approach to hearsay, as it would involve too great a measure of judicial discretion, minimize the predictability of rulings, and enhance the difficulties of preparation for trial.

26.55 & 26.56. In the end, we favour a general rule excluding hearsay with specific exceptions, meant to provide for cases where necessity coupled with circumstantial guarantee of trustworthiness justifies the making of an exception. These exceptions—to deal with the aspect of necessity—recognize that the required information is available only through one who reports a statement made by another person, and that the original declarant cannot be subjected to the conditions usually imposed on a witness. But the exceptions should also postulate that in the circumstances of the case there is some guarantee of truth

¹Federal rules of evidence (U.S.A.), Note of the Advisory Committee (1974) 34 L. Ed. 1d. at page 111. (151)
which would be a reasonable substitute for the ideal conditions under which an ordinary witness gives his evidence. The central question, thus, to be considered in determining whether an exception should be made or not, is this—

To what extent will the reception of the information, under conditions which do not satisfy the usual protective tests, serve to accomplish the objectives of the trial, and yet not expose the trier to an appreciable danger of being misled?

26.57. The problem, thus, resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.¹

26.58. Since hearsay testimony proceeds not from the personal knowledge of the witness, but from the repetition of what the witness has heard others say, the witness at trial is an inferior substitute for the original declarant. Opportunity to observe demeanor is what, in a large measure, confers depth and meaning upon oath and cross-examination.²

26.59. In particular, the experience of common life does not favour any view that it would be safe to act on hearsay. No doubt, in common life, necessity often makes people act on hearsay, when they do not have the time or opportunity to perceive facts for themselves. But this mostly relates to conduct which one has to undertake in one's self-interest. For example, if one hears about a fire in the neighbourhood, or if, in a village, one hears about an impending attack by dacoits, protective or defensive measures will naturally be adopted without waiting for verification of the information received. Similarly, in a matter concerning the family and its reputation and welfare, one has usually to act on information obtained through others. There is, however, a vital difference between acting on such information to one's self-interest (on the one hand) and deciding disputes which might affect the fortunes of third persons for a life time. Even in ordinary life, the risks consequential on acting on hearsay are not inconceivable. Many friendships have been broken, or relations strained, by reason of those concerned rushing to hasty decisions on unverified information reported secondhand. It would not, therefore, be far from the truth to say that experience in common human affairs warns one to be cautious while acting on hearsay.

26.60. As regards the lessons of history, it is well-known that one of the crucial battles in Indian history—the 3rd battle of Panipat—was lost because of misreported information as to the fate of the leader of the campaign.³ The leader was informed that his son had been killed—an information which was false. Other examples of the dangers of acting on hearsay could be drawn from history; it would be pedantic to multiply them.

26.61. One of the writers⁴ on Evidence points out that instead of stating as a maxim, that the law requires all evidence to be given on oath, it should state that the law requires all evidence to be given under personal responsibility. He adds that even if the oath were abolished, the rule rejecting secondary evidence ought to remain exactly as it is. In other words, evidence which is not connected by the responsible testimony of a person who could be contradicted by the party against whom it is offered, is to be rejected.

²Federal Rules of Evidence — Note of the Advisory Committee, 34 L. Ed. 2d. at page 179 (clause xxix).
³3rd Battle of Panipat.
⁴Best on Evidence (1922), page 416, 424.
26.62. Elsewhere, the same author has described the rule against hearsay evidence as an illustration of the broader principle that persons are not to be affected by the acts or words to which they were neither party nor privy, and which they had no power to prevent or control—Res inter alios acta alteri nocere non debet.

26.63. We may state that the question of modifying or widening the scope of specific exceptions to the rule against hearsay has already been considered at the appropriate place. 5

26.64. It was stated in the last paragraph of Taylor on Evidence, in his 12th Edition:

"The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labour from the manner of treatment, and will rise from the study of its principles convinced with Lord Erskine that with some few exceptions they are founded in the charities of religion—in the philosophy of nature—in the truths of history—and in the experience of common life."

We think that this is certainly true of the rule against hearsay, as codified in the Indian Evidence Act.

26.65. So much is the importance of the rule recognised in India that even in regard to industrial tribunals, it has been held that while any person can give evidence about what he heard, yet if it is to be used for proving the truth of that statement, then, it would be hearsay and not admissible for that purpose. When a fact is sought to be proved, even before a domestic Tribunal, it must be supported by statements made in the presence of the persons against whom an enquiry is held, and if that statement is made behind the back of the person charged, it ought not to be treated as substantive evidence; this is one of the basic principles which cannot be ignored on the mere ground that domestic Tribunals are not bound by the technical rules of procedure contained in the Evidence Act.

26.66. It may be that the hearsay rule, in its present form, is the result of a conglomeration of conflicting considerations, modified by historical accidents. Or, it may be that it represents the mitigation of a rigid rule by numerous rigid exceptions. However, it cannot be denied that the rule recognises the fact that when there is a chain of inferences to be drawn from the utterance of a person who is not subject to contemporaneous cross-examination in court, a chain leading to an inference about the act or phenomenon which that utterance is supposed to deal with, the chain becomes weak with every increase in the number of links in the chain. This appears to be a fundamental consideration.

26.67. To quote Lord Normand: 6

"The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness

---

1Best on Evidence (1922), page 96, paragraph 112.
2Section 32.
5Mc Cormick, "The Border Land of Hearsay" (1930) 39 Yale Law Journal 489, 504
and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost."

26.68. Traditionally, the inaccuracies which might creep in whenever there is a judicial investigation of facts, are attributed to the four testimonial infirmities of ambiguity, insincerity, faulty perception and erroneous memory: it seems to be too radical a step—and a step uncalled for—to disregard these infirmities.

26.59. Stephen, describing the dangers of hearsay, has stated:2

"It would open a wide door to fraud. People would make statements for which they would be in no way responsible, and the fact that those statements were made would be proved by witnesses who knew nothing of the matter stated. Everyone would thus be at the mercy of people who might choose to tell a lie, and loose evidence could neither be tested nor contradicted."

"Suppose that A, B, C and D give to E, F and G a minute detailed account of a crime which they say was committed by Z: E, F and G repeat what they have heard correctly. A, B, C and D disappear or are not forthcoming. It is evident that Z would be altogether unable to defend himself in this case, and that the Court would be unable to test the statements of A, B, C and D. The only way to avoid this is to exclude such evidence altogether, and so to put upon both Judges and Magistrates as strong a pressure as possible to get to the bottom of the matter before them."

"It would waste an incalculable amount of time. To try to trace unauthorised and irresponsible gossip, and to discover the grains of truth which may lurk in it is like trying to trace a fish in the water."

26.70. To what Stephen has written, we may add that when a witness in court offers evidence regarding a matter within his own knowledge, he is under oath and subject to cross-examination and in the personal presence of the judge. If he reports the utterance of another, he is, as to the fact and content thereof, in exactly the same situation as if he were reporting any non-verbal event of which he has knowledge.4 His oath and cross-examination, however, are guaranteed only that he is himself speaking the truth, and not at all that the person whose utterance he is reporting was speaking the truth. When the fact and content of such person's utterance, regardless of its truth, are relevant and material, there is no reason for excluding the testimony of the witness concerning them. But when the utterance is offered for its truth, then the witness is testifying only to its fact and content, and the utterer is testifying to the matter asserted in the utterance. As the utterer is not under oath and is not subject to cross-examination, and is not before the court, his testimony is ordinarily deemed too untrustworthy to be received. If such testimony is to be admitted, it must be because there are some good reasons for not requiring the appearance of the utterer, and some circumstances of the utterance which perform the functions of the oath and the cross-examination. In other words, it must be under some specific exception to the rule against hearsay based on a circumstantial

2Stephen, Introduction to the Indian Evidence Act, pases 162-163; Woodroffe, page 76.
3Emphasis added.
4Note in (1922) 153 Law Times, 187, 188.
guarantee of truth. This is our approach, and, consistently with that approach, our recommendation as to the rule against hearsay preserves intact the rule as such in Section 60.

26.71. We are aware that in England, statutory provisions enacted recently have gone far in changing the law for civil cases, and a few changes have also been made in regard to criminal cases. We may, as a matter of information, refer to the English statutory law on the subject in brief. The legislative framework for reform of the law of hearsay in England is extremely complicated, mainly owing to the fact that the statutory provisions on the subject are to be found in a number of enactments. Some complexity also results from the situation that some of the statutory provisions are confined to civil cases, and some of them are confined to criminal cases. For civil cases, the most important provisions are contained in the Civil Evidence Act, 1968, as amended in 1972. For criminal cases, the important provisions are contained in the Criminal Evidence Act, 1965, and the Criminal Evidence Act, 1967. For our purpose, it is not necessary to quote the sections of the various statutes. In order to get a broad picture of the reform effected, it will be more convenient to draw attention to some of the salient features.

26.72. For civil cases, the Civil Evidence Act, 1968, may be described as achieving a partial abolition of the rule against hearsay. In this context, we may refer to four of its principal features. In the first place, the Act makes what may be conveniently described as first-hand hearsay statements admissible, subject to certain conditions. In the second place, it allows second-hand hearsay statements to be received in evidence, either where the statements are contained in a record or in a few other cases. In the third place, where the maker of the statement is called as a witness in court, the Act gives to the court an exclusionary jurisdiction, and similar exclusionary jurisdiction is also conferred on the court where the statement was made in earlier proceedings. In the forth place, that Act contains certain provisions designed to prevent the party against whom a statement is tendered from being taken by surprise by its being adduced at the trial. The Act must be read with relevant Rules of the Supreme Court Order 38, Rules 21 to 34.

26.73. The main topics dealt with in the English Act of 19681 (aplicable only to civil cases) are as follows:

- Section 3, Civil Evidence Act, 1968. Witnesses’ previous statement.
- Section 4, Civil Evidence Act, 1968. Admissibility of certain records.
- Section 5, Civil Evidence Act, 1968. Admissibility of statements produced by computers.
- Section 6, Civil Evidence Act, 1968. Provisions supplementary to section 2 to 5.
- Section 7, Civil Evidence Act, 1968. Admissibility of evidence as to credibility of maker etc. of statement admitted under section 2 or section 4.
- Section 8, Civil Evidence Act, 1968. Rules of court.
- Section 9, Civil Evidence Act, 1968. Admissibility of certain hearsay evidence formerly admissible at common law.

1Civil Evidence Act, 1968.
26.74. The position under the above Act of 1968 (as read with the Rules) may be thus stated: in its broad features. In civil cases a statement made by someone who is not called as a witness is, by agreement of the parties, admissible as evidence of any fact stated. It is also admissible without such agreement, provided the following conditions are fulfilled.

(a) The statement was either made in a document or is proved by the direct oral evidence of any person who either heard or otherwise perceived it being made;

(b) the maker of the statement is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement, having regard to the time which has elapsed since it was made. (This condition can, however, be relaxed by the court)\(^1\);

(c) the party desiring to give the statement in evidence has served the notice required by rules of court on all other parties to the proceedings\(^2\). (This condition can, however, be relaxed by the Court)\(^3\).

2. The above conditions do not apply to informal admissions and, where second hand hearsay is involved, to the proof of reputation\(^4\).

3. The court has a discretion to admit a statement, coming within clause 1 above, notwithstanding that the conditions specified in clauses 1(b) and 1(c) have not been fulfilled.

26.75. This is a brief statement of the important features of the position as to civil cases in England under the Act of 1968. Two sections of the Criminal Justice Act, 1967, affect the reception of documentary hearsay. Section 2 of the Act deals with committal proceedings, and provides for the reception of written statements on the same footing as oral evidence, if certain formal requirements are met—copies are provided to all parties, and no objection is made.

26.76. Section 9 of the Act of 1967 is far broader, and provides for situations other than committal proceedings. Section 9 begins with the same phraseology as section 2, i.e.:

"In any criminal proceedings, other than committal proceedings, a written statement by any person shall be admissible as evidence to the like extent as oral evidence to like effect by that person".

26.77. Then follow certain formal requisities, similar to those contained in section 2, such as, signing and notice. If neither party objects within seven days of service of a copy of the statements, the statement becomes admissible under this section. The parties may agree before, or during, the hearing to receive a statement although the requirements for service of a copy of the statement have not been met. Forms for service of notices under this section have been prescribed\(^5\).

---

\(^1\) Assisted has been partly taken from Cross on Evidence, (1971), page 100, Article 37.

\(^2\) Order 38, Rule 25. Rules of Supreme Court.

\(^3\) See infra.

\(^4\) Civil Evidence Act, 1968 Section 5 as. 1-2.

\(^5\) See infra.

\(^6\) Section 9 of the 1968 Act.

\(^7\) Magistrate's Courts Rules, 1968, r. 58; and Practice Direction by the Lord Chief Justice (1969) 3 All. E.R. 1033.
26.78. It may be noted that in relation to civil cases, such changes were introduced long ago—in 1938. After the Criminal Evidence Act of 1965, and the Criminal Justice Act of 1967 took effect, the rules regarding hearsay statements became—to put the matter roughly—identical in civil and criminal cases in the two areas covered by the Civil Evidence Act, 1938. Statements made “in the ordinary course of business” and documentary hearsay were generally receivable in civil and criminal trials; subject, of course, to the qualifications previously noted. In other areas of hearsay, the common law prohibitions and exceptions remained largely in effect until modified by statute.

26.79. Whether these amendments made by statutory provisions in England are theoretically desirable or not, is a matter which we need not go into again1. But it must be pointed out that the amendments are complicated in nature. In England, such complicated provisions would not create serious practical problems. The law is administered by Judges of the High Court, except in cases—mostly relating to monetary claims of small value—which are within the jurisdiction of the county courts. The number of judges administering the law of evidence in civil cases in England is limited. The position in India is radically different, and the provisions made in England, which are of a fairly cumbersome and complicated character, may, for that reason, create difficulty.

26.80. It may also be pointed out that so far as criminal cases are concerned, the amendments made in England are of a very limited character2, and it would not be inaccurate to say that in regard to the points covered by these amendments, the position in India, under the Indian Evidence Act read with the provision in the Code of Criminal Procedure relating to evidence given by the accused, is not, in substance, different. In so far as the English Act of 1967 contains provisions relevant to inquiries in proceedings for commitment of the accused, these have no practical importance in India, because, under the new code of Criminal Procedure, “commitment” proceedings are formal only, and no inquiry into the merits is contemplated by the Code before an accused is committed to the sessions.

26.81. & 26.82. To revert to the question which we raised at the outset of this chapter, we may, in the light of the above discussion, record our conclusion that we do not consider it desirable to make any basic changes in the rule against hearsay.

1See discussion as to how far changes are needed in the rule against hearsay, supra.
2The Criminal Evidence Act, 1898; the Criminal Evidence Act, 1965, and the Criminal Evidence Act, 1967.
CHAPTER 27

DOCUMENTARY EVIDENCE—THE GENERAL SCHEME

27.1. We now proceed to a consideration of the provisions relating to documentary evidence. There are three distinct questions which are dealt with in the Act: in regard to documentary evidence—(a) first, how the contents of documents are to be proved; (b) secondly, how the document is to be proved to be genuine; and (c) thirdly, how far and in what cases oral evidence is excluded by documentary evidence.

27.2. The first question is dealt with in sections 61-66, and sections 59 and 22 are also relevant to this question. Taking section 59 with sections 61 and 64, the result may be stated as follows:

The contents of a document must, in general, be proved by a special kind of evidence called primary evidence; but there are exceptional cases in which such contents may be proved otherwise.

27.3. Evidence which is used to prove the contents of a document, but which is not primary, is called secondary. Primary evidence is said, by section 62, to be the document itself, produced for the inspection of the Court. Later on, in the section, this is called the original document. The contents of public documents being provable in a particular manner, this matter is dealt with separately in sections 74-78. The question how far witnesses may be cross-examined as to written statements made by them without producing the writings, is dealt with by section 145.

27.4. Lastly, the Act deals, in sections 79-90, with the presumptions which the courts are enabled or directed to make in respect of certain documents or specified classes of documents, tendered in evidence before them.

27.5. Having dealt with the two kinds of evidence oral and documentary,—the Act proceeds to deal with their inter-relationship. The exclusion of oral by documentary evidence is the subject-matter of the next few sections—section 91 onwards.

27.5A. So much as regards the general scheme of the provisions concerning documentary evidence. "Documentary evidence", as defined in the Act, means all documents produced for the inspection of the Court. Aside from "real" evidence—of which the court is the original percipient—and matters of which judicial notice is taken, all evidence comes to the tribunal either (a) as the statement of a witness, or (b) as the statement in a document. This is how a "document" is interwoven into the scheme of the Act.

---

1 Woodroffe.
2 Woodroffe.
3 Woodroffe.
4 Section 3—"document".
5 Section 60 proviso.

408
27.6. The scope and ambit of the various provisions relating to documentary evidence, including, in particular, the restrictive provision in section 64 to which we have already referred, is essentially dependent on the meaning attributed to the expression "document". That expression is defined in section 3, and the definition is wider than its ordinary meaning. We need not discuss its various ingredients again. But it will be useful to point out that the principal element in the definition of "document"—in this Act as well as in many other Central Acts—is the recording of a matter in some permanent form. The theory of the law is that matter which is recorded in that form should be proved by producing that record, except in special cases.

27.7. In a sense, the restrictive provision in section 64, emphasising the primary character of "primary" evidence, is analogous to the rule against hearsay. Just as, by virtue of the rule against hearsay, a fact which can be seen or otherwise perceived is to be proved only by the person who says he has seen or otherwise perceived it, similarly, under the scheme of the provisions relating to documentary evidence, a record must come directly before the court, and not indirectly through copies or oral accounts or other types of secondary evidence thereof. Where the contents of any document are in question, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is satisfactorily accounted for.

With these general introductory remarks, we are now in a position to deal with the sections proper.

SECTION 61

27.8. Section 61 deals with proof of the contents of a document. It may be recalled that in the scheme of the Act, there are two principal kinds of evidence, namely, oral and documentary. Oral evidence has already been dealt with in sections 59 and 60, and the Act now proceeds to deal with documentary evidence. In general, a document produced at the instance of a party must be proved. Consent by a party to a document being exhibited does not dispense with the proof of its genuineness.

27.9. Proof of a document comprises proof of two elements, namely, proof of its execution and proof of the contents. Proof of execution of a document is postponed by the Act to later sections, and proof of the contents of a document is the subject-matter dealt with in section 61. The section provides for two alternative media of proof, namely, primary evidence and secondary evidence. The two alternatives provided for in the section are defined in the next two sections—section 62 which deals with primary evidence and section 63 dealing with secondary evidence.

27.10. But it should be pointed out that under section 64, a document must be proved by primary evidence, except in specified cases. In this sense, "primary evidence" fully justifies its name. Primary evidence is evidence which the law requires to be given first. Secondary evidence is the substitute, and is evidence which may be given in the absence of primary evidence. As will be seen later, the rule preferring primary evidence is based on the principle that the best available evidence is to be produced.

27.11. The above discussion is intended to indicate the scheme of the Act. It does not disclose any need for amending section 61.

---

1Section 60.
4Section 67 at seq.
5See discussion relating to section 64 infra.
28.1. Of the two modes of proving documents contemplated by the Act, we shall now deal with primary evidence. The expression is defined in section 62, which provides that "primary evidence" means the document itself produced for the inspection of the court. The document has to be physically produced.

28.2. Of course, the production of a document does not imply its admission in evidence—an aspect which became very important in a Madras case 1, and which was discussed in the Privy Council also. The Privy Council held that production and presentation are not identical with admission in evidence 2.

28.3. In the normal case, a document has only one original. But certain special cases required to be dealt with. Documents are often executed in duplicate. This situation is dealt with in the first Explanation to section 62. Under the first half of the Explanation, where a document is executed in several parts, each part is primary evidence of the document. The expression "part" here does not bear the ordinary meaning of "fraction," but refers to the form in which documents are sometimes executed, namely, a document is written out as many times over as there are parties, and each is signed by all the parties. In other words, the Explanation, in its first half, refers to documents executed in duplicate, triplicate and the like.

28.4. In contrast with the above, the latter half of the first Explanation to Section 62 refers to a procedure in which each of the instruments is signed only by one party, and each delivers to the other what is known as the counterpart. In the first half of the Explanation, "each part" is primary evidence of the document, while, in the second half, each counterpart is primary evidence as against the parties executing it. 4

28.5. Under the second Explanation to section 62, where a number of documents are all made by one uniform process—as in the case of printing, lithography, or photography—each is primary evidence of the contents of the rest. But, where they are all copies of a common original, they are not primary evidence of the contents of the original. The principal of this section was applied in a Lahore case 5, in allowing a witness to refresh his memory by looking at one specimen, although earlier he had seen another specimen of the document.

28.6. It must be noted that copies made by mechanical processes, though they are excluded from being primary evidence by the Second Explanation to Section 62 can constitute secondary evidence under section 63(2). The effect of the combined operation of the Second Explanation to section 62 and the second clause of section 63—to state the matter in very brief terms—is that copies made by mechanical processes, though not primary evidence of the original,

---

2Rala of Bobbili v. Inaunti China, (1899) I.L.R. 23 Mad. 49 (P.C).
3See Muhammad Ayub v. Rahim Baksh, (1922) I.L.R. 3 Lah 282, 284.
can constitute secondary evidence of the original, provided that the other conditions of section 63(2) are satisfied. Thus, where there is an allegation of the publication of a libel in a newspaper, each machine made copy is accepted as primary evidence of other copies inter se\textsuperscript{1}, but it is secondary evidence of the manuscript.

28.7. These provisions give a fairly comprehensive idea of what are, and what are not, originals for the purpose of the law of evidence. We are not, in the present context, concerned with what is deemed to be the original of an instrument for the purposes of stamp duty — a matter dealt with in the Stamp Act.

28.8. Finally, we may note that the provisions with which we are dealing now are confined to documents, and do not apply to other objects. As regards other objects, the court may direct their production in court\textsuperscript{2}, but it is permissible to give oral evidence as to their existence, condition or contents, without their production, there being no express prohibition in this regard.

28.8A. The above discussion does not disclose any need for amending section 62.

\textsuperscript{1}Woodroffe.  
\textsuperscript{2}Section 60.
CHAPTER 29
SECONDARY EVIDENCE — SECTION 63

I. INTRODUCTION

29.1. Section 63 enumerates the various species of secondary evidence.

There are five categories of secondary evidence mentioned in the section. The first category is — "Certified copies given under the provisions hereinafter contained". This clause of section 63 should be read with sections 65(1), 74, 77 and 86.

29.2. The second category mentioned in section 63 is "Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies".

29.3. Illustration (a) to the section, referring to a photograph of an original, illustrates this clause; and the illustration makes it clear that such photographs are secondary evidence even though the photograph and the original have not been compared. This, in fact, constitutes an important point of difference between the second category and the third category.

Illustration (b) is also to be read with this clause.

29.4. The third category is — "Copies made from or compared with the original". It is obvious that the fact that the copy was so made or compared, will have to be proved. This clause might be particularly useful in case of uncertified copies, provided they are proved to have been made from or compared with the original.

29.5. This clause is illustrated by illustration (c).

Copies falling under this category, in fact, furnish the most usual illustration of secondary evidence sought to be made admissible. This is apparent from the mass of case law relating to this clause, out of which a few reported cases are mentioned in the foot-note.

29.6. The word "copy" is not defined in the Act. But we get an idea of what a copy is from the provisions of the section. Secondary evidence means and includes, — (i) certified copies as provided in section 76 of the Evidence Act, (ii) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies, and (iii) copies made from or compared with the original. Obviously, therefore, a copy means a document prepared from the original which is an accurate

---

1As to certified copies, see section 74.
(c) Deputy Commissioner v. Universal Films, A.I.R. 1950 All. 696.
(f) N.C. De, 45 C.W.N. 654.
or true copy of the original. In Webster's New World Dictionary, the word "copy" is stated to mean "a thing made just like another; full reproduction or transcription".

The fourth and fifth categories relate to counter parts and oral accounts of documents.

Illustration (d) to the section tells us what is excluded from secondary evidence.

29.7. It would be seen that throughout section 63 runs the governing principle that, as far as possible, proof must be immediate.

It is on this principle that the section, in effect, requires that in the absence of special circumstances, the copies must be tantamount to the original — clause (4) — or must be immediately derived from the original. The connection between the original and the copy offered as evidence should not be remote. It is for this reason, for example, that oral accounts of a copy are not admissible — see illustration (d) — and it is, again, on this principle that a copy of a copy, except in certain cases, is not evidence — see illustration (c).

II. SCOPE OF SECONDARY EVIDENCE—SECTIONS 63 AND 65

29.8. Before proceeding to deal with the various clauses of section 63 in detail, it is necessary to discuss one important question pertaining to the scope of "secondary evidence" as a whole.

29.9. It may be noted that section 63, which opens with the words "secondary evidence means and includes", contains five clauses thereunder. The use of the word "means" conveys the impression that "secondary evidence" must fall within any one of the five clauses of the section, but there are two species of evidence which, though not enumerated in section 63, must be treated as secondary evidence according to the view of three of us namely, the species of evidence mentioned in section 65(b) and (g) — briefly, written admission of the contents of documents and general result of collection of documents respectively.

29.10. Let us first refer to a Madras case. The plaintiff had filed a suit for the redemption of a mortgage.

The two mortgage deeds produced by the plaintiffs were found to be forged documents, and the suit was dismissed. Even the second appeal was dismissed by a majority decision of two judges on one side, with the third judge dissenting.

29.11. The plaintiffs also argued that "written admissions" made by the defendants could be relied upon as "secondary evidence" under section 65. The court, although it laid down that the description of several kinds of secondary evidence given in section 63 was not exhaustive, rejected the plea of the plaintiffs, as the primary evidence produced by them was found to be forged.

The court observed that section 63 is Not exhaustive of the categories of secondary evidence. This is particularly so, since "written admissions" were in issue, and the same has not been mentioned as "secondary evidence" in any of

---

the clauses of section 63. This case holds that written admissions fell within the concept of "secondary evidence" though not mentioned in section 63.

29.12. In another Madras case, the precise point at issue was, whether the contents of a will could be proved by a judgment which contained a translation of the will. It was held that the translation of a document is not secondary evidence of the contents of the document, and that the definition in section 63 is exhaustive. This case did not involve any species of evidence mentioned in section 63 or section 65—which is the reason why it was not regarded as secondary evidence. In other words evidence not falling in section 63 or 65 is not secondary evidence.

29.13. In a Lahore case, it was held that section 63 is exhaustive as to the meaning of "secondary evidence," and that an abstract translation of a document does not come within its terms, and is, therefore, inadmissible. This case also did not involve any species of evidence mentioned in section 63 or 65 and the species could not therefore, be regarded as secondary evidence.

29.14. In a Patna case, the question for consideration was, whether the draft of an award, from which the original award was prepared by the arbitrators, could be admitted as "secondary evidence" of the award. It was held that it could not be admitted as secondary evidence. The court also held that the expression "means and includes" in section 63 makes it quite clear that the five clauses of section 63, referring to "secondary evidence", are exhaustive. Here also, the species of evidence at issue was one mentioned in the two sections.

29.15. In one case decided by the Supreme court where this question was not directly in issue, the Supreme Court made an observation that section 63, inter alia, defines what secondary evidence "means and includes". The Supreme Court did not, however, elaborate further if this section is exhaustive of secondary evidence or not.

29.15A. In so far as the decisions of the high Courts noted above could be rationalised, one may state that the approach underlying them is as follows:—

(a) the species of evidence mentioned in section 65 is also secondary evidence, but

(b) a species of evidence not mentioned in section 63 or section 65 is not secondary evidence.

These decisions also reveal one serious defect in the section, namely, that in order to find out what is secondary evidence, one has also to read section 65, clauses (b) and (g).

29.16. In this sense, section 63 becomes incomplete. Three of us—Dr. P. B. Gajendragadkar, Shri Sen Verma and Shri Bakshi—are therefore of the view that section 63 should be made self-contained by adding the other species mentioned in section 65, clauses (b) and (g). By specifically mentioning the species of evidence mentioned in section 65(b) and (g) in section 63, the uncertainty as to the scope of section 63 would be removed. Moreover, it is desirable that a section defining an expression should mention every matter that falls within that concept, instead of leaving it to a subsequent section.

---

1Jagannatha Naidu v. The secretary of state for India, A.I.R. 1922 Mad. 334.
29.17. and 29.18. It was pointed out in the Madras case,¹ by Tyabji J., that cases (b) and (g) mentioned in section 65 would not, apparently, fall under any of the five clauses of section 63, referring to what secondary evidence “means and includes.” Presumably because of this aspect, he observed that the five clauses of section 63 “are not exhaustive”—an observation with which Spencer J., in the same case agreed.

If the amendment favoured by the three of us is carried out, section 63 would be self-contained as to the categories of secondary evidence and thereafter, in future, it will not be necessary to rely on section 65 insofar as the species mentioned in section 65 are concerned. At the same time, controversies as to other species of evidence will not arise.

29.19. According to the view of three of us, therefore, section 63 should be amended by specifically mentioning what is mentioned in section 65 (b) and section 65(g). The species of evidence described in these clauses of section 65 is none else than secondary evidence, according to the three of us, for reasons which will be given in detail presently. Hence both these species should find a place in the enumeration in section 63. Thereafter, the words “and includes” should be deleted from section 63, since that word is a source of confusion and, apart from that, modern legislative practice does not use the formula “means and includes.” It may be noted that under our unanimous recommendation as to the various definitions in section 3, the formula “means and includes” is being revised so as to replace it by “means.”

29.20. The principal object underlying the approach indicated above is to introduce accuracy as well as neatness in the provisions of the Act and to restore symmetry and consistency between section 63 and section 65. For taking the view that clauses (b) and (g) of section 65 essentially deal with secondary evidence, several reasons suggest themselves. The following are the important reasons, according to the Members who favour the amendment.

(a) In section 65, the opening words and the marginal note expressly use the expression “secondary evidence”. This renders the conclusion inescapable that the species of evidence described in clauses (b) and (g) of that section is none else than secondary evidence. If it was contemplated by the legislature that a kind of evidence other than secondary evidence can be given in the form of written admissions or general result, then such species could have been dealt with in a separate section. It would have been inappropriate to include such “non-secondary” species in the very section that bears the caption “secondary evidence” and opens with those very words.

(b) If the contrary view is taken, the opening words and marginal note in section 65 would have to be radically altered. This is a reductio ad absurdum of the opposite view.

(c) Section 65 consists of two halves. The first half lays down the basic principle that secondary evidence could be given in certain situations. In the second half, the section addresses itself to a question of detail—which is the species of secondary evidence to be given in each situation? It is pointless to say that the latter half of section 65 is separate from the earlier half. It is the earlier half of section 65 which is the basic one, dealing with the conditions for applying the section. The latter half gives the details. A detail cannot travel beyond the basic principle.

(d) The fact that section 65, clauses (b) and (g) do not repeat the words "Secondary evidence" is of no consequence for the present purpose, because there was no need for the draftsman to mention them again. In relation to other clauses, there was a point in repeating them, because the draftsman wished to embrace all types of secondary evidence or to exclude all other types from those clauses. This was not the situation for clauses (b) and (g). It is well-known that a good draftsman does not resort to unnecessary repetition.

(e) In any case, the positive indication given by the opening words in section 65 and by the marginal note thereto cannot be overlooked, and must override any argument based on the absence of repetition of the expression "secondary evidence" in relation to (b) and (g)—an absence which itself is accounted for satisfactorily, as explained above.

(f) Attention should be drawn to the following discussion in a judgment of the Supreme Court—Further & strictly speaking the appellant Shri Sibnarayan Singh Mahapatra having in his own letter dated the 19th July 1943 referred to above admitted the existence and contents of the Ekramama, secondary evidence is, strictly speaking admissible under section 65(b) of the Indian Evidence Act."

These observations refer to the written admissions as secondary evidence.

In a Bombay case, it was held that where a document was unstamped, secondary evidence of its contents could not be given. The document sued on was a promissory note. It was chargeable with a duty of two annas.

On the question of secondary evidence, the court held that in this case, the plaintiff could not recover irrespectively of the promissory note, because he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence.

Dealing further with the written admissions relating to the promissory note, Birdwood J. observed: "the case is not one in which secondary evidence would be admissible for the purpose of proving the contents of the unstamped promissory note: for primary evidence, i.e. the document itself, is forthcoming. To such a case, section 65, clause (b) of the Evidence Act would not apply". Whether this particular reason for rejection is sound or not is not material. The point is that written admissions were described as "secondary evidence".

Birdwood J.'s observations in a later part of the judgment are still more pertinent.

"The admission of secondary evidence would, moreover be an evasion of section 34 of the Stamp Act of 1879, under which the note cannot "be acted on", being unstamped. See Muttukaruppa Kaundan Rama Pillai. To prove it by secondary evidence, and so make it the basis of a decree, would clearly be to act on it. The note cannot, therefore, be looked at in dealing with the claim".

(g) That section 65(b) also speaks of "existence and condition" is not conclusive, because that clause also uses the word "content". It cannot be denied that evidence of the contents of a document, if it

---

2Emphasis supplied.
3Damodar v. Jagannath, (1888) I.L.R. 12 Bom. 443, 446.
4Muttukaruppa Kaundan Rama Pillai, 3 Mad. H.C. Rep. 158, 160
is not primary, must be secondary, so far as the scheme of sections 61-64 is concerned. These sections expressly enact that contents of documents can be proved either by primary or by secondary evidence. They do not provide that such contents may also be proved by such other evidence as is mentioned in section 65 (b) and section 65 (g).

(h) Approaching the matter from the point of view of section 63 also, it is to be noted that the formula "means and includes" used in the section is, at the present day, considered undesirable in a definition. The legislature should give a clear indication either that the enumerated species are all that the genus defined embraces—("means"), or that there may be other species ("includes"). The present double form leads to confusion.

(i) Approaching the matter from the angle of section 91, it should be pointed out that section prohibits, in the case of the terms of a written contract, grant or disposition of property, evidence other than the document itself or secondary evidence. A third type of evidence which is neither the document itself nor secondary evidence is not contemplated by section 91. (j) thus, the contrary view is likely to create anomalies while the suggested amendment has the merit of logic, promotes consistency and certainty and does justice to the spirit and intendment of the provision.

It is stated that the evidence of written admissions is evidence merely of the fact of the admission and not of the document. This objection loses sight of the fact that section 65 itself describes the written document as evidence of the "existence, condition or contents" of a document.

This is because the latter half of section 65 is interlinked with the first half. Contents of a document are, in the scheme of the Act, proved either by primary or by secondary evidence (section 61). If a written document is neither secondary nor primary evidence, it is outside section 61, and such a view would conflict with section 61.

The argument that merely the fact of admission is proved, misses the point that when the contents of a document are admitted, what is ultimately to be proved is the document, and not the admission. The admission is only the medium. Moreover, the written document is admissible only within the framework prescribed by section 65, first part, which clearly states that secondary evidence may be given of the existence, condition or contents of a document.

Then a point has been made that section 63 already enumerates the species of secondary evidence and section 65 does not purport to do so. This point misses the very issue, namely, whether clauses (b) and (g) are not secondary evidence. The very suggestion made is that section 63 should be made self-contained. No doubt, section 65 is not a section intended to enumerate what is secondary evidence, but the very question is, if section 65 assumes certain evidence to be secondary evidence, should that species not be mentioned specifically in the enumerating section—section 63—so as to avoid incompleteness of section 63.

It has been stated that the word "when" in each clause of section 65 does not indicate what is secondary evidence. This argument misses the important grammatical aspect and the proper way of reading each clause of section 65. Each clause is an adverbial clause, not complete until the opening clause "secondary evidence may be given.............." is also read in conjunction therewith.
The adverbial clause in section 65 (b) and (g), opening with the word "when" would be grammatically incomplete unless the opening words "secondary evidence may be given" are added thereto.

It is stated that section 65(b) makes a written document admissible, because otherwise section 64 would not be complied with. But, it is also stated that a written admission is primary evidence. If that is so, the proposition is section 64 — "documents must be proved by primary evidence except in the cases hereinafter mentioned", would not come in the way. The very fact that section 65 describes the "cases hereinafter mentioned" in terms of an exception shows that what is provided in section 65 is not primary evidence, in the scheme of our Act, whatever else it may be.

The view that a written admission is "primary evidence" of the contents of the document, is a view which seems difficult to accept in the scheme of the Act. If it is primary evidence, it would be expected to find a place in the definition of "primary evidence" in the Act, which, however, in section 62, defines that expression as meaning the document itself produced for the inspection of the court. That definition, it should be noted, does not use the expression "includes".

As regards section 65 (g), it is stated that it is neither primary nor secondary evidence. Such a conclusion, however, conflicts with three basic features of the scheme of the Act:—

(i) Contents of documents proved either by primary or by secondary evidence (section 61) and no third type of evidence is contemplated in chapter 5 of the Act.

(ii) The first half of section 65 and the marginal note speak only of secondary evidence.

(iii) The unity of section 65 is destroyed if some species are regarded as primary, some as secondary and some as tertiary.

29.21. If the above view, namely, that classes (b) and (g) of section 65 deal with secondary evidence, is correct, the following clauses could be added to section 63.

(6) written admissions of the existence, condition or contents of the original;

(7) the general result of the originals, where they consist of numerous accounts or other documents which cannot be conveniently examined in court, as stated by any person who has examined them and who is skilled in the examination of such documents."

Further, the words "and includes" should be deleted from the opening portion.

This is the view of three of us. The remaining three — Dr. Tripathi, Shri Dhavan and Shri Mitra — do not, however, agree with the suggested amendment. The Commission being equally divided, it is not possible to make any recommendation on the point discussed above. However, since the point is of importance from the angle of proper drafting of the Act and from the angle of avoiding obscurity, confusion and uncertainty, it has become necessary to discuss the matter at length.

It should be pointed out that the section being with "secondary evidence". Hence the conclusion that the evidence referred to in (b) and (g) is a species of secondary evidence is inescapable. This is fortified by the use of the definite expression "secondary evidence" in the marginal note of section 65. If the
opposite view is taken then not only the marginal note but also the opening words would have to be revised as "The evidence specified in this section".

The draftsman did not repeat the label "secondary evidence" when dealing with the case in section 65(b) because there was no occasion to do so. In relation to clauses (a) etc. he wanted to provide that "any species" of secondary evidence was to be permitted.

It should be noted that section 64 makes it mandatory that documents must be proved by primary evidence, except in the specific cases. If the evidence specified in section 65(b) and section 65(c) is not "secondary" then there comes into being a type of evidence which is neither primary nor secondary. If that is the position then the expression "secondary evidence" in sections 91-92 will also have to be added to, for covering section 65(b) and (g).

It will not do to say that section 65 clause (b) deals with existence, because it also deals with "contents". The contents of documents as such cannot, in the scheme of the Act be proved except (by) either primary or secondary evidence.

Three of us—Dr. Tripathi, Shri Dhavan and Shri Mitra do not agree with the above. Their views are mentioned in the following paragraph which incorporates a note setting out their views in their own words.

29.21A. It has been urged that section 65(b) is not a case of secondary evidence, notwithstanding the marginal note and that section 65(b) speaks of "existence", and evidence about "existence" cannot be secondary. It is existence only of a "fact". But as against this, it can be said that one would not be doing violence to the expression "secondary evidence" by using it for "existence" and "condition" as well. Such a use would not be revolutionising the concept of secondary evidence. Even if an objection could be raised at all, it would be valid only for "existence" and "condition" but there could be no such objection about "contents".

29.22. There are several judicial decisions in which section 65(b) has been treated as case of secondary evidence. It may be noted that section 65 opens with the words "secondary evidence".

The word "proved" in section 65(b) may also be emphasised in this context. As to the word "existence", let us take a case where the existence itself is denied, and the document it not proved to be lost or to be with a third party. In such a case, evidence of the "existence" would be material, and it would be secondary. It is not primary in any case. To put section 65(b) in section 63— even in so far as existence or condition is mentioned— created no complications.

29.22A. The views of two of us — Dr. Tripathi and Shri Mitra — on the subject are reproduced below from the note given by them for the purpose—

MINUTE OF DR. TRIPATHI AND SHRI MITRA REGARDING RECOMMENDATIONS RELATING TO SECTION 63 OF THE ACT.

We are unable to agree to the proposal for amendment of section 63 of the Act by addition of the proposed clause (6). The proposed clause is as follows:

"(6) Written admission of the existence, condition or contents of the original".

It is to be noticed that section 63 is concerned with the definition and enumeration of secondary evidence. By the proposed amendment an admission
in writing that a document is in existence or that such a document is in good
or bad condition or an admission regarding the contents of the document would
be treated as secondary evidence. So far as the contents of the original are con-
cerned, it is to be noticed that a copy of the original is already covered by
sub-section (3) of section 63. The effect of the amendment in so far as it concerns
the contents of a document is that a written admission of the contents becomes
secondary evidence.

Consideration of the proposed amendment makes it necessary to refer to
section 65. It may be remembered, however, that in order to attract section 65(b)
the written admission of the contents of the document has to be the admission
by the person against whom it is sought to be proved or by his representative
in interest.

It is next to be recalled that section 65 deals with cases in which secondary
evidence relating to documents may be given, and says that secondary evidence
may be given of the existence, contents or condition of a document in the follow-
ing cases, and thereafter proceeds to enumerate seven cases in which secondary
evidence may be given.

When A gives evidence that B had admitted the existence of a document, A
is not giving evidence of the document itself or its contents, but A is giving
evidence of the fact that B had admitted the existence of the document. Similarly
again, if a person writes a letter to another, and subsequently writes another
letter saying in that second letter that he should destroy the first letter, the
second letter is evidence that the writer admitted the existence of the first letter,
and is not secondary evidence of the first letter. Again if the writer mentions
in the second letter anything about the condition or contents of the first letter,
such mention also is only evidence of the fact that he admitted the condition
and contents of the second letter; it is not secondary evidence of the first letter.

The language of section 65 makes it clear, that the section does not deal
with kinds or varieties of secondary evidence. If the section dealt with kinds of
secondary evidence, it would be meaningless because the kinds of secondary
evidence have already been enumerated in section 63.

The key to the interpretation of section 65 lies in appreciating the nature
of its contents. As already stated, the section does not enumerate kinds of sec-
dondary evidence, but it enumerates situations in which secondary evidence may be
given. Secondary evidence remains what it is as defined in section 63. Section
65 only says when that secondary evidence, as defined in section 63, may be
given.

It is very significant that every one of the clauses (a) to (g) under section 65
begins with the word “When”. In other words, when X happens or Y happens
or Z happens, then and then only secondary evidence is admissible and not other-
wise. “When” indicates the situation in which or the circumstances in which
secondary evidence may be given. The word “When” cannot and does not indi-
cate what is secondary evidence. The marginal note or heading of section 65
makes the position quite clear inasmuch as it says “cases in which” secondary
evidence may be given; which in other words means the circumstances and
situations in which secondary evidence may be given.

After specifying seven different occasions on which secondary evidence may
be given in clauses (a) to (g) of section 65 by using the word “When”, there are
four small paragraphs beginning with “in case” or “In cases”. The second of
these says, “In case (b) the written admission is admissible”. The reason for
insertion of this provision plainly is that without such a provision the written admission would not be admissible as evidence of the fact of admission itself, because the language of section 64 will stand in the way.

The same argument is applicable to clause (g) and to the last paragraph of section 65 which deals with clause (g). The evidence of the general result of the documents by any person who has examined them is neither primary evidence of the document nor secondary evidence. Such evidence will not be admissible except by virtue of the provision in the last paragraph of the section. Clause (g) only enumerates the circumstances in which secondary evidence of the original mentioned therein can be given. But the secondary evidence, if given, must be secondary evidence in terms of section 63, i.e., it should be either certified copy, etc., or an oral account of such part of the contents as it is intended to present to the court. It is clear that if oral or written evidence as to the general result of a whole collection of documents itself is treated as secondary evidence, then it will have the effect of creating a new class or category of secondary evidence which might replace primary or secondary evidence as known in the law of evidence. This point may be further elaborated by what it hereinafter stated.

The third part of the section which is as follows is of great significance:—

"In case (b), the written admission is admissible".

It is plain that the written admission contemplated by sub-section (b) is not treated as secondary evidence but as written admission.

The effect of what is now proposed to be done is that the written admission of the existence, condition or contents of the original would be treated as secondary evidence. One reason behind the suggestion for the amendment is that the head-note or marginal note of section 65 speaks of secondary evidence and this head-note or marginal note embraces all the clauses of the section including clause (b).

The next prima facie ground for the proposed amendment is that the section opens by saying that secondary evidence may be given in the following cases and thereafter sets out different cases in which secondary evidence can be given. It may be said that all the clauses under the section including clause (b) should be construed to mean secondary evidence.

We are unable to agree either with the proposed amendment or with the reasons behind the suggestion. In our view, a written admission relating to the existence or condition of a document cannot be said to be secondary evidence of the admission of such matters, namely, existence or condition of the document.

Turning now to the question of the head-note or marginal note of the section which speaks of secondary evidence, it must be noticed that in the third part of the section quoted above, the evidence is said to be written admission and not secondary evidence. If it was intended that the written admission relating to existence or condition of a document is to be treated as secondary evidence, there is no justification for not using the words: "secondary evidence" as has been done in the case of clauses (a), (c), (d), (e) and (f). To say that written admission relating to the existence or condition of a document is to be treated as secondary evidence would have the effect of introducing a new concept in the rule relating to secondary evidence. We are of the opinion that evidence relating to existence or condition of a document cannot be said to be secondary evidence for any reason whatsoever. The existence or condition of a document is a question of fact and a written admission regarding such a question of fact can by no means be said to be secondary evidence of the contents of the documents.
For the reasons mentioned above, we are of the opinion that the proposed clause (6) should not be added to section 63 of the Act.

Sd/- P. K. Tripathi,
20-1-77

Sd/- B. C. Mitra.
20-1-77

29.22B. The view of one of us — Shri Dhavan — on the subject is reproduced below from the note given by him for the purpose:—

MINUTE OF SHRI DHAVAN OPPOSING THE PROPOSAL TO AMEND SECTIONS 63 AND 65 OF THE ACT

In my opinion, there should be no amendment of sections 63 and 65 and both these sections should remain as they are.

Section 63 purports to enumerate five categories of what the section calls, "secondary evidence". It begins: "Secondary evidence means and includes" — then follow 5 clauses indicating 5 categories of secondary evidence. An important question is whether these five categories are exhaustive. In my opinion, they are not exhaustive, reasons to be explained later.

Section 64 is very short and provides: "Documents must be proved by primary evidence except in the cases hereinafter mentioned".

Section 65 provides that secondary evidence may be given of the existence, condition or contents of a document in 7 circumstances which are mentioned in clauses (a), (b), (c), (d), (e), (f) and (g). Then follow illustrations of evidence other than primary evidence which may be given in the above 7 cases.

Illustrations of clause (b) and clause (g) are important. Illustration (b) says: "In case (b) the written admission is admissible". Illustration (g) says: "In case (g) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents". It may be noted that section 63 does not include written admission illustration (b) or evidence of general result illustration (g) among the categories of secondary evidence mentioned in clauses (1), (2), (3), (4) and (5) of that section. What is the explanation for this omission.

The only two reasonable alternative explanations are (1) either section 63 is not exhaustive, or (2) illustrations (b) and (g) in section 65 are types of evidence other than secondary.

In my view, illustration (b) and illustration (g) can be treated as secondary evidence only if the categories of secondary evidence enumerated in section 63 are not regarded as exhaustive.

It has been suggested that a possible explanation may be oversight or inadvertence on the part of those who drafted the Act. I am afraid I am unable to agree with this argument. The Indian Evidence Act is considered to be a masterpiece of excellent draftsmanship and I find it difficult to believe that the mention of the illustration was due to an oversight, inadvertence or error.

I prefer the alternative explanation that section 63 is not exhaustive of the types of secondary evidence, and respectfully agree with the view of the Madras High Court in Kattiani Amma v. Narayanan Nambiar A.I.R. 1915 Mad. 962. In that case, the Division Bench held that section 63 was not exhaustive. In support of this view, their Lordships pointed out that "though section 65 purports to enumerate the cases in which secondary evidence may be given, the evidence which is rendered admissible in cases (b) and (g) would not apparently fall under any of the five clauses of section 63 referring to what
secondary evidence means and includes". To my mind this argument is conclusive and is preferable to the alternative argument that the legislature made a mistake — one might even call it a blunder — in drafting sections 63 and 65.

The language of section 63 indicates that this section does not give an exhaustive definition of secondary evidence but only enumerates five categories of what the section calls secondary evidence.

It is true that other High Courts have observed that section 63 is exhaustive in Jagannatha Naidu v. Secretary of State A.I.R. 1922 Mad. 334. Spencer and Devadoss, JJ. observed: "The definition in section 63 is exhaustive as the section declares that secondary evidence 'means and includes' and then follow the five kinds of secondary evidence'. But the learned Judges did not give any reason for their observation and did not refer to the argument in the earlier Madras case cited above. It may also be noted that Spencer, J. who delivered the judgment in the latter case was a member of the Bench which decided the earlier case in which he had expressly observed:

"I am quite willing to concede that the Evidence Act places written admissions on a higher footing than oral admissions of the contents of the document and that the description of several kinds of secondary evidence given in section 63 is not exhaustive". His contrary observation in the latter case that "the definition in section 63 is exhaustive" is contradicted by his own earlier observation in the former case.

In Hafiz Muhammad Saleman v. Hari Ram and Others A.I.R. 1937 Lahore 370, Tek Chand and Dalip Singh, JJ. observed that section 63 of the Evidence Act "is exhaustive of the meaning of secondary evidence'. But the learned Judges advanced no argument in support of this observation and did not refer to the Madras case Kalliani Amma v. Narayanan Nambiar cited above. It may be noted that they referred to the latter Madras case (cited above) — overlooking the fact that Spencer, J. who was a member of the Bench deciding this case had contradicted himself. It appears to me, therefore, that the view taken by the Madras High Court in Kalliani Amma’s case is sound.

It may be noted that the Supreme Court in M/s Hindustan Construction Co. Ltd. v. Union of India A.I.R. 1967 S.C. 526 while considering section 63 did not give any definite opinion on the question whether the section was exhaustive. The court merely observed: "that section (S. 63 of the Evidence Act) inter alia defines what secondary evidence means and includes...". The learned Judges (K. N. Wanchoo and G. K. Mitter, JJ.) did not discuss the question whether section 63 is not exhaustive. They did not disagree with the view taken by the Madras High Court in Kalliani Amma’s case.

It has been argued that the words "means and includes" are no longer used to indicate that a particular definition is not exhaustive, and in fact these words have been out of use for some time. But with respect, the question is not what the words "means and includes" are supposed to indicate or not indicate today but what they were intended to indicate by the legislature a hundred years ago when the Evidence Act was passed in 1872. I am reluctant to accept the argument that the words "and includes" in section 63 were included as a mere verbiage. This argument is contradicted by the illustrations given in clauses (b) and (g) of section 65.

It is suggested that the proposed amendments to section 63 and section 65 will not alter the law in any way and their effect will be to make the language and arrangement of the two sections more systematic and tidy. With respect,
I think that if the proposed amendments are not intended to introduce any change in the law, this is an argument in favour of making no change at all and letting the sections alone.

But it appears to me that the effect of the proposed amendments will be to change the law. The very fact that two additional clauses will be added to the existing five would suggest that the definition of secondary evidence in section 63 had been made exhaustive, contrary to the view taken by the Madras High Court in Kalliani Amma’s case — a view not dissented from or overruled by the Supreme Court.

Furthermore, I feel that with the advancement of science and technology, new varieties of secondary evidence, closely akin to the five types of secondary evidence already mentioned in section 63, may come into existence. It is, therefore, not desirable that the definition of secondary evidence in section 63 should be made exhaustive.

It has been suggested that this Commission has recommended in several sections of the Evidence Act that the words “means and includes” should be replaced by a single word — either “means” or “includes”. That may be so, but if any change is to be made, I would suggest that the words “means and includes” in section 63 should be replaced by the word “includes”.

In the result, I agree with my colleagues, Dr. Tripathi and Mr. Mitra that there should be no amendment of section 63 and section 65, both of which should remain as they are.

Sd/- S. S. Dhavan

20th January, 1977

III. VARIOUS CLAUSES CONSIDERED

Section 63(1) and 63(2).

29.23. We now proceed to a consideration of the existing clauses of section 63.

No changes are needed in the first two clauses, dealing with certified copies and mechanical copies respectively.

Section 63(3).

29.24. As regards section 63(3), which deals with compared copies, it has been held that a paper-book is not admissible as secondary evidence unless it is proved that the papers were printed after comparison with the original.\(^1\) It would appear that such copies can fall, if at all, only under clause (3) and that clause postulates that the copies must be made from or compared with the original. Although, ordinarily, one may presume that a copy printed in the paper-book was compared with the original, it must be stated that the accuracy of such a copy depends on so many factors. For this reason, the clause may be left undisturbed.

Section 63(4).

29.25. With regard to section 63(4), which deals with counterparts, it may be stated that a counterpart is primary evidence against a person executing it.\(^2\) Under section 63(4), as against parties who did not execute them, counterparts are secondary evidence.

Section 63(5).

29.26. In regard to section 63(5) which makes admissible oral accounts of the contents of a document given by some person who has himself “seen” the document, it will suffice to observe that the most important requirement under

\(^1\)Santokhi, A.I.R. 1929 Patna 41, 43.

\(^2\)Section 62, Explanation 1.
this clause is that person must have seen the document in original; and, as was held in a Bombay case, where the person in question was given a written statement of the contents of copy of a document the original of which was not seen by him, it cannot come within this clause.

29.27. We do not propose any change on the above point. But there is a verbal point concerning section 63(5) which may be mentioned. The clause speaks of "oral account of the contents of a document," given by some person who has himself "seen" it. It has been held by the Privy Council that the person concerned must have read the document. This interpretation should be suitably codified, since this is not very clear from the wording.

29.28. Accordingly, we recommend that in section 63(5), for the word "seen", the word "read" should be substituted.

IV. OTHER POINTS OF DETAIL

29.29. We have now concluded our consideration of the various clauses of section 63. A few new points relevant to the scope of "secondary evidence" may be dealt with. The question as to how far judgments can be treated as secondary evidence of the pleadings of the parties etc. may be conveniently considered at this stage. The answer to this question is not free from difficulty. In some cases, the judgment has been treated as inadmissible. In several cases, however, a judgment has been admitted to prove an admission or acknowledgement made by a party in his pleadings in the previous suit.

29.30. A judgment narrating the substance of the pleadings has also been used to furnish evidence of the allegation.

29.31. But it should be pointed out, that judgments cannot be appropriately regarded as falling under any of the five categories mentioned in section 63. If they are to be admissible, that could only be on a view that section 63 is not exhaustive. But that itself is a matter of controversy.

29.32. The position in this regard could become clear if the verbal change which we have discussed in the opening part of section 63, to replace the words "means and includes" by "means", could be implemented.

29.33. While on section 63, we may refer to the subject of tape-recording which has figured in some cases. The Supreme Court has held that if a statement is relevant, then an accurate tape-record of the statement is also relevant and admissible. In case before the Supreme Court, the appellant had been convicted of an offence under section 165-A of the Indian Penal Code. A trap had been laid, and a tape-recorder had been used to record the conversation between the accused and the complainant. The Supreme Court held:

---

1Kanya Lal v. Piarahai, (1882) I.L.R. 7 Bom. 139.
(b) Krishnaaswamy Ayyangar v. Rajagopal Ayyangar, (1895) I.L.R. 18 Mad. 73 (77.78 section 35 cited).
(c) S. K. Ramaswamy Counlan v. S. N. P. Subbaraya Counlan A.I.R. 1948 Mad. 388, 390 para 5.
4(a) Kailas Chandra Nag. v. Bilay Chandra Nag, A.I.R. 1923 Col. 18;
5See discussion as to whether section 63 is exhaustive.
6See discussion relating to section 63, opening part.
"If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the feature of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with Lok Sabha".

29.34. In an earlier Supreme Court case, with regard to the contention that these could be tampered with, the majority held that:

"In the ultimate analysis, the factor mentioned would have a bearing only on the weight to be attached to the evidence and not on its admissibility."

29.35. The minority opinion in the same case held:

"The tape recorded conversation between the appellant and the other person talking with him can only be corroborative evidence, of the appellant that the other persons had made such and such statements, but cannot be direct or primary evidence that the third person had stated what the other speaker had told the appellant.

"The High Court did not rely on the renderings of the tape-recorded conversation in view of the fact that such tape-recordings can be tampered with. Tape recordings can be legal evidence by way of corroborating the statements of a person who deposes that the other speaker and he carried on that conversation or even of the statement of a person who may depose that he over-heard the conversation between the two persons and what they actually stated had been tape recorded."

The position emerging from the above decisions does not appear to call for an amendment of the law.

V. STAMP

29.36. The question of stamp duty has a bearing on the admissibility of secondary evidence. But this is a matter outside the Evidence Act.

3(1972) I.S.C.C. 545, 549.
CHAPTER 30

SECONDARY EVIDENCE WHEN ADMISSIBLE

SECTIONS 64 AND 65

30.1. We shall now deal with certain important provisions relating to primary and secondary evidence. Our immediate concern will be with three sections which — broadly speaking — (i) lay down the general rule as to primary and secondary evidence, (ii) provide for certain exceptional cases and (iii) deal with certain conditions relevant to some of the exceptional cases.

SECTION 64

30.2. Section 64 provides that documents must be proved by primary evidence except in the cases hereinafter mentioned. The exceptions to this provision are to be found mainly in Section 65. The rule in Section 64 is generally said to be based on the "best evidence" principle; but the rule is probably older than that, being a survival of the doctrine of 'profert' which required the actual production of the document pleaded.

We have no suggestions to make with reference to this section.

SECTION 65

I. INTRODUCTORY

30.3. While the general rule prohibiting secondary evidence of a document is stated in Section 64, Section 65 states, the exceptional cases in which secondary evidence is admissible.

30.4. We shall deal later in detail with the various exceptions. For the present, it will be sufficient to state that the exceptions contained in the various clauses of Section 65 deal with cases where production of the original document is likely to create certain legal or physical difficulties or inconvenience. In some cases, the difficulty almost amounts to an impossibility. Clauses (a) and (e), — as also to some extent, clauses (e) and (f) relating to public documents, — deal with legal or physical impossibility, while clauses (d) and (g) deal with physical difficulty or inconvenience. Clause (b) stands by itself: it relates to written admissions of the existence condition or contents of the document, and is really a case where production of the original is not insisted on, there being reliable evidence which, in addition, has been supplied by a party in a form which ought to be admissible as against him. It may also be noted that under clause (g), what is admitted in substitution for the originals is the general result as stated by a person who has examined the originals and who is skilled in their examination.

II. WHETHER CLAUSES MUTUALLY EXCLUSIVE.

30.5. It must be noted, at the outset, that the various clauses of section 65 are not mutually exclusive. If, for example, a case falls under clause (a), then secondary evidence is admissible, even if the conditions of clause (e) or clause (f) are not satisfied. Thus, though, in case (e) or (f) (public documents etc.), only a certified copy is admissible, this express restriction, which is relevant to clause (e) or (f), does not bar the production of other type of secondary evidence of that document where some other clause of the section applies.

e.g., where the original document is lost. One would have thought that this is fairly clear from the scheme of the section, but it seems that a different view was urged on this point in the past, thought the attempt failed.

30.6. It appears that the obscurity is primarily due to the negative and exclusionary words employed in the section, where it provides:

"In case (e) or (i) a certified copy, but not other kind of secondary evidence, is admissible."

30.7. To this sentence, it would be desirable to add the words "unless some other clause of this section applies." We recommend this amendment, in order to make the language of the section conform to what is intended and what has been its judicial construction.

We shall now deal with the points relating to particular causes of the section.

III. CLAUSE (a) — PERSON LEGALLY BOUND

30.8. Section 65 (a) permits secondary evidence to be given when the original is in the possession etc. of—

(i) the person against whom the document is sought to be proved, or

(ii) any person out of reach or not subject to the process of the court; or

(iii) "any person legally bound to produce it", when, after the notice mentioned in section 66, such person does not produce it.

30.9. Some controversy has been caused by the words "any person legally bound to produce it"—occurring in section 65(a). It may be noted that in English law, when a person is legally bound to produce a document, he can be compelled to do so, and secondary evidence is not permitted. To this extent, the section marks a departure from the English law.

So the first point to be discussed is whether this departure from the English law is justified. We shall indicate our preference in this regard later. But it would be convenient first to deal with the views that could possibly be held on the subject.

30.10. One view on the subject is that in section 65(a), the word "not" is to be read before the words "legally bound". This is the view of Norton, and also of Markby*. Norton, however, adds that the case of a person legally bound to produce falls within clause (b), second part. Another possible view is that the section marks a deliberate departure from the English law as regards persons legally bound to produce the document, as it is not reasonable that a party's right to give evidence should be taken away by the wilful, negligent and possibly fraudulent refusal of another to produce a document which the law requires him to produce, and on this view, the word "not" should not

---


(b) In the matter of Collision, (1879) I.L.R. 5 Cal. 568 (Wilson J.) (Argument of Woodroffe not accepted).

(c) Sunder v. Chandrasokar, (1907) I.L.R. 34 Cal. 293, 297 (Harington & Geidt J.J.) (Argument of Mr. Hill not accepted).

It is to be carried out in section 65 at the appropriate place.


be read before the word "bound". It must be noted that the remedy which the English law allows in such a case (case of a person bound to produce)—action for damages—is not speedy, and may not even be adequate, because the person concerned, having custody of the document, may be a man of straw. We are of the opinion that the latter is the correct view. We do not, therefore, suggest any amendment of clause (a) on this point. As to persons not legally bound, we are adding them separately.

30.11. There is, however, one point on which there is scope for improvement in clause (a). Where the document is in the possession of any person out of reach of or not subject to the process of the court, notice is not necessary under section 66, proviso (6). But the last paragraph of section 65(a) would give the impression that notice is necessary even in such a case. To remove this defect, it is desirable to add, in section 65(a), after the figures "66", the words "where such notice is required under that section" and we recommend that the clause should be so amended.

30.12. Then there is a verbal point concerning section 65(a). The notice is described in the clause somewhat cryptically by the words "after the notice mentioned in section 66". These words really mean—"when any person in whose possession or power the original may be, does not, after receiving the notice (if any) required by section 66, produce such originals". It may be useful to make this clear, and we recommend that the clause should be suitable amended for the purpose.

30.13. The wording of clause (a) has given rise to considerable doubt in cases where the person to whom a summons is issued for the production of the document objects to doing so, and is not legally bound to produce so. In other words, where the non-production of the document is justifiable and, therefore, the objection to production is upheld by the court, the document does not fall within clause (a).

We propose to deal with this point under clause (c).

IV. CLAUSE (b)

30.14. This takes us to clause (b) of section 65. Under that clause, when the existence, condition or contents of the original document have been proved to be admitted in writing, by the person against whom it is proved or by his representative-in-interest, then the written admission is admissible. This clause should be contrasted with section 22, which relates to oral admissions of the contents of a document. While oral admissions are not ordinarily admissible until the party proposing to prove them shows that he is entitled to give secondary evidence, the written admission is admissible even though the original is in existence and is not produced.

30.15. It may be noted that this type of secondary evidence is an addition to the categories specified in section 63. No changes appear to be necessary in this clause.

V. CLAUSE (c)

30.16. Section 65(c) permits secondary evidence to be given where the original has been destroyed or lost, or when the party offering evidence of the contents of the document cannot, for any other reason, not arising from his own default or neglect, produce it in reasonable time.

---

1 Cf. R. v. Watson, 2 Times Reports 201, referred to by Stokes.
2 See discussion as to section 65(c), infra, page 1142 et. seq.
3 See section 22.
4 See discussion as to section 63.
Person not legally bound.

30.17. The situation where the document is in the possession of a person who is not legally bound to produce it gives rise to a certain amount of difficulty. This controversy has been considered in many cases as relevant to clause (a), but clause (c) seems to be the proper place for dealing with the matter.

30.18. As to the merits of the question, there can hardly be any doubt that secondary evidence ought to be permissible in such cases. The party offering secondary evidence of the contents of the document has no other alternative, because, if the person not legally bound to produce the document — whatever be the source of the privilege — does not waive his privilege and if other evidence of the contents of the document is excluded, truth is withheld from the court for no compelling reasons. The immunity from production may arise from the fact that the document is privileged by reason of its character, or from the fact that the person in possession is privileged by reason of his status. We are not concerned with the details of such privileges. Our attention is naturally focussed, in the present context, on the party who is conducting a litigation in court to which the document is relevant.

30.19. In England, in such a case secondary evidence is admissible. This appears to be a salutary rule, and it is difficult to assume that this salutary rule of English law was deliberately departed from. Rather, it is better to take the view that in such a case, secondary evidence is admissible. It may be noted that in section 65(c), the words “when the party offering evidence of its contents cannot, for any other reason not arising from his default or neglect, produce it in reasonable time”, which follow the words “when the original has been destroyed or lost”, would permit of secondary evidence where a stranger not legally bound to produce the document is in possession of the document. It is sometimes stated that such a case can fall within the words “not subject to the process” in clause (a), but we would prefer to regard it as analogous to clause (c), which covers “any other reason not arising from his default or neglect.”

30.20. Since this aspect is not very obvious from the wording of clause (c), we recommend that it should be made clear in section 65(c) by suitable amendment.

VI. CLAUSES (d) to (g)

Section 65(d).

30.21. Under section 65 (d), secondary evidence may be given where the original is of such a nature as not to be easily moveable. The usual illustrations of this clause are inscriptions on walls and fixed tablets, murals, monuments, grave-stones, notices fixed on boards and the like. Documents in foreign countries, though not falling under clause (d), would fall either under clause (a) or clause (c). No changes are needed in this clause.

Section 65(e).

30.22. Section 65(e) permits secondary evidence to be given where the original is a public document within the meaning of section 74. In this case, a certified copy is admissible. But if there is a case for giving secondary evidence under some other clause of section 65, such as, clause (d), then the type of secondary evidence mentioned in that clause also applies. We have already discussed this point. No changes are needed in this clause on any other point.

1 Calevafa v. Guest, (1898) 1 Q.B. 759 (Legal professional privilege).
2 Best on Evidence (1922) page 201, 498.
3 Woodroffe.
4 See discussion as to how far various clauses of section 65 are mutually exclusive; supra.
30.23. There is another situation in which certified copies can be given in evidence. Section 65(f) permits secondary evidence to be given, in the case of a document of which a certified copy is permitted by the Evidence Act or by any other law in force in India to be given in evidence. The words "to be given in evidence" mean "to be given in evidence in the first instance without having been introduced by other evidence". No changes are suggested in this clause.

30.24. Section 65(g) permits secondary evidence to be given in the case of originals consisting of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. It would appear that even where the documents are public documents, this clause would apply, if the fact to be proved is their general result.

30.25. It may be noted that clause (g) is an addition to the categories of secondary evidence enumerated in section 63. We have no further comments on this clause.

VII. RECOMMENDATION

30.26. The recommendations made in the above discussion may now be summarised.

(a) As regards persons legally bound to produce the document, section 65(a) may remain as it is.

(b) In section 65(a), a verbal change should be made, to bring it in harmony with section 66. This can be achieved by inserting, in section 65(a), after the figure "66", the words "where such notice is necessary."

(c) In clause (a), for the words "after the notice mentioned in section 66" the words "when any person in whose possession or power the original may be, does not, after receiving the notice (if any) required by section 66, produce such original" should be substituted.

(d) As regards persons not legally bound to produce the document, the situation should be expressly included in section 65(c), by an amendment.

(e) It should be made clear that the clauses are not mutually exclusive. In the sentence — In case (e) or (f) a certified copy, but no other kind of secondary evidence, is admissible" the words "unless some other clause of this section applies" should be added for the purpose.

SECTION 66

30.27. Section 66 provides that secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is (or to his attorney or pleader), such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court, considers reasonable under the circumstances of the case.

1See Hurriah v. Prosunno, (1874) 22 Weekly Reports 303 (Calcutta).
2Sundar Kuar v. Chandreshwar, (1907) I.L.R. 34 Cal. 293, 297 (Harrington and Geidt, JJ.).
3See discussion as to section 63, supra.
30.28. Under the proviso to the section, such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) When the document to be proved is itself a notice;
(2) When, from the nature of the case, the adverse party must know that he will be required to produce it;
(3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
(4) When the adverse party or his agent has the original in Court;
(5) When the adverse party or his agent has admitted the loss of the document;
(6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court."

30.29. The object of requiring notice under section 66 is to give opposite party a sufficient opportunity to produce the document, and thereby to secure, if he pleases, the best evidence of its contents. Notice to produce also excludes the argument that the opponent has not taken all reasonable means to secure the original.¹

¹Woodroffe.

No changes are needed in the section.
CHAPTER 31

PROOF OF SIGNATURE

SECTION 67

31.1. Section 67 provides that if a document is alleged to be signed or Introductory, to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.

31.2. In a sense, this provision is redundant, because it is a general rule of law that a party who alleges a fact must ordinarily prove it. The section merely states, with reference to documents, the universal rule. However, the section brings out specifically the application of this rule in relation to one aspect of proof concerning documents—proof of execution.

The provision applies as much to primary evidence as to secondary evidence. Even where secondary evidence is given, execution of the original must be proved.

31.3. The principle underlying the section is a simple one. Questions Principle. relevant to the contents of a document having been dealt with in sections 61-66, the further question arises with reference to a document used as evidence, namely, whether it is that which it purports to be; whether, in other words, it is a genuine document. This is a question of its authorship—identity of signatures. This question is dealt with in section 67.

31.4. The question of genuineness is dealt with more particularly in relation to attested documents in subsequent sections. These sections are followed by section 73, which, incidentally, is not confined to attested documents.

31.5. It should be noted that a “document” is not necessarily in writing or signed. Writings constitute only one species of documents. The definition in the Act of “document”\(^1\), and the illustrations thereto, make this clear. But, if the document is in writing, its genuineness should have been either admitted, or should be established by proof, which should be given before the document is accepted by the court. This is what section 67, in substance, leads to.

31.6. The nature of the evidence to be rendered for proving the execution of a document will greatly depend upon the nature of the document. Proof of signature must, of course, be given, as signature is almost universal. Attestation is sometimes an imperative formality\(^2\) for the complete execution of a document. Sometimes a seal may be required.

31.7. No particular mode of proof of signature is prescribed in the Act. Mode of proof. This leaves a wide scope as to the media of proof. It has been held,\(^3\) for example, that “in order to prove the writing of a person, it is not necessary

\(^1\)Nikant Pandit v. Jaggoobaidh, 12 B.L.R. App. 18 (Marklay).
\(^4\)See section 3, definition of “document”, and illustrations thereto.
\(^5\)See sections 68-73.
that the person must know the language in which the document has been written. If he has deposed that execution has been made in his presence and he has seen the executant putting his signature in his presence, it has been held that the document stands proved. On the same reasoning, if a person is an illiterate and has seen somebody putting his signature on a document in his presence, in my opinion, he has proved that document."

Direct proof not required.

31.8. It should be noted that proof of signature need not be direct, i.e. by evidence of an eye witness. It can be circumstantial or indirect also. The ordinary methods of proving handwriting are by calling as witness a person who wrote the document, or who saw it written, or who is qualified to express an opinion on handwriting, or by comparison or by admission. There may be circumstantial evidence also, and there can also be presumptions. The document itself could furnish internal evidence of its genuineness. Of course, this is not to say that any one mode will be enough.

Whether strict proof required.

31.9. Observations occur in an Allahabad case, in the judgment of Ashworth J., to the effect that section 67 requires specific evidence that the signature is in the handwriting of the executant, and that the definition of "proof" will not be of use for the purposes of section 67.

31.10. Later, in the same judgment, Ashworth J. has described section 67 as requiring "strict proof of signature". This, with respect, seems to be a debatable view. It may be noted that the practice in England is not so strict. For example, in a very early English case, where the attesting witnesses were either dead or out of reach for the process of the court, and it was proved that the attestation was in the handwriting of the attestor who was dead, the Court held the handwriting of the obilgor need not be proved. The Court held that attestation, when proved, is evidence of everything on the face of the paper which purports to be seen by the attesting witness. We are referring to this case to show that English courts do not confine themselves to "strict proof" of signature or execution.

31.11. A somewhat similar situation arose in a Madras case, where it was held that the signature of the attesting witness, when proved, is evidence of everything on the face of the document and of the fact that he saw the executant make his mark.

31.12. In fact, it was pointed out in a Supreme Court cases that the genuineness of the document is proof of the authorship of the document, and proof thereof is proof of a fact, like that of any other fact. In that case, internal evidence afforded by the contents of the document—that the document constituting a genuine link in a chain of correspondence—was described as a fact from which the court may be in a position to determine authorship of the document.

31.13. It was observed in one of the early Allahabad cases that, in England, there is a distinction between the proof of handwriting and presumptive or other evidence that the document has been executed. But, with respect,
this view as to the English law does not appear to be correct. We have already mentioned one English case relating to attestation. The inference to be drawn in cases of this kind (proof as signature of an attesting witness) depends on a number of circumstances peculiar to the cases in which they arise. Of course, if the court is not satisfied with the evidence adduced before it as to execution, the document remains unproved. This is because the evidence is insufficient. As a matter of law, however, for the proof of execution, any of the modes of proof, including even statements relevant under section 32(2), can be admissible.\(^1\)

31.14. Some controversy seems to have arisen in the past as to the value of an endorsement made by the Registrar in a document in relation to execution of the document, and the admission about that made before the Registrar. It is not, however, possible to lay down any hard and fast rule on the subject.

31.15. The above discussion is intended to elucidate some important aspects of the subject. The points discussed above do not seem to call for any amendment of the section.

\(^1\)Adam Kerr, supra.

\(^2\)Abdulla Paru v. Gannibal (1887) I.L.R. 11 Bom. 690, 691. (Witness called to prove the handwriting of one attesting witness of a deed of conveyance).
CHAPTER 32

ATTESTED DOCUMENTS (SECTIONS 68-72)

1. GENERAL

32.1. Proof of execution of a document, in general, has been already dealt with under section 67. As already stated, ordinarily no particular mode of proof is required for proving the execution of a document. But, in relation to certain special classes of documents, this rule had to be modified. This modification is to be found in sections 68 to 72 (documents requiring attestation). The object with which attestation is required by law, it is stated, is to afford proof of the genuineness of the document. To secure this object, certain broad principles have been followed:

(1) The provisions of the prescribing attestation would be defeated if a document required to be attested were to be allowed to be used in evidence otherwise than in accordance with the provisions of sections 68 to 71. Formalities imposed by law as “barriers against perjury and fraud” must be strictly observed.

(2) At the same time, the fate of a document is not necessarily at the mercy of the attesting witnesses. The mere fact that they repudiate their signatures or the like, does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony.

(3) Where, however, attestation is optional, a party is free to give such evidence as he pleases, the case not being one in which the law has required a particular form of proof.

32.2. These are the broad principles underlying sections 68 to 72, which contain special provisions applicable to documents required by law to be attested. At least one attesting witness must be called.

32.3. In England, the rule that one of the subscribing witnesses of an attested document must be called unless they were all unavailable, used to apply to all attested documents, whether attestation was required by law or not. Lord Ellenborough said in R. v. Harringworth, that the rule was as fixed, formal, and universal as any that can be stated in a court of justice. It probably originated in the ancient requirement that the witness to a deed should, where possible, be summoned to sit with the jury, in the days when that body was composed of witnesses rather than triers of fact.

32.4. In more modern times, the rule was sought to be justified on the ground that the parties to a document must be taken to have agreed that the document should not be given in evidence unless the attesting witness was called when possible, but, by virtue of section 7 of the Criminal Procedure Act, 1865 (which applies to civil and criminal cases), instruments to the validity of which attestation is not necessary may be proved as if there had been no attesting witnesses thereto, and section 3 of the Evidence Act, 1938, provides

\[ \text{Section 68—History of the English law.} \]

\[ \text{32.3. In England, the rule that one of the subscribing witnesses of an attested document must be called unless they were all unavailable, used to apply to all attested documents, whether attestation was required by law or not. Lord} \]

\[ \text{Ellenborough said in R. v. Harringworth, that the rule was as fixed, formal, and universal as any that can be stated in a court of justice. It probably originated in the ancient requirement that the witness to a deed should, where possible, be summoned to sit with the jury, in the days when that body was composed of witnesses rather than triers of fact.} \]

\[ \text{32.4. In more modern times, the rule was sought to be justified on the ground that the parties to a document must be taken to have agreed that the document should not be given in evidence unless the attesting witness was called when possible, but, by virtue of section 7 of the Criminal Procedure Act, 1865 (which applies to civil and criminal cases), instruments to the validity of which attestation is not necessary may be proved as if there had been no attesting witnesses thereto, and section 3 of the Evidence Act, 1938, provides} \]

\[ \text{\footnote{See discussion as to section 67.}} \]

\[ \text{\footnote{Cross on Evidence (1973), page 530.}} \]

\[ \text{\footnote{R. v. Harringworth (Inhabitants), (1815) 4 M. & S. 350.}} \]

\[ \text{\footnote{Cross on Evidence (1973), page 530.}} \]

\[ \text{\footnote{Whyman v. Garth, (1853) 8 Exch. 803 (Pollock, C. B.).}} \]

436
that in any proceedings, civil or criminal, an instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive. The only exception in England is the case of testamentary documents, to which the section is expressly stated to be inapplicable.

After this introductory discussion, we may proceed to consider the sections proper.

II. SECTION 68—THE PRINCIPAL QUESTION

32.5. Section 68 provides that where a document is required by the law to be attested, it shall not be used as evidence until at least one attesting witness has been called for proving its execution (if the attesting witness is available).

32.6. The rule is so stringent that even where the document is lost and secondary evidence is allowed to be led, the formality of calling the attesting witness has to be observed. This stringent and harsh rule may work hardship in a few cases. It must, however, be noted that the section is confined to documents “required by law to be attested”. Further, the proviso takes registered documents out of its scope.

32.7. Documents requiring attestation are very few. Important examples of these are—

(i) certain wills;¹

(ii) mortgages for Rs. 100 or more, in cases where sections 58 and 59 of the Transfer of Property Act, 1882 extend;

(iii) gifts of immovable property, in cases where sections 123—124 of the Transfer of Property Act, 1882 extend;

32.8. Though the Stamp Act, in defining a “bond” speaks of attestation, a bond is not a document required by law to be attested within the meaning of section 68.

32.9. The rule in section 68 is very stringent as stated above, and occasionally causes hardship, inasmuch as it may not always be easy to call the attesting witness, from the point of view of expense and trouble. Should the law on the subject be liberalised? The reason underlying the rule requiring the attesting witness to be called is stated to be, that the parties to the document must be taken to have agreed that the document should not be given in evidence unless the attesting witness was called, when possible.

“Subject as hereinafter provided, in any proceedings, whether civil or criminal, any instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved as if no attesting witness were alive:

Provided that nothing in this section shall apply to the proof of wills or other testamentary documents”.

See also Jadnaveth v. Isar, A.I.R. 1939 Pat. 47; Kurimullan v. Dada, A.I.R. 1925 All. 56.
²See sections 57, 58 and 63 of the Indian succession Act, 1925.
³(a) Mor v. Raina, A.I.R. 1953 M.B. 158;
(b) Ram Dutt v. Lalat Prasad, A.I.R. 1948 Oudh 258;
The change in our Act, as recommended above, will be a similar one.

32.10 to 32.13. We can see from reported cases the hardships caused by the existing rigid provision. We may also refer to Sarkar's suggestion to confine sections 68—72 to wills as in England. Sarkar has stated that the present law leads to perjury, and reform is long overdue.

32.14. The attesting witness is only an additional safeguard. Attestation is a safeguard at the time of execution. The best evidence would not necessarily be confined to an attesting witness. Even a non-attesting witness has seen the execution of the document. For this reason also we need not make evidence of the attesting witness compulsory.

32.15. It may be noted that the executant himself — though he may be a party to the suit—is not a compulsory witness. Even where the litigation is between third parties, the principal executant is not a compulsory witness.

32.16. An objection was raised that section 68 should not be disturbed, because —

(i) attesting witness is the best evidence of attestation, though not of execution, and

(ii) if we modify the section, then the requirement of attestation in the substantive law becomes futile. But the hardship caused by section 90, cannot be overlooked.

32.17. No doubt, after the insertion of the proviso in 1926 to section 68, the hardship is somewhat reduced, since registered documents are outside section 68. But if execution is specifically denied, this relaxation does not apply. Even a document to be used for part-performance (section 53A, Transfer of Property Act) may be hit by section 68, and it cannot be used as a shield unless section 68 is complied with.

32.18. Further, there is no question of the requirement of attestation being futile. The attestation will, in any case, have to be proved. But, it is unjust to make it a compulsory requirement for proof of the document. This often may lead to injustice. There is no need to give undue importance to the attesting witness by making it compulsory to call the attesting witness.

We must, however, add that one of us—Shri Mitra—is not in agreement with this recommendation.

32.19. There is another point which may be considered regarding the scope of the section. Section 90 entitles the Court to draw a presumption regarding ancient documents. The question is, whether, in the case of ancient documents governed by section 90, but required to be attested, section 68 would still apply so as to make the calling of the attesting witness obligatory. The decision in a Calcutta case is to the effect that the presumption under section 90 cannot be drawn in the case of a document required to be attested, and that section 68 could not be controlled by section 90.

Footnotes:
1See Sarkar's Evidence Act (1965), preface and also commentary on section 68.
32.26. It has been held⁴ that though, under section 90, a document can be presumed to have been properly attested and executed, still, where direct evidence satisfying section 68 is available, the proof of the document should not be left to section 90.

32.21. It would seem that the position requires to be stated clearly. The proper course, in our view, would be to allow section 90 to over-ride section 68. If the beneficial provisions of section 90 can apply to execution by the main executant, it would be anomalous if they are not available merely because the document is required to be attested; attestation is, after all, merely intended to be in aid of execution by the principal. If there are other circumstances justifying a presumption of genuineness, calling the attesting witness should not be insisted upon. Moreover, the presumption under section 90 is discretionary, and there is no risk of injustice since, if the court does not wish to draw the presumption, it will not do so on the facts.

32.22. It is, therefore, desirable to modify the section so as to provide that section 68 does not affect section 90, and we recommend that section 68 should be amended accordingly.

III. SECTION 68—SOME MATTERS OF DETAIL

32.23. Apart from these changes of substance, a few other points of detail need to be considered. Where the original of a document is in the possession of the opposite party, it is not clear whether section 68 will apply, though, under section 89, there is a presumption about the genuineness of a document which is not produced after notice. There is, in this respect, some likelihood of a conflict between section 68 and section 89. Such a case should be expressly excluded from section 68, which should be amended for the purpose.

32.24. We, therefore, recommend that in section 68, a suitable exception should be inserted on the above point.

32.25. While excluding cases where the witness is incapable of giving evidence, section 68 does not exclude the case of a witness who is kept out of the way by the adverse party, or whose attendance cannot be procured without unreasonable expense or delay. We are of the view, that such a case should also be excluded, as it stands on the same footing as that of a witness who cannot give evidence.

We recommend that the section should be amended accordingly.

32.26. Under the proviso to section 68, it shall not be necessary to call an attesting witness in the case of a document, not being a will. Where the document has been registered, unless its execution is specifically denied. This proviso becomes redundant if our recommendation to confine the main paragraph of the section to wills is accepted⁶ and we accordingly recommend that the proviso should be omitted. Of course this is subject to dissent by Shri Mitra.

32.27. Then there is some controversy as to how far a document required to be attested can be given in evidence for a collateral purpose (without complying with the provisions of section 68). One view is, that the section applies

⁵Cf. Section 33.
⁶See supra.

29—131 LAD/ND/77
only if the document is relied upon as one requiring attestation, so that non-compliance with the section does not prevent its use for any other or collateral purpose (for example, to prove some admission contained in the document). 

32.28. This view, however, is not shared by some High Courts, which have held that the section applies in all cases, in view of its stringent wording. The latter view appears to be the correct one on the language of the section. The question, then, is whether the section should be amended to allow the use of such documents in evidence for collateral purposes. While there is something to be said in favour of such a course, in view of the reason underlying the rule (intention of the parties), it does not appear to be practicable to frame any such limitation in precise and unambiguous words. The matter should, therefore, be left as it is.

32.29. Another question which has arisen is whether section 68 applies where secondary evidence is to be given of a document under section 65. Presumably, the words “shall not be used as evidence”, would cover secondary evidence also. It has been so held in a number of decision. This seems to be the rule in England also. It is unnecessary to disturb the language of the section on this point.

32.30. The reasoning on which section 68 is based, is that the parties intended that the attesting witness should testify to the execution of the document in case of dispute. This reasoning cannot apply as between third persons, and, from that point of view, it is not easy to defend the application of section 68 to third persons. In view, however, of the fact that the section will now apply only to a limited class of documents, no change is recommended on this point.

32.31. It was held in an Allahabad case that under sections 68 to 72, it is not a necessary element in the proof of attestation that the signature of all the attesting witnesses of a will should be identified. It was also held that it was not necessary that the attesting witnesses should be able to identify the signature of each other or even to know each other, and hence, there can be no basis for the requirement that the witnesses should identify each other's signature. This position need not be disturbed.

32.32. In an earlier Report of the Law Commission, the following recommendation relevant to the proviso to section 68 was made.

"In the Registration Act, provision should be made that whenever attestation is required by law, at least one attesting witness should be examined at the time of registration. The executant who would be examined should also be asked about the signature of the attesting witnesses. If attestation is not proved, registration should be refused.

(a) Shyam Lal v. Lakshmi Narain, A.I.R. 1939 All. 269.
(b) Mahadeo Prasad v. Ghulam Mohammad, I.L.R. 46. All. 649.
(c) See also Moti Chand v. Lalla Prasad, I.L.R. 40 Allahabad 256.

(a) Shih Chandra Singh v. Gour Chandra Paul, A.I.R. 1922 Calcutta 160.
(b) Awadh Ram Singh v. Mahabub Khan, A.I.R. 1924 Oudh. 255.

(b) Jadunath v. Isar, A.I.R. 1939 Patna 47.
(c) Bhiknath Singh v. Joginder, A.I.R. 1952 Madhya Bharat, 146.


6th Report of the Law Commission (Registration Act), page 27, para. 66, last two sub-paragraphs. The draft of the provision proposed to be inserted in the registration Act will be found at page 30, draft section 20(1)(b) (i) and 20(2)."
If this requirement is introduced in the Registration Act, it will be necessary to make consequential amendments in section 68 of the Evidence Act."

32.33. But, when the Registration Act was re-considered by the Law Commission this recommendation was not approved. Hence no change is needed in this respect.

IV. REDRAFT

32.34. In the light of the above discussion, we recommend the following redraft of section 68. We have already stated that one of us—Shri Mitra—is not agreeable to this recommendation in so far as the section is to be confined to Wills.

REVISED SECTION 68

68. If a will is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court, unless the witness is incapable of giving evidence or is kept out of the way by the adverse party or is one whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable:

Exception.—Nothing in this section applies to the case where the will is in the possession of the opposite party, nor shall this section affect the provisions of section 89 or section 90.

(Proviso omitted).

V. SECTIONS 69—72

32.35. Section 69 provides that if "no attesting witness can be found", etc., it must be proved that the attestation of at least one witness is in his handwriting and that the signature of the executant is in his hand-writing. Now, the section does not expressly provide for many other cases of unavailability of the witness, for example, where the attesting witness (though alive) is not subject to the process of the court or is not capable of giving evidence. Though it has been held, that, where the witness is incapable of giving evidence, the case can be regarded as falling under section 69, it is desirable to make the position clear. All the cases covered by the main paragraph of section 68 should be covered for the purposes of section 69 also.

32.36. Amongst the cases to which section 69 applies, is the case where the document appears to have been executed in the United Kingdom. In such a case also the signature of at least one attesting witness should be proved to be in his hand-writing etc. and the signature of the executant should be proved in his hand-writing. There does not appear to be any reason for retaining, at the present time, this special provision for documents executed in the U.K. That part of the section should, therefore, be deleted.

32.37. Accordingly, we recommend that in section 69, the words "or if the document purports to have been executed in the United Kingdom" should be omitted.


32.38. It will also be necessary to replace the word "document" by the word "will", in consequence of our recommendation to narrow down the scope of section 68. The revised section will read as follows:—

REVISED SECTION 69

"69. If no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the will is in the handwriting of that person."

SECTION 70

32.39. Section 70 provides that the admission of execution "by himself" made by a party is sufficient proof of execution even though the document is required to be attested. In a Calcutta decision, it has been held that, while admission of execution dispenses with proof of execution, it does not dispense with the necessity of proof of attestation.

32.40. The Calcutta decision is open to criticism for two reasons—

(i) such interpretation would render the section nugatory, in many cases, and

(ii) it is illogical to say that execution can be inferred from the admission, but not the attestation.

Attestation is merely incidental to execution by the main person; its purpose is to secure proof by an accredited witness, and where the main person himself admits execution without denying attestation, there is no reason why the law should still insist on formal proof of attestation. After all, an attesting witness is called not for proving only attestation, but "for the purpose of proving its execution." See section 68.

32.41. The view expressed by Woodroffe J. in a subsequent case of the Calcutta High Court may be noted. He observed that the admission of execution has the effect of dispensing with the proof of attestation.

32.42. The view taken in the earlier Calcutta case is not likely to prevail, and a different view has been taken in several decision of other High Courts. We do not, therefore, suggest any amendment, on this point. The latter view is implicit in section 70.

32.43. There is some doubt on the question whether section 70 is confined to admissions made in the pleadings or in the examination of a party or otherwise in the course of proceedings. One view is, that it is so confined, and

1See discussion as to section 68.
3See also para. 32.41, infra.
4Section 68.
6For example, see.
(b) Gurcharan v. Ram Bharosey, A.I.R. 1943 Oudh 218.
(c) Soma Sundaram v. Mahbula, A.I.R. 1933 Mad. 432, 434.
8(a) Raja Mangal v. Mathura Dubain, I.L.R. 38 All. 1; A.I.R. 1915 All. 385.
(b) Seikh Dawood v. Ram Nathan, A.I.R. 1923 Calcutta 149(2).
(d) Abdul Karim v. Salim (1900) I.L.R. 27 Cal. 190.
(e) Timmaru v. Diannara, A.I.R. 1948 Bom. 322.
admissions mentioned in section 22 or section 65(b) do not fall under the section. On this view, pre-litigation admissions do not fall within the section.

A contrary view has, however, been taken in some cases.

32.44. Since the reason underlying the existing rule is that the parties arrange for attestation with the object of securing evidence in case of litigation, it is reasonable to hold that only an admission made for the purpose of litigation should come under the section. Hence, the former view is correct, and the section should be confined to admissions made in the course of the proceedings.

32.45. We, therefore, recommend that in section 70, after the words “The admission of a party to an attested document of its execution by himself”, the words “if such admission is made in a pleading or otherwise in the course of the proceeding”, should be inserted.

32.46. Another verbal change is required in section 70. Wherever the word “document” occurs, the word “will” should be substituted, in view of the change recommended by us in section 68.

32.47. Since a will speaks from the death of the testator, questions as to its execution would arise mostly only after the death of the testator. However, it is not inconceivable that during his lifetime the testator is a party to a proceeding in which the will is in issue—for example, in the case of mutual wills.

32.48. If the above changes are made, section 70 will read as under:

REVISED SECTION 70

“70. The admission of a party to an attested will of its execution by himself shall, if such admission is made in a pleading or otherwise in the course of the proceeding, be sufficient proof of its execution as against him, though it be a will required by law to be attested”.

32.49. Section 71 provides that if “the attesting witness” denies or does not recollect the execution of the document, its execution may be proved by other evidence. The words “the attesting witness” presumably refer back to section 68, under which “one attesting witness at least” has to be called for proving execution. On this construction, if the one witness called under section 68 denies execution etc. under section 71, it would be permissible to have other evidence.

32.50. The matter, however, seems to have created some doubt, and the question has arisen whether it is necessary to call all the other attesting witness or witnesses (if available) before giving other evidence. The doubt has been raised by a few decisions, holding that if one witness cannot recollect or is hostile, the other witnesses must be called. A contrary view has been expressed in other cases.¹

¹For example Gurcharan v. Ram Bhorose, A.I.R. 1943 Oudh 218, 221 (reviews case-law).
²See the recommendation relating to section 68.
⁴(a) Hason Ali v. Gardas Kapali, A.I.R. 1929 Cal. 188.
(b) Ayenati v. Mohammed Esmail, A.I.R. 1929 Cal. 441, 442; (Jack J.).
(c) Bali Ram v. Kanaiola, A.I.R. 1924 Nag. 367.
32.51. In our view, it should not be necessary to call all the attesting witnesses. The section does not expressly provide that all witnesses must be called, and in any case, the contrary view may cause inconvenience. Nor is it implied that other evidence cannot be given. A clarification is needed in view of the conflict. In a Calcutta case, two Judges differed\(^1\) on this very point.

**Recommendation.**

32.52. We recommend that section 71 should be amended to incorporate the correct view stated above. Also, the section should be confined to wills, in view of the change\(^2\) recommended by us in section 68.

Section 71 should, therefore, be revised as under:

**REVISED SECTION 71**

"71. If the attesting witness called for the purpose of proving execution\(^4\) denies or does not recollect the execution of the will, its execution may be proved by other evidence and it shall not be necessary to call any other attesting witness".

32.53. Section 72 provides that in the case of documents not required to be attested, the attesting witness need not be called. The section should be confined to wills, as already recommended by us.\(^3\) The revised section will read as under.

**REVISED SECTION 72**

"72. An attested will not required by law to be attested may be proved as if it were unattested."

It may be stated that—

(i) Sections 68—71 are qualifications of section 67; and

(ii) Section 72 is a counter qualification of sections 68 to 71.

The scope of section 72 should therefore be co-extensive with section 68.


\(^2\)See Field, 6th Ed., page 236.

\(^3\)See discussion as to section 68.

\(^4\)Cf. section 68.

\(^5\)See discussion as to section 70.
CHAPTER 33
COMPARISON OF SIGNATURE BY THE COURT
SECTION 73

I. INTRODUCTORY

33.1. So far, we have been concerned with provisions dealing with the proof of documents through the medium of witnesses. Under certain provisions of law, however, the satisfaction of the court is established more directly, and material for the satisfaction of the court originates not in evidence given before the court, but in some other manner. Section 73 furnishes an example of such provision. It reads—

"73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose."

"The court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person."

"This section applies also, with any necessary modifications, to finger impressions."

II. THEORETICAL ASPECTS

33.2. This section is not only of practical importance, but also has considerable theoretical appeal. In the first place, it may be stated that, in the absence of such a provision as is contained in the second paragraph of the section, a question could have been raised whether the court has power (without a specific statutory provision) to compel a person to give a specimen of his writing. Of course, the word "compel" is not used in the section, which employs the expression "direct". However, direction from the Court amounts to compulsion, obviously in this context. If a person refuses to give a specimen of his fingerprints, the question may arise whether the forcible taking of his fingerprints is justifiable, — a question which still remains to be decided at common law.

33.3. Hence, without clear statutory authority, an order for fingerprints, even if it does not result in a person's furnishing evidence "against himself", creates difficulties, because its enforcement would constitute an infringement of personal liberty.1

33.4 Lord Reid stated in S. v. McC—

"I must now examine the present legal position with regard to blood tests. There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will. In my view, the reason is

---

1See Note in (1933) 176 Law Times 25.
3S. v. McC. (1972) A.C. 24, 43 (per Lord Reid), (See infra).
not that he ought not to be required to furnish evidence which may tell against him. By discovery of documents and in other ways the law often does this. The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'etat but by gradual erosion; and often it is the first step that counts. So it would be unwise to make even minor concessions."

33.5. Such a question could arise even apart from the constitutional prohibition in article 20(3) of the constitution (privilege against self-incrimination). That prohibition is relevant only for the accused and only for criminal cases. Freedom from interference with the person is a common law right, available to every person. It may be noted that the case-law relating to article 20(3) of the Constitution, in the context of provisions for giving finger prints, while holding that article 20 does not apply, relies mainly on the fact that the person concerned is not "a witness against himself," because he is not conveying or communicating any information or material. Those cases assume that the accused under section 73 is being "compelled", but there is no compulsion to be a witness against himself. This aspect is brought out more expressly in the decisions of some of the High Courts relating to section 73 or cognate provisions.

33.6. Another aspect of theoretical interest in this section is, as already stated, the machinery which it creates for the direct satisfaction of the court. Yet another aspect of juristic interest is the clarification made in the first paragraph to the effect that the signature, writing or seal which is used for comparison need not have been produced or proved for any other purpose. To state what is implicit in the scheme of the first paragraph, that document need not be relevant to the facts of the case.

33.7. The usefulness of finger prints to the police authorities might be granted; but such usefulness does not, of itself, render it legal. If the general welfare of the community rendered a serious limitation of the personal rights of the citizen necessary, this limitation should be effected by clear and considered legislation. The second paragraph, insofar as it applies to finger prints, avoids such controversies, to the extent to which the action taken falls within the paragraph.

33.8. A decision of the Justiciary Appeal Court at Edinburgh upon finger print law possesses considerable importance for those concerned with the administration of justice. The majority of the Scottish Judges in that case held, as a matter of Scot common law, that an accused person could be compelled to give his finger prints by force by the police. In that case, the finger prints of a man charged with house-breaking had been taken without his consent and without a warrant having been obtained for the purpose. When these finger prints were sought to be put in evidence against that man before the Sheriff's Court, an objection was raised that since the finger prints had not been lawfully obtained, they were not competent evidence. The objection was upheld by the Court of the Sheriff, but, on an appeal by the Procurator Fiscal, the Justiciary Appeal Court, by a majority judgment, allowed the appeal.

33.9. In the majority of four judges, again, the reasons differed. Lord Clyde, Lord Justice General, attached weight to the letter of the Secretary of state for Scotland in 1904, recommending the taking of finger impressions by the police "in

---

2*Introduction, supra.*
3*Article in Justice of the Peace, reproduced in (1933) 34 Criminal Law Journal 71.*
the case of untried prisoners detained at police stations and lock-ups." Three of the other Judges in the majority thought that the forcible process was justified in the public interest and did not constitute a violation of the common law rights of the subject, out of these three, again, one thought that the requirement of the warrant prior to force being used was not for protecting the prisoner, but to confer enabling power on the police as regards prison authority.

33.10. Dissenting from the majority judgment, Lord Hunter said that the practice in question was not countenanced in England, and that it was unfortunate that the law of Scotland should be declared different from that of England upon such a matter. He regarded the practice of having finger prints by force as an assault upon the person of a prisoner, fundamentally objectionable and contrary to the common law doctrine of personal liberty. It was, he said, for the legislature to curtail such right of personal liberty and not for the court.

The forcible taking of finger prints does not appear to have been the subject of reported English judicial decisions.

33.11. The principle that physical compulsion of the nature in question is illegal may be illustrated with reference to blood tests. Evidence of blood tests can be of the greatest value on issues concerning the paternity of a child, and, in a number of cases in which the adults consented to the tests, such evidence was acted on. In England, this aspect of blood test evidence is now controlled by the Family Law Reform Act, 1969. In the absence of such statutory authority, compulsory taking of blood tests would be illegal.

33.12. It is not proposed here to discuss the evidentiary value of finger print evidence. It is generally accepted in the courts today as satisfactory and, indeed, as very strong evidence,—unless, of course, there are allegiances against genuineness. It may, however, be said in passing, that it appears to be accepted mainly on expert opinion. This expert opinion, involving extensive and often intricate calculations, is rather beyond the ability of the average man to test.

III. OBJECT OF COMPARISON

33.13. In the opening words of section 73, the object of the comparison in question is stated. The object is to ascertain whether a signature, writing or seal is that of the person by whom it purported to have been written or made. With this object, the section provides that any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved. The section makes it clear that this procedure may be resorted to, even though the signature, writing or seal has not been produced or proved for any other purpose. The last mentioned portion appears to be needed to make it clear that the fact that the other writing contained in the signature, writing or seal contains matter otherwise irrelevant, will not come in the way of the procedure.

33.14. There may be cases where no such writing (that is to say, a writing admitted or proved to the satisfaction of the Court to have been written by the person concerned) is available, and the second paragraph of the section deals with this situation, by providing that the Court may direct any person present in Court to write words or figures for the purpose of enabling the Court to compare

---

1Emphasis supplied.
3See (a) Rex v. Cauleton, (1909) 3 Cr. App. R. 74.
(b) Rex v. Bacon, (1915) 11 Cr. App. R. 90, 46.
the words or figures so written with the words or figures alleged to have been written by such person. The third paragraph is explanatory.

We shall now deal with the points arising under each paragraph.

IV. SECTION 73—FIRST PARAGRAPH

33.15. Under the first paragraph of the section, comparison of a disputed writing with what may be called a standard writing is permitted. But a controversy has arisen whether the disputed writing must itself state that it is the writing of the person in question, or whether it is enough if the disputed writing is alleged to be of that person. The former view seems to have been taken in Calcutta, the latter view seems to have been taken in Bombay.

33.16. The controversy rests on the words 'purports to have been written or made'. The word 'purports' has been given a narrow meaning by Jenkins C.J. in a Calcutta case, where he remarked that the section requires that the disputed writing must itself state or indicate that it was written by that person. This interpretation was repeated in a later Calcutta case. The High Court of Bombay has, however, taken a wider view on this point. Decisions in Madras are conflicting. An earlier Madras case took the same view as the Bombay High Court, but a later case again raises some doubt.

33.17. Now, while, on the present wording of the section, there is something to be said for the narrower view (that is, the Calcutta view), there is much to be said in favour of adopting the wider view as a matter of legislative choice. There is no reason why this part of the section should be limited in its scope, when the second paragraph of the section (relating to directing any person present in court to write out words and figures for comparison) contemplates comparison with words or figures alleged to have been written by such a person.

33.18. It may be noted, in this connection, that the corresponding provision in the English statute law viz. section 8 of the Criminal Procedure Act, 1865 (which by section 1 thereof, applies to all courts), is wider and runs as follows:

"Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the Court and Jury as evidence of the genuineness or otherwise of the writing in dispute."

33.19. In view of what we have stated above, we recommend that the first paragraph of section 73 should be amended by substituting, for the word 'purports', the words "is alleged".

33.20. Another point relating to the first paragraph, on which controversy seems to have arisen, is whether the comparison should be by the court, or

---

1See case law, infra.
2See case law, infra.
3Barinda Kumar Ghosh v. Emperor, (1910) I.L.R. 37, Cal. 467.
8Section 8, Criminal Law Act, 1865 (Eng.).
9That is after action taken under second paragraph.
whether the comparison could be by an expert or by any other person. About the power of the court, there is no dispute in the case law although it is hazardous.¹

A court is competent to compare the disputed writing of a person with others which are admittedly proved to be his writings. It may not be safe² for a Court to record a finding about a person’s writing in a certain document merely on the basis of comparison, but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard.

33.21. As to comparison by an expert under the court’s orders such a power may, perhaps, be implied. However, a controversy has arisen on the subject. The controversy this time rests on the words “may be compared”—a verb without a subject mentioned. The case law on the subject may be examined. In a Bombay case³ of 1973, the complainant filed an application, praying that the accused be directed to give his specimen handwriting for use thereof by the handwriting expert to give his opinion whether the letter in question was in the handwriting of the accused and was signed by him. The accused argued that the Magistrate should not, after taking the handwriting of the accused, send it for the opinion of the expert to help the prosecution.

33.22. It has been held in one earlier Bombay case⁴ that section 73 would limit the power of the court to direct a person present in Court to write any words or figures only for its own purpose, and such power would not extend so as to permit one or other party to ask the court to take such handwriting for the purpose of its evidence or its own use. This was noted. The High Court also noted a judgment where⁵ the Supreme Court held that there was no infringement of article 20(3) of the Constitution by compelling the accused person to give his specimen handwriting or signature or impression of his fingers to the investigating officer or under orders of the court for the purpose of comparison under the provisions of section 73 of the Evidence Act. The point whether the court, after taking such specimen handwriting could, for the purpose of helping the prosecution, send it to the handwriting expert or not, was not for consideration before their Lordships of the Supreme Court.

33.23. The High Court held that the above ruling of the Supreme Court was of no avail, as the Court was not, in the instant case, concerned with the question of infringement of article 20(3). The Court was concerned with the question whether the Magistrate, after recording the specimen handwriting of an accused in his presence, could help the prosecution by sending it for the opinion of the expert. Hence the order of the Magistrate directing the specimen handwriting of the accused so taken in court to be sent to the expert, was set aside.

33.24. It seems to us, with respect, that a view that section 73 limits the power of the Court is based on a misconception of the true scheme of the Act and the scope of the section. No doubt, section 73 does not authorise the Court to send the specimen to an expert. But, at the same time, the section imposes no prohibition against sending the specimen to an expert. Whatever doubts may exist, de hors section 73, on the question whether legally a court

can choose an expert and send the document to him, section 73 certainly does not stand in the way of such a procedure. The section is, in fact, irrelevant to the point.

33.25. It may be noted that in the Act of 1855, section 48 ran as follows: 6

"On an enquiry whether a signature, writing or seal is genuine, any undisputed signature, writing or seal of the party whose signature, writing or seal is under dispute may be compared with the disputed one, though such signature, writing or seal be an instrument which is not evidence in the cause."

To the same effect is a Calcutta case. 6

33.26. In England, by the Criminal Procedure Act, 1865—which applies to civil proceedings also—"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

It will be observed that the Act in force in England does not contain any prohibition. In fact, it does not require the evidence of expert witnesses; but, in a number of criminal cases, such evidence has been regarded as desirable 6 or even necessary.

33.27. Having regard to the obscurity of the position on the subject, it is desirable to clarify the law. In our view, the comparison should be by the court, or under its orders. If such a provision is expressly made, the court will have power, inter alia, to send the document to an expert. Of course, by "expert", in the above discussion in relation to handwriting, we do not mean only professional experts. 6

33.28. Power of the court to direct any person present in court to write any words, or figures is restricted to enable the court itself to compare handwriting according to a Delhi case. 6

It holds that there is no ambiguity or confusion in the phraseology used in the second paragraph of the section. Therefore, the only purpose for which a court may direct any person in the court (including an accused person) to write words or figures is to enable the court to compare the words or figures so written with any words or figures alleged to have been written by such person. Where the purpose of directing a person present in court to write any words or figures is not to enable comparison of words or figures alleged to have been written by such person but is to enable any of the parties to have the words or figures so written compared from a handwriting expert of that party, the second paragraph of the section would have no application, according to the Delhi case.

This case shows the need for clarification.

---

6Section 48, Evidence Act (2 of 1855).
6See R. v. Amanullah, (1866) 6 W.R. Criminal, p. 5 (Cal.).
6Section 6, Criminal Procedure Act, 1865 (Eng.).
6(a) R. v. Talley (1961), 1 W.R. 1309, 1312 (CCA).
6Cf. section 47.
V. SECTION 73—SECOND PARAGRAPH

33.29. The second paragraph deals with the power of the court to take
certain compulsive measures directing a person to give his signature or thumb
impressions. A constitutional question pertaining to this paragraph may first be
dealt with. An order forcing the accused to give his signature or thumb-impressions
does not violate Article 20(3) of the Constitution. This has now been decided
by a majority judgment\(^1\) of the Supreme Court.\(^2\) No change is required on the
above point.

33.30. But controversy has arisen as to the power of the court to direct
comparison pending investigation. In one case,\(^3\) it has been held that a Magis-
trate has power under section 73 to direct an accused to give finger impressions
as well as specimen writings, and this does not offend against Article 20(3) of
the Constitution. In this case, the accused were produced before a Magistrate
by the police for taking their specimen signatures and thumb impressions for
the purpose of comparison during the course of investigation of the case. The
accused refused to give their specimens as such. The Magistrate rejected the
request of the police. In revision, the High Court set aside the order of the
Magistrate and directed him to obtain the thumb impressions and signatures of
the accused, with the observation that this does not fall within the expression
"to be a witness" under Article 20(3) of the Constitution of India.

33.31. In one Madras case,\(^4\) the High Court has taken the view that under
section 73, the Court cannot direct a person to give specimen signatures and
handwriting pending investigation by the police.\(^5\)

33.32. The Madras High Court\(^6\) has in the above case (dissenting from a
Patna case\(^7\)), held that the court cannot direct a person to give a specimen
signature and handwriting pending investigation by the police. The petitioner
in the Madras case was arrested by the police in connection with certain offences
of cheating, forgery etc. and was subsequently released on bail. Pending investiga-
tion, the police filed a Memorandum to the Sub-Divisional Magistrate,
requesting him to direct the petitioner to give a specimen signature and hand-
writing, for the purposes of further investigation. On issue of a notice by the
Magistrate, it was held that the Magistrate had no power to direct the accused
to give his specimen handwriting or signature in the course of investigation
by the police at their instance.

Same is the Kerala view.\(^8\)

33.33. It has also been held\(^9\) in Orissa that the Court cannot direct the accused
to give specimen signatures and handwriting pending investigation of the case
by the police. The High Court held that there is no provision in the Code of

\(^1\)State of Bombay v. Kathi Kalu, A.I.R. 1961 S.C. 1808, 1816, Points (3) and (4) and
1819, 1820, para. 32,

\(^2\)See also—
(a) the case law discussed in Mahal Chand v. State, (1960-61) 65 C.W.N. 433 (D.B.);
and
(b) J. Subbhash, A.I.R. 1970 Mad. 85.

\(^3\)Govt. of Manipur v. Thokchom Tomba Singh and Others A.I.R. 1969 Manipur 22.


\(^5\)See also Farid Ahmad, A.I.R. 1960 Cal. 32, 34.


\(^8\)Alvatus John v. State of Kerala, 1966 M.L.J. (Cr.) 298 (Ker.) (D.B.), (Noted in the
Yearly Digest).

(B. C. Das, J.).
Criminal Procedure which empowers a magistrate in every context or generally to assist the police in their investigation with a view to securing evidence. Such powers as exist are of a limited character. The provisions of the Identification of Prisoners Act, are also silent as to the taking of specimen handwriting or signatures of the accused. This Act confines itself to the securing of "measurements", including the finger impressions and footprints of an accused or a convicted person.

33.34. In a Calcutta case, two criminal Revisions were taken up for hearing together, as they involved a common question of law.

33.35. In one case, the petitioner Priti Ranjan Ghosh was directed by the Sub-Divisional Magistrate, Alipore to give specimen hand-writings to an officer of the Central Bureau of Investigation during the investigation of a case against the petitioner. Against this order, the petitioner moved the Sessions Judge, Alipore, but the order of the Sub-divisional Magistrate was upheld. The petitioner then filed a criminal Revision in the High Court.

33.36. In the other case, the petitioner Gokal Chand Sharma was directed by the Chief Presidency Magistrate, Calcutta to give specimen handwritings and signatures for the purpose of investigation of a case against him by the Enforcement Branch of the Calcutta police. The petitioner came up in revision to the High Court against this order of the Chief Presidency Magistrate.

33.37. The common question of law which arose in both the criminal Revisions was whether a Magistrate can direct an accused person to give his specimen writings to the police in the course of investigation.

33.38. The High Court accepted both the criminal Revisions, holding that section 73 does not empower a court to direct an accused person to give his handwriting or signature in the course of investigation. It quashed the orders of the lower courts. The High Court held as under:

"After a Court has taken cognizance, it has the power to direct an accused person to give his specimen handwritings where the Court itself requires such writings to come to its own conclusion and the Court cannot exercise this power for the benefit of either the prosecution or the defence."

33.39. It has, however, been held by the Andhra Pradesh High Court that under section 73, the Court does not exceed its powers in directing an accused to give his thumb-impressions to enable the police to make investigation of an offence, and, even in such a case, the purpose is to enable the court before which the accused is ultimately sent up for trial to compare the specimen thumb impressions of the accused with his alleged impressions. It has been further held that the order of a magistrate directing an accused to give his specimen signature for the purpose of investigation does not amount to testimonial compulsion so as to be violative of Article 20 (3) of the Constitution.

33.40. The case law discussed above shows that there is a conflict of views, and a clarification is desirable. We recommend that it should be made clear that the power under the section operates only after a court has taken cognizance.

---

1 Identification of Prisoner Act (30 of 1920).
3 Emphasis added.
It may be noted that the Evidence Act applies only to judicial proceedings,¹ and it would be inconsistent with the general scheme of the Act to provide for a power exercisable at an earlier stage.

VI. SECTION 73 — THIRD PARAGRAPH

33.41. We now come to the third paragraph of the section (finger impressions). Consequent on the amendments² recommended by us with reference to section 45 as regards palm impressions, footprints, and typewriting, it is necessary to include, in section 73, reference to palm impressions, footprints and typewriting, and we recommend that the section should be suitably amended for the purpose.

VII. RECOMMENDATION

In the light of the above discussion, we recommend that section 73 should be revised as follows:

Revised section 73

"73. (1) In order to ascertain whether a signature, writing, or seal is that of the person by whom it is alleged to have been written or made, any signature writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared by or under the orders of the Court with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

(2) The Court may direct any person present in Court to write any words of figures for the purpose of enabling comparison of the words or figures so written with any words or figures alleged to have been written by such person.

(3) This section applies also, with any necessary modifications, to finger impressions, palm impressions, footprints and typewriting.

Explanation.—Nothing in this section applies to a criminal court before it has taken cognizance of an offence."

¹Section 1.
²See, under section 45, discussion relating to palm impressions, footprints and typewriting.
CHAPTER 34

PUBLIC DOCUMENTS—SECTION 74 AND 75 AND PRIVATE DOCUMENTS

I. PUBLIC DOCUMENTS—IMPORTANCE

34.1. Documents are of two kinds, public and private. Section 74 gives a definition of the term "public document", and section 75 declares all documents other than those particularly specified to be private documents. Section 74 to 78 deal with—

(a) the nature of the former class of documents, and

(b) the proof which is to be given of them, including the grant of certified copies.

Section 74 defines their nature; and sections 76 to 78 deal with the exceptional mode of proof applicable in their case. The proof of private documents, as defined by section 75, remains subject to the general provisions of the Act relating to the proof of documentary evidence, contained in sections 61—73.

Two classes of public documents.

34.2. The list of public documents is found in section 74. There are two main classes of public documents, as provided in the section. In the first class are included documents forming the records or the acts of certain authorities and officers. In the second class are included public records of private documents.

The first important difference between the two classes, then, consists in the nature of the act dealt with in the documents. The first class is confined to what may be called public acts or records thereof, while the second class is confined to private acts recorded by a public authority. Another important difference between the two classes of public documents is that while the first class covers documents of any part of the world (if the other condition regarding the nature of the act or record is satisfied), the second class of public documents is confined to India, because the words used are—"public records kept in any State of private documents". As originally enacted, the Act used the words "in British India", but subsequent adaptations have resulted in the phrasing quoted above.

Provisions as to public documents.

34.3. The most important substantive provisions as to public documents are contained in sections 76 to 78. These deal with the mode of proof of public documents; but section 76 also confers a right. We shall discuss this aspect later.

Modes of proof.

34.4. As regards proof, there are two special modes of proof permitted by the provisions for public documents, namely, (i) by production of certified copies, and (ii) by production of certain records, journals, gazettes and the like. In regard to the first mode of proof — certified copies — it is pertinent to observe that where the original is a public document, a certified copy can be given in evidence thereof without proof of destruction or loss of the original, and without notice to produce. In addition, in respect of certain special classes of public documents, there are several provisions elsewhere in the Act. Certified

---

1 Section 65(6).
2 Section 66.
3 E.g., section 35.
II. CONCEPT

34.5. It may be useful to say a few words about the concept of public documents. In the leading English case of *Sturla v. Freccia*, Lord Blackburn stated —

"I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial duty to inquiry, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

34.6. In the leading English case, referred to above, the question related to the admissibility of a statement containing the age and place of birth of an individual in a report of a Committee appointed by a foreign Government about his fitness to hold a post under it. The House of Lords rejected the evidence afforded by the report, on the substantial ground that it was not (1) made under a duty to enquire into the circumstances recorded, (2) concerned with a public matter, (3) intended to be retained permanently, and (4) meant for public inspection.

34.7. The definition of "public document" is the section 74 is important, *inter alia*, because of the substantive right which section 76 confers. That section, so far as is material, provides that every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate, etc.

34.8. The theory of the English law is that every person has a right to inspect, a public document, subject to certain exceptions, provided he shows his individual interest in the particular document. We shall consider, in detail, the scope of this right later. We are mentioning it here to show the importance of section 76, and the consequential importance of section 74.

34.9. Reverting to section 74, we may state that the objection to requiring production of public documents in the original rests on the ground of, what is often described as, "moral inconvenience". One of the exceptions to the rule requiring primary evidence to be given which exception rests on grounds of physical impossibility or inconvenience,—may be compared. Public documents are, comparatively speaking, little liable to corruption, alteration or misrepresentation,—the whole community being interested in their preservation, and, in most instances, entitled to inspect them. The number of persons interested in

---

1*Sections 79 to 86.*
3Emphasis supplied.
5*Queen Empress v. Arumugam*, (1896) I.L.R. 29 Mad. 189. 191 (Order of reference to the Full Bench; proposition approved in the Full Bench decision at page 196, Shephard 1).”
6See discussion as to section 76.
7Section 65, clause (d)—where characters are traced on a rock or engraved on a tombstone or the like.

30—131 LAD/ND/77
public documents also renders them much more frequently required for evidentiary purposes; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use would soon ensure destruction.

34.10. A proceeding in a court of justice is provable by an examined copy. This rule has arisen from the convenience of the thing, that the originals may not be required to be removed from place to place.1

34.11. For these and other reasons, the contents of public documents are allowed to be proved by derivative evidence.

34.12. After these introductory remarks, we may address ourselves to certain specific questions arising on the wording of section 74.

III. MEANING OF DOCUMENTS FORMING ACTS

34.13. We first take up the expression "documents forming the acts or records of the acts", which is the crucial expression in the first half of the section. Some controversy seems to have arisen in the context of Income-tax returns. Broadly speaking, the controversy is rested on the question whether a document prepared by a private person and submitted to a public officer can fall within the quoted words. One view on the subject is that the section contemplates that the document must be prepared by the public officer or under his directions. Accordingly, if a private person has submitted a paper to the public officer, that is not an act or record of the public officer. In the Madras High Court, this view prevailed for some time, but this was later overruled in a Full Bench Madras case.2 The essence of the reasoning of Leach C.J. in the later Madras case is indicated by the following passage, quoted from the judgment of the Full Bench:

"If the argument, that an income-tax return is not a public document, but that the order passed thereon is, were carried to its logical conclusion, it would mean that no part of the record of a civil suit could be regarded as constituting a public document except evidence recorded by the Court or summonses or notices or interlocutory orders or the judgement in the case. In 25 W.R. 68 Garth C.J. and Birch J, expressly held that a petition which was the subject-matter of an order passed was part of the record in the suit, and I do not think that this can reasonably be doubted. In my judgement, it would be putting an unwarranted restriction on the words "documents forming the acts or records of the acts" to say that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for the purposes of the assessment. I consider that the record of an Income-tax case must be regarded as the record of the acts of the Income-tax Officer in making his assessment and, therefore, that any document properly on the record is just as much a public document as the final order of assessment."

34.14. This view may be contrasted with an earlier Madras case. In that case,3 the meaning of the expression "act" (in section 74) came up for construction. The precise question was, whether papers forwarded to a magistrate by

1Lady Dartmouth v. Roberts, 16 East, 341 (per Bayley J.).
a police officer under certain sections of the Code of Criminal Procedure — mainly, sections dealing with preliminary measures in the course of investigation, — were public documents, and it was held by a majority that they were not. In coming to this conclusion, the majority construed section 74 in a narrow manner. The following extract from the judgement of Shephard, J., gives, in a fair measure, the reasoning on which the majority judgement is based:—

“In construing that section, I think it may fairly be supposed that the word “act” in the phrase ‘document forming the acts or records of the acts’ is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document. The kind of acts which section 74 has in view is indicated by section 78 of the same Act. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character. The inquiries which a public officer may make, whether under the Criminal Procedure Code or otherwise, may or may not result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specific act in which they may result. It is to the latter only, in my opinion, that section 74 was intended to refer. Unless this line of distinction is drawn, I do not see where the right of discovery is to stop. If the report which a subordinate police officer sends to the station-house officer may be inspected before the trial, what is there to prevent inspection of the report which any other officer furnishes for the information of the public prosecutor? It is true that the police officer acts in performance of a statutory duty, but section 74 makes no distinction between such acts and other official acts. If an investigation amounts to an act of a public officer within the meaning of that section, and the report of it is, in consequence, a public document, it practically follows that the accused is at liberty to look into the brief of the counsel for the prosecution.”

34.15. We have considered this reasoning carefully, but we are of the view that such a narrow construction is not intended by the section. In our opinion, the later case
d takes the correct view. We do not recommend any amendment in this regard, as it would not be easy to frame a clarification of a general nature.

IV. PLANTS ETC.

34.16. Another controversy pertaining to section 74 may, however, be mentioned, as it deals with an important matter which is of a recurring nature and of practical importance. There is a difference of opinion as to whether plaints and written statements are public documents. According to one view, pleadings are not public documents, and so a certified copy of a plaint is not admissible in evidence.7 A plaint is not a public document, according to the Oudh view.8 A Patna case9 holds that sub-section (2) of section 74 can, in no way, include a plaint. The plaint is neither an act nor the record of an act of any public officer.

---

7 Emphasis supplied.
8 Narasimha Rama Rao v. Venkataramaya. A.I.R. 1940 Mad. 768, 775 (supra).
34.17. According to the Calcutta view¹, under section 74, pleadings and other papers in a case do not appear to fall under “public documents”. A contrary view was taken in an earlier case.²

In Madras³, the view adopted seems to have been that plaints and written statements are public documents.

34.18. A clarification on this particular point would be desirable. Our view is that it is desirable that plaints, written statements, petitions and other papers filed by parties in a court should be regarded as public documents, so that under section 76, if a person has a right to inspect the paper in question, a certified copy of the document can be given. This would avoid the necessity of producing the original in a subsequent case, and thereby save a lot of avoidable shifting of judicial records. Moreover, the reasoning which we have quoted from the Madras case⁴ suggests that this would be the logical view to take.

V. RECOMMENDATIONS

34.19. In the light of the above discussion, we recommend that section 74 should be amended by inserting the following Explanation at the end of the section:

“Explanation.—Records forming part of a case leading to a judgement of a court or an order of a public officer, if the order is pronounced judicially, are themselves public documents.”

VI. SECTION 75

34.20. Section 74 having defined public documents, section 75 provides that all other documents are private documents. It needs no change.

⁴Narayana Rama Rao v. Venkataramaya, A.I.R. 1940 Mad, 768 (supra)—discussion regarding “Meaning of acts”, etc.
CHAPTER 35
CERTIFIED COPIES—SECTIONS 76-77

I. SECTION 76 — INTRODUCTION

35.1. Under section 76 wherever there is a right to inspect a public document, the officer having custody of the document must issue certified copies. The actual provision is much more elaborate, but we have stated above its gist, in order to keep in the forefront certain important points that require consideration.

35.2. The most important aspect to which attention should be drawn is that the section applies only where there is a right to inspect a public document. The entire section hinges on it.

35.3. The right to inspect a public document is, thus, of crucial importance, and requires consideration in some detail. The Evidence Act itself is silent as to the right of inspection; but section 76 assumes that there is such a right. Apart from special provisions contained in various Central Acts, which we need not enumerate for the present purpose,—the right would, in India, as in England, exist even apart from statute.

35.4. Section 76 (as already stated) assumes the right of inspection to exist; and its own positive provision is only to the extent of giving a right to certified copies in cases where the right to inspect exists. Thus, if there is a right to inspect a public document otherwise than under the section, then the effect of the section is to confer a right to certified copies. Conversely, if there is no right to inspect, the section does not apply.

II. RIGHT TO INSPECT — SOURCE OF

35.5. Apart from statutory provisions, a right to inspect exists under common law. In India, the rule recognised by the judicial decisions is that in general any person who can show that he has an interest, for the protection of which it is necessary that liberty to inspect the document should be given, has a right to inspect the public document.

35.6. In England, wherever an original document is of a public nature and would, of itself, be evidence if produced from proper custody, certain kinds of copies of the document are admissible in evidence at common law also.

35.7. In Mutter v. The Eastern and Midlands Railway Company, Lindley, L.J. with the concurrence of Conyngham, L.J. and Bowen, L.J. laid down the rule thus:

"When the right to inspect and take a copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. When the right to inspect and to take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has

---

1R. v. Arumugam, (1897) I.L.R. 20 Mad. 189.
in what he wants to copy, and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle, as is shown by the judgment in *Rex v. Justices of Staffordshire*.

In *Rex. Justices of Staffordshire*, LORD Denman, Chief Justice observed that in regard to the persons interested, 'Every officer appointed by law to keep records ought to deem himself for that purpose (i.e. for the purpose of production of documents) 'a trustee'."

35.8. The case of *Mortimer v. Mc'callan* is also of interest. That case related to the books of the Bank of England. But the decision is based on a wider ground, namely, the public inconvenience of bringing the original of a public record. In fact, the judgment of Lord Abinger C.B. refers to the already established practice of allowing copies of books of Customs and Excise to be received in evidence. Alderson B. developed the point of public inconvenience further by taking the analogy of inscriptions on tombstones or on a wall. The books of the banks, which are not removable on the ground of "public inconvenience" were upon the same footing in point or principle nature of the thing itself. Alderson B. observed that the necessity of the case in the one instance (inscriptions) and the general public inconvenience in the other case (public books), that is the general public inconvenience which could follow from the books being removed, supplied the reason of the rule.

### III. STATUTORY PROVISIONS

35.9. The two rights relevant to the present discussion—inspection and copies—are sometimes provided for by statute. These statutory provisions are of various categories.

(a) The statute may give a right of inspection, and also provide a penalty and a remedy in case of refusal to allow inspection. This is rare in modern times.

(b) Or, the statute may merely give a right of inspection, without making any provision for any remedy.3

(c) Or, the statute may give a right to certified copies, without an express provision for inspection.

35.10. An example of the last mentioned category is to be found in the code of Civil Procedure, 1908, whereunder certified copies of judgments and decrees of certain courts must be furnished. The Code of Criminal Procedure similarly gives a right to obtain a copy of the document in certain cases.4 A right to obtain a copy is conferred by many other statutory Provisions, which we need not enumerate for the present purpose. Examples are however given in the footnote B.

---

3See Appendix.
5See Appendix.
6For example—
   (a) Section 19, Societies Registration Act, 1860;
   (b) Section 4, Powers of Attorney Act, 1882;
   (c) Section 35, Indian Registration Act, 1908;
   (d) Section 164, Companies Act, 1956;
   (e) Various Acts relating to marriages.
35.11. Certain statutory provisions in force in England may be noticed. For example, copies of records in the public Record Office in the custody of the Master of the Rolls may be made at the request and cost of any person desirous of acquiring them; and any copies so made are to be examined and certified as true and authentic copies by the Deputy Keeper of the Records of one of the Assistant Record Keepers and sealed or stamped with the seal of the Record Officer—Every copy so certified and purporting to be sealed or stamped with that seal is admissible in evidence without any further or other proof thereof, in every case in which the original record could have been received in evidence.

35.12. By the Evidence Act, 1845, wherever by an Act in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company or any certified copy of any document, bye-law, entry in any register or other book; or of any other proceeding, shall be receivable in evidence of any particular in any court of justice or before any legal tribunal either House of Parliament or any committee of either house or in any judicial proceeding, the same shall respectively be admitted in evidence provided they purport to be sealed or officially stamped or sealed and signed as required or impressed with a stamp or signed, directed by the respective Act. Proof of the seal or stamp or signature or official character of the person appearing to have signed, is dispensed with, and further proof thereof is also dispensed with, "in every case in which the original record could have been received in evidence."

35.13. Section 14 of the Evidence Act, 1851, is a more general provision, and reads thus:

"14. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to bear, receive, and examine evidence, provided it be proved to be an examined copy of extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four pence for every folio of ninety words."

IV. MEANING OF RIGHT TO INSPECT AS REFERRED TO IN SECTION 76

35.14. After this general discussion as to the importance and possible sources of the right to inspect, we may turn our attention to certain points arising with reference to the words "right to inspect", as employed in section 76.

35.15. A controversy seems to have arisen as to whether these words mean that there must (in order to bring the case within section 76) be a right to look into the entire original record, or whether the requirement indicated thereby is satisfied in any other manner. Thus, in a Bombay case, it was held that an

Controversy as to the words "right to inspect"—do they imply a right to look into the record.

1Sections 12 and 13, Public Records Office Act, 1838, (1 and 2 Vic. Chapter 94).
2Section 1, Evidence Act, 1845 (8 & 9 Vic. C, 113) (Eng.).
3Section 14, Evidence Act, 1851 (Eng.).
income-tax officer is prohibited by section 54 of the Income-tax Act, 1922 (now repealed and re-enacted, from giving certified copies of income-tax returns or of assessment orders even to the assessee on demand, and that the assessee has no "right to inspect" these original documents from the custody of the Income-tax officer. Hence, section 76 does not apply to them.

35.16. On the other hand, in an Allahabad case, it was held that since, under the Income-tax Manual, a copy of the assessment order is supplied to the assessee, free of cost, he can be taken as having a right to inspect the order within the meaning of section 76.

35.17. It is desirable to clarify the law on the subject. We are of the view that whenever copies are required to be given to a person under a statutory provision, or non statute rule or order made by the government even if it be non statutory the document should be regarded as one which that person has a "right to inspect" within the meaning should be so amended. It would advance the object of the legislation.

V. CONFIDENTIAL DOCUMENTS

35.18. Another controversy seems to have arisen in the past in relation to certain documents which are required to be treated as confidential under a specific statutory provision. An example of such provision is in section 137 of the Income-tax Act, 1961, which corresponds to section 54 of the Income Tax Act of 1922. That section—as far as is material, and to state only its gist—provides that the documents in question shall be treated as confidential. As to the effect of such a provision on the question whether the documents are public documents and, if so, whether there is a right to inspect, there appear to exist views on the subject,—the first being that by virtue of such a provision the documents cease to be public documents, the second being that though they are public documents, there is no right to inspect them, and the third being that they are documents subject to a right of inspection.

35.19. The first view is represented by a decision of the Bombay High Court, to which we have already referred. It was held in that case that the assessment order of the Income-tax Officer was not a public document, since it was confidential.

35.20. The second view is represented by a Calcutta case, holding that whilst such an order is a public document, it is a document in respect of which there is no right to inspect. This view, while taking note of the fact that the Income-tax Manual allows the assessee to have a copy of the document, points out that the Manual has no statutory authority, and also that the Manual does not, in terms, provide for a right of inspection.

35.21. According to the Allahabad High Court, the document is a public document in such a case, and further, it is also a document of which a certified copy can be given in evidence. This is also the view of the Patna High Court. The Allahabad view is based on the reasoning that the provision in the Income-tax Act for keeping the assessment order confidential was aimed simply at preventing the Income-tax Officer from betraying the confidence of which he

---

2This is not a draft.
is the recipient, and did not prohibit the assessee from giving evidence in respect of a document in his possession.

35.22. In our view, it is desirable that the law on the subject should be clarified. Where a person has a right to inspect or to obtain a copy of a public document by law or by virtue of a non-statutory rule or order made by Government, then the mere fact that the officer is bound to keep the document confidential from others should be immaterial. The specific provision as to non-statutory rule or order is desirable, in view of the Calcutta decision that the Income-tax Mandal does not have statutory authority. We recommend that the section should be so amended. Our reasons are as follows:

Confidentiality as an obligation imposed on the Income-tax Officer or other authority is intended, in such cases, to prevent disclosure to third persons, and not a disclosure to the person affected by the order. For that reason, confidentiality should be immaterial in the context of section 76, where the copy is proposed to be used as evidence by that very person who is entitled to a copy.

35.23. The words “any person” in section 76 would, at the first blush, seem to suggest that the section is meant for documents which every person has a right to inspect.

35.24. This, however, is not the only possible construction—Vide the words “that person”, which later follow. If the section was intended to be narrow, the appropriate words would have been “every person” at both the places. The words “that person” seem to suggest that the right to copies is available to a person who has the right of inspection,—or, at least, that such can be a possible interpretation.

32.25. It would not be improper to observe that such special cases cannot be adequately dealt with by resorting to the dichotomy of documents which (i) the public have a right to see and (ii) documents which no one can inspect as they relate to the affairs of the State. Where the question is whether certain documents are concerned with affairs of State, copies will not be given, and, in fact, even evidence thereof is not permissible without the permission of the head of the Department subject to the final determination by the court. In these cases the privilege is conferred in the interests of the state, and not for the protection of any person. But, in the case of Income-tax assessment orders and the like, the position is not exactly the same. They are not records kept for the information of the public, it is true. But, at the same time, they are not records kept exclusively for the information of the executive. The dichotomy referred to at the outset in this paragraph would not produce just and satisfactory results in regard to the right to inspect, because the documents in question (like income-tax assessments and income-returns) stand midway between a document which every member of the public has a right to inspect (on the one hand) and a document which no citizen has a right to inspect (on the other hand).

35.26. The principal object of such provisions as to confidentiality is fairness to the assessee. In a Madras case, it was observed—

“A full disclosure of a person’s affairs may be attendant with the risk that it prejudices him in his business. The statute, therefore, contains

---

1Section 123.
stringent provisions in the matter of disclosure by rendering a breach there-
of by a public servant punishable under section 54(2). It must be noticed
that the protection given by section 54 was for the benefit of the assessee;1
It would, therefore, stand to reason that he could, if he so chooses, waive
the privilege conferred on him”.

35.27. In a Patna case2 the object of section 54, Indian Income-tax Act,
1922, was thus described—

“The object of this section seems to be that the matters referred to
in such documents should be kept strictly confidential as between the
assessee and the Income-tax Department so that the assessee and the In-
come-tax Department may not hesitate in placing before the department
even confidential matters for the purposes of assessment without fear of
any disclosure of those matters.”

In view of what is stated above, the law should be amended as already
indicated.

VI. OTHER POINTS CONCERNING SECTION 76

35.28. We may now briefly dispose of other points concerning section 76.
In a previous Report of the Law Commission,3 the question of secondary evidence
of public documents was touched upon. Delays in the disposal of cases,
it was noted, were frequently caused by the requirement relating to production
of certified copies; at the same time, it was observed, it was difficult to conceive
of any other manner of proof of public documents. If it is left open to the
parties to adduce other proof of such documents, the Court would be com-
pelled to go into conflicting evidence, which would be obviously undesirable
when the contents can be proved by certified copies. The following observa-
tions were made: “The question may also receive the further consideration
of the Commission at the time of the revision of the Evidence Act.”

35.29. We have considered the matter further. But we do not regard it
as prudent or feasible to make any change in the present provisions as to the
mode of proof of public documents. We do not see how, apart from such proof
as is permitted under the existing law, it would be possible to devise any fresh
categories of secondary evidence for public documents. In fact, the facility
of putting certified copies in evidence is itself a special facility devised for pub-
dic documents; it is not available in respect of other documents. We respect
fully agree with the observations made in the earlier Report.

VII. RECOMMENDATION AS TO SECTION 76

35.30. In the light of the above discussion, we recommend that in section 76,
amendments should be made to carry out the two points indicated above.4 This
object can be achieved by adding two Explanations, as follows5:—

“Explanation 2.—For the purposes of this section, it is not necessary
that the public should have a right to inspect the document and it is suffi-
cient if the person demanding a copy has a right to inspect the document
of which the copy is demanded,

1Emphasis added.
Chowdhry, J).
4See supra—
(i) Recommendation as to copy given under statutory provisions,
(ii) Recommendation as to confidential documents,
5Present Explanation to section 76 to be re-numbered as Explanation 1.
Explanation 3.—Where a person has by a law a right to inspect a document or to a copy thereof, or where a rule or order made by the Government allows a copy to be given, this section applies notwithstanding any provision of law requiring that the document shall be treated as confidential in regard to other persons.

VIII. SECTION 77

35.31. Section 77 provides that "such" certified copies may be produced in proof of the contents of the public document or parts of the public documents of which they purport to be copies.

35.32. It may be noted, that by using the word "such", the section refers back to those certified copies which are mentioned in section 76. Section 76, in its turn, refers to public documents which a person has a right to inspect. An interesting question that has arisen is, if a public servant issues a certified copy to a party who has no right to inspect the original, is that certified copy one contemplated by section 76, and, accordingly, admissible under section 77.

35.33. Some High Courts—for example, Bombay and Calcutta—seem to have answered the question in the negative, by taking a narrow view.

In one Madras case Varadachariar, J was careful to record that he did not accept the reasoning in the Bombay case.

35.34. Though there is no direct conflict of views, the position on the above point appears to be obscure and a clarification is desirable. We recommend that the position should be made clear by providing that if a certified copy is, in fact, given, that will be admissible whether or not there was a right to inspect the original. This would be the only preferable course, from the practical point of view. Otherwise the time of the court would be wasted in an academic inquiry as to the existence of the right to inspection and needless summoning of the original.

35.35. Another question which could be raised with reference to section 77 pertains to certified extracts. In a number of cases, extracts of public documents have been admitted in India.

35.36. In some of these cases, section 77 was referred to. But, in few others, the section was not referred to.

35.37. In some of the cases only section 35 was referred to. In some, again only section 74 and 76 were referred to.

35.38. In some of the cases, there were specific statutory provisions permitting the giving in evidence of extracts.

4See also Anwar Ali v. Tafazzal Ahmed, A.I.R. 1925 Ran. 84.
5This is not a draft.
35.39. It may be noted that in the English law, mere extracts do not seem to be admissible in the absence of statutory provisions.

35.40. Apparently, the matter does not seem to have led to any practical difficulty in India, and the section may, on this point, be left as it is.

Finally, the question, whether only, certified copies can be secondary evidence, has been discussed already.

35.41. In the result, the only change needed in section 77 (as indicated above) is with reference to the situation where a copy is in fact given.

APPENDIX

Provisions in the Code of Criminal Procedure 1973 as to inspection etc. of certain documents

<table>
<thead>
<tr>
<th>Section</th>
<th>Right to inspect</th>
<th>Right to copies</th>
</tr>
</thead>
<tbody>
<tr>
<td>207 (Proviso)</td>
<td></td>
<td>100 (6), (7)</td>
</tr>
<tr>
<td>298 (Proviso)</td>
<td></td>
<td>134 (2)</td>
</tr>
<tr>
<td>288(1)</td>
<td></td>
<td>155(5)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>166(5)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>173(7)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>207</td>
</tr>
<tr>
<td></td>
<td></td>
<td>208</td>
</tr>
<tr>
<td></td>
<td></td>
<td>306(3)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>310(2)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>314(2)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>353(4)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>362(1),(2),(5),(6)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>385(1) IV</td>
</tr>
<tr>
<td></td>
<td></td>
<td>407 (5)</td>
</tr>
</tbody>
</table>

1Finlay v. E. 31 L.I.M. & P. 149; Phipson, Evidence (1963), para. 1697.

2See discussion relating to section 65(c).
PUBLIC DOCUMENTS—PROOF BY OTHER MODES

36.1. Proof by certified copies is not the only mode of proving public documents. There are other modes of proof, as to which section 78 contains an important provision.

SECTION 78

36.2. Section 78 provides that the public documents enumerated in the six clauses of the section may be proved in the manner provided in the relevant clause. The section, by its very terms, is not exhaustive. The court is not confined exclusively to the modes of proof laid down in the section. Thus, for example, the section does not prohibit the original of the public document in question from being produced; nor does it affect the general provision in section 77, permitting proof of public documents by the production of certified copies. The section, in other words, provides for an additional mode of proof.

36.3. The first clause of section 78 deals with acts, orders or notifications of three authorities—the Central Government, the Crown Representative and the State Government. So far as the Crown Representative is concerned, the operation of the section should be confined to the period before 15th day of August, 1947, and we recommend that the clause should be so amended.

36.4. The second clause of section 78 deals with the proof of the proceedings of the Legislatures. Before Independence, the expression “Legislatures” came up for consideration before the Federal Court in Niharendu’s case. The question at issue in that case was the proof of the proceedings of the U.K. Parliament. The Federal Court held that the proceedings of the U.K. Parliament came either under the second or under the fourth clause of section 78, and official Parliamentary Debates afforded adequate proof of the passing of the proceedings by the House of Parliament. In the course of the discussion, the Federal Court (Gwyer C.J.) observed that it may be that in the second category, the words “the Legislatures” were intended to include all the Legislatures which have the power to make laws for British India or for any part thereof.

36.5. It may be pointed out that proceedings of foreign legislatures are specifically covered by the fourth clause of section 78. The fact that the fourth clause of the section provides for legislatures of foreign countries was noticed by the Federal Court also: but the Federal Court, without expressing any final opinion on the point, did say that it would be difficult to suppose that the Parliament of the U.K. could have been described by the Indian Legislature in 1872 as the legislature “of a foreign country”. This particular question is now of academic importance; but, in the interest of accuracy, it is desirable to substitute, for the words “the legislatures” in section 78(2), the words “Parliament or of the legislature of any State”. We recommend accordingly.

4See also discussion by Harrington J. in the Englishman Ltd v. Laiapatrai, (1910) I.L.R. 37 Cal. 760, 775.
36.5. With reference to this clause of the section, it may be noted that this clause does not deal with a question that sometimes arises where there is a mistake in the printed copy of an Act. Sometimes, the version of an Act as printed separately by official order differs from the version in the Official Gazette. In such cases, the court is free to correct the discrepancy—if necessary by comparison with the original. Such a power is implicit in the provision relating to judicial notice.1

36.7. It is not often that the question of the accuracy of the text of a Central Act as printed in the copies available to the public arises. However, this question did arise in the twenties, in regard to article 177 of the Indian Limitation Act, 1908, as amended in 1920. The question related to the text of the original Act of 1908; the version as it appeared in the Gazette of India differed from the version as given in the copy of the Act as published by the Superintendent of Printing. This led to a conflict of views. According to one view, the version in the Gazette was to be taken as authoritative, and must be followed.2 Thus, if there is a discrepancy between the text as published in the Gazette of India and the text as published by the Superintendent of the Government Printing, the former must prevail.3 The Lahore High Court held4 that the version in the Gazette must prevail. The matter was considered at length in a Calcutta case,5 in which Page J., having regard to the intrinsic provisions of the Act, preferred the version as contained in the published Act to that contained in the Gazette. Apparently, section 78(2), in so far as it mentions all published Acts or “copies purporting to be printed by the Government”, was not considered as literally applicable. It may be that the published Acts did not purport to be printed “by order of Government”, but only by the Superintendent, Government Printing, India. However, the judgment does not say so.

36.8. Sometimes two printed copies of an Act differ. Such an instance was brought to light in a Bombay case.6 The High Court had to consider. The amendment of section 104 of the Bombay Local Boards Act, 1923, by Act 23 of 1938. The relevant passage from the judgment is given below:

"Section 4 of the amending Act is as follows:—

4. In clause (b) of sub-section (1) of section 104 of the said Act, after the words, ‘on account of’, the words ‘an octroi or’ shall be inserted.

But the words ’on account of’ twice appear in section 104(1), once in the exception and once in the substantive part of the section.

Two copies of the amended statute were handed up to this Bench. In one of them, the words ‘an octroi or’ had been inserted after the words ‘on account of’ where they first appear and in the other copy after the words ‘on account of’ where they secondly appear in the section. In both cases the section as thus amended reads correctly in point of form and grammar, though the resultant sense is very different. Carelessness in legislative drafting of this character is liable to bring the law into great confusion and this case clearly demonstrates how desirable it is when sections of a Provincial Act are subsequently amended, for the whole amended section to be re-enacted in its amended form or for prints of the Act in its amended form to be speedily available. The great inconvenience attendant-upon the

1Section 57, penultimate paragraph.
426 Calcutta Weekly Notes (Journal), page 150; I.L.R. 4 Lah. 367.
present method of making legislative amendments by correction slips intended to be stuck into unamended copies is but too well-known in this Court. In this case in order to settle what was the intention of the Legislature we sent for the King’s printer’s copy of the Act as amended and from it, it appears, that the inserted words are to be placed after the words ‘on account of where they first occur in the old section.’

We are referring to this aspect not in order to suggest any amendment—the problem does not arise often—but because the matter is of some interest.

36.9. In England, no proof of public statutes is required. By statute, every Act passed after 1850 is a public Act, and is to be judicially noticed. unless the Act itself provides expressly to the contrary. Where judicial notice is excluded, the Act must be proved in the ordinary way by a copy. Apparently, the copy must be one compared with the Parliamentary roll (which was the previous method of recording the Act).

Thus, in short, public statutes are judicially noticed, and no proof of them is required.

36.10. Previously, after the Royal assent, the Clerk of Parliament transcribed every public Act on a roll which was delivered into Chancery and this was considered the only record.

The practice of engrossing Acts on “rolls of Parliament” was discontinued after the Evidence Act, 1845, and now the recognised record is a copy printed by the Queen’s Printer—though there are still two prints of vellum made, signed by the Clerk of Parliaments or his Deputy, of which one is preserved in the House of Lords and the other in the Public Records Office. If any occasion arises for doubting the accuracy of the print of any statute, reference may be had to the Rolls of Parliament (as to statutes passed prior to 1849), and also, as to Acts between 1487 and 1849, to the original Acts.

36.11. Apparently, this comparison is to be done by the court itself with reference to public general Acts, or any local or private Act directed to be judicially noticed as a Public Act and it does not seem to be the duty of the parties to examine or to produce an examined copy of the entry on the Chancery Roll or of the vellum print (as the case may be).

36.12. So much as regards the proof of legislation. We now proceed to the next clause of section 78. Clause (3) provides for the proof of proclamations, orders and regulations issued by Her Majesty or by the Privy Council or by any department of Her Majesty’s Government. This clause should be confined to proclamations etc. issued before the 15th August, 1947, in view of the constitutional changes that have taken place. We recommend that section 78(3) should be amended, by inserting, before the words “proclamations, orders and regulations issued by Her Majesty or by the Privy Council or, by any department of Her Majesty’s Government”, the words and figures “as respects the period before the 15th day of August, 1947”.

---

1Section 9, Interpretation Act, 1899 (Eng.).
2The Prince’s case, (1660) 8 Coke Reports, 1-a, 20-b.
3(a) R. v. Jefferies, (1721) 1 Str. 466.
(b) Price v. Hellis, (1813) 1 M & S 135.
4Willies Claim (1869) Law Reports, 4 House of Lords 126.
7Crates Statute Law (1963), page 39.
36.13. At this stage, we may refer to two Acts, of the U.K. Parliament, the Documentary Evidence Act, 1868; and the Documentary Evidence Act, 1882, relating to certain official documents (now repealed in their application to India). The Act of 1868 provides that the prima facie evidence of any proclamation, order or regulation issued by Her Majesty or by the Privy Council or under the authority of any department or officer mentioned in the Schedule to the Act of 1868 may be given by providing a copy of the gazette or a copy provided by the Government printer etc. The Act of 1882 supplements the Act of 1868, by providing that provisions (of the 1868 Act) applicable to copies printed by the Government printer or under Her Majesty’s authority etc. shall apply also to documents printed under the superintendence or authority of Her Majesty’s Stationery Office.

36.14. A recommendation was made in the Fifth Report of the Law Commission, to the effect that if these provisions are to be retained, they may be included in the Evidence Act at the proper place. Subsequent to that Report, the two British Acts in question have been repealed in their application to India.

36.15. It does not appear to be necessary, in the present constitutional position, to make any provision on the subject. So far as orders and proclamations issued before the 15th August, 1947, are concerned, the question may not arise frequently, and, in any case, section 78(3) of the Evidence Act will take care of them. Now that the Acts in question have been repealed, we may leave the matter at that. For all practical purposes, section 78(4) will suffice.

36.16. Under section 78, clause (4), the act of the executive or the proceedings of the legislature of a foreign country may be proved by journals published by their authority or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign or by a recognition thereof in some Central Act. We have no comments on this clause.

36.17. Section 78, clause (5), deals with proof of the proceedings of a municipal body in a State. Two modes of proof are provided, namely, (i) a copy of such proceedings certified by the legal keeper thereof, and (ii) a printed book purporting to be published by the authority of such body. Certified copies would even otherwise be admissible under section 77 in proof of public documents, and there can be hardly any doubt that the proceedings of a municipal body in a State, in so far as they form the acts or records of the acts of that body within the meaning of section 74(1), are public documents. Doubts might arise, however, in respect of other proceedings of the municipal bodies. Clause (5) avoids all these controversies.

36.18. This is the first point that illustrates the utility of the clause. Secondly, 'certified copies', in relation to public documents in general, (as defined in section 76), bring in the requirement of a right to inspect. Clause (5) of section 78 avoids that complication also. In other words, whether or not there is a right to inspect, and whether or not the proceedings fall within section 74(1), a copy of the proceedings of a municipal body in a State, certified by the legal keeper thereof, is one mode of proof recognised in respect of those proceedings.

1The Documentary Evidence Act, 1868 (31 & 32 Vic. Ch. 37).
2The Documentary Evidence Act, 1882 (45 & 46 Vic. Ch. 9).
3Fifth Report (British Statutes applicable to India), page 49, under Entry 81.
4The British Statute (Application to India) Repeal Act, 1960 (57 of 1960).
36.19. No changes are needed in the clause. No doubt, the clause is somewhat ill-placed, being sandwiched between clauses which deal with foreign documents. However, we do not think it convenient to disturb the structure of the section.

36.20. Finally, clause (6) of Section 78 deals with the proof of public documents of any other class in a foreign country. In this case, the “original” is specifically mentioned. Besides the original, the clause allows proof by a certified copy. But the copy must be certified by the legal keeper thereof, and must also bear a certificate under the seal of a notary public or of an Indian consular or diplomatic officer, where the copy is duly certified by the officer having legal custody of the original. In addition, there must be “proof of the character of the documents according to the law of the foreign country”.

36.21. It is the last mentioned requirement which raises one query, namely, what is the precise purport of this requirement? One view could be that irrespective of whether the document produced is the original or a certified copy (bearing the necessary certificate), this clause contemplates that there must be proof of the character of the document according to the foreign law. However, it is possible to adopt a different construction, by holding that the requirement of the proof of character is applicable only to the certified copy, in order to show that it was a public document. As printed in the Act, the clause is capable of either construction. If the latter construction is to be adopted—and that appears to be the construction intended—it would be necessary to split up the clause in a suitable manner. We recommend that it should be so split up.

36.22. Revised section 78(6) will read as under:—

“(6). Public document of any other class in a foreign country,

(a) by the original, or

(b) by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of an Indian Consular or diplomatic officer, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.”

APPENDIX 1


“DOCUMENTARY EVIDENCE ACT, 1868 31 & 32 Vict. c. 37.

2. Prima facie evidence of any proclamation, order or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the Schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order or regulation.

(2) By the production of a copy of such proclamation, order or regulation, purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

(3) By the production, in the case of any proclamation, order or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council, and in the case of any proclamation, order or regulation issued by or

under the authority of any of the said departments or officers, by the production of a
copy or extract purporting to be certified to be true by the person or persons specified
in the second column of the said schedule in connection with such department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing,
or partly in print and partly in writing.

No proof shall be required of the handwriting of official position of any person
certifying, in pursuance of this Act, to the truth of any copy of an extract from any
proclamation, order or regulation.

"3. Subject to any law that may be from time to time made by the legislature of
any British colony and possession, this Act shall be in force in every such colony and
possession.

"6. The provisions of this Act shall be deemed to be in addition to, and not in dero-
gation of, any powers of proving documents given by any existing statute, or existing at
common law."

"DOCUMENTARY EVIDENCE ACT. 1882 45 & 46 Vict. c. 9.

"2. Where any enactment, whether passed before or after the passing of this Act,
provides that a copy of any Act of Parliament, proclamation, order, regulation, rule,
warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence,
or have any other effect, when purporting to be printed by the Government printer, or the
Queen's printer, or a printer authorised by Her Majesty, or otherwise under Her Majesty's
authority, whatever may be the precise expression used, such copy shall also be conclu-
sive evidence, or evidence, or have the said effect (as the case may be) if it purports to
be printed under the superintendence or authority of Her Majesty's Stationery Office."

SECTION 78-A
(West Bengal Amendment)

Section 78-A inserted by West Bengal Act No. 29 of 1955 and amended by West
Bengal Act 20 of 1960 is of purely local interest, as it deals with certain problems in
partitioned districts of Bengal.
CHAPTER 37
PRESUMPTIONS AS TO DOCUMENTS—SECTION 79
I. PRESUMPTIONS AS TO DOCUMENTS

GENERAL

37.1. When a document, whether private or public, is offered in evidence, certain presumptions may arise in respect of it. These are enumerated in sections 70 to 90. Those presumptions, however, are not conclusive. An inference is drawn from certain facts in lieu of any other mode of proof. The inferences are of two kinds. The inference may be one which the court is bound to make, so that the fact is taken as proved until it is disproved; in this case, it is said that the court “shall presume;” or, the inference may be one which the court is at liberty to make,—i.e. the court is at liberty either to accept the fact as proved until it is disproved, or to call for proof of it in the first instance; in this case, it is said that the Court “may presume”.

37.2. None of these presumptions is conclusive. All that the law does is to allow the Court to dispense with evidence if it should think fit to do so, or in certain cases, to require it to do so. But proof to the contrary is not ruled out by the sections with which we are concerned—sections 79 to 90.

37.3. The two classes of inferences play an important part in the proof of documents. Sections 79—85, and section 89, provide for cases in which the Court shall presume certain facts about documents; sections 86—88 and 90, provide for cases in which the Court may presume certain things about them.

Sometimes, two sets of presumptions will apply to the same document. For instance, what purports to be a certified copy of a record of evidence is produced. It must, by section 79, be presumed to be an accurate copy of the record of evidence. By section 80, the facts stated in the record itself as to the circumstances under which it was taken, i.e., that it was read over to the witness in a language which he understood, must be presumed to be true.

37.4. There is a rationale underlying these presumptions. Most of the presumptions as to documents are based on the principle that it may be presumed that solemn or official acts were done in the ordinary manner. Sometimes there are additional considerations also. For example, the presumption which is directed to be raised by section 90 in relation to ancient documents is of great importance in obviating the effects of the lapse of time as to the proof of documents. As years go on, the witnesses who can personally speak to the attestation or execution of a document, or to the handwriting of those who executed or attested it, gradually die out. If strict proof of execution of handwriting were necessary, it would, after a generation, become impossible to prove any document. On the other hand, there is some reason to suppose that documents, of which people take care for a long series of years, are authentic. The law acts upon this probability, and provides the presumption that in the case of documents proved or purporting to be thirty years old, and produced from proper custody—that is the place in which, the care of the person with whom, it would naturally be, the court may presume that the signature and every other part of such a document is in the handwriting of the person by whom it purports to be written, and that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Other presumptions may, of course, be raised under the provisions of section 114, as is indeed indicated by illustration (i) to that section, according to
which the Court may presume that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged, though, in considering whether such a maxim does or does not apply to the particular case before it, the Court will also have regard to such facts as the following, viz., that though the bond is in the possession of the obligor, the circumstances of the case are such that he has stolen it. There are many other presumptions as to documents known to English law, for which no express provision is made in the Act, and which, therefore, can be raised only under the general provision contained in section 114.

II. SECTION 79—PARLIAMENTARY DOCUMENTS

37.5. After this general discussion, we may deal with section 79. Under that section the court shall presume the genuineness of every document purporting to be a certificate, certified copy, or other document which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer of the Government duly authorised, provided the document is substantially in the form and purporting to be executed in the manner directed by law in that behalf.

37.6. Case law on the section does not raise serious problems. But reference should be made to a suggestion made by the Committee of Privileges of the Lok Sabha on a point which is relevant to this section.1 On a reference made by the Speaker of the Lok Sabha in three individual cases, the Committee of Privileges considered the question of the procedure for producing before courts of law documents connected with the proceedings of the House. We shall refer only to that recommendation of the Committee which touches on the law of evidence.

37.7. One of the recommendations by the committee of privileges was, that normally, when the documents are required to be produced in the Court of law and are connected with Parliament, certified copies should be considered sufficient evidence of such documents, and that, if necessary, the relevant provisions of the Evidence Act may be amended accordingly. (The then Law Minister was a Member of the Committee). The Lok Sabha discussed the report, and agreed with it in toto.

37.8 For appreciating this suggestion, it is desirable to have a look at certain provisions relevant to the subject. It may be noted at the outset that the Evidence Act is not entirely silent about documents with which Parliament is concerned. Under section 78(2), the proceedings of Legislatures can be proved by the Journals of the Legislatures, or published Acts or abstracts, or by copies purporting to be printed by the order of the Government concerned. Therefore, so far as published "proceedings" are concerned, no further provision appears to be necessary. This leaves documents which are not part of the published proceedings. These may, for the sake of convenience, be referred to as "unpublished" documents. Such unpublished documents can be classified into:

(a) documents which form "the acts and records of acts" of Parliament, and

(b) documents which do not form the acts or records of acts of Parliament.

Documents falling under category (a) are public documents under section 74(1)(iii), so that certified copies of such documents can be given under

---

section 76, and such certified copies can, under section 77, be accepted in evidence without production of the original under section 77.

37.9. In regard to these documents,—i.e. those falling under category (a) above,—the only question that can be usefully considered is the extension of the beneficial provisions of section 79 (presumptions as to the genuineness of certified copies), to certified copies of such documents. In view of the suggestion made by the Committee on Privileges, which is sound in principle, we recommend that section 79 should be extended to such documents.

37.10. This leaves only the documents referred to in category (b) above—which can be described as unpublished private documents of Parliament. It does not appear to be desirable to extend the facilities of certified copies to such documents, and we may take it that it was not the intention of the Committee on Privileges to extend the facility of certified copies to unpublished and private documents of Parliament.

37.11. It may be mentioned that leave of the House is necessary for giving evidence in a court of law in respect of the proceedings in that House or Committees thereof or for production of any document connected with the proceedings of that House or Committees thereof, or in the custody of the officers of that House. According to the first Report of the Committee of privileges of the Second Lok Sabha, "no member or officer of the House should give evidence in a court of law in respect of any proceedings of the House or any Committees of the House or any other document connected with the proceedings of the House or in the custody of the Secretary without the leave of the House being first obtained".

37.12. It may also be stated that whenever any document relating to the proceedings of the House or any committee thereof is required to be produced in a court of law, the court or the parties to the legal proceedings have to request the House, stating precisely the documents required, the purpose for which they are required and the date by which they are required. It has also to be specifically stated in each case whether only a certified copy of the document should be sent or an officer of the House should produce it before the court.

37.13. When the House is not in session, the Speaker may in emergent cases allow the production of the relevant document in order to prevent delay in the administration of justice and inform the House accordingly of the fact when it re-assembles or through the bulletin.

37.14. There are also instructions for adopting the proper form of address and emphasising that normally only the certified copies should be called for and that section 78(2) of the Act should be borne in mind.

The form of request prescribed is as follows:—

"From

To

The Speaker of the House of the People/The Chairman of the Council of States, Parliament House,

New Delhi.

Dated, the .......... 19......

Sub: (Description of the case)

---

1Shakdher and Kaul, Parliamentary Procedure in India, page 177.
2See also Lok Sabha Debates 13th September, 1957, pages 13760 to 13763.
Sir,

Where mere production of documents is required.

In the above proceedings, the plaintiff/defendant/complainant/accused proposed to rely upon the documents, specified in the Annexure, which are in the custody of the House of the People/the Council of States. I have to request you to move the House if you have no objection to grant leave for the production of documents in my court and, if such leave is granted, to arrange to send the documents/certified copies of the documents so as to reach me on or before ................. by registered post (A.D.) or through an officer in the Secretariat of the House.

Where oral evidence of an officer in the Secretariat of the House is required.

In the above proceedings, the plaintiff/defendant/complainant/accused proposes to examine .................................. an officer in the Secretariat of the House of the People/the Council of States (or any duly informed officer in the Secretariat of the House) as a witness in regard to matters specified in the Annexures. I have to request you to move the House, if you have no objection to grant leave for the examination of the said officer in my court, and, if such leave is granted, to direct the officer to appear in my court at 11 a.m. on .........................

Yours faithfully,

ANNEXURE

1.
2.
3.
4.

III. SECTION 79—JAMMU AND KASHMIR

Section 79—Officers of Jammu and Kashmir

37.15 and 37.16. Another question relevant to section 79, pertains to the State of Jammu and Kashmir. The presumption as to genuineness of certified copies arising from section 79 is, by the terms of that section, available only in respect of certificates, certified copies or other documents certified by the officers mentioned in the section. Now, the section mentions any officer of the Central Government or the State Government, “or any officer in the State of Jammu and Kashmir who is duly authorised therefor by the Central Government.” Thus, in the case of officers in the State of Jammu and Kashmir, specific authorisation of the officer by the Central Government is necessary, while, in the case of other areas, any officer can certify the document in question.

37.17. It has been suggested,¹ that this distinction need not be kept alive any longer, and that the mere fact that the Evidence Act does not apply to Jammu and Kashmir does not justify the restriction as to the certification of documents in respect of that State. The suggestion appears to be reasonable. However, before we record our acceptance, it is worthwhile discussing one point.

37.18. The point to be considered is—Is Parliament competent to make the proposed amendment in so far as the State of Jammu & Kashmir is concerned? The Constitution, Concurrent List, entry 12, which pertains to “evidence”, does not apply to the State of Jammu & Kashmir—except to the limited extent provided in that entry and therefore the question arises whether section can be amended as proposed. We are of the view that the proposed provision is not legislation on “evidence” in relation to the State of Jammu &

Kashmir. It is not an exercise of the legislative power over the State of Jammu & Kashmir on the subject of “evidence” at all. It is legislation in relation to the areas to which the Act extends, on the subject of evidence and, therefore, the fact that Concurrent list, entry 12 relating to “evidence” does not apply to the State of Jammu & Kashmir, is not material to the proposed amendment.

31.19. Entry 12, in its application to the State of Jammu & Kashmir, reads as follows:

“12. Evidence and oaths in so far as they relate to administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country”.

The fact that this entry has a very limited ambit, would be relevant if Parliament were to legislate as to the evidence admissible in the courts in the State of Jammu & Kashmir. The entry would prohibit such legislation and would be relevant in a negative sense. Again, the entry would be relevant—this time in a positive sense—if legislation is to be passed to the effect that oaths administered by our diplomatic officers in, say, France shall be recognised in India, not excluding Jammu & Kashmir. The entry would permit such legislation.

37.20. But neither of these situations exists in section 79. The pith and substance of the law,—as it now stands and as it is going to be amended if our recommendation is accepted,—is the law of evidence in relation to the areas to which the Act extends. Section 79 is a mandate to the courts in the areas to which the Act extends, in regard to the reception of certain species of evidence. If the view is taken that section 79, when it makes any provision in relation to the State of Jammu & Kashmir, amounts to legislation in relation to that State on the subject of “evidence”, then even the present provision in section 79, referring to certificates etc. given by “any officer in the State of Jammu and Kashmir who is duly authorised by the Central Government” cannot be supported,—the more so because that part of the section is not confined to officers of the Central government functioning under central laws in the State of Jammu & Kashmir. On such a view, even the validity of sections 84 to 86 may come to be doubted, because if they constitute legislation (i) on “evidence”, (ii) in relation to areas outside India, then it is difficult to see how the Governor-General in Council could pass such legislation, acting as the legislature for British India.

37.21. On the constitutional question, referred to above, the history of the section raises no difficulty. The material part of section 79, as originally enacted, read thus—“which purports to be duly certified by any officer in British India, or by any officer in any native State in alliance with Her Majesty, who is duly authorised thereto by the Governor-General in Council to be genuine.”

On this section, Woodroffe’s commentary is that it applies to certificates etc. “by officers in British India or by duly authorised officers in allied native States.”

[The words “to be genuine” appeared at the end in the original section, but have been transposed to the opening part by the Adaptation Order, 1948. Other adaptations and amendments are noted below.]

In 1937, by the Adaptation order, this section was adapted.

After 1937 and before 1948, the section read as follows:

“79. The court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as
evidence of any particular fact, and which purports to be duly certified by any
officer in British India or by an officer in an Indian State who is duly authorised
thereto by the Central Government or the Crown Representative to be genuine.

Provided that such document is substantially in the form, and purports to
be executed in the manner directed by law in that behalf.

"The Court shall also presume that any officer by whom any such docu-
ment purport to be signed or certified had, when he signed it, the official
character which he claims in such paper."

37.22. The Adaptation order of 1948 made some adaptations and changes.
It transposed the words "to be genuine" at the beginning (as already stated). It
brought in the concept of a government officer. It removed the words "British
India" totally. After 1948 and before 1950, the section read as follows:

"79. The Court shall presume to be genuine every document purport-
ing to be a certificate, certified copy, or other document, which is by law
declared to be admissible as evidence of any particular fact, and which pur-
ports to be duly certified by any officer of the Central Government or a
Provincial Government, or by any officer in an acceding state or other
Indian State, who is duly authorised thereto by the Central Government,

"Provided that such document is substantially in the form, and pur-
ports to be executed in the manner directed by law in that behalf.

"The Court shall also presume that any officer by whom any such docu-
ment purports to be signed or certified held, when he signed it, the official
character which he claims in such paper."

37.23. By the Adaptation Order of 1950, the following adaptation was
made—

"Section 79. For "accession State or other Indian State" substitute "a
Part B State".

After the 1950 Adaptation and before 1951, the section read as follows:

"79. The Court shall presume to be genuine every document purport-
ing to be a certificate, certified copy, or other document, which is by law
declared to be admissible as evidence of any particular fact, and which pur-
ports to be duly certified by any officer of the Central Government or of a
State Government, or by any officer in a Part B State, who is duly authoris-
ed thereto by the Central Government: Provided that such document is sub-
stantially in the form, and purports to be executed in the manner directed
by law in that behalf.

"The Court shall also presume that any officer by whom any such docu-
ment purports to be signed or certified held, when he signed it, the official
character which he claims in such paper."

By the Act of 1951, the following amendment was made:

"Section 79. For "in a Part B State" substitute "in the State of Jammu
and Kashmir."

In effect, the section was amended so as to read as it now reads.

1This is important.
2This is important.
3The Part B States (Laws) Act, 1951.
37.24. Thus, it was in 1951 that the State of Jammu and Kashmir came to be mentioned separately in the section. That Act brought Part B States (except Jammu & Kashmir) in line with Part A and Part C States, by extending the Evidence Act to the Part B States (except Jammu & Kashmir). Authorisation of the Central Government was henceforth required only in regard to Jammu & Kashmir. This exception was not, constitutionally speaking, imperative. We need not assume that it was based on any notion that Parliament was not competent to apply the section to documents in the State of Jammu & Kashmir.

37.25. In short, words referring to a native State were replaced by “Part B States” and then by the State of Jammu and Kashmir. In each case, the authorisation was to be given by the Central Government. This requirement was understandable at a time when there were so many Indian States, with a diversity in the structure and efficiency of their administration, so that it was considered proper that the authorisation should be by the Central Government in order to maintain uniformity and ensure efficiency.

37.26. When the section was amended in 1951 so as to extend it to Part B States, the same scheme was maintained,—apparently because the question was not raised in the form in which it is raised now, or perhaps because a certain amount of diversity in administrative efficiency in Part B States was still assumed to have continued. This was understandable in 1950, but would hardly be true today. In any case, the idea of a native State cannot be allowed to survive at the present day. The history of the section seems to suggest that the “Central Government” was originally mentioned for “native States” for administrative reasons, and this mention survived, after the Constitution, not because of constitutional difficulty that was felt in relation to the State of Jammu and Kashmir, but for other reasons.

It may incidentally be noted that section 79 has no application to original documents.

In view of the points made above, we see no difficulty of a constitutional nature in the proposed amendment relating to Jammu and Kashmir, nor any other objection thereto.

37.27. Accordingly, we recommend that in section 79, the words:

“or by any officer in the State of Jammu and Kashmir, who is duly authorised thereto by the Central Government”\(^{1,2}\) should be omitted.

---

\(^1\)The recommendation as to Parliamentary papers (supra) should also be implemented.

\(^2\)The recommendation as to Jammu & Kashmir is subject to reservation by Member Shri Sen Verma.
CHAPTER 38

PRESUMPTIONS AS TO RECORD OF EVIDENCE—SECTION 80

I. INTRODUCTORY

38.1. We propose to deal now with another presumption of a particular importance to judicial proceedings. When documents are produced as record of evidence or other statements or confessions, recorded by competent persons, certain presumptions are desirable, since it would be inconvenient to require proof of matters which may reasonably be presumed to be true in the case of such records. Section 80, in regard to documents to which it applies, provides for three such presumptions: first, that the document is genuine; secondly, that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and thirdly, that such evidence, statements or confessions were duly taken.

38.2. Like section 79, this section gives legal sanction to the presumption that official documents are executed regularly. The strength of these presumptions dispenses with the necessity of proving, by direct evidence, what it would be otherwise necessary to prove.

38.3. The documents to which section 80 applies are mainly of three categories:

First, record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence;

secondly, a statement by a prisoner or accused person; and

thirdly, a confession by a prisoner or accused person.

(We are, for the present, omitting statutory requirements applicable to each category which are not material to the scheme of classification). Now, it may be noted that records of statements made by witnesses are not covered by section 80, unless those statements are "evidence" taken in a judicial proceeding or before any person authorised by law etc.—the first category referred to above. We shall have occasion to refer to this aspect later on. Since statements recorded under section 164 of the Code of Criminal Procedure, 1973, are made by persons other than the accused, and are of considerable practical importance.

38.4. The practical application of section 80 would be better understood if it is borne in mind that the section is connected with certain other provisions of the Act and other laws. For example, the phrase "evidence given by a witness in a judicial proceeding", used in the section, recalls the provisions of section 33, under which such evidence is relevant in certain circumstances. Similarly, the mention of statements or confessions of accused persons takes us to the provisions of the Code of Criminal Procedure, relevant to the recording of statements and confessions made by accused persons in the course of investigation. Finally, the reference to evidence given by a witness before any officer authorised by law to take such evidence is intended primarily for cases where, under special laws, there is a power to take evidence on oath.

2R. v. Shirey, (1876) I.L.R. 1 Bombay 210, 222.
3See discussion as to section 164, Criminal Procedure Code, infra.
After this introductory discussion, we shall consider a few points arising out of the section.

II. SECTION 164, CODE OF CRIMINAL PROCEDURE

38.5. We have, while analysing the section, mentioned above,¹ that the three categories of statements to which the section applies do not cover the statements of witnesses except in certain cases—briefly statements recorded in judicial proceedings in the form of evidence. The expression "judicial proceedings" would not cover statements recorded by a Magistrate under section 164 of the Code of Criminal Procedure from a person who is not the accused.² Such statements would not also amount to "evidence" within the meaning of the Act. We are of the view that such statements should, by an express amendment, be brought within section 80, and we recommend accordingly.

III. DYING DECLARATIONS

38.6. Our mention of statements recorded under Section 164 of the Code of Criminal Procedure and of statements made by witnesses in general, brings us to an important question concerning what are popularly known as dying declarations. It may be pointed out that dying declarations do not fall within any of the three categories into which the statements covered by section 80 can be divided. They do not constitute "evidence given in judicial proceeding", and therefore do not fall within the first category,² or are they recorded by an officer authorised by law "to take such evidence". Since they are not made by a prisoner or accused person, they do not fall within the second and third categories also.

38.7. Notwithstanding this position, it would appear that some High Courts have given the benefit of section 80 to dying declarations, sometimes without an analysis of the various categories in the section. These High Courts, with respect, have not paid sufficient attention to the fact that except for section 164 of the Code of Criminal Procedure, there is no other general provision in Indian Statute Law permitting or requiring a magistrate to record a dying declaration.

38.8. Thus, the Madras High Court¹ has held that where the dying declaration has appended to it a certificate that it has been read over to the deponent and declared to be correct and signed by the Magistrate, section 80 creates a presumption that the circumstances stated are true, "the investigation by the Magistrate being a judicial proceeding." There is, however, no detailed discussion of the meaning of the expressions "judicial proceeding" or "evidence", the two expressions of importance used in section 80.

The Allahabad High Court¹ has held that section 80 is applicable to all dying declarations recorded by a Magistrate. Unfortunately, however, the judgment does not analyse the various ingredients forming part of section 80.

38.9. The Bombay view is to the contrary. In a Bombay case,¹ the Government Prosecutor argued that a dying declaration before a Magistrate on solemn affirmation could be admitted without proof under section 80.

¹Para. 38.3 supra.
²See discussion under section 3, "Judicial Proceeding".
³Para. 38.3 supra.
⁴In re Karuppan Sampan, A.I.R. 1916 Mad. 121 (Spencer and Phillips, JJ.).
⁶Rev. v. Fata Adji, (1874) 11 Bom. High Court Reports, 247.
His point was that “it may be treated as a memorandum of evidence by a witness, before an officer authorised by law to take evidence”. One of the judges—West, J.—observed, in his comment on this argument, that “the Magistrate was not the committing Magistrate, and the prisoners were not present, and had no opportunity of cross-examining the dying man”.

38.10. Criticising this reasoning, the Allahabad High Court,1 in the case already referred to, said that of all these reasons, not one reason could be altered if the Magistrate who recorded the dying declaration, were called. This is true, but it may be pointed out that in the Bombay case, the Judge observed in the judgement that the person who took the statement should be subject to cross-examination so that the Court may know the condition of the declarant and other circumstances.

The reasoning on which the Bombay decision is based—though not stated in so many words—is that a dying declaration, even when made on solemn affirmation, does not fall within section 80, nor does it fall within section 33.

38.11. In the Allahabad case, reliance has been placed on the definition of “court” given in the Act—a definition which includes all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence. Since the Magistrate who recorded the dying declaration was legally authorised to do so and the inquiry which he was making was an inquiry directed for the purpose of recording a particular statement, the High Court seems to have taken the view that he was a “court”. But the really important point does not seem to have been discussed in the Allahabad case, namely, what is the exact scope of the expressions “judicial proceeding” and “evidence” as used in section 80. These two expressions are crucial, and, as we have already shown while discussing section 3, the meaning of the expression “judicial proceeding” is not certain, and the matter is a difficult one.

38.12. The Rangoon High Court1 has categorically held that a dying declaration has to be proved, for it is not a record of the “evidence” given by a “witness” before an officer authorised by law to take such evidence. Therefore, the presumption under section 80, Evidence Act, could not arise. In passing, however, the High Court observed that if the Magistrate “is empowered to record the evidence”, it would have been unnecessary for him to prove that he took the statement, because “evidence” includes all statements which the court permits or requires to be made by witnesses and “court” includes judges and Magistrates.

38.13. It may be pointed out that a Magistrate acting under section 164 of the Code of Criminal Procedure does not determine any jural relation, and it is difficult to see how the proceeding could be assumed to be a “judicial proceeding”. If statements of witnesses recorded before trial do not satisfy the requirement of “judicial proceeding”, then dying declarations cannot be covered by section 80.

Thus, with respect, the correctness of the Allahabad view is debatable, on the present language.

However, from the practical point of view, it seems desirable to make some provision ensuring that section 80 can be used in such cases. Magistrates are frequently transferred from one place to another; and under the present law,

2See discussion as to section 3—“Judicial proceeding”.
3Sultainman v. The King, A.I.R. 1941 Rang. 301 see of at page 304 (Mosely J.) (Case law discussed) and page 303 (specific point discussed). (Bennet, J.)
Magistrate would have to call the recording Magistrate to prove declaration. This position should be altered, as it causes inconvenience. We believe that the amendment of section 80, which we are amending in relation to statements made under section 164, Cr. P.C.1 substantially achieve the object.

A.14. The position regarding dying declarations will be clearer if the following situations are borne in mind separately.

(a) On a proper reading, the section would not apply, if the dying declaration was not recorded by a Magistrate. In such cases, there is no judicial proceeding.

(b) Where the dying declaration was recorded by a Magistrate, two situations require to be considered—

(i) The first is where the Magistrate does not purport to act under section 164 of the Code of Criminal Procedure. In this case also, section 80 would not apply, there being no judicial “proceeding”, whatever view one may take of section 164.

(ii) Where, however, the Magistrate purports to act under section 164, the question whether section 80 applies or not, depends on the other question, namely, whether section 80 applies to statements under Section 164, Code of Criminal Procedure. We are, as stated above, proposing separately a clarification2 in relation to statements recorded under section 164. That should take care of most dying declarations recorded by Magistrates, and, in our view, section 80 ought not to apply to other dying declarations. This will not, of course, render other dying declarations irrelevant; but they will have to be proved by calling the person who recorded the declaration.3

IV. MEANING OF THE EXPRESSION “DUTY TAKEN”

38.15. This disposes of that part of section 80 which deals with various categories of documents covered by it. Where a document falls within any of these categories, the presumptions provided for in the latter half of the section apply. We have comments only on one of the presumptions under which (so far as is material) the confession taken down in the circumstances set out in the section shall be presumed to be “duly taken”. This provision is to be found in the last words of the section. What we would like to emphasise is that these words do not rule out any defence to the effect that the confession was involuntary. This is, perhaps, obvious, but we think it proper to mention it here in order to emphasise an important limitation on the scope of the section.

V. RECOMMENDATION

38.16. As a result of the above discussion, we recommend that in section 80 the words and figures “or to be a statement recorded by a Magistrate under section 164 of the Code of Criminal Procedure 1973”, should be added after the words “taken in accordance with law.”

1See the point relating to section 164, Cr. P.C. supra.
2See discussion relating to section 164, Cr. P.C. supra.
CHAPTER 39

PRETENSIONS AS TO CERTAIN OFFICIAL DOCUMENTS

39.1. We now address ourselves to certain presumptions which are of importance in connection with official documents. This discussion will cover sections 81 to 84. The common thread connecting these sections is the fact that most of the documents covered by these sections derive their source from official authority. The only exception to this general position is section 81, in so far as it deals with newspapers or journals. Otherwise, the rationale of these sections is the principle that official acts are presumed to be performed regularly.

SECTION 81

39.2. Section 81 requires the Court to presume the genuineness of certain documents. First the section mentions—

(i) the London Gazette.

(ii) the Government Gazette of any colony, dependency or possession of the British Crown.

(iii) Copy of a private Act of Parliament of the United Kingdom printed by the Queen’s printer,

(iv) Newspapers or journals.

These are published documents.

The last portion of the section is not confined to published documents, but applies to “every document purporting to be a document directed by any law to be kept by any person: if such document is kept substantially in the form required by law and is produced from proper custody.”

39.3. In so far as the section deals with the London Gazette, the Government Gazette of any Colony etc. and a private Act of the U.K. Parliament it should, in view of the constitutional changes that have taken place in the country, be confined to the period before the 15th day of August, 1947, and we recommend accordingly.

39.4. It is needless to state that in relation to newspapers or journals,—as in relation to other documents mentioned in the section—the presumption under the section is only as regards their genuineness, and not as regards the truth of their contents. Therefore, even if the newspapers are admissible in evidence without formal proof by virtue of this section, the matter printed therein is not proof of the truth of its contents. As the High Court of Lahore observed:

“[The paper] would merely amount to an anonymous statement........... This type of hearsay evidence is obviously inadmissible in a court of law .............”

39.5. The expression “proper custody” use in this section is defined in section 90, Explanation, which expressly provides that the Explanation (contained in section 90) applies to section 81 also.

1 Compare recommendation as to section 37.

484
SECTION 81A (NEW) (REGISTRATION BIRTHS ETC.)

We may, at this stage, deal with the need for a new section as to registration of births etc.

39.6. In a previous Report\(^1\) of the Law Commission dealing with British Statutes applicable to India, the Commission examined certain British statutes relevant to evidence. The commission referred to the provision contained in the Registration of Births, Deaths and Marriages (Scotland) Act, 1854 and the Amendment Act of 1910, and suggested that if this provision is to be retained, it may be incorporated in the Evidence Act. These statutes, in effect, provide that an extract of an entry in a register of births etc. in Scotland shall be admissible in all parts of Her Majesty's dominions without further proof.

39.7. Incidentally, it was also suggested in that Report that it may be examined whether such privileges should be confined to England, Scotland and Ireland or whether the privilege should extend elsewhere.

The two British statutes cited above have since been repealed.\(^2\) But the suggestion referred to above awaits further consideration. Incidentally, it may be stated that the Central Act on registration of births and deaths\(^3\) does not provide for the matter.

39.8. We have now considered the question, and are of the view that a provision should be enacted giving this facility\(^4\) for all the countries. We are not giving a draft of the section, but we may state that it can be conveniently inserted as section 81A and we recommend accordingly.

SECTION 82

39.9. Section 82 raises certain presumptions as to a document which is admissible in England or Ireland without proof of seal or signature, and provides that the document shall be admissible for the same purpose for which it would be admissible in England or Ireland. The use of the section necessarily involves a reference to the law for the time being in force in England and Ireland.

39.10. The documents of which the Court will take judicial notice, or which the court will take as proved without proof of authentication, in England, fall in a very long list. Most of them are public and judicial documents. The matter is dealt with mostly by statutory provisions too numerous to be mentioned here, the principal of these being the Documentary Evidence Act, 1868, the Documentary Evidence Act, 1882, the Public Records Act, 1958 and other Special Acts. Some of the provisions are concerned not with the proof of authenticity but with the proof by copies, and some of them are concerned with authenticity of the copies themselves. On a study of the subject as dealt with in some of the English books on Evidence,\(^5\) it would appear that the various categories of documents in respect of which English Courts do not insist on proof of signature or seal are, in the vast majority of cases, documents executed in England, Scotland, or Ireland.

39.11. Having regard to this position we recommend that the present provision should be deleted.

---

\(^1\)5th Report (British Statutes Applicable to India), page 44, Entry 48.
\(^2\)The British Statutes (Application to India) Repeal Act, 1960 (57 of 1960).
\(^3\)Registration of Births and Deaths Act (18 of 1969).
\(^4\)Draft not attached.
\(^5\)Phipson on Evidence (1963), Chapter 44, paragraphs 1718 at sec.
39.12. Under section 83, the court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government, were so made and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

39.13. It is not, for the present purpose, necessary to discuss again the law relating to relevancy of statements made in maps, charts and plans—a topic specifically dealt with in section 36. The section now under discussion mainly deals with the mode of proof of the accuracy of certain maps or plans made by the Government. It is also needless to add that maps or plans which do not fall within section 83, though they may be relevant, must be proved like any other document, unless of course, their accuracy is expressly or impliedly admitted by the parties, or covered by any other specific provision.

39.14. A case of implied admission of the accuracy of a map arose long ago in Calcutta. In that case, a civil amin made a local inquiry as to the situation of certain disputed lands with reference to the Collectorate map put in by the plaintiffs. Admission of the map was objected to by the defendants, who were present and recognised the boundary indicated as the boundary whereon an inquiry was to be made. It was held that the map must be taken to be one which the parties recognised as correct and trustworthy, irrespective of the question whether it was or was not prepared with the authority of the Government.

39.15. The presumption in section 83 (as in the other sections in this group), is based on the maxim that official acts are performed regularly. It will be presumed that Government, in the preparation of maps and plans for public purposes, will appoint competent officers to execute the work entrusted to them, and that such officers will do their duty. Thus, survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence as to the state of things at the time when they were prepared. They are not, however, conclusive, and may be shown to be wrong; but, in the absence of evidence to the contrary, they are judicially receivable as correct when made.

Maps made for a particular purpose are not so presumed, as they are made post-factum motam.

39.16. This section does not mention charts. However, for the reasons which we have stated while discussing an earlier section we recommend that charts should also be added in this section.

SECTION 84

39.17. Section 84, which is derived from a similar provision in the previous Act in force in India on the law of Evidence, deals with certain books relating to the law of "any country".—the books mentioned are—

(a) a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and

---


2See also Kanto Prasad v. Jagat Chandra (1897) I.L.R. 23 Cal. 335, 338.


4G. N. Chaudhuri, 21 Weekly Reports 115 (Calcutta).

5See discussion relating to section 36.

6Evidence Act, 1855 (2 of 1855).
(b) any report of a ruling of the courts of such country contained in a book purporting to be report of such ruling. The provision is that the court shall presume the genuineness of such books.

The presumption under the section is rebuttable. It is also to be noted that this section does not deal with relevance. It merely dispenses with the proof of the genuineness of official collections of laws and official or unofficial law reports. How far they are relevant is dealt with in section 38.

39.18. In this section, the words "any country" are wide enough to cover India, and it is not proposed to disturb the section by excluding India. We are mentioning this because, under an earlier section, we have made a recommendation to exclude 'India'. That section deals with the relevancy of statements as to law, and since relevancy is a question of fact, that section, in so far as it covers Indian law, is out of harmony with the mandatory provisions under which the court shall take judicial notice of Indian law.

In the result, section 84 may be retained as it is.


1Section 38.
2Section 57.
CHAPTER 40

MISCELLANEOUS PRESUMPTIONS AS TO DOCUMENTS—SECTION 85 TO 89

INTRODUCTORY

40.1. Apart from presumptions as to public documents and records or memorandum of evidence, statements or confessions, with which we have so far been mainly concerned, there are other provisions in the Evidence Act providing for presumptions as to certain documents. Sections 85 to 89 contain these provisions. Section 90 dealing with presumptions as to documents thirty years old—otherwise known as "ancient documents"—will require separate discussion, in view of its importance.

SECTION 85

40.2. A presumption as to powers of attorney is the subject-matter of section 85, under which the court shall presume that every document purporting to be a power of attorney and to have been executed before and authenticated by the authorities or persons specified in the section was so executed and authenticated. The authorities and persons specified in the section are—a rotary public, or any Court, judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government.

40.3. The principle underlying the section is this. The fact of execution before, and authentication by, persons of the position and office of those in the section mentioned, affords a guarantee and prima facie proof of such execution and authentication respectively.

The Act does not define what is a power of attorney.

40.4. Wharton\(^1\) defines a power of attorney as "a writing given and made by one person authorising another, who in such case, is called the attorney of the person (or donee of the power), appointing him to do any lawful act in the stead of that person, as to receive rents, debts, to make appearance and application in court, before an officer for registration and the like. It may be either general or special i.e., to do all acts or to do some particular act". Stroud\(^2\) defines it as an authority whereby one is "set in turn, stead or place" of another to act for him.

In an English case,\(^3\) Coltman J. observed as follows—

"Where one is authorised in writing, on behalf of another and in his name, to do an act, that is an appointment of an attorney within the meaning of the Stamp Act."

The definition in the Indian Stamp Act\(^4\) also lays emphasis on the use of the name of another person.

Powers of Attorney Act \(^5\) 1882.

40.5. At this stage, we may mention that the Central Act on the subject of powers of attorney\(^6\) does not contain a definition of the expression "powers of attorney". In fact, that Act does not purport to deal with the subject of

---

\(^1\)Wharton Law Lexicon, 1953.
\(^2\)Stroud, Judicial Dictionary (1953), page 2257.
\(^3\)Walker v. Romnett, (1896) 135 E.R. 1181.
\(^4\)Section 3, Indian Stamp Act.
\(^5\)The Powers of Attorney Act, 1882.
powers of attorney in a comprehensive manner. It is concerned only with certain aspects thereof. The only provision of relevance to the law of evidence is section 4.

40.6. Section 4 of the Powers of Attorney Act, 1882, provides that a power of attorney may be deposited in the High Court with an affidavit verifying the execution of the power of attorney, and a copy may be presented at the office and stamped as “certified copy”. Such certified copy will, by virtue of the section, be sufficient evidence of the contents of the deed. We are making a separate report on the Act.

40.7. There are special provisions in the Registration Act\(^1\) in relation to powers of attorney which we need not discuss for the present purpose.

40.8. The presumption about authentication under section 85 implies that the person authenticating has assumed himself of the identity of the person who has signed the instrument as well as of the fact of execution. The effect, therefore, is that a power of attorney bearing the authentication of a Notary Public (or of any other authority mentioned in section 85) is taken\(^3\) as sufficient evidence of the execution of the instrument by the person who appears to be the executant on the face of it. It was so held in an Allahabad case\(^5\).

This proposition was laid down in an earlier Calcutta case also\(^4\), and in a Bombay case\(^6\).

The above discussion does not disclose any need for changing the section.

SECTION 86

40.9. Under section 86, the court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of India or of Her Majesty’s dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

An officer, who, with respect to any territory or place not forming part of India or Her Majesty’s dominions, is a Political Agent therefor as defined in section 3 (clause 43), of the General Clauses Act, 1897, shall, for the purposes of this section, be deemed to be a representative of the Central Government in and for the country comprising that territory or place.

40.10. While certain presumptions as to certified copies of foreign judicial records are dealt with in section 86, it may be noted that such proceedings can also be proved by an official of the Court, speaking to what took place in his presence\(^7\), since section 86 does not exclude other proof.\(^8\)

No changes are needed in the section.

40.11. Under section 87, the court is permitted to make certain presumptions as to certain books, maps and charts. The books are those to which it may refer for information on “matters of public or general interest”. The maps

---
\(^1\)Sections 33 to 35, Indian Registration Act, 1908.
\(^2\)Waghrir v. Iniff, (1855) 24 Law Journal Chancery 120.
\(^4\)In the goods of Mylne v. (1939) I.L.R. 33 Cal. 625.
and charts are those which are published and "the statements of which are relevant facts". The book, map or chart must be produced for inspection. The presumption is as to genuineness, and not as to accuracy. In this respect, this section is narrower than a few other sections for example, sections 83 and 86—where the presumption extends also to accuracy.

40.12. Under an earlier section—section 57—in all cases when the court is called upon to take judicial notice of a fact, and also in all matters of public history, science or art, the court may resort for its aid to appropriate books or documents of reference.

40.13. When the Court takes judicial notice by reference to such books or documents, then, under section 87, the court may presume that such books were written and published by the person by whom and at the time and place, by whom, or at which, they purport to have been written or published.

40.14. Further, under another section, statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans, made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts.

40.15. It has been pointed out above that section 87 raises no presumption of accuracy. At the same time it should be noted that, in a proper case, accuracy can be presumed under the general provision contained in section 114. In the case, however, of maps and plans purporting to be made by the authority of Government the Court must presume that they were so made, and that they are accurate, but maps or plans made for the purpose of any cause, that is, maps specially prepared for that purpose and with a view to their use in evidence must be proved to be accurate. This is by virtue of section 83.

40.16. It may be noted that a map or plan is a "document", and the provision in section 90, relating to ancient documents, applies to maps also.

40.17. Two minor changes are required in the section. The first is that plans should be added, as in section 36. The second is that the portion relating to statements of fact, should be expressed more clearly.

We recommend that the section should be suitably amended to effect these two changes.

SECTION 88

40.18. Section 88 provides that the court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the court shall not make any presumption as to the person by whom such message was delivered for transmission.

*Section 57, penultimate clause.
*Section 36.
*Section 83.
*Section 3, definition of "document" illustration.
*See discussion relating to section 36.
40.19. It may be noted that the section itself does not raise any presumption of delivery to the addressee, but assumes, on the contrary, that such delivery has taken place. This is clear from the words "forwarded from a telegraph office to the person to whom such message purports to be addressed".

40.20. However, it may also be noted, that in the case of the post office, there is a presumption that a letter properly directed and posted (and not returned) was delivered in due course. It has been stated that this presumption will be extended to postal telegrams, now that the inland telegraphs form part of the Government postal system. The view has been expressed in England that proof that the message was sent over the wires addressed to a particular person at a particular place, he being shown to be at the time resident at such a place, may present a prima facie case of the reception of such telegram by the addressee.

40.21. It would appear that, in India, such a presumption may be raised under the general section relating to facts which the court may presume. Further, the Evidence Act provides that where there is a question whether a particular fact was done, the existence of any course of business, according to which it would naturally have been done, is a relevant fact and may be proved.

40.22. As to giving the telegram in evidence, it is to be pointed out that the original of a telegram is the one which is handed over for transmission and not the one which is delivered. The original, as sent, must, therefore, be produced from the post office, or if the original is destroyed, a copy would be admissible.

The above discussion does not necessitate any amendment of the section.

SECTION 89

40.23. Section 89 provides that the court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law. The principle applicable to the situation dealt with in section 89 is usually referred to as the principle of necessity. The notice to produce is usually given under section 65(a) read with section 66.

40.24. The presumption under the section is rebuttable; but it is to be noted that the mere production of the document at a later stage is not enough to rebut the presumption. One example of a circumstance justifying rebuttal

---

1See—
(a) British and American Telegraph Co. v. Colson, L.R. 6 Ex., 122; per Barmwell B.
(b) Walls v. Wicker, 86 L.J.K.B. 177.
(c) Cases in Phipson, Evidence, (1963), para. 301, footnote 18.
3Wharton, Ev., Section 76, 1323, 1329, cited in Woodroffe.
4Section 114, Illustration (f).
5Section 16.
7Godwin v. Francis (1870) Law Reports 5 Common Pleas 297.
8R. v. Regan, (1887) 16 Cox 203 ; Phipson (1963), para. 1689.
of the presumption is where the deed in question is proved at some time in the past to have been in the possession of the party giving notice.

40.25. Another method of rebutting the presumption would be by an admission by one of the parties who now seeks to rely on the document. In this connection, it is to be noted that once it is shown that the document was un-stamped, it should be presumed to have continued until the contrary is proved. Circumstances may, again, show that the document is not in the possession of the party to whom the notice is given, and in such a case, the presumption cannot be made.

The above discussion does not disclose need for any amendment.

Chapter 41

ANCIENT DOCUMENTS

SECTION 90

I. INTRODUCTION

41.1. An important presumption concerning what are known as 'ancient documents' forms the subject-matter of section 90, which we shall now proceed to consider.

41.2. After the lapse of time, it is difficult if not impossible, to prove the handwriting, execution and attestation of documents in the ordinary way, and the law, out of sheer necessity, provides for certain presumptions as to the genuineness of such documents. Besides necessity, there is another aspect justifying such a presumption. A fabricated document will, generally, by reason of some intrinsic or other inconsistency, afford internal evidence of its real character, because forgery of a document—if there has been a forgery—would normally have been detected in the meantime.

41.3. Initially after the passing of the Evidence Act, there seems to have been some reluctance on the part of some courts in India to draw the presumption which is drawn in England in respect of such documents. This reluctance is illustrated by a few Calcutta cases.

In one case, the court stated that the rule of English law had been adopted in the country, but the courts had to be extremely careful in the application of it to this country.

41.4. These remarks may now appear to be only of historical importance. But it is better to bear them in mind, since the drawing of a presumption under section 90 is not a mere mechanical act, but requires the exercise of careful discretion, and courts—even in cases after the passing of the Act—again and again, stress the danger of treating old documents as established merely because the conditions of the section are fulfilled. For example, in a Punab case, Farran, C.J. observed:

"We are fully aware of the danger of treating old documents as established merely because they are 30 years old and come from the proper custody."

Section 90 may now be quoted:

"90. Presumption as to documents thirty years old—where any document, purporting or, proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that persons' handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation—Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they

1Gooru v. Bykunto (1886) 6 Weekly Reports 82 (Calcutta).
"would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This Explanation applies also to section 81".

41.5. The principal foundation for the rule enacted in section 90 is that of necessity as already stated. The rule is founded on the great difficulty—and often the impossibility—of proving handwriting after a long lapse of time. It is also based on the rationale that the attesting witnesses, if any, would now be non-available. Conditions as to the age of the document and production from proper custody are prerequisites. But other circumstances also weigh with the court in the exercise of its discretion.

The presumption relates to the execution of the document i.e., signature, attestation etc. In other words, its genuineness, but not the truth of its contents, forms the subject-matter of the presumption.

41.6. The presumption is discretionary. Regarding the care to be exercised in making the presumption under the section, the law is laid down in cases such as Ugrakant Chowdhury v. Hurro Chunder Shickdar. The court may, but is not bound to, make the presumption, merely because of the apparent age of the document. The difficulty, on the other hand, of proving the execution of ancient documents and the reasons in favour of such presumptions where small doubt exists as to their genuineness, are set forth in Govinda Hazar v. Pratap Narain Mukhopadhyaya.

41.7. In one case the privy Council held that notwithstanding that a document was more than 30 years old and had been produced from proper custody, the courts below exercised their discretion under section 90, by not admitting the document in evidence without formal proof and by rejecting it when no such proof was given, on the grounds that there were circumstances in the case as the document itself threw great doubt for its genuineness. The Privy Council upheld the exercise of the discretion by the court, and declined to interfere with it.

41.8. In the case of documents 30 years old, the genuineness of which is disputed, it is necessary, therefore, for the Courts to consider the evidence external and internal—of the document, in order to enable them to decide whether, in any particular case, they should or should not presume proper signature and execution.

II. CONDITIONS

41.9. So much as regards the principle of the Section, it may be useful now to draw attention to a few important conditions for the applicability of the section and other limitations as to its scope.

In the first place, the section does not create any presumption of accuracy of the contents of the document. The truth of its contents must be proved by other means.

---

In the second place, the section cannot be applied unless the signature of a particular person or handwriting of any part of the document, is in issue. Where the document does not purport to be signed by or written in the hand of a person the section has no application.

In the third place, the presumption is discretionary and rebuttable.

In the fourth place, the document must purport or be proved to be thirty years old.

Finally, the document must be produced from proper custody.

41.10. A Calcutta case illustrates the first limitation. The appellants sued for declaration of their title and correction of settlement records of 1917, where the names of some others found place. The first court decreed the suit, on appeal to the District Court, the decision of the lower court was reversed. Hence the appeal to the High Court.

41.11. The contention of the appellant was that the "Jamabandi furd" was an ancient document, which must be presumed to have been proved under section 90. If the document was not genuine, the appellant should be given an opportunity to prove the genuineness of it.

In fact, the lower court admitted the document without proof, and thus deprived the party of the chance to adduce evidence to prove that one Darpa Narayan was the ijaradar of the Zamindar from whom the mother of the appellant got the Settlement deed.

41.12. It was held that a person producing such a document was relieved of the necessity of proving that it was executed by the person who purported to be the executant, provided that the document was 30 years old and was produced from proper custody. But it was not the same thing as saying that the court should presume the correctness or genuineness of every statement appearing in the document.

The appeal was dismissed.

The other conditions need no comments.

41.13. If the conditions analysed above are satisfied, the presumption specified in the section may be drawn—the section does not provide that it must be drawn in every case. But once the circumstances are such that the presumption can be justly drawn, then, there are no further limitations in law, and it may be useful to amplify this proposition by drawing attention to the width of the section.

41.14. Thus, for example, the section applies to any 'document'. The documents are not confined to transfers in the restricted sense, but would include books of account, letters and registers.

If the document purports to be written by a particular person, then it does not matter that the document was in the form of entries in the 'bahis' of parties.

7See discussion in Huzare Singh A.I.R. 1937 Lahore 599.
41.15. In the case of account books over 30 years old, there can be a presumption that they are written by persons by whom they purport to have been written. Section 32(2) can be applied also in case it is proved that the person who wrote the document in question is dead or otherwise not available as a witness. Under Section 34, entries in old account books by themselves are not sufficient to charge a person with liability.

III. COMPUTATION OF THE PERIOD

41.16. These, then, are the general propositions as to the scope of the section and the conditions for its applicability. We may now look into a few points which deserve consideration. First, we may refer to the controversy that arose in the past as to the date up to which the period of 30 years is to be counted, and the date on which it is to begin.

41.17. As regards the date up to which the period is to be counted, the controversy was set at rest by the Privy Council and it is now settled law that the period of 30 years under the section is to be reckoned not up to the date upon which the document is filed in the court, but up to the date on which the document having been tendered in evidence, its genuineness or otherwise becomes subject of proof.

41.18. As regards the starting point, the period is to be counted from the date which the document bears. For example, it is not the date of death of the testator (in the case of a will). Where a document is undated, no presumption can be drawn under section 90, as it cannot be said that the document purports to be 30 years old. It must then be proved in the ordinary way.

IV. DURATION

41.19. Another question to be considered concerns the duration of the period. The period mentioned in section 90 is 30 years. The period of 30 years is one established by common law. Originally, even at common law, the period was 40 years.

It may be noted that the period has been reduced to 20 years in the U.P. by a local amendment. The question is whether such an amendment should be made in the Act.

In England, by the Evidence Act, 1938 the period has been reduced to 20 years.

41.20. Now, the rule authorising a presumption regarding ancient documents is one established for the sake of general convenience and founded on the great difficulty (and often the impossibility) of proof of handwriting after a long lapse of time.

---

7Section 4, Evidence Act, 1938 (1 and 2 George, 6, c. 28).
41.21. Of course, any period that must be fixed in this context has to be arbitrary; but there does not appear to be a strong objection if the period is reduced to twenty years. With the complexity of life and numerous proprietary and business transactions which a person has to undergo in modern days, considerations of convenience justify the reduction of the period, as the number of documents entered into or maintained increases with the complexity of life.

41.22. We, therefore, recommend that the period should be reduced to twenty years from thirty years.

V. COPIES—U.P. AMENDMENT

41.23. While the discussion so far related to the period, we now turn to another point arising out of the section. It is now settled that section 90 does not apply to copies of the document. But, though the presumption under the section, as such, does not apply in respect of copies, proof of execution of the original document may be furnished by the peculiar nature of the copy. Thus, where the deed was registered and the certified copy bore the necessary endorsements of the sub-Registrar before whom the execution acknowledged the execution and was duly identified, proof of execution may be found in the certified copy itself.¹

41.24. It was held in an earlier Bombay case² that section 58, 59 and 60 of the Indian Registration Act, 1908 provide that the facts mentioned in the endorsements of the sub-Registrar may be proved by those endorsements, provided the provisions of section 60 of the Indian Registration Act have been complied with. This aspect is further illustrated by another Bombay case.³ In that case, the trial court had admitted in evidence the certified copy of a deed of adoption merely on the ground that the original was lost and that it was more than thirty years old. The first appellate court held that as the execution of the deed had not been proved, it should not have been exhibited.

41.25. In the second appeal, Baker J., reversing the decision of the first appellate court, held that the facts mentioned in the endorsements of the Sub-Registrar could be proved by those endorsements themselves if section 60 of the Registration Act is complied with; and, in the case before the court, the endorsements showed that the executant had admitted execution of the document and given his thumb impression and had been identified before the Sub-Registrar; therefore, the copy of the adoption deed was admissible in evidence, and was sufficiently proved.

41.26. In this connection, we may mention that the U.P. Legislature has, by a local amendment⁴ inserted, in section 90, a provision to deal with certified copies of ancient documents which are registered. This has been done, by re-numbering section 90 as section 90(1), and adding the following sub-section in section 90:—

"(2). Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person’s handwriting and in the case of a document executed or attested, that it was duly

executed and attested by the person by whom it purports to have been executed or attested."

41.27. We think that this limited extension of the section should be adopted and we recommend accordingly.

41.28. The question whether the presumption under section 90 should be made applicable to certified copies of documents 30 years old has been considered in a previous Report of the Law Commission. The Commission expressed the view that no inherent testimony was afforded by certified copies as to the circumstances under which the original came into existence or for deciding whether the original itself possessed any features which would have destroyed or affected its validity.

41.29. The presumption under section 90 is based on two requirements—that the document should be 30 years old, and that the document must be produced from custody which the Court considers to be proper. After noting these two ingredients of the section, the Commission observed—

"By what process of reasoning could the court raise these presumptions in regard to the original documents when all that is produced before it is mere certified copy? It may be that the original of which a certified copy more than 30 years old is produced was a fabricated document. It does not, therefore, seem to us reasonable to extend these presumptions to the original when it is not before the Court"........"for these reasons we do not recommend the acceptance of the suggestion. What we recommend is that questions relating to............. ancient documents may be examined by the Commission when revising the Evidence Act."

We may state that we broadly share this approach, subject to what we have recommended above as to certified copies of registered documents.

VI. SECTION 90 AND SECTION 68

41.30. We have now dealt with all the points that needed discussion. We do not pause to examine the inter-relationship between section 68 and section 90. The question as to how far section 90 should override the provisions of section 68 has been discussed separately.5

VII. RECOMMENDATION

41.31. In the light of the above discussion, we recommend that in section 90,—

(i) in sub-section (1), for the word 'thirty' the word 'twenty' should be substituted, and

(ii) a new sub-section (2) should be inserted as follows—

"(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a certified copy thereof is produced, the court may presume that the signatures and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting

---

14th Report Vol. 1, page 518, para. 9, first sub-paragraph and page 519, para. 10.
3See discussion relating to section 68.
5The word 'only' is not necessary before the word 'certified.'
4Cf. section 65(f).
5See recommendation as to section 74.
and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested."

SECTION 90A (Proposed)

41.32. In addition to the amendment made in U.P. regarding certified copies of registered documents where the document is twenty years old, another amendment has been made in that State which is not confined to documents purporting to be twenty years old, but applies to documents falling within the specified category, whatever be the age. The principal object of this amendment is to facilitate the proof of the specified category of documents. A brief discussion of certain aspects relevant to an appreciation of its object would be useful.

41.33. In the law of procedure, the distinction between documents which may be called basic documents—to use a convenient expression—and other documents, which may be conveniently described as evidentiary documents, is well recognised. There are certain special provisions in the Code of Civil Procedure as to the production of these documents at the first hearing. These provisions are not applicable to documents which do not constitute the foundation of the case of the party but are mere evidence. Ordinarily speaking, the basic documents would go to prove or disprove a fact in issue, while the evidentiary documents would be mainly concerned with relevant facts. Of course, this distinction is not to be taken literally, but only as a help to understanding the relative importance of basic documents and evidentiary documents.

41.34. Experience shows that in relation to evidentiary documents, time is sometimes wasted in their proof, and in certain cases where the circumstances supply a reasonable guarantee of genuineness, there should be no objection to the court being given a discretion to presume such genuineness.

Acting on the above principles, the U.P. Legislature has inserted a new section—section 90A which applies to—

(a) registered documents,

(b) certified copies of registered documents,

(c) certified copies of documents forming part of the records of courts of Justice.

The rationale is that in the case of such documents, it would be reasonable to presume genuineness having regard to certain special characteristics.

41.35. The section inserted in the State of U.P. is in the following terms:

"90A(1) Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a court of Justice, is produced from any custody which the court in the particular case considers proper, the court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

The Explanation to sub-section (1) of Section 90 will also apply to this section."

---

1See discussion relating to section 90.
2The U. P. Civil Laws (Reforms and Amendment) Act, (34 of 1954).
41.36. As to registered documents, the query may arise why there should be two provisions dealing with the same—one in section 90 as amended in the U.P. and other section 90A, as inserted in the U.P. The answer is that section 90A while it includes registered documents within the specified categories, does not apply to documents which are the basis of the suit or which are relied on by the plaintiff or defendant.

41.37. The following further points may be noted with reference to section 90A inserted in U.P.

(i) The section inserted in U.P. does not require that the document must be thirty years old. But instead, it requires registration or being part of a judicial record.

(ii) The presumption may be made only if the original shows, on the face of it, the name of the person by whom it purports to have been executed. Where the document does not purport to show who prepared and signed it, the section does not make it admissible without proof.

(iii) The presumption under section 90A is with regard to the execution of a document, and in that respect, section 90A is narrower in scope than section 90. Evidence Act, under which a presumption may be made also that a document is in the handwriting of a person by whom it purports to have been written.

(iv) Section 90A is confined to a presumption regarding the execution only as it had, within its purview, not only a registered document, but also a certified copy of a document forming part of the record of a Court of Justice.

(v) Lastly, the Court has a discretion under section 90 and also under section 90A. If, in the exercise of discretion, a Court does not raise a presumption, no interference will be justified in appeal.1

41.38. We think that the U.P. amendment is a useful one, and recommend its adoption, but as regards judicial records, it should be confined to documents which are (a) registered or (b) adjudged to be genuine in the earlier case.

CHAPTER 42

EXCLUSION OF ORAL EVIDENCE—IN SUBSTITUTION FOR DOCUMENTARY EVIDENCE

SECTION 91

I. INTRODUCTORY

42.1. Two species of evidence—oral and documentary—have been the subject-matter of elaborate discussion so far (particularly documentary evidence), and we have already considered the relevant statutory provisions in detail. Now, since a fact can be proved, inter alia by either oral or documentary evidence, and since often, in respect of that fact, both oral and documentary evidence can,—at least in theory,—exist, the question naturally arises whether both the types of evidence can be produced to prove the fact. In the absence of statutory provisions to the contrary, there would obviously be no bar to such a course being adopted, because, once a fact is relevant, then, as section 5 enacts, “evidence” may be given, and “evidence”, as defined in the Act includes oral as well as documentary evidence. This would be the theoretical consequence of section 5—but only in the absence of specific provisions. It is obvious that if such a situation were allowed to prevail in relation to documents, there would be confusion, and what would be described loosely as the question of “competition” between oral and documentary evidence may arise. Which species of evidence is to be preferred, and to what extent?

42.2. Specific provisions are laid down to deal with the matter, in Chapter 6. The Chapter deals with “competition” between the two species of evidence. In more expressive language, one may describe the topic dealt with in the Chapter as inter-relationship between oral and documentary evidence. Can only documentary evidence be given? If documentary evidence is given, can other evidence override it? These and other related matters form the subject-matter of the Chapter.

42.3. In England, this topic is described as relating to the “admissibility of extrinsic evidence as affecting documents”. It has been described as a branch of the law of evidence which is, perhaps, of all branches, the most difficult of application. The contents of a document are proved by the production of the original, or where secondary evidence is permissible, by secondary evidence. But, where the question is not primarily as to the contents of a document but as to the existence of matters of fact of which a document forms the record and proof, other considerations come into play. Two questions then arise, namely—

(i) whether the fact that the document forms the record and proof, excludes other evidence of matters which are so recorded; and

(ii) to what extent the matters so recorded can be affected by other evidence?

42.4. The law shows considerable preference for documentary evidence. In modern times, the rule is explained as one of “best evidence”. It has long been recognised that the best evidence in the possession of a party must be given;

---

1Woodruffe.
2For brevity, “document” in the following discussion will include secondary evidence.
3Woodruffe.
the principal application of this rule is to private documents. When the transaction to be proved is primarily evidenced by writing, the writing must be produced or accounted for. It would be improper for the court to rely upon a possibly imperfect copy of an original when the original itself can be produced, or to accept the recollection of a witness, which may be faulty as to the contents of a document when the document can itself be referred to.\textsuperscript{1} For the same reason, when a preliminary written agreement is followed by an agreement which has superseded the written agreement, the deed must itself be produced.\textsuperscript{2}

42.5. The rule prohibiting evidence in substitution of documents—usually known as the parole evidence rule, and more accurately described as the rule excluding extrinsic evidence—has an interesting history. Phipson\textsuperscript{3} refers to the early German procedure when a legal system of formal oral transactions prevailed. At that time, the document was not exclusive or conclusive in effect; but the rise of the seal marked a new era for documents. Originally, it was probably only the king who had a seal. His seal was indisputable. The analogy worked downwards, and the sealed writing tended to be the contractual act itself and not a mere testimonial device.\textsuperscript{4} With the development of the seal, there evolved a distinction based on grades of evidence, namely, a matter of “record” was higher than the deed and records and deeds were higher than an everment. For example, the decrees of courts of records were not only exclusive evidence of their own existence, admitting of no alternative proof, but were also conclusive, admitting of no contradiction.

42.6. The same principles were taking effect in relation to deeds. For example, a bond (an instrument introduced by the Lombard bankers) would be the exclusive evidence of the debt, and the creditor might not prove the debt by parole. This was the aspect of exclusive evidence. Then, a deed could not be annulled or altered except by deed. This was the aspect of conclusive evidence. The dispositive, as opposed to the testimonial, character of a written instrument, was further emphasised by the statute of frauds. The exclusive aspect of deeds under seal now became extended to documents under signature.

Similarly, the conclusive aspect of deeds began to be extended to unsealed writings.

42.7. The best evidence rule does not, however, apply to chattles. For example, when the question concerns the quality of the bulk of goods to a sample the chattel need not be produced.\textsuperscript{5}

42.8. In Hockin’s case\textsuperscript{6} the respondents were charged with breaches of the statutory order issued during the war time regulating the making of civilian clothing, the charge being that they manufactured garments with more pockets and buttons than the Order allowed. Evidence was given by the officer of the Board of Trade that he had inspected the particular articles referred to in the charge, and had found that the articles did not comply with the regulations. It was contended by the respondents that the clothing which was alleged to infringe the regulations should have been produced. It was held that the production of the clothing was unnecessary.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{1}]Permanent Trustee Company of New South Wales v. Fels. (1918) A.C. 879 (P.C.).
\item[\textsuperscript{2}]Williams v. Morgan, (1850) 15 Q.B. 782.
\item[\textsuperscript{3}]Phipson Evidence (1863), page 710, Paragraph 1072.
\item[\textsuperscript{4}]Phipson Evidence (1963), page 710, paragraph 1072.
\item[\textsuperscript{5}]Hockin v. Ahlquist, (1944) 1 K.B. 120; (1943) 2 All E.R. 722, 724.
\item[\textsuperscript{6}]Hockin v. Ahlquist Brothers, (1943) 2 All. Eng. Reports 722.
\end{itemize}
\end{footnotesize}
42.9. Amongst the cases relied on was an earlier one, where damages were claimed for the infringement of copyright in a picture, and it was held that evidence given by a party who said that he had seen the picture was admissible, and that it was evidence for the jury that the photography sold by the defendants was a copy of the original picture; and the Court of Appeal observed that it was not necessary for the plaintiff to produce the original picture. The following dicta of Lord Esher M. R. in the Court of appeal are pertinent:—

"Different kinds of evidence may be used to prove the same fact, and this is another way of proving the fact that the picture which the defendants sold was a copy of the original picture in respect of which there is copyright. If the jury were not satisfied, it would be open to them to say: 'you could have produced better evidence'".

II. DISPOSITIVE AND OTHER DOCUMENTS

42.10. In this connection, it is necessary to distinguish between dispositive documents and others. The importance of the distinction has been pointed out by Woodroffe,2 and it is of some relevance in appreciating certain controversies pertaining to sections 91-92, which we shall discuss in the due course.

42.11. "Dispositive" documents are those which are uttered dispositively, that is, for the purpose of disposing of rights. "Non-dispositive", documents are those which are uttered non-dispositively,3 that is, not for the purpose of disposing of rights. In the language of Bentham, the former are "predetermined" documents, while the latter are "casual" documents. In general, non-dispositive or casual documents,—for example, a letter or a memorandum thrown off hurriedly without intending to create a contract, which is offered not to prove a contract but to establish a non-contractual incident—are peculiarly dependent on extraneous circumstances, and often cannot be explained unless those circumstances are put in evidence. On the other hand, dispositive documents are usually prepared deliberately and are couched in words which are selected for the purpose, because they have a settled legal or business meaning.

42.12. In regard to dispositive documents as well as in regard to matters required by law to be reduced to the form of a document (whether or not these matters be in the nature of dispositions), section 91 enacts that no evidence in proof of the terms shall be given excepting the document itself or secondary evidence thereof when admissible.

42.13. In addition, where the document purports to be final settlement of a previous negotiation or where the matter is required by law to be reduced to writing, it is essential that the documents shall not be varied by words of month, because otherwise the benefit of writing would be lost. This aspect is dealt with in section 92.

42.14. To summarise very briefly the important provisions and approach adopted in this Chapter, while extrinsic evidence is inadmissible to supersede the terms of the document,4 or to control it,5 that is to say, to contradict, vary, add to or subtract from, the terms of the document, extrinsic evidence may yet be admissible in aid of, and to explain, the document.6 The principle underlying section 91 is that oral proof cannot be substituted for the written evidence.

1Lucius v. Williams & Sons. (1892) 2 Queens Bench 113, 116 (C. A.).
2Woodroffe, Introduction to Chapter 6 of the Evidence Act.
3Woodroffe.
4Section 91.
5Section 92.
6Section 92, 6th proviso and sections 93 to 100.

33—131 LAD/ND/77
and the principle underlying section 92 is that oral proof cannot control written evidence. These two sections constitute the pivot of the whole Chapter in the Evidence Act regarding the inter relationship of documentary and oral evidence.

III. UTILITY OF THE SECTION

42.15. A detailed consideration of these two sections will be made in due course. We may, before doing so, take note of a criticism often made of the rule excluding alternative evidence of matters recorded in, or required to be recorded in, documents.

42.16. This rule—that is to say, the rule that the document is exclusive evidence — has been criticised as amounting to tautology. To quote from an article by Wedderburn:

"More serious for our purposes is another limitation upon the parole evidence rule, one which causes the rule to be no more than a self-evident tautology. The rule applies only if the document is intended to be the whole contract. If, therefore the parties intended to make a contract partly oral and partly written, there is no objection to parole evidence being introduced to prove the oral terms, unless statute intervenes.

"thus, the “rule” comes to this: when the writing is the whole contract, the parties are bound by it and parol evidence is excluded; when it is not, evidence of the other terms must be admitted. To say this is to say little more than that the parties are bound, as usual by the terms which, from an objective point of view, were “intended” by them to be contractually binding, and the peculiar difficulties introduced by the writing have been conjured away. If that is correct, it is very easy to conclude that the only question to be asked in such a case is: "Did the parties intend to set their oral stipulation side by side with the written document so as to make each an essential part of the bargain, or was the written document the sole repository of the contract?"

42.17. There may be theoretical force in the criticism. But it would be too much to say that the rule has no utility. The rule serves to emphasise the superior role of documentary evidence, and in the majority of cases, the argument that the document did not record all the terms, will fail. The rule at least throws the burden on the opposite party to show that the document did not record all the terms. Viewed in this light, the rule possesses considerable practical utility, whatever be the objections that could be advanced against it in theory.

IV. SCHEME

42.18. This introductory discussion was intended to indicate the scheme and rational of the principal sections in the Chapter. A brief discussion of the scheme of the other sections in this Chapter of the Act will be useful at this stage. All these sections — sections 91 to 100 — dealing with the exclusion, by documentary evidence, of other evidence, are contained in Chapter 6. As already noted, (a) when the terms of a contract, grant or other disposition of property, have been reduced to the form of a document, or (B) in all cases, in which any matter is required by law to be reduced to the form of a document, the document is, under section 91, the exclusive evidence of such terms or matters.


5See the discussion in oscar Chess, Ltd. v. Williams, (1957) 1 W.L.R. 370 (C.A.).

6Cheshire and Fifoot, Contracts, per 100.
42.19. Under section 92, evidence of an oral agreement or statement cannot be admitted to contradict, vary, add to, or subtract from its terms, except in cases given in the proviso to the section. Thus, these two sections lay down general propositions.

42.20. The general propositions in these two sections are to be read subject to sections 93 to 98, which permit oral evidence to be given to explain ambiguities, obscurities and illegible characters in documents. Further, these general propositions do not apply to persons who are not parties (section 99). And it is to be noted that the entire Chapter does not "affect" wills (section 100), there being detailed provisions in the Indian Succession Act, 1925, on the subject of extrinsic evidence of wills.

42.21. The basic scheme of the Chapter does not require much change, but a few points of detail require attention, and these will be discussed under the relevant sections.

42.22. As has been pointed out by the Supreme Court, 1 the rule of exclusion enunciated in section 92 is supplementary to section 91. The two sections supplement each other; section 91 would be frustrated without the aid of section 92, and section 92 would be inoperative without the aid of section 91.

V. SECTION 91

42.23. After this preliminary discussion, we proceed to consider the sections proper. Two cases are dealt with in section 91; these are to be found in the main paragraph of the section.

It provides as follows:

"91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence as admissible under the provisions herein before contained.

There are two exceptions to the section, in these terms—

"Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills admitted to probate in India may be proved by the probate." 2

We shall deal later with the significance of these Exceptions. 2

42.24. Then, there are three Explanations. The first Explanation makes it clear that this section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Where there are more originals than one, one original only need be proved, according to the second Explanation.

The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact — the third Explanation makes that clear.

2See discussion relating to section 91—Exceptions, Infra.
There are five illustrations. According to illustration (a), if a contract be contained in several letters, all the letters in which it is contained must be proved. This illustrates the first Explanation.

According to illustration (b), if a contract is contained in a bill of exchange, the bill of exchange must be proved. This illustrates the main paragraph.

Under illustration (c) if a bill of exchange is drawn in a set of three, one only need be proved. This illustrates the second Explanation.

Illustration (d) takes a different case. A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible. This illustrates the third Explanation.

The third Explanation is also illustrated by illustration (e). A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

VI. SECTION 91—MAIN PARAGRAPH

42.25. The main paragraph of the section has been the subject matter of numerous judicial decisions, but the points decided hardly disclose any need for amendment of the section. We do not therefore, pause to consider those decisions.

42.26. It should also be pointed out that questions such as, what documents should or should not be registered, or what transactions should or should not be reduced to writing, are matters which do not concern section 91.

42.27. This aspect of the law is illustrated by leases. By the combined operation of section 107 of the Transfer to Property Act, 1882, sections 17 and 49 of the Indian Registration Act, 1908, and section 91 of the Evidence Act, where lease from year to year or exceeding a year or reserving an yearly rent is not registered, the terms of the lease cannot be proved either from the unregistered Kabuliya or from oral evidence of the transaction.¹

VII. DEPOSITIONS

42.28. The discussion immediately preceding was concerned with bilateral transactions. It may be recalled that section 91 also covers “matters required by law to be reduced to the form of document” and such matters may or may not be bilateral. Amongst the matters required by the law to be reduced to the form of a document are depositions in civil and criminal cases and confessions in criminal cases. These are not bilateral. These seem to have raised, in practice, questions of procedure as well as questions of evidence. The two types of questions should be kept distinct from each other.

42.29. Where the procedure laid down by law for recording the depositions or confessions has not been complied with, the question may arise whether the deposition or confession is valid. We are not, however, here concerned with that question. Such a question arises out of the informality in the procedure; how far such informality is saved, is a matter regulated by the Codes of Civil and Criminal Procedure for example, section 99 of the Code of Civil Procedure, 1908 and similar provisions in the Code of Criminal Procedure.

¹(a) Atul Krishna v. Zaheed. A.I.R. 1941 Cal. 102, 103 (Sen, J.).
(b) Ram Chandra v. Tama. (1912) I.L.R. 36 Bom. 500, 503;
(c) Mahalakshmana v. Suryanarayana. A.I.R. 1928 Mad. 1113.
42.30. It is the second type of question, relating to evidence, which is relevant to the present discussion. Some misunderstanding seems to exist as to the admissibility of oral evidence of what the witness or the accused said (in his deposition or confession). Prima facie, such evidence should be regarded as excluded by section 91. The language seems to be fairly clear. Nevertheless, there seems to be some misunderstanding on the subject. By way of illustration, we may refer to a Patna case on the subject. In a proceeding under section 145, Code of Criminal Procedure, 1898, (disputes as to immovable property), between Sheo Karan Lal and his brother Sheo Prasad Lal, the petitioner made a statement in cross-examination that he (the petitioner) had illicit relationship with the wife of his brother Sheo Prasad Lal. On the basis of this statement, he was prosecuted under section 500, Indian Penal Code (defamation), on a complaint filed by one Bandi Prasad as the servant of Girki Bai, wife of Sheo Prasad Lal, complaining that she had been defamed by the aforesaid answer given by the petitioner in cross-examination. The point urged by the petitioner in the High Court was that the magistrate had not in the earlier proceeding recorded the exact question and answer forming the subject-matter of the complaint of defamation against him, and that the prosecution was debarred from proving it by an oral evidence of the magistrate who appeared as a witness in the defamation case.

The High Court held that if the Court has made a record of the question and answer, then no other evidence was admissible except by the proof of the statement which was thus reduced to writing. But, in this case, there was no such record of the exact question and answer and, therefore, the prosecution was free to prove by oral evidence the actual words which were the subject of this prosecution.

The petitioner was, however, acquitted by the High Court, by giving him protection under section 132 of the Evidence Act.

42.31. In an Allahabad case there was a revision petition against the order of a first class Magistrate lodging a complaint against the applicant under section 193, Indian Penal Code for the offence of perjury. The petitioner had given false evidence during his cross-examination in a criminal case before the Magistrate.

42.32. It was argued by the petitioner in the High Court that no prosecution for perjury could be ordered as his deposition was not read over to him as required under section 360 of the Code of Criminal Procedure, 1898. The High Court rejected the petition, and held that the Magistrate or his Clerk who took down the deposition could be examined as a witness during the trial to prove that the accused made the deposition as recorded. The High Court further held that if the prosecution had to prove that the deposition made by the witness was correct, it would have to produce the deposition and section 91, would bar any other evidence. But, when the prosecution has simply to prove that the witness made the deposition, there is nothing in section 91 to prevent this fact from being proved without producing the deposition itself.

42.33. In another Patna case, the accused petitioners were apprehended by a Sub-Divisional Magistrate while smuggling rice from one district to another.

---

in violation of law. The accused petitioners admitted this before the Sub-
Divisional Magistrate, and made confession in this regard. They were pro-
csecutd subsequently, and, on conviction of the petitioners, the matter came 
up before the High Court in a revision petition at the instance of the accused.

42.34. The first point raised in the High Court was that the confessions 
made by the accused before the Sub-Divisional Magistrate were not admissible 
in evidence. It was urged that in view of section 91 the confessional statements 
made before the Magistrate could not be proved by the oral evidence of the 
Magistrate.

42.35. The High Court held that the Magistrate did not record the confes-
sions under sections 164 and 364 of the Code of Criminal Procedure, 1898, 
apparently because no investigation had commenced. It further held that sec-
ction 91, Evidence Act, would not be a bar to the admission of oral evidence 
when a confessional statement is made to the Sub-Divisional Magistrate which he was not bound to record under sections 164 and 364 of the Criminal Pro-
cedure Code.

42.36. Reverting to the first mentioned Patna case, with respect, we are 
not satisfied that the case was correctly decided. On the language of section 
91, such evidence cannot be admitted, because the words “any matter re-
quired by law to be reduced to the form of a document” in section 91 would, on 
an ordinary reading, cover statements of the accused and depositions of wit-
wnesses required to be reduced to writing.\(^1\) Having regard to the terms of the 
section, we do not think that any other view can be supported. The Allahabad 

case depends on special facts. The second Patna case is also outside section 
91, because once it is held that the confession was not required by law to be 
reduced to writing, the case is not covered by either branch of the section.

42.37. We are making these observations to show the proper scope of 
section 91. If properly applied, the section does not disclose any ambiguity 
calling for amendment, and we recommend none.

VIII. SECTION 91—EXCEPTIONS

42.38. We now proceed to consider the Exceptions to section 91. The 
effect of the first exception to the section is that the fact of a person having 
acted as a public officer can constitute proof of his appointment to the pub-
lic office concerned. The rationale on which this Exception is based is that 
due appointment may fairly be presumed from acting in an official capacity, 
since it is very unlikely that anyone would intrude himself into public situa-
tion which he was not authorised to fill, or, that if he wished, he will be al-
lowed to do so. In a sense, that is a particular application of the maxim that 
oficial acts are presumed to have been performed regularly.\(^2\) We do not re-
commend any change in the first Exception.

42.39. The second exception to section 91, under which wills admitted to 
probate in India may be proved by the probate, in effect adds a species of 
secondary evidence (though not in so many words) to those already recogni-
ded by the Act in section 63. Since a probate as such is not included in the 
enumeration of “secondary evidence” given in section 63, it was necessary to 
mention it specifically in section 91, it having been provided in the operative 
part of the section that only the document or its secondary evidence is admis-

\(^2\)Woodroffe, Commentary on sections 79 and 91.
sible. In relation to foreign wills, reference may also be made to section 82; the effect of that section, in substance, is that wills admitted to probate in England and certain other countries of the common wealth may be proved by the probate or by any other means available in England. It may be noted that in England, wills can be proved by means of a Probate.\(^1\) The Exception needs no further comments.

42.40. It may also be noted that the provisions in the succeeding sections in the Chapter, particularly sections 95 and 96, constitute qualifications\(^2\) to the first proposition in section 91, although they are not, strictly speaking, in the nature of “exceptions.”

42.40A. The Explanations to the section require no comments.

\(^1\)Whicker v. Hume, 7 House of Lords Cases 120, 124.
\(^2\)Karappa v. Thopoth, (1927) I.L.R. 30 Mad. 397.
CHAPTER 43

VARIATION OF DOCUMENTARY EVIDENCE BY OTHER EVIDENCE

SECTION 92

I. INTRODUCTORY

43.1. We now proceed to consider another important section relevant to the question of conflict between oral and documentary evidence — section 92. Under the main paragraph of the section, when the terms of "any such contract grant or other disposition of property", or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, "as between the parties to any such instrument or their representatives in interest", for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Six provisos qualify this section. We shall deal with them later.

43.2. There are 10 illustrations appended to the section. Of these, the first 3 illustrations illustrate what, by virtue of the section, cannot be proved. The remaining relate to facts which can be proved by virtue of the provisos to the section.

Thus, where the document employs general words covering a class of objects, it would exclude oral evidence to the effect that a particular object in that category was excepted. That is what illustration (a) illustrates, by stating that where a policy of insurance is effected on goods in ships from one place to another, the fact that that particular ship was orally excepted from the policy cannot be proved. This is an example of oral evidence sought to be tendered to vary the terms of a contract reduced to the form of a document.

Similarly, illustration (b) shows that the date of payment fixed under a written agreement cannot be changed by an oral agreement. This also would be oral agreement varying the terms of a written contract.

Illustration (c) indicates very strikingly how a map attached to a deed cannot be departed from in the determination of the question as to what passed under the deed.

Illustrations (d) and (e) illustrate the first proviso.

Illustrations (f), (g) and (h) illustrate the second proviso.

Illustration (i) is a case outside the main paragraph of the section, because oral evidence is now sought to be tendered not about the terms of the contract, but about a fact, namely, the receipt of money.

Illustration (j) is in the same category.

II. WANT OF SYMMETRY

43.3. At the outset, it is necessary to discuss one important question which relates not to any matter of detail pertaining to the section, but to the scope of the section as a whole. This question is concerned with the application of the section to documents concerned with matters other than contracts, grants and dispositions of property. How far should the section, in its latter half,
apply to non-contractual and non-proprietary matters or — more particularly — to non-contractual and non-proprietary unilateral matters? Like section 91, section 92, in its opening part, speaks of two kinds of situations — (i) contract, grant or other disposition of property reduced to the form of a document, and (ii) matter required by law to be reduced to such form.

Now take the operative portion in section 92, which is represented by the words “no evidence.............shall be admitted, as between the parties to any such instrument”. This part is so worded that it is not clear how far it is applicable to the transactions referred to above. A want of symmetry arises by reason of the words “as between the parties.”

43.4. To put the matter in a different form, section 92, in its earlier half, purports to deal with two situations—

(i) when the terms of any contract, grant or other disposition of property, reduced to the form of a document, have been proved according to section 91; and

(ii) when any matter required by law to be reduced to the form of a document, and so reduced, has been proved according to section 91.

Taken together these two would cover all the cases to which section 91 applies. But difficulty arises from the operative provision in the latter half of section 92 (prohibiting evidence of oral agreement or statement at variance with the document). How far should this part of the section cover any matter required by law to be reduced to document which is not a contract, grant or disposition of property? This part of the section does not cover the whole field traversed by section 91. The wording is somewhat ambiguous or incomplete; this ambiguity or incompleteness results primarily from the words “between the parties” etc.

43.5. One possible view is that both the situations mentioned above — i.e. all cases falling under section 91 — and to be covered by latter part of section 92.

43.6. On another interpretation, however, the subject-matter of section 92 is merely (a) contracts, grants and other dispositions of property, embodied in a document by consent of parties, and (b) (at the most) other bilateral transactions embodied in a document by requirement of law.

This view would leave out those transactions which are not bilateral, and are not in the nature of contracts, grants and other dispositions of property. Thus, on this interpretation, the section is limited to bilateral documents.

The effect of the later interpretation could be illustrated by taking the case of the statement of a witness recorded by a court as required by law. Oral evidence to contradict the record of the statement would not be excluded, on the latter interpretation since the statement is not a bilateral transaction, and the words “between the parties to it”, which occur in the latter part of section 92, cannot be appropriately applied to the record of the statement.

Again, where the matter required to be reduced by law in writing is a decree, the section, on this view, would permit evidence to contradict the terms of the decree. “In other words, the case where a matter is required to be reduced into writing by law and is so reduced, but does not constitute a bilateral transaction, would, on this interpretation, be outside section 92. The question then arises what ought to be the proper approach in regard to the contradiction of such matter.
The query raised above is not a mere academic one. Case law in India, to which we shall presently refer, shows that the controversy has arisen in practice.

43.7. We shall first refer to the decisions of the High Courts, in order to indicate the nature of the controversy, and then refer to certain observations of the Supreme Court on the subject.

One view on the subject would appear to be that the second part of the section is not confined to dispositive documents, but applies to all documents which are contracts, grants or dispositions of property reduced to writing, or contain matter which the law requires to be reduced to writing. This view is represented by certain Madras decisions\(^1\) and also by the observations of Walsh J. in an Allahabad case.\(^5\) On this view, sections 91-92 are co-extensive with each other.

43.8. According to another view, because of the words "as between the parties to any such instrument" which occur in section 92, section 92 has a narrower scope than section 91, and deals only with two classes of cases, namely, (i) contracts, grants or other dispositions of property reduced to the form of document by the act of parties and (ii) contracts, grants or other dispositions of property which are required by law to be reduced to the form of a document.\(^6\) This is the Calcutta view, taken in 1914.

43.9. It was held in an early Calcutta case,\(^7\) that the object of the Legislature was to deal with two classes of cases, namely, first, contracts, grants or other dispositions of property which had been reduced to the form of a document by the act of parties as mentioned in section 91 and, secondly, contracts etc. required to be reduced to the form of a document. This decision has been followed in a later Calcutta case.\(^8\)

43.10. According to another Calcutta case,\(^9\) sections 91 and 92 refer only to what are known as dispositive documents, and the words "or any matters required by law to be reduced to the form of a document" must be read in that sense. The actual case related to a decree but the reasoning on which the decision is based was as stated above. The High Court relied on "the language of that section (section 92) and section 91 which precedes it and to the principle which underlies them". On this view, section 92 would be confined to—

(a) contracts, grants or dispositions of property in writing, and

(b) any other matter required by law to be reduced to the form of a document, provided it is of a dispositive character.

Of course, in either case, the dispute must be between the parties to the instrument.

---

\(^{1}\)See Raja of Kala Hazi v. Venkatadri Rao (Madras) Infra.
\(^{2}\)See Lachman Das v. Baba Ram Nath (Allahabad), Infra.
\(^{5}\)Gajanand v. Haribux, A.I.R. 1943 Cal. 634, 635 (Mc Nair J.) (reviews cases).
43.11. The Allahabad view is that because of the words “as between the parties to any such instrument”, and the word “instrument”, the section applies only to dispositive documents between contracting parties or elaborately,

(a) contracts, grants or dispositions of property, and

(b) dispositive instruments inter partes which embody matter required by law to be reduced to the form of a document, provided, of course, in every case, that the dispute arises between the parties.

43.12. The Madras view is to the contrary. The following extract from the Judgment of Odgers J. in a Madras case reported in 1927 is instructive, as showing the views on the subject as expressed judicially up to 1927 and as also showing the Madras views.

“Much stress is laid on Debendra Narain Sinha v. Sourindra Mohan Sinha, a case of the Calcutta High Court — and Ananda Priya Baishnavi v. Bijoy Krishna Ray, simply follows it, — where the learned judges held that section 92 of the Evidence Act does not apply to decrees and therefore oral evidence may be admissible in proof of an alleged oral agreement between the decree-holder and judgment debtor.

“This is based on the assumption that the words as between the parties to any such instrument or their representatives in interest” are to be read along with the words “contract, grant or disposition of property” and also along with the words “or any other matter required by law to be reduced to the form of a document.” On this assumption the learned Judges proceed to hold that the object of the Legislature was to deal with only two classes of cases, namely first, contracts, etc., reduced to writing by the act of parties as mentioned in section 91, and the form of writing; in other words, the expression “any matter required by law to be reduced to the form of a document” is controlled by the expression “as between the parties to any such instrument or their representatives in interest” and has, in section 92, a much narrower scope than in section 91. This case, though not quoted, was obviously before two other judges of the same High Court in Ananda Priya Baishnavi v. Bijoy Krishna Ray, and was followed. It is to the same effect, i.e. that section 92 of the Evidence Act only refers to dispositive documents, in other words, the words “any matter required by law to be reduced to the form of a document” are ejusdem generis with contracts, grants or dispositions of property. This case Debendra Narain Sinha v. Sourindra Mohan Sinha has been disapproved by Napier and Krishnan JJ., in S.A. No. 62 of 1920. They agree in saying that there is no warrant for the narrow construction placed on the material words by the Calcutta High Court, and, if I may say so, I respectfully agree with their opinion. In Lachman Das v. Baba Ramnath Kalikaminivala, the judgment-debtor alleged an oral agreement and the decree-holder denied such an adjustment taking place. Both the judges held that such an agreement

---

1Ganga Dhal Rai v. Ram Oudh, A.I.R. 1929 All. 79, 81 (Sulaiman, Ag. C. J.). (Case reg. decrees).
5Emphasis supplied.
as alleged could not be set up under Order XXI, rule 2, as a bar to execution and one of the learned Judges, Walsh J., also held that under section 92 of the Evidence Act it could not be set up as it was clearly a new agreement contradicting or varying the terms of the original decree.

43.12A. The observations of Cugenev J. In a Madras case may be cited:

"As an oral agreement, I hold that it offends against the terms of section 92, Indian Evidence Act. The learned Judges who decided Debendra Narain Sinha v. Sourindra Mohan Sinha, considered that the words "any matter required by law to be reduced to the form of a document" being controlled by the words 'as between the parties to any such instrument or their representatives, in-interest' must be construed as meaning contracts, grants, or other dispositions of property which are required by law to be reduced to the form of a document.

With great respect I do not feel constrained by the language of the section to narrow its scope in this manner, more especially as it seems, as objectionable, that the parties to a decree should orally vary its terms, as that they should so vary the terms of any 'dispositive' instrument. It does not, therefore, seem reasonable to attribute to the legislature an intention to permit the one while prohibiting the other. Nor do I see any such instrument to a decree-holder and a judgment-debtor. I prefer therefore to adopt the construction favoured in W.V. Collard v. M.A. Collard, and by Napier and Krishnan, JJ., in S.A. 52 of 1920 and to hold that section 92 does not preclude the proof of an oral agreement modifying the terms of a decree."

43.13. So much as regards the decisions of the High Courts. The matter was discussed by the Supreme Court a few years ago. In that case the official assignee moved the Insolvency Court under section 55 of the Presidency Towns Insolvency Act, for a declaration that a deed of gift executed by the insolvent in favour of his wife and sons, (appellants) was void, as one without consideration. It was held that it was open to the appellants (the wife and sons) to lead oral evidence to show that the transaction evidenced by the deed of gift was, in reality, a transfer for consideration. Section 92 of the Evidence Act was wholly inapplicable to the proceedings, because the dispute did not arise between the parties.

The supreme Court, however, considered sections 91-92 in detail. The observations, though obiter, of the Supreme Court, in this case seem to take, in effect, the view that section 92 is confined to bilateral documents.

43.14. So far as section 92 is concerned, the relevant observations of the Supreme Court are as follows:

"Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been

---

3Emphasis supplied.
4M. V. Collard v. M. A. Collard A.I.R. 1922 All. 7; 44 All. 954.
6See section 99.
8Also see Chand Prasad Singh v. Piar Biari Bibi, (1966) 8 S.C.R. 138, Point 173;
proved by the production of the relevant documents themselves under S. 91; in other words, it is after the document has been produced to prove its terms under S. 91 that the provisions of s. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms.

The application of this rule is limited to cases as between parties to the instrument or their representatives in interest. There are six provisos to this section with which we are not concerned in the present appeal. It would be noticed that Ss. 91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid of s. 92 and s. 92 would be inoperative without the aid of s. 91. Since section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the documents properly proved under s. 91, it may be said that it makes the proof of the document conclusive of its contents. Like s. 91, s. 92 also can be said to be based on the best evidence rule. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas s. 92 applies to documents which can be described as dispositive. Section 91, applies to documents which are both bilateral and unilateral, unlike s. 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that s. 92 does not apply to strangers who are not bound or affected by the terms of the documents. Persons other than those who are Parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties, or their representatives in interest that the rule enunciated by S. 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of S. 99 itself. Section 99 provides that "persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document". Though it is only variation which is specifically mentioned in S. 99, there can be no doubt that the third party's right to lead evidence which is recognised by S. 99 would include a right to lead evidence not only to vary the terms of the document, but to contradict the said terms or to add to or subtract from them. If that be the true position, before considering the effect of the provisions of S. 92 in regard to the appellants' right to lead oral evidence, it would be necessary to examine whether S. 92 applies at all to the present proceedings between the official assignee who is the respondent and the donees from the insolvent who are the appellants before us.

III. POSITION IN ENGLAND

43.15. We have noted above the Indian case law as to the scope of section 92. We may now refer to a few English cases relevant to the subject of certain judicial documents.

In England, extrinsic evidence is, in general inadmissible to contradict or vary judicial documents. Thus, a county court judgement cannot be varied by the judge's notes, still less by the informal memoranda or letters of the

---

1Emphasis supplied.
3Dews v. Ryley, L. J. C. P. 264.
registrar, and the note or certificate of his judgment supplied by a country court judge for appeal is conclusive, and cannot be varied by affidavit or shorthand notes.

43.16. In *R. v. Tyrone* justices, where out of five justices, only one was recorded as dissenting, the king’s Bench Division was held bound by the record, and evidence to show that a decision was not that of the majority was rejected, Campbell L. C. remarking: “In recent cases the court has gone very far in allowing affidavits contradicting matters which appear regular on the face of the record. We are not inclined to extend that practice.”

IV. QUESTION OF AMENDMENT CONSIDERED

43.17. We now revert to the law in India and should take note of a suggestion made to us namely, that in order that the section may bring out the position more clearly than at present, some change in its wording should be made. The suggestion was that two amendment should be made in the section. So far as bilateral documents are concerned— to which the section certainly applies—the matter should be dealt with first. But the question whether the section should be revised so as to provide that it will extend to unilateral documents where the matter is required by law to be reduced to writing, should also be considered on the merits.

43.18. In order to achieve the first object, it was suggested that section 92, main paragraph, should be revised as follows, and made into a sub-section:

1. “92. (1) When the terms of any such contract, grant or other disposition of property as is referred to in section 91 or any matter required by law to be reduced to the form of a document and constituting a transaction between two or more parties, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted,

a. as between the parties to any such contract, grant or other disposition of property or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, the terms of the document,

or

b. as between the parties to such transaction, or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from the terms of the document in which the matter required by law to be reduced to the form of a document is recorded, as the case may be,"

43.19. Another point concerns the contradiction of matters which are not bilateral and are not contracts, grants or dispositions of property, but are still required by law to be reduced to the form of a document. These are covered by the preceding section, (section 91) and when in respect of them, documentary evidence is given as required by section 91, the question naturally arises whether the documentary record can be contradicted. Important illustrations of such matters are—

(i) Confessions of the accused,

(ii) statements of witnesses, and

1 Stonor v. Fowle, 13 App. Cas. 20 at pp. 27-28.
4 Section 92 was to be renumbered as sub-section (1), since a new sub-section is to be inserted, see infra.
(iii) other court proceedings,—apart from the question of decrees;
(iv) resolutions of companies when required to be in writing.

A separate sub-section was suggested for the purpose. On the merits, it was stated that such a provision is needed, as otherwise the object of the law requiring the matter to be reduced to the form of a document would be defeated. It would be objectionable that a matter required by law to be reduced to the form of a document, not being a bilateral transaction, should be variable by evidence of an oral statement, since the very object of the substantive law in this case is that the written record should be exclusive and conclusive record of the matter in question.

43.20. The suggested sub-section was on the following lines:—

"(2) When any matter required by law to be reduced TO THE FORM OF A DOCUMENT, and not constituting a transaction between parties, has been so reduced and the document has been proved according to section 91, no evidence of any oral statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from the contents of the document."

43.21. We have after considerable discussion decided to recommend the Recommendation.

V. DECREES

43.22. There still remains to be considered one controversy concerning the scope of the section. The controversy relates to the question whether, having regard to section 92, an oral adjustment or variation of a decree can be proved. As has been pointed out separately, there is a controversy as to how far section 92 applies to documents which are not bilateral, and that controversy has given birth to the conflict of views regarding adjustment of decrees also.

However, we may note that the variation of a decree is a matter of procedure, and not of evidence. Hence, the question does not exclusively relate to section 92. Private persons cannot, by mere agreement, which is a private act vary or modify a judicial act. This is true whether the agreement be oral or written. This was pointed out in a Madras case. A decree is a creature of court, and cannot be varied by private act.

43.23. So far as an executing court is concerned, Order 21. rule 2 of the Code of Civil Procedure, 1908, gives very clearly the procedure for recognition of variations, and it is that rule which contains the relevant law of procedure.

43.24. The aspect that the variation of decrees really raises a question of procedure, was lucidly set out in the Madras case. It will be useful to quote, in extenso, the relevant observations:—

"A decree does not come within the purview of section 92. A decree is not a creature of consensus but of the court. Only a Court can bring it into existence, and only a Court can vary or nullify it. Even when the parties to a suit compromise the suit, the agreement of compromise does not become a decree until the Court directs the passing of a decree in terms of the compromise."

1These words are intended to exclude acts between parties, which are already dealt with in the preceding part of the section.
2The provisions will appear as provisions to sub-section (1).
3See discussion relating to section 92 "any matter require.............", supra.
Even where parties adjust a decree, an order of the Court is necessary to give effect to the adjustment; without such an order the adjustment by the parties leaves the decree as it is. A decree or its terms cannot be varied or modified except by the Court; it is a matter of procedure and not of rules of evidence. The parties cannot by their agreement alone vary or modify the terms of the decree, whether the agreement be oral or written."

"The rule enacted by section 92 is a rule excluding evidence of oral agreement varying the terms of certain documents, and it implies that but for such exclusion the agreement could in law vary the terms. Where no such variation is possible in law by agreement, whether written or oral, the rule of exclusion of or evidence of oral agreement cannot apply, and this is the case with a decree. The law does not contemplate the possibility of varying decrees of Court by mere agreement between the parties thereto; the mischief against which section 92 is directed could never affect decrees. Attempts to vary the terms of decrees are guarded against not by any rule of evidence but by rules of procedure, such as those relating to amendment of decrees, appeal, review, and execution of decrees."

We now proceed to consider the proviso to the section.

VI. SECTION 92—THE FIRST FIVE PROVISOES

43.25. Under the first proviso to section 92, any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating there to; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, or mistake in fact or law. Illustration (c) to the section specifically indicates that such a mistake as referred to by law, entitle a person to have the contract "reformed" — which is the old equivalent of what is known now as "rectification" — may be proved. This process does not seem to be confined to mistakes in the formation of the contract, and seems also to cover mistakes in rendering the intention of the parties into words. In such cases, there is an agreement; but, the words in which the agreement is expressed do not totally express the meaning of the parties. In one of the Bombay cases,¹ where there is an extensive discussion of mistake, it is pointed out that what is rectified is not the agreement, but the mistake in the expression of it. Specific reference to the first proviso to section 92 is found in an Allahabad case,² where rectification was allowed.

The combined effect of the first proviso to section 92 and of section 31 of the Specific Relief Act, 1877, is discussed in a Madras case.³

43.26. A suggestion has been made that section 92 should be clarified to permit the rectification of mistakes, and oral evidence should be admissible for the purpose. It does not, however, appear to be necessary to make any such clarification, for the reason that under the first proviso to section 92, any fact can be proved which "invalidates any document or entitles any person to any decree or order relating thereto, such as ..........mistake of law".

Under the Specific Relief Act,⁴ mistake in recording the intention of the parties justifies rectification⁵. Such mistake can be pleaded by way of defence also⁶. Hence, no change is needed.

²Abdul v. Ram, I.L.R. 44 All. 246.
⁴Section 31, Specific Relief Act, 1877, and Similar provision in the 1963 Act.
⁵See Rangaswami v. Souri, A.I.R. 1916 Mad. 519; I.L.R. 39 Mad. 792
Even before the passing of the Specific Relief Act, 1877, jurisdiction to rectify instruments on the ground of mistake was well recognised.

43.27. Under the second proviso to section 92, the existence of any separate oral agreement as to any matter on which document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document. We have no changes to suggest in this proviso.

43.28. Under the third proviso, the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved. This proviso also needs no change.

43.29. Under the fourth proviso, the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents. The proviso may, at the first sight, appear to be a curious one, since it materially affects that part of the section which prohibits evidence "varying" the terms of the document. However, it should be pointed out that the proviso excludes cases where the contract etc. is required by law to be in writing.

With this limitation as to its scope, the proviso is understandable, because the law will not go to the length of prohibiting subsequent oral agreements in toto.

43.30. Under the fifth proviso, any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved. This proviso itself is subject to a counter-proviso, which is expressed as follows:—

"Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract"

We have no comments on this proviso.

VII. THE SIXTH PROVISO

43.31. The sixth proviso to section 92 requires a more detailed discussion. It provides that any fact may be proved which shows in what manner the language of a document is related to existing facts. The rationale of the proviso is clear enough. In general, no document can be interpreted or understood without taking notice of "external" reality, because a document is, after all, intended to affect, in some way or other, the facts existing outside the document.

Like a literary work, a document is produced by a certain person in a certain time and place, and it is always related to various facts not recorded in the document. No document is written in a vacuum, and therefore, none can be read, understood or interpreted in a vacuum. It is knowledge of the external facts that is designed to fill, in some measure, that vacuum.

43.32. The language of the sixth proviso has been criticised judicially. Thus, Mcleod, C.J. has observed that the language is rather vague. We are not, however, satisfied that the language of the proviso suffers from any inherent defect.

---

1Kassim v. Noor, (1864) 1 Weekly Reports 76.
2Bunputt v. Juwahar, (1867) 8 weekly reports 152. (Calcutta).
No doubt, difficulties may arise in its application to the facts of a particular case. This is true not merely of this proviso, but also of numerous other provisions in the Evidence Act. The principle underlying the proviso is, however, clear enough—the admissibility of evidence to show the connection between the words of an instrument and external reality, and to ascertain the identity or extent of the subjects referred to in a document.

43.33. The principal object of the sixth proviso is to enable evidence to be given to identify the subject-matter of what is stated in the document. In one of the early English cases, Wood V.G. observed: "Some evidence is necessary in any case of a will, that is to say, evidence to show the subject and object of the gift." In the same case, he emphasised that all "external information is requisite in construing every document". Indeed, as Goodeve has stated, "It is by these circumstances (surrounding the instrument) as by lamplight, that the Court reads the document."

Most of the English cases relate to wills, but the principles are the same.

So viewed, the proviso does not seem to suffer from any ambiguity, and we do not, therefore, consider it necessary to recommend any amendment on the point to which the above discussion relates.

43.34. It may be noted that the principle is not peculiar to India. It is recognised in England also. Lord Abinger observed long ago—

"To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subject of his allusions or statements..................

43.35. A suggestion has been made that since sections 93 to 98 amplify and illustrate this proviso, the connection between section 92 and sections 93 to 98 should be made clear by adding in the sixth proviso, the words "for the purpose and to the extent provided in section 93 to 98."

The suggestion is based on a slight misconception as to the meaning of the sixth proviso to section 92. The proviso allows evidence to show how the words of the document "fit the external reality" Sections 93 to 98 deal only with certain special situations which may, in the absence of suitable provisions, create difficulties by reasons of the incomplete or defective language of the document as tested with external realities. These sections do not necessarily exhaust the situations to which the sixth proviso to section 92 may apply.

We are, therefore, unable to accept the suggestion.

VIII. CONCLUSION

43.36. The change required in section 92 is as indicated above.

---

1In the matter of Felthan, 1 Kay & J. 528 (cited by Woodroffe).
2Goodeve, Evidence, page 386, cited by Woodroffe.
3Din Dee of Hitcocks v. Hitcocks, (1838) 5 M & W 363, 368 (Lord Abinger)
4Fitz Unissa v. Hanifaunissa, I.L.R. 27 All. 612.
CHAPTER 44

EVIDENCE FOR INTERPRETATION OF DOCUMENTS—SECTIONS 93—100

44.1. The exclusive and conclusive character of documentary evidence is dealt with, in sections 91-92, which we have so far considered. The rules in these two sections do not come in the way of evidence of facts necessary to be introduced for the purpose of interpreting the document; such evidence does not displace or modify the document, but explains it. Certain guidelines for dealing with such evidence are to be found in sections 93-100. Some of these rules are permissive, while others are exclusionary.

SECTION 93

44.2. Section 93 enacts an exclusionary rule, and provides that when the language used in a document is, "on its face", ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. For example—as the illustrations to the section tell us,—

A agrees, in writing, to sell a horse to B, for "Rs. 1,000 or Rs. 1,500".

Evidence cannot be given to show which price was to be given.

Similarly, if a deed contains blanks, evidence cannot be given of facts which would show how they were meant to be filled.

The reason is that these are 'patent ambiguities' as is indicated by the words 'on its face'. Patent ambiguities cannot be removed by extrinsic evidence.

The section does not appear to need any change.

SECTION 94

44.3. Another exclusionary rule is to be found in section 94. Under that section, when language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. The illustration to the section illustrates this principle—

"A sells to B, by deed, 'my estate at Rampur containing 100 bighas'. A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size."

This section deals with a case where there is no ambiguity—patent or latent—and therefore no need to modify the terms of the document.

We have no comments on this section.

SECTION 95

44.4. In contrast with the two preceding sections, section 95 contains a permissive provision. Language which fails to apply to external facts, though not ambiguous in itself, is dealt with in the section. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

1Woodroffe.
2Section 93.
3Sections 96-97.
Thus, as the illustration to the section says—

“A sells to B, by deed, ‘my house in Calcutta’. A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed”.

These facts may be proved to show that the deed related to the house at Howrah.”

The principal object of the section is to enable evidence properly establishing the connection between the document and the external reality to be given.

The section does not seem to need any change.

SECTION 96

44.5. Section 96 contains another premissive provision. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may, under the section, be given of facts which show which of those persons or things it was intended to apply to.

This is illustrated by two illustrations.

If A agrees to sell to B, for Rs. 1,000 “my white horse”, and A has two white horses, evidence may be given of facts which show which of them was meant.

Similarly, if A agree to accompany B to “Haiderabad”, “evidence may be given of facts showing whether Haiderabad in the Dekkhan or Haiderabad in Sindhu was meant”.

44.6. The cases to which section 96 applies are cases of latent ambiguities. In this respect, section 96 forms a contrast to section 93, which dealt with patent ambiguities. The situation in section 96 is really analogous to that dealt with in section 95. In both cases, disharmony with reality arises, in relation to a document. In section 95, the disharmony arises because of incompleteness of the documentary language. In section 96, the disharmony arises because of latent ambiguities, in the documentary language. Such ambiguity arises from facts external to the documents and these facts create a question not solved by the document itself.

The section may be left as it is.

SECTION 97

44.7. Section 97 enacts another permissive provision. This is applicable when the language used in a document applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either. Evidence may be given to show to which of the two it was meant to apply.

44.8. Thus, A agrees to sell to B “my land at X in the occupation of Y”. A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell — vide the illustration. The rationale of the section is that where the ambiguity arises by reason of external facts, extrinsic evidence is admissible.

4 Contrast section 94.
44.9. The section is meant for those cases in which the ambiguity is rather one of description, since the description is *imperfect* when brought to bear on any given person or thing.

44.10. Section 94 provides that when the language of a document is *plain and applies accurately to existing facts*, evidence may not be given to show that it was not meant to apply to such facts.

No changes are needed in the section.

**SECTION 98**

44.11. **Under Section 98, evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.**

This is illustrated by the illustration to the section, which reads —

"A, a sculptor, agrees to sell to B 'all my mods'. A has both models and modelling tools. Evidence may be given to show which he meant to sell'.

44.12. It would be of interest to refer to the comparable rule as to statutes.

"It is a familiar rule in the construction of legal instruments, alike dictated by authority and common sense, that common words in the instrument are to be extended to all the objects which, in their usual acceptation, they describe or denote, and that the technical terms are to be allowed their technical meaning and effect; unless in either case the context indicates that such a construction would frustrate the real intention of the draftsman".

44.13. Words of common use are generally to be construed according to their natural, plain, and ordinary signification. Terms of art should be understood according to their usage in the art to which they belong.

44.14. The principle upon which words are to be construed in instruments is very plain—where there is a popular and common word in an instrument, that word must be construed, *prima facie*, in its popular and common sense. If it is a word of a technical or legal character, it must be construed according to its technical or legal meaning. This would be its secondary meaning. But, before evidence can be given of the secondary meaning of a word, the Court must be satisfied from the instrument itself, or from the circumstances of the case, that the word ought to be construed, not in its popular or primary signification but according to its secondary intention. In England, it has been held that evidence that expressions were used in a technical sense ought not to be admitted without a distinct averment as to the particular words to which evidence is proposed to be directed and as to the technical or trade meaning which it is sought to attribute to them.

The section needs no change.

---

SECTION 99

44.15. Under section 99, persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

44.16. This provision is illustrated by an illustration. A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time, they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests.

44.17. The question has arisen whether, in confining itself to persons who are not parties, section 99 intends that the rule against variance (given in section 92) should apply as between a party and a stranger.

44.18. The point came up for discussion before the Supreme Court in one case, where it was held that the true position is, that if the terms of any transfer reduced to writing are in dispute between a stranger to the document, and a party to the document (or his representative-in-interest), the restriction imposed by section 92 (which excludes evidence of oral agreement) will not apply; and both the stranger to the document and the party (or his representative-in-interest) are at liberty to give evidence of the oral agreement, notwithstanding the fact that such evidence, if believed, may contradict, vary, add to or substract from, the terms reduced to writing.

44.19. In our view, it is desirable to make the position clear, by substituting suitable words in section 99, since the present wording does not completely bring out this position. We recommend that the section should be amended accordingly. The new wording should make it clear that section 99 applies, (a) as between strangers, and (b) also as between a party and a stranger.

44.20. As to that part of section 99 which provides that persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement "varying", the terms of the document, the question has been raised whether the word "varying" has been used in a narrow sense, in contradistinction to the wider words "contradicting, adding to, varying or substracting from" the terms of the document, used in section 92.

44.21. It has been held by the Supreme Court\(^2\) that though it is only "variation" which is specifically mentioned in section 99, there can be no doubt that the third party's right to give evidence which is recognised by section 99 would include a right to give evidence to contradict, add to, or substract from the terms. Previous to the Supreme Court's decision also, it had been held by the Madras High Court\(^1\) that the word "varying" (in this section) covers the same ground as the comprehensive words used in section 92.

44.22. It is desirable to embody this interpretation in the section. Accordingly, we recommend that the more elaborate words used in section 92 should be adopted in section 99 also.

---


\(^3\)Bai Hira Devi v. Official Assignee, A.I.R. 1958 S.C. 448, 450, right-hand column, para. 5.

44.23. The next question to be considered relates to matter required by law to be reduced to the form of a document. In England, there is little doubt that, in proceedings between strangers to transactions required by law to be in writing, the circumstances in which extrinsic evidence is admissible are the same as the circumstances in which it is admissible in proceedings between the parties to the document; though there is some authority for the view that extrinsic evidence is always admissible except as between parties when the document merely embodies a transaction to the validity of which the writing is not essential, even if the extrinsic evidence has the effect of varying, adding to, or contradicting the terms of the writing.

44.24. In *R. v. Inhabitants of Cheadle,* the parish was allowed to call a pauper whose settlement was in issue, to swear that a deed of conveyance to which we was a party was, contrary to its express terms, unsupported by consideration.

In *R. v. Adamson,* the accused was charged with obtaining money by false pretences as a premium payable under a deed of partnership executed by the prosecutor. It was held that the prosecutor could give evidence of a different consideration for the payment of the premium than that stated in the deed. *Stephen* treated these cases as authorities for a general exception to the rule prohibiting extrinsic evidence adding to, varying or contradicting the terms of a document. But it is possible to treat the decisions as permitting extrinsic evidence (except as between the parties) for the reason that the matter was not required by law to be reduced to writing.

But the rule prohibiting extrinsic evidence certainly applies in some cases in which one of the parties to the proceedings was not a party to the writing, but the other was a party.

44.25. In *Merchantile Bank of Sydney v. Taylor,* for instance, the bank was not allowed to adduce evidence of an oral agreement between the Bank and one of several sureties, of whom the defendant was another, that the guaranteed debt should not be included in a release from liability given by the bank.

44.26. The evidence received in *R. V. Inhabitants of Cheadle,* would now be admissible in proceedings between parties to the deed, and *R. v. Adamson,* may simply indicate that the rule does not apply in criminal proceedings. "The authorities are too scanty to be a convenient subject for any generalisation," Cross so sums up the position. It was suggested to us that where the matter is required by law to be reduced to writing, contradiction by oral evidence should not be permitted, even between strangers, and the section should be so amended. Such an amendment, it was stated, is required if the policy of the law that requires a writing is not to be frustrated. We have, after considerable discussion, decided to accept the suggestion.

\(^1\)Cross, Evidence (1974), page 540.
\(^2\)Cross, Evidence (1974), page 540.
\(^3\)R. v. Inhabitants of Cheadle, (1832) 3 B. & Ad. 833. Contrast the operation of the rule that a document is exclusive evidence of its terms, illustrated by *Augusten v. Chalies,* (1847) 1 Exch. 279.
\(^7\)Merchantile Bank of Sydney v. Taylor, (1893) A.C. 317.
\(^8\)R. v. Inhabitants of Cheadle, Supra.
\(^9\)R. v. Adamson (1843) 2 Meedy (c. 286 C. C. R.) supra.
\(^11\)Compare discussion as to section 92.
Recommendation

44.27. In the light of the above discussion, we recommend a re-draft of section 99, on the following lines:

"99. Evidence of any facts tending to show a contemporaneous agreement contradicting, varying, adding to, or subtracting from the terms of a document may be given—

(a) as between persons who are not parties to the document or their representatives in interest, or

(b) as between a person who is a party to the document or his representative in interest and a person who is not such party or representative in interest.

Exception.—No such evidence shall be given where the matter is required by law to be reduced to writing.

SECTION 100

44.28. Section 100 is as follows:—

"100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act, 1865 (X of 1865) as to the construction of wills."

The reference in this section to the Indian Succession Act, 1865 should be replaced by a reference to the Indian Succession Act, 1925 (39 of 1925). Accordingly, we recommend that for the words and figures, in question the figures "1925" should be substituted.
CHAPTER 45

BURDEN OF PROOF—SECTIONS 101—104

I. INTRODUCTION

45.1. Chapter 7 of the Act deals with the difficult but unavoidable question of "burden of proof". Though the provisions contained in the Act may need no change, an examination of the subject in some depth is necessary in order to clarify a few aspects.

45.2. The grammatical meaning of the expression "burden of proof" is simple. It is elementary that if a party asserts certain facts and seeks relief, the facts which he asserts must be proved. The court cannot, in general, take them for granted.

45.3. The expression "burden of proof" is, however, used in two senses. It means (a) the burden of establishing a case, whether by preponderance of evidence (as in civil cases) or beyond reasonable doubt (as in criminal prosecutions); and (b) the duty or necessity of introducing evidence either to establish such a case or to meet evidence sufficient to constitute rebuttal of a prima facie case proved by the other party.

When the expression is used in the first sense, the emphasis is on the suit or proceeding as a whole. When it is used in the second sense, the emphasis is on the stage at which the matter stands.

45.4. Burden of proof in the first sense depends in a civil case, on the state of the pleadings. In a criminal case, it is always on the prosecution. Burden of proof in the second sense is on the party against whom the Court, at the time when the question is to be determined, would give the judgment, if no further evidence is introduced. Before evidence in the case commences, this burden rests on the party who has the affirmative of the issue; after evidence in the case is gone into, the burden of introducing evidence is always on the party who has to meet such a case.

45.5. The first kind of burden never shifts. The second kind of "burden of proof" refers to the duty of one party to produce sufficient evidence for a judge to call on the other party to answer. The incidence of this duty is determined by particular rules of evidence. This burden is described as the "evidential burden", the "burden of adducing evidence," or the duty "of passing the judge". Failure to discharge the first burden will cause the judge to decide against the proponent on that issue; failure to discharge the second will cause the judge to decide against the proponent without calling on his opponent.

45.6. The distinction is therefore commonly made by commentators on the law of evidence between the use of the term—

(a) in the sense of the burden which lies throughout the trial of establishing a case—usually called the general burden of proof—and

(b) in the sense of the onus of producing evidence at any particular stage during the trial.

---

1Section 101, second para.
2Section 101, first para.
II. ON WHOM BURDEN LIES

45.7. In most civil cases, the burden of proof in the first sense lies upon the plaintiff, since it is he who, in his plaint, asserts that certain facts are as stated in the plaint. However, it may be that the defendant admits the main facts set out in the plaint,1 but contends that there are other facts which provide an answer to some or all of the allegations of the plaintiff. In such a case, the general burden lies upon the defendant who must establish the truth of these facts.

45.8. As regards the second meaning of “burden of proof” (in the sense of the onus of producing evidence), this lies at any time upon the party against whom the case would be decided if no further evidence were to be produced. As the case proceeds, this burden may shift to and fro from one party to the other as each side may produce a prima facie case in its favour, which can only be rebutted by fresh evidence from the opposite side. So too, when one party wished the court to believe any particular fact,2 the burden of proof as to that fact rests upon that party, unless it is provided by any law that the proof as to that fact lies upon any particular person. Moreover, the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wished to give such evidence.

III. HE WHO ASSERTS MUST PROVE

45.9. In legal proceedings, the general rule is that he who asserts must prove;3 this proposition is sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue. In the absence of some rule requiring proof of an assertion, there may be harassment to the opposite party and waste of time of the Court.

45.10. This rule is derived from the Roman Law,4 and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative. The affirmative of the issue, however, may be negative in form, involving the proof of a negative, such as the fact that goods were not consigned within a specified period,5 or that houses were not built according to specification,6 or that a transaction is, in reality, one different from what on its face it appears to be,7 or that a will ought not to be admitted to proof,8 or that a contract is not perpetual,9 or the omission to insure premises,10 or the assignment of premises without consent,11 or sale on premises without the lessor’s consent in writing.12

---

1Cf. section 102, illustration.
2Cf. section 103.
3Cf. section 104.
5Calder v. Rutherfoart (1922), 3 Brod., & Bing. 302, 304.
10Doed, Bridger v. Whitehead (1830) 8 Ad. & El. 571; Price v. Worwood (1859) 4 H.&N. 312 at p. 517.
45.11. In applying the rule, however, regard must be had to the distinction between the burden of proof as a matter of substantive law or pleading, (the legal burden) and the burden of proof as a matter of adducing evidence during various stages of the trial. This distinction has already been adverted to.\textsuperscript{1}

45.12. The former burden is fixed at the commencement of the trial by the state of the pleadings or their equivalent, and is one that never changes under any circumstances whatever.\textsuperscript{1} and if, after all\textsuperscript{1} the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him.\textsuperscript{1}

45.13. The burden of proof in the sense of the burden of adducing evidence is a burden which may shift continually throughout the trial, according as the evidence in one scale or the other preponderates.\textsuperscript{1,4}

45.14. The latter burden has been judicially described\textsuperscript{1} as a provisional burden which is raised by the state of the evidence, from which the court may draw an inference one way or the other but is not bound to do so.

45.15. All this may sound complex. The truth is that the phrase “burden of proof” embodies an abstract concept expressed in metaphysical form.\textsuperscript{10} The practical purpose which the rules perform in a civil case is to enable the court to frame issues and decide where the burden on each issue lies.

IV. SCHEME OF SECTIONS 101-104.

45.16. The general principle underlying the sections in this Chapter is that the party wishing to establish, before the Court, the truth of certain facts, must prove them (section 101).

In other words, a party, who desires to move the Court, must prove all facts necessary for that purpose (sections 101-105).

This general rule is, however subject to two exceptions (in addition to the general rule that facts admitted or judicially noticed need not be proved):——

(a) A party need not prove such facts as are especially within the knowledge of the other party (section 106);

\textsuperscript{1}See \textit{Emauel v. Emmanuel}, (1946) Probate 115; (1945) 2 All E.R. 494;
(c) \textit{Tilley v. Tilley}, (1949) Probate 240 C.A.; (1949) 2 All E.R. 1113.
(d) \textit{Lowndes v. Lowndes}, (1950) Probate 223; (1950) 1 All. E.R. 999.


\textsuperscript{3}See supra.

\textsuperscript{4}supra.

\textsuperscript{5}Halsbury, 3rd Ed. Vol. 15, pages 267-268, para. 489.


\textsuperscript{7}(a) Abruha v. North Eastern Rail Co. (1883) 11 Q.B.D. 440, 456 (per Bowen, L.J.);
(c) Wakelin v. London and South Western Rail Co., (1886) 12 App. Cas. 41 (H.L.);

\textsuperscript{8}Halsbury, 3rd Ed. Vol. 15, page 269, para. 492.


(b) A party need not prove so much of his allegations in respect of which there is any presumption of law (sections 107-113), or, in some cases, of fact (section 144) in his favour.

45.17. The scheme of the principal sections is as follows:

Section 101 introduces us to the topic of burden of proof.

Section 102 deals with the general burden of proof, vide the words “in a suit or proceeding”. The section seems to deal with the burden of persuasion or the legal burden. Section 103 deals with the burden of proof of particular facts. Section 104 deals with the burden of proof of introductory facts. With the burden of proving the specific facts dealt with in each section. This group may be said to extend up to section 111.

V. SOME BROAD PROPOSITIONS

45.18. It may be convenient to set out some broad propositions deducible from the reported cases on sections 101-104—

(a) It is incumbent on each party to discharge the burden of proof which rests upon him1. Where the burden of proof lies on a party suing as a plaintiff and is not discharged, the suit must be dismissed.2

(b) When the issue raised by the Court is in substance, whether the plaintiff’s or defendant’s story is true, it is possible that neither of the stories may be true. Usually, really material question is—Is the plaintiff’s story true? If the defendant’s defence is a plea in confession and avoidance, namely, a plea which admits that the plaintiff’s story is true but avoids it — then, if the defendant fails to prove his case, the plaintiff may recover. But if the defence is substantially an argumentative traverse of the truth of the plaintiff’s story, not admitting that one word of it is true and setting up certain things perfectly inconsistent with it, then the truth of the plaintiff’s story becomes the real question. If the plaintiff’s then does not prove the affirmative of his issue, the consequence is that he must fail, and the defendant may say, “it is wholly immaterial whether I prove my case or not; you have not proved yours”3,4.

(c) The burden of proof, in the sense of the burden of introducing evidence to prove a particular fact may, and constantly does, shift during the trial. There are many cases in which the party on whom the burden of proof in the first instance lies may shift the burden to the other side, by proving facts giving rise to a presumption in his favour,5 or by showing an admission.6

(d) The answer to the question on whom the burden of proof rests, includes the answer to another question, which frequently causes great controversy in the preliminary stages of a case, viz, which party has the privilege, or incure the duty, of beginning.

(e) The amount of evidence required to shift upon a party the burden of displacing a fact may depend on the circumstances of each case.7

---

1Baljnah v. Raghonath (1892) 12 C.L.R. 186, 193.
3Chandranath v. Ramraj, (1870) 6 B.L.R. 305, 308.
VI. SECTIONS 101 to 104

We may now consider the sections proper.

SECTION 101

Section 101 contains two propositions —

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The first proposition is based on the principle that the time of the Court ought not to be wasted in idle controversies nor should a party be dragged without factual basis.

Illustration (a) to the section deals with a criminal prosecution.

If A desires a Court to give judgment that B shall be punished for a crime which A says B has committed, A must prove that B has committed the crime.

Illustration (b) relates to a civil proceeding. A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true. A must prove the existence of those facts.

The section needs no change, not having raised any difficulty in practice.

SECTION 102

45.19. Under section 102, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustration (a) relates to the case where A sues B for land of which B is in possession, and which A asserts, was left to A by the will of C, B’s father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore, the burden of proof is on A.

In this case the burden rests on the plaintiff.

In illustration (b), A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

From the illustrations, it would appear that the section deals with the “legal burden of proof” — also called the burden of persuasion.

The section needs no change.

SECTION 103

45.20. Under section 103, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration (a) is as follows:

See supra.
(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

45.21. The emphasis in the section is on particular facts. In relation to facts in issue, this section and section 102 yield the same result. But, in relation to other relevant facts—e.g., admissions—section 102 may not suffice—vide the words "in a suit or proceeding" in section 102.

We have no further comments on the section.

SECTION 104

45.22. Under section 104, the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wished to give such evidence.

This section clearly deals with relevant facts which are not facts in issue. It really deals with the proof of certain preliminary facts which constitute a condition precedent to the production of a particular species of evidence.

This is clear from the illustrations to the section:—

(a) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

The section needs no change.

1Sic. In the Act, as published in Gazette of India, 1872, Pt. IV, page 1, there is no illustration (b).
CHAPTER 46

BURDEN OF PROOF

EXCEPTIONS TO CRIMINAL LIABILITY—SECTION 105

I. INTRODUCTORY

46.1. Under section 105, the burden of proof of defences recognised by the criminal law is on the accused. That, of course, is not the text of the section, but fairly represents its gist. In India, exceptions to criminal liability are principally contained in Chapter 4 of the Indian Penal Code, and there are special exceptions contained in particular sections of the Code—e.g., section 499, I.P.C.—or in special laws.

46.2. Ordinarily, section 105 is taken to mean that the burden of persuading the court about the existence of facts giving rise to the defence is on the accused, so that—as the section itself says,—"the court shall presume the absence of such circumstances". The section is an important qualification of the general rule that, in criminal trials, the onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution.

46.3. It should be noted that the previous law on the subject was different. It required the prosecution to prove the absence of circumstances constituting special exceptions.1 Section 105 effected an alteration in the previous law.

46.4. In England, a distinction is made in this context, as to legal and evidentiary burden.2 In regard to indictable offences, it is for the prosecution to negative any exception favourable to the defendant which is engrafted in the definition of an offence, except—(a) regards the defence of insanity, and (b) as regards statutory provisions constituting a reversal of onus.

46.5. In Woolmington's3 case, throughout his speech Lord Sankey was at pains to stress the fact that it is the duty of the prosecution to prove the guilt of the accused in every case, although special rules govern the question of onus under some statutes, and, so far as the defence of insanity is concerned, at common law. Hence with these exceptions (statutory exceptions and common law rule as to insanity), the legal burden of establishing every issue rests at the outset upon the Crown in all criminal cases, although the accused starts with an evidential burden so far as such matters as non-insane automatism,4 provocation,5 self-defence6 and duress7 are concerned.

46.6. As to the defence of insanity, though the judicial dicta in England are to the effect that the burden of proof is on the accused, yet it has been argued by several writers,8 that the burden (in the sense of the burden of persuasion) is

---

2The Evidence Act expressly repealed section 237 of the 1861 Code; the whole of the Code was subsequently repealed by Act 10 of 1872.
3See also discussion as to sections 101-104.
6Chan Kau v. R., (1955) A.C. 206; (1955) 1 All. E.R. 266 (self-defence and provocation.).
9Williams, Criminal Law (1961), pages 519-520, para. 165.
on the prosecution, and that the only burden on the accused is the burden of introducing of evidence in the first instance. This aspect will be examined in detail later.

II. TWO KINDS OF BURDENS

46.7. Writers on the law of evidence generally distinguish between the persuasive burden of proof and the evidentiary burden of proof. The “persuasive” burden of proof—which is the one usually meant in the discussion—is the task of persuading the court that the facts are as the party carrying the burden asserts. We have already mentioned this while discussing the earlier sections. Usually, in a criminal case, the prosecution has this burden, and it must persuade the court beyond reasonable doubt of the truth of the accusation. The “evidentiary burden”, on the other hand, means that whichever party asserts a proposition, carries the burden of demonstrating that there is evidence in support of that proposition. Generally, the persuasive burden: but the effect of the evidentiary burden being on the accused in respect of particular facts, is that he cannot raise frivolous defences. This burden does not indicate any particular quantum of proof, but the accused has to produce or point to the evidence which bears the construction that he wishes to put upon it.

46.8. With reference to the question of burden of proof that may be made to rest on the accused, three different possible categories could be contemplated.

(1) A statute may conceivably throw the burden of proof of all or some of the ingredients of an offence on the accused. Such a case is outside section 105. Such a case can, of course, constitute an exception to the general rule in sections 101-104. The case put in the Illustration to section 106 (travelling without a ticket) is one example. In that illustration, the burden of proving that the accused had a ticket is on him, that being a fact "especially" within his knowledge.

(2) A statute may throw on the accused a special burden, not as to the ingredients of the offence, but only as regards the protection given on the assumption of the proof of the said ingredients.

(3) The statutory provision may relate to an exception and some of the many circumstances required to attract the exception, if proved, may affect the proof of all or some of the ingredients of the offence.

III. INSANITY

46.9. Some discussion of the position relating to the defence of insanity is required. The defence of insanity (unsoundness of mind), as recognised in the Indian Penal Code, consists of two branches—

(a) that the accused did not know the nature and quality of the act, or
(b) that he did not know that it was wrong or contrary to law.

In England also, this defence has two similar branches.

46.10. The Mc Naughten Rules were a synthesis of (a) Rex v. Arnold (1724) 16 How. St. Tr. 695; (b) Peiper's Case (1760) 19 How. St. Tr. 895; (c)
Hadfield's Case, (1800) 27 How. St. Tr. 1282; and (d) Bellingham's Case, (1812) in 1 Collinson, A Treatise on the Law Concerning Idiots, Lunatics and Other Persons Non Compotes Mentis 636 (1812). In Perser's Case, (1760) 19 How. St. Tr. 886,948, the Solicitor General, purporting to summarize Hale, stressed: "a faculty to distinguish the nature of actions; to discern the difference between moral good and evil ............. " In Hadfield's Case, (1800) 27 How. St. Tr. 1282, Erskine minimized the 'right and wrong' test and emphasized knowledge of the nature of the act. In Ballingham's Case, (1812) it was observed: 'If a man were deprived of all power or reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law' Treatise on law concerning lunatics I Collinson, op. cit. etc. 671...........

46.11. The well known answer in Mc Naghten contains the phrase "such a defect of reason, arising from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong". There are certain controversies in England as to the scope of this defence, particularly the meaning of the word "wrong": and it may be that there are differences between the Indian and the English law in matters of detail. But those controversies and differences are not material for the present purpose.

Cockburn's argument in defence of Mc Naghten contains an excellent summary of the earlier leading cases and of the medico-legal treatises.

46.12. So far as the first branch of the defence is concerned, it has been stated by academic writers in England, that since it is intimately connected with mens rea, the burden ought to be on the prosecution. The facts which show Insanity, would also negative mens rea. Conversely, facts which show knowledge of the nature of the act, also establish mens rea.

46.13. Even as regards the second branch of the defence of insanity, it has been argued in England that it only means that the accused has to discharge the evidentiary burden of introducing or pointing to some evidence in support of his argument, but no more: because it would be very strange if the onus of proof is on the Crown where the defence is based on the first branch of the defence of insanity, and on the accused where it is based on the second branch of that defence.

46.14. It may be noted that in most States in the United States, the tendency is to place the burden of proof (in the true sense) in respect of the defence of insanity upon the prosecution, and this is also the rule adopted in the Model Penal Code.

This, too, is the rule on the Continent.

46.15. It has been stated that there are currently two views in the United States as to the party which should bear the burden of proof of the defendant's

---

1 Hall, Criminal Law and Procedure—Cases & Materials (1965), page 470.
2 Mc Naghten, 4 St. Tr. (n.s.) 972-992.
3(a) Glueck Mental disorder as a Defence in Criminal Law, 41;
(b) Wellhoven, Insanity as a Defence in Criminal Law (1954), Chap. 4;
(c) Grumbht, Penal Reform (1949), page 436;
(d) Reid in 69 Yale L.J. 382.
4 Section 4.02 (11), Model Penal Code (American Law Institute).
5 See Peter Clark, "The Insanity Defence in Pennsylvania", (Fall 1971) 45 Temple Law Quarterly 63, 69.
sanity or insanity. Approximately one half of the states and the federal courts require the prosecution to prove the defendant's sanity beyond a reasonable doubt.

46.16. The remainder of the States in the U.S.A., including Pennsylvania, require the defendant to prove his insanity. He has to prove his insanity by a preponderance of evidence. The recent trend, however, seems to be towards the former view.

46.16A. Those jurisdictions in the U.S.A. which require the prosecution to prove the defendant's sanity beyond a reasonable doubt have adopted the theory that mental capacity is a required element of the crime. The commonly accepted rationale underlying this theory is that the defendant cannot have the required criminal intent while insane.

An alternative theory that has been suggested is that the sanity of the defendant is an element independent of intent, in view of the fact that the essence of a finding of insanity is a verdict of not guilty.

46.17. The following comment made by an academic writer is of interest as regards the position in the U.S.A.:

"Although it is arguable that whether or not the defendant argue (that) his acts were wrong, does not go to the element of intent, it does not seem possible, however, under the first aspect of the M'Naughten Rule, for a defendant not to know what he was doing (and) yet still have the required intent to commit a criminal offence. Intent is a required element of all malum prohibitum crimes, and "the State is required by the Due process Clause to prove all elements of a crime beyond a reasonable doubt."

"The fact of the defendant's sanity or insanity is a question for the jury as the trier of fact. To be allowed their due freedom to find the facts, the jury must be free to apply whichever aspect of the M'Naughten Rule they find most applicable to the evidence before them. Thus, due process would seem to require that the state prove beyond a reasonable doubt that the defendant knew the nature and consequences of his act.

"There are two possible solutions which could reconcile Pennsylvania use of the M'Naughten Rule with due process requirements. The first is to instruct the jury alternatively that the prosecution must prove beyond a reasonable doubt that the defendant knew the nature and consequences of his acts, and that the defendant must prove by a preponderance of the evidence that he "did not know those same acts were wrong. This would require the jury to apply two different standards of proof to the same issue and the same evidence. This would appear to be a hopeless task for the jury to perform accurately.

1Weihofen, Mental Disorder as a Criminal Defence (1954), pages 212-13.
2Weihofen, Mental Disorder as a Criminal Defence (1954) 238; Mc Cormick Evidence, section 321.
5Peter Clark, "Insanity Defence in Pennsylvania" (1971 Fall) Temple Law Quarterly, 63, 70.
7The United States Supreme Court recently held that the Constitution requires the state to prove all elements of a crime beyond a reasonable doubt, In re Winship, (1970). 397 U.S. 358.
"The remaining alternative is to require the prosecution to prove the sanity of the defendant beyond a reasonable doubt under both aspects of M'Naghten Rule. This seems clearly to be the preferable solution."

46.18. In Australia, the onus of proof of insanity is on the accused. But the onus of the accused (in respect of insanity) is the civil onus, and not the criminal onus: i.e., the accused merely has to establish a balance of probability; and this view of the High Court of Australia was approved on appeal by the Privy Council.¹

Thus, in Australia, the quantum of proof required to rebut the presumption of sanity is milder than that required of the prosecution for proving the guilt of the accused.

IV. QUANTUM OF PROOF

46.19. So much as regards proof of the defence of insanity. As to the question of quantum of proof in general under section 105, an acute controversy as to the interpretation and application of the section arose in the past. Several alternative approaches are found in the judicial decisions.

46.20. The precise question that deserves to be considered is whether section 105 requires—

(a) proof beyond reasonable doubt, or

(b) preponderance of evidence (as in a civil case), or

(c) evidence which just creates a reasonable doubt that the accused might not have been guilty—the doubt being created as to the mental element of the offence; or

(d) evidence creating a reasonable doubt as to whether the accused is guilty in law—the doubt being as to the absence of circumstances which bring into play one of the general or special exceptions to criminal liability.

Of course, the decisions do not make any such analysis as is presented above. But it seems desirable so to formulate the queries, for a proper discussion of the question.

View (a)

46.21. The Bombay view on the subject was that the accused must prove the applicability of the exception in the same manner as the prosecution has to prove its case. This was the view taken by a special Bench of the Bombay High Court,² in a case where private defence was pleaded. The court held, that if the act which is basis of the charge is established (beyond reasonable doubt), then in the same way it was for the accused to prove the existence of circumstances bringing his case within the limits of the right of private defence; and 'proof' must mean the same thing in either case. According to this view, there is no difference between the quality of 'proof' that has to be adduced by the prosecution or by the accused. The prosecution has to prove the offence, but the accused must prove the exception and the weight of the burden does not differ in the two cases.

¹See discussion in Rishi Kesh Singh v. The State, A.I.R. 1970 All. 51 (9 Judges).

Note:

(a) Sodeman v. R. (1936) 55 C.I.R. 192, 228. Affd. (1936) 2 All. E.R. 1138 (P.C);
46.22. It was held by the Bombay High Court, that the standard of proof of the prosecution and the accused must be the same and on this reasoning, the accused has to bear a strict burden of proof under section 105. This view must now be taken as impliedly overruled by the decisions of the Supreme Court, to which we shall refer later.

46.23. Most of the other High Courts, however, took a different view—view (b)—and in substance, followed the English case of Reg. v. Carr Brian. According to that case, (a) the law presumes innocence of the accused unless the contrary is proved, and the jury should be directed, (b) that the burden on the accused is less than that required at the hand of the prosecution in proving the case beyond reasonable doubt, and (c) that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

View (b) is taken also by some Judges of the Allahabad High Court.

46.24. According to view (b), there is a distinction between the degree of certainty required in cases where the burden is on the prosecution and the degree of certainty required in cases where the burden is on the accused. The decisions cited below took this view. One of the Lahore cases showed some uncertainty as to whether the burden on the accused is to be established by preponderance or whether he has merely to make out a prima facie case.

It should not, of course, be assumed that view (b) and view (c) are necessarily inconsistent with each other.

View (c)

46.25. View (c) is represented by the majority decision in Parbhoo v. Emperor, where the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole (including the evidence in support of the plea of general exceptions), a reasonable doubt is created in the mind of the court about the guilt of the accused. This view was accepted by some Judges (including Beg J.) in a later Allahabad case, and reiterated by Beg J. sitting as a Judge of the Supreme Court in the recent case of Partap v. The State.

View (d)

46.26. View (d) is represented by the view of some Judges of the Allahabad High Court. Where any general exception is pleaded, and the evidence adduced to support the plea fails to satisfy the court, affirmatively that the accused has.

---

2See Supreme Court cases, infra.
4Parbhoo v. Emperor, A.I.R. 1941 All. 402 (P.B.) particularly Mulla J.'s judgment, which was elaborately discussed by Beg J. in Rishi Kesh Singh v. The State, A.I.R. 1970 All. 51.
5(a) Parbhoo v. Emperor, A.I.R. 1941 All. 402 (Some Judges).
(b) Youusuf v. The State, A.I.R. 1954 Cal. 258;
(c) Kamla Singh v. The State, A.I.R. 1955 Pat. 209, 213;
7Parbhoo v. Emperor, A.I.R. 1941 All. 402 (P.B.).
fully established his plea, then, according to this view, the accused is still entitled to an acquittal if, upon a consideration of the evidence as a whole, a reasonable consequential doubt is created in the mind of the court as to whether the accused is really guilty of the offence of which he is charged. This view also concentrates on the proof of the ingredients of the offence as such, but it takes care to add that cases under section 80 and 84 of the Indian Penal Code (accident and insanity respectively), fall within it, since they affect the intention of the person who committed the alleged act.

46.27. A case which came up before the Allahabad High Court illustrates the range of the controversy. In *R. S. Pandey v. The State*, the accused R. S. Pandey, along with another person, was prosecuted under sections 499-500, I.P.C. on the allegation that he had written and got printed a pamphlet containing defamatory statements about Dr. A. K. Sanyal, District Medical Officer, Kanpur. The defence of the accused was that the allegations were true and that it was for the public good that the imputations were made and published. He also pleaded that the opinions expressed by him were in good faith, and could not be regarded as defamatory within the meaning of section 499, I.P.C. In substance, he relied on Exceptions first, second, eighth and ninth to that section.

The accused was convicted by the trial Court, but the High Court, on appeal, acquitted him along with his co-accused.

46.28. Dealing with the question regarding the 'burden of proof' when the case came within the exceptions of section 499, I.P.C. (defamation), the High Court held as under:—

"The error in which the trial court fell was that it expected a *much higher degree of proof* from the accused for bringing the case within the exceptions contained in section 499, I.P.C. than the law required."

The High Court further observed as follows:—

"What section 105 of the Indian Evidence Act requires is that the accused should introduce such evidence as may displace the presumption of the absence of circumstances for bringing his case within an exception and may thereby satisfy the court that such circumstances may have existed. As held in the case of *Rishi Kesh Singh v. The State*¹, an accused person is entitled to be acquitted if, upon a consideration of the evidence (as a whole) including the pleas given in support of a general exception, a reasonable doubt is created about guilt of accused."

46.29. We may now turn to the decisions of the Supreme Court as regards the quantum of proof. *Dahyabhai*² was concerned with insanity. The Supreme Court observed in that case:—

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:—

"The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea*; and the burden of proving that (fact) always rests on the prosecution from the beginning to end of the trial. There is a rebuttable presumption that the accused was not insane, when he "committed the crime, in the sense laid down by section 84 of the Indian Penal Code; the accused may rebut it by placing

---

before the court all the relevant evidence—oral, documentary or circumstantial; but the burden of proof upon him is no higher than that which rests upon a party to civil proceedings. Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including (the) mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

46.30. This passage was referred to in a judgment1 of the Supreme Court delivered in 1965, and it was made clear that it does not mean that the prosecution must, contrary to what is expressly provided in section 105, establish sanity. In that case, counsel for the accused appellant argued that mens rea being an essential ingredient of the offences charged (murder, attempt to murder, and grievous hurt), the conviction of the accused could not be sustained, as no intention to cause death or injury could possibly be attributed to an insane person. The Supreme Court held that—(i) intention can be presumed from the circumstances, and (ii) the facts of the case gave no proof of insanity. In giving this finding, the Supreme Court also made the above clarification.

46.31. Then, there is a recent decision of the Supreme Court,2 where the question of the quantum of proof required to prove self-defence was considered. It was clearly laid down that the standard of proof required on the part of the accused was not as high as that required on behalf of the prosecution; and, applying this standard, the Supreme Court set aside the conviction of the accused for murder and allowed their plea of self-defence. Sarkaria J. on behalf of himself and Bhagwati J., described the burden in terms of preponderance of evidence. But Beg J. in an elaborate judgement, after quoting from his own judgment in the Allahabad High Court,3 held that the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, including the evidence given in support of the plea of general exception, a reasonable doubt is created in the mind of the court about the guilt of the accused—in this case, the required mens rea of murder. Beg J. elaborated the discussion by analysing the concept of reasonable doubt; a reasonable doubt about the guilt of the accused could be created not only by preponderance of evidence as regards the general exception pleaded by the accused, but also by creating reasonably doubt about the accused's guilt. Even if the accused did not fully establish his plea as to circumstances coming within a general exception, yet, if there is sufficient evidence to justify the finding that the prosecution had not established its case beyond reasonable doubt on an essential ingredient in a finding of murder—requiring mens rea—the accused must be acquitted. The test so laid down by Beg J. is wider than the test of preponderance of evidence. This difference of approach between Sarkaria and Bhagwati JJ. on the one hand and Beg J. on the other hand, of course, made no difference to the result in that particular case, since, on either view, the defence succeeded.

V. CONCLUSION

46.32. In this connection, it may be noted that the question is whether the presumption under the last part of section 105—an obligatory presumption—is not removed as soon as any credible evidence in support of the plea

---

1Bhikari v. The State, A.I.R. 1966 S.C. 1; (1965) 3 S.C.R. 194, 198 (per Mudholkar, J.)
comes on the record. This question has not been dealt with by the Supreme Court. It was suggested that unless the hands of the Court are freed from the obligatory presumption, by lifting it as soon as credible evidence comes on record in support of the exception, the court would not be in a position to view the evidence as a whole and give the benefit of doubt to the accused.  

"It would, in that case, act as a genuine statutory exception snapping the golden thread of Anglo-Saxon jurisprudence which we have adopted as our own."  

The last part of section 105 provides—"The court shall presume the absence of such circumstances."

46.33. It was expressly decided by M. H. Beg J., in the Allahabad case, as follows:—

"My view, therefore, is that, in cases where the accused pleads exceptions the obligatory presumption is lifted as soon as there is some evidence to support the plea. The accused may carry his plea further and succeed in creating a reasonable doubt about an ingredient of an offence. The prosecution will have to remove this doubt, possibly in the course of argument, to succeed after this. In other cases, the accused may have carried his case still further and established his plea (relating to the exception), by a preponderance of probabilities. Although, there is no provision in our Criminal Procedure Code for production of evidence in rebuttal by the prosecution, as of right, after the accused has established an exception by a preponderance of probability, yet, it is conceivable that, in exceptional cases, the prosecution may be able to demolish the defence case, even "after it is fully proved, by some rebutting evidence which the Court is persuaded to admit under section 540, Criminal Procedure Code, in exercise of the Court's power to decide the case justly after finding out the whole truth. For example, the prosecution may be able to prove that a doctor, who had given evidence of the injuries on the accused, had undoubtedly fabricated evidence. Ultimately, these stages become parts of a single psychological process of appraisement of evidence as a whole which the judge goes through in his mind when considering sifting weighing comparing and testing the prosecution and defence versions and evidence placed side by side with a view to pronouncing his judgement. At this stage, the obligatory presumption under section 105 cannot stand in the way of an acquittal if evidence in the case justifies giving the accused the benefit of reasonable doubt on the charge."

46.34. It was suggested to us that while the general provision in section 105 need not be disturbed, there is scope for reform of the law in relation to the quantum of proof for insanity. It was stated that it would be more in consonance with modern thinking (as is shown by the above discussion), in relation to the defence of insanity, if section 105 is modified as to replace the present provision, which throws the persuasive burden or onus of proof on the accused, by a provision which will place only the evidentiary burden on the accused. This would be more in consonance with justice, because in most

Recommendation as to insanity.

3Compare the judgment of M. H. Beg J., in Rishi Kesh Singh v. The State, A.I.R. 1970 All. 51, 92, para. 139.


6Emphasis added.


8See: Two kinds of burden, supra.
cases, some evidence of insanity would displace the *mens rea* requisite for the offence\(^1\) in respect of which the defence is usually raised.

46.35. The suggestion was that the following proviso should be inserted below section 105:

"Provided that where the existence of circumstances bringing the case within section 84 of the Indian Penal Code is in issue, it shall be sufficient for rebutting the presumption and discharging the burden laid down in this section if there is evidence of any fact creating a reasonable doubt about the sanitary\(^2\) of the accused."

46.36. In this connection, it may be stated that the fact that a person is acquitted on the ground of insanity does not mean that he will be set free. There are detailed provisions in the Code of Criminal Procedure\(^3\) for the treatment of a person acquitted by a criminal court on the ground of insanity. The gist of these provisions is that the person acquitted is to be detained in a place approved by the State Government or, if the court so orders, to be placed in the custody of a relative or friend. The acquitted person is not "punished"; but he is properly safeguarded. Thus, a liberalisation of the law relating to burden of proof in relation to insanity would not cause any danger.

We have, however, decided to leave the section as it is, as some of us have an apprehension that this relaxation may affect the operation of section 105 in the case of other defences.

---

\(^1\)Usually, homicide and its species.

\(^2\)The word 'sanity' could, if so desired, be replaced by more elaborate wording to be borrowed from section 84.

FACT ESPECIALLY WITHIN A PARTY’S KNOWLEDGE—SECTION 106

I. INTRODUCTORY

47.1. Section 106 creates a special rule relating to the burden of proof in cases where the fact in question is “especially within the knowledge of a particular person”. In such a case, the burden of proving that fact is upon that person. Illustration (a) to the section tells us that when a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him. This illustration, it should be noted, could apply whether the case is civil or criminal. Illustration (b) states that if A is charged with travelling without a railway ticket, the burden of proving that he had a ticket, is on him. The limitations of this illustration were explained in a case before the Supreme Court, where the accused was prosecuted for drawing travelling allowance for travelling in the second class without having actually travelled.

Illustration (b), it was held, was of no use for the prosecution, since knowledge of the fact was equally available to the prosecution in this particular case. The word “especially” in the section indicates that the fact must be pre-eminently or exceptionally within the knowledge of the person on whom the burden is sought to be placed under the section.

47.2. We shall now discuss a few salient points concerning the section, in view of the difficulty experienced in applying the section and in view of the fact that the situations in which the section may possibly be of use are of a recurring nature. This is desirable even though an amendment of the section may not be necessary.

47.3. Primarily, the section is based on a consideration of the capability of parties. The ability of parties to give evidence may affect the burden of proof. A person will not, therefore, be forced to show a thing which lies not within his knowledge and which lies “peculiarly”—as the English law says—within the knowledge of the opposite party. It is this principle which is expressed in the section, which, however, uses the expression “especially within the knowledge”. The principle is not necessarily based on an assumption that it is difficult to prove the negative—though, in practice, many cases do present that situation. The real rationale is the capability of parties, as stated above. We use “capability” as covering the resources at the command of a party.

If a fact is peculiarly within the knowledge of a party and not easily within the knowledge of his opponent, then justice requires that he must prove it.

II. LIMITATIONS

47.4. While the principle underlying the section is clear, certain limitations of the scope of the section should also be noted. In the first place, this section applies only to the parties to the suit, and not to witnesses. Witnesses do not, in the scheme of the Act, have the burden of proving or disproving any fact.

---

Secondly, the section does not mean that, in a criminal case, the accused must prove positively that the act alleged by the prosecution was not committed. He is bound to prove, only that fact which was within his special knowledge. The commission of an act by a person is not a fact within his special knowledge within the meaning of the section—though, in certain circumstances, his intention may be a fact within his special knowledge.

Thirdly,—and this is the most important aspect—the section must be construed in a common sense manner. Bose J., in Shambhu Nath's case, observed:

“This is a section which must be considered in a common sense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the case with which the accused could prove them, are all matters that must be taken in consideration. The section cannot be used to undermine the well established rule of law that save in a very exceptional class of cases, the burden is on the prosecution and never shifts.”

47.5. In that case, the accused was charged with claiming T.A. without having actually travelled in the class concerned. Bose J. observed:

“Now what is the position here? These journeys were performed on 8-9-1948 and 15-9-1948. The prosecution was launched on 19-4-1950 and the appellant was called upon to answer the charge on 9-3-1951; and now that the case has been remanded we are in the year 1956. The appellant, very naturally said on 27-4-1951, two and half years after the alleged offences:

It is humanly impossible to give accurate explanation for the journeys in question after such a lapse of time”.

47.6. The prosecution gave evidence that no tickets had been issued on that date from the station concerned for the class concerned, but the Court pointed out that the tickets may have been purchased on the train. Lapse of time was material in this case.

47.7. In applying the section, the crucial word “especially” should not be lost sight of. In two appeals before the Privy Council, involving a corresponding provision of the Ceylon Evidence Ordinance and the Singapore Evidence Ordinance respectively, the operation of this principle in relation to the proof of guilt is considered at length.

47.8. The Ceylon Evidence Ordinance (No. 14 of 1895), section 106 enacts that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In Attygalla v. R., the accused were charged in respect of an illegal operation performed upon a woman while she was under chloroform. The defence was that no operation took place, but merely an examination. The judge directed the jury that the facts being specially

---


within the knowledge of the accused, the burden of proving the absence of any operation was upon them:

It was held—

(i) the direction was an incorrect statement of law, and the onus of proving that there was a criminal operation was upon the prosecution;

(ii) but, in view of the other evidence in the case, there was no such substantial injustice as is necessary to justify the granting of special leave to appeal in a criminal matter.

47.9. A case from Singapore is also of interest. By section 107 of the Singapore Evidence Ordinance: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." The appellant was charged with, and convicted of attempting to cheat a man and thereby attempting dishonestly to obtain money from him by representing to him that she was able to induce the magistrate before whom the man was to be charged with a criminal offence to show favour to him. The trial judge held that whether or not the appellant could induce the magistrate to show favour to the accused man was a fact which was especially within the knowledge of the appellant, and that under section 107 of the Evidence Ordinance, the onus was on her to prove that she could induce the magistrate to show favour.

47.10. It was held that by reason of section 107 no burden was placed on the appellant to prove that there had been no deceit. The burden was on the prosecution to prove affirmatively that there had been deceit. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the magistrate, and that had not been done. There was, in fact no evidence against the appellant on a principal ingredient of the charge, namely, deceit, and the case therefore come within the range of cases in which the Board would interfere.

III. EFFECT OF ESSENTIAL INGREDIENTS OF THE OFFENCE

47.11. So much as regards the limitations that should be borne in mind while applying the section. At the same time, judicial observations which go to the length of saying that this section does not absolve the prosecution from proving all essential ingredients of the offence, should be read with the facts of the case. In some cases where the section applies, the effect would be that an essential ingredient of the offence need not be proved.

47.12. For example, in a charge of travelling without ticket—which is the hypothetical case put in illustration (b)—the non-purchase of the ticket is certainly an "essential" ingredient of the conduct charged.

Nevertheless, the burden of proving that the accused had a ticket is on him, for the reason that the fact is "especially" within his knowledge. Again, where the question is whether the death is intentional or accidental and the evidence shows that the accused was present throughout on the scene, and the circumstances suggest some kind of participation by him, he may have to prove his plea that the death was accidental.

1Mary Ng v. Queen, (1958) A.C. 173 (P.C.).
2Emphasis supplied.
47.13. This aspect is illustrated by *Sanwal Das v. State* where the subject of “burden of proof” under section 106 came up before the Supreme Court. The accused was prosecuted, along with his parents, under section 302, Indian Penal Code, for the murder of his wife. There was evidence that the accused along with others was in the room when the death of the wife occurred, and there was also strong evidence of ill-feeling between the accused and his wife. The accused took the defence that his wife met her death because her Nylon saree had accidentally caught fire from a kerosene stove. The Supreme Court held that the burden of proving this plea was on the accused, by virtue of sections 103 and 106. It is a different matter that the quantum of evidence by which the accused may succeed in discharging his burden of creating a reasonable belief—proving that circumstances absolving him from criminal liability may have existed—is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt. In this case, this particular plea of the accused was rejected by the Court, in view of other evidence. The Court held that the case was of murder. However, there was no evidence of participation of the accused in the murder and the extent of that participation. Hence, only a conviction under section 201, I.P.C. (concealing evidence of offence) was ordered, and the conviction under section 302/34, I.P.C. was reversed.

### IV. ENGLISH LAW

47.14. It would be of interest to note the English law on the subject. In English law, the exact scope and nature of burden of proof relating to a fact within the knowledge of a person seems to have fluctuated ever since the matter was considered. Discussion of the subject usually begins with *R. v. Turner*, in which the accused was charged with possessing certain game without legal authority, contrary to a statute. The statute provided for ten exceptional cases in which possession was to be regarded as with legal authority. It was held that it was not incumbent upon the Crown to attempt to prove that none of the exceptions applied, and it was for the accused to adduce evidence to show that his case was within one of the exceptions. The facts are reminiscent of section 105 of our Act, and, in fact, Lord Ellenborough C.J. did not put the principle in terms of “peculiar knowledge,” but decided the matter by applying the test that the statute, in effect, is “a prohibition on every person to kill game unless he brings himself within some one of the qualifications allowed by law, the proof of which is easy on the one side, but almost impossible on the other.”

However, Bayley J. put the matter more widely, observing that “if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is to prove it and not he who avers the negative.”

Thus, the case was really of a statutory exception to penal liability, but the observations of Bayley J. raised the interesting aspect of “peculiar knowledge.”

47.15. In some English cases “peculiar” knowledge and the need to avoid making a party prove the negative have been held, without express statutory words, to put an “evidential” burden on the accused: this commonly arises in crimes of carrying on some activity *without a licence or certificate*.

47.16. The placing of such burden is usually justified by the triviality of these offences and the desirability of lightening the prosecution burden in respect of them. For example, it has been held* that the prosecution need not show

---

that a person charged with practising a certain profession or carrying on a certain activity without a licence had no licence.

47.17. There may be situations involving serious offences. In *Hill v. Baxter*, the accused in a prosecution for dangerous driving pleaded that he became unconscious as a result of sudden illness. He produced no evidence in support of his plea. The Magistrate acquitted him, and the prosecutor successfully appealed to the Divisional Court. Lord Goddard, C.J. held that the onus of proving that he was in a state of *automatism* was on the accused. This, he said, is not only akin to the defence of insanity, but it is a rule of the law of evidence that the onus of proving a fact, "which must be exclusively within the knowledge of a party", lies on him who asserts it. Of course, he added, in a criminal case, this onus on the defendant is not as high as it is on the prosecutor. It may be noted that in these observations, the word used is "exclusively" and not "peculiarly" or "especially". Obviously, it was used in view of the special facts of the case.

47.18. The rule as to peculiar knowledge is, however, in general, believed to apply in England only to *negative averments* where facts are within the peculiar knowledge of a person. Similarly, the rule does not apply even to negative averments, where the subject-matter is not peculiarly within the knowledge of the accused. For example, the prosecution must establish the absence of consent in cases of rape or criminal assault, even though consent is a matter within the special knowledge of the accused.

47.19. Thus, in *Abrath's case*, it was held by the Court of Appeal that in an action for malicious prosecution, the burden of proving the absence of reasonable and probable cause and also the burden of proving the factum of the offence was on the plaintiff. Bowen, L.J. (with whom Brett, M.R. and Fry L.J. concurred) put it on the principle that the correct test was to ask oneself which party would be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case. "If the assertion of a negative is an essential part of the plaintiff's case, the proof of assertion still rests upon the plaintiff". Noting the argument that sometimes it is said that an exception exists in those cases where the fact is peculiarly within the knowledge of the party, Bowen L.J. said that counsel had not gone to the length of contending that in all these cases, the onus shifts. "I think a proposition of that kind cannot be maintained, and that the exceptions supposed to be found amongst cases relating to the same law may be explained on special grounds."

47.20. Where the rule applies on the facts, it is for the person concerned to prove that he had the requisite licence, but it is not clear whether this is merely an evidential burden or a legal burden. The distinction becomes of importance in this context because, if it is only the evidential burden, then even if the accused does not discharge that burden by producing his own evidence of the requisite licence or other qualification, he is not to be convicted if any reasonable doubt on any part of the case remains in the mind of the court. This is because the "legal" burden of the prosecution remains undischarged, in view of the reasonable doubt that survives.

---

2. Note the word "exclusively".
3. The word "exclusively" was also used by Lord Goddard in *Cohen*, (1951) 1 All. E.R. 203, 206.
However, there are dicta in a case decided by the Court of Appeal, suggesting that the accused has the burden of persuasion (legal burden) and must prove his qualification or licence on the balance of probabilities.

It was believed up to 1944 that the prosecution must give prima facie evidence. But the Court of Criminal Appeal in Oliver, held that the prosecution need not give even prima facie evidence.

47.21. Some Judges in England seem to be prepared to go to the length of saying that whenever a fact is peculiarly within the knowledge of the accused, the burden of proof in respect of it is on him. If this means the persuasive burden, it would go far to destroy a cherished principle of law. However, a close examination of the judgment in the later case of Cohen indicates that all that is referred to is the evidential burden. Moreover, the rule does not apply to every issue in respect of which the accused has peculiar knowledge of the facts, but (it would appear) is confined to statutory defences of licence, permission and the like.

47.22. If the persuasive burden of all facts within the knowledge of the accused were cast upon him, the rule would be directly contrary to the principle of Woolmington, for there is nothing more obviously within the knowledge of the accused than his own state of mind, yet the burden of proving this rests on the Crown.

Proof of defence.

47.23. In England, the rule may not extend to defences. In R. v. Spurge, the accused raised the defence of mechanical defect as a defence to a charge of dangerous diving. His appeal against conviction failed, because he was aware of the defect. The following observations, however, are relevant as to the burden of proof:

"It has been suggested by counsel of the Crown that the onus of establishing any defence based on mechanical defect must be upon the accused, because necessarily the facts relating to it are peculiarly within his own knowledge. The facts, however, relating to a defence of provocation or self-defence to a charge of murder are often peculiarly within the knowledge of the accused, since often the only persons present at the time of killing are the accused and the deceased. Yet, once there is any evidence to support these defences, the onus of disproving them undoubtedly rests upon the prosecution. There is no rule of law that where the facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on these facts shifts to the accused. No doubt, there are a number of statutes where the onus of establishing a statutory defence is placed on the accused, because the facts relating to it are peculiarly within his knowledge. But we are not here considering any statutory defence."

47.24. Writing in 1961, Glanville Williams thus summarised the position:

"To sum up this discussion, the position is that where a statute prohibits an act but provides exceptions, and the question whether he comes

---

2Oliver. (1944) K.B. 68; (1943) 2 All. E.R. 800.
3Oliver. (1944) K.B. 68; (1943) 2 All. E.R. 800.
4Williams, Criminal Law (1961) page 983, para. 293(2).
5Cohen (1951) 1 K.B. 905; (1951) 1 All. E.R. 203.
6Williams, Criminal Law (1961), page 983, para. 293(2).
8Emphasis supplied.
9Williams, Criminal Law (1961), page 904, para. 293(2).
within the exceptions is peculiarly within the knowledge of the accused, the prosecution satisfies the evidential burden by giving evidence of the commission of the act, and the evidential burden of qualification or excuse is then on the accused. But the persuasive burden (it may be though) remains with the prosecution.¹

"Outside this rule, the prosecution must generally give some evidence of the commission of a crime, even in respect of elements that lie peculiarly within the knowledge of the accused, before the case will be left to the jury; but where the matter is peculiarly within the knowledge of the accused, comparatively slight evidence on the part of the prosecution will be accepted."

47.25. In a decision of the Court of appeal¹ reported in 1974, however, a different approach seems to have been taken. In that case, the accused was charged, on indictment, with selling by retail intoxicating liquor without holding a liquor licence to be issued by the Justices of the Peace authorising the same,—such a sale being an offence under section (160)(1) of the Licensing Act, 1964. The prosecution had proved that the accused sold intoxicating liquor, but did not adduce any evidence to show that he did not get a licence. Nevertheless, the accused was convicted, and his appeal was dismissed (after reviewing a number of authorities) by Lawton L. J., who said that as a result of experience an exception had been evolved to the fundamental rule that the prosecution must prove every element of the offence charged. The statement of law contained in his judgment differs in some respects from what was previously understood to be the position. The position as previously understood was—to state the matter broadly—that the principle was confined to cases in which the accused had peculiar means of knowledge of the positive of a negative overt act forming part of the case of the prosecution. Lawton L. J., after referring to the exceptional rule throwing the onus on the accused, put the reason for the rule in these words—

"This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge was laid. If the true construction is that the enactment prohibits the doing of acts, subject to proviso exceptions and the like, then the prosecution can rely on the exception" (i.e. the exceptional rule as to burden of proof).

47.26. It would, thus seem that the law in England is in a fluid state. This is fairly clear if one takes into account the pronouncements in R. v. Spurgo² and R. v. Edwards³. The statement of the rule merely in terms of "facts within peculiar knowledge" may, it seems, well require some qualifications. The emphasis in the recent decision of R. v. Edwards is on the aspect of exception to criminal liability—apparently, peculiar knowledge is also required.

¹Emphasis added.
³Emphasis added.
⁴Emphasis supplied.
⁵R. v. Spurgo, supra.
47.27. In R. Ewans, it was observed:

"There are several authorities in which reference has been made to the importance of the consideration that the facts which bring a defendant within the ambit of a particular exception, if they are peculiarly or exclusively within the knowledge of the defendant, should be regarded as matters which it is for him to establish and, that is not a mere matter of convenience. It is tolerably plain that there must be many statutory prohibitions which would become incapable of enforcement if the prosecution had to embark upon inquiries necessary to exclude the possibility of a defendant falling within a class of persons excepted by the section when the defendant himself knows perfectly well whether he falls within that class and has or should have readily available to him the means by which he could establish whether or not he is within the excepted class. That consideration has proved a powerful one in enabling courts in the past to construe enactments such as the section now before us and we think that it is of the utmost persuasive importance in relation to this section and we take the view that the burden did lie on this defendant to show that he fell within the excepted class of a person who has possession of this scheduled drug as a result of the prescription of a qualified medical practitioner."

As to the nature of the burden — i.e. whether the burden is legal or evidentiary — again, there is, in England, some obscurity though, the better view seems to be that it is evidentiary.

V. CONCLUSION

47.28. We have considered this discussion necessary for a proper appreciation of the position in regard to certain aspects of the application of the section. To make the discussion complete, we have referred to the fluctuating and uncertain position in England. But it is not our intention that our Courts should be guided by English cases in this context.

We do not recommend any change in the section. The principle is sound, and if properly applied, the section will not lead to injustice.

1R. v. Ewans, (1973) 2 W.L.R. 1372, 1378.
2Cohen, (1951) 1 K.B. 505.
CHAPTER 48

PRESUMPTION OF LIFE

SECTION 107

I. INTRODUCTORY

48.1. Human affairs ordinarily continue to exist for a certain period. On the
basis of such continuity, various presumptions are founded. A state of
affairs once known to exist can be presumed to continue to exist — the period
for which such continuance is presumed will, of course, depend on our usual
experience.

48.2. This principle is applied by section 107 in the narrow sphere of
continuance of human life. The section provides that when the question is
whether a man is alive or dead and it is shown that he was alive within thirty
years, the burden of proving that he is dead is on the person who affirms it.
This section is, however, subject to the next section, whereunder, if a person
has not been heard of for seven years by those who would naturally have heard
of him if he were alive, the burden of proving that he is alive is shifted to the
person so asserting.

II. ENGLISH LAW

48.3. In England, this presumption is a species of the general presumption
of "continuance of a state of affairs". As the presumption is in favour of the
continuance of life, the onus of proving the death lies on the party who asserts
it.1

The late Professor Thayer wrote of "a general supposition of continuance,
applicable to everything which has once been proved to exist — to an orange
as well as a man; — a presumption which serves, in reasoning, to relieve from
the necessity of constantly re-proving, from minute to minute, this once-proved
fact of existence".2

The position in this regard has been lucidly stated thus by Phipson3 in
his Manual—

"Another commonly met with (Sic) presumption of fact is the pre-
sumption of continuance. Any proved state of affairs may be presumed
to have continued for some time. Thus, if a man is proved to have been
alive on a certain date, it may well be inferred that he was alive on a
slightly4 or even considerably later date,5 depending upon his state of
health and mode of life."

In Lawson on Presumptive Evidence,6 the rule with regard to the presum-
ton of life is thus summarised:

---

1In re Wilson, (1964) 1 W.L.R. 214, 217 (reviews cases).
2The late Professor J. B. Thayer, Preliminary Treatise on Evidence, at Common Law
4Re Phene’s Trusts (1870) L.R. 5 Ch. App. 139.
5R. v. Willshire, (1881) 6 Q.B.D. 356; Re Forster’s Settlement, (1942) Ch. 199.
6Lawson, Presumptive Evidence, page 192, cited in Woodroffe’s Evidence 1941),
page 778.

551
"Love of life is presumed (therefore suicide will not be presumed), and a person proved to have been alive at a former time is presumed to be alive at the present time until his death is proved or a presumption of death arises."

Where a person is once shown to have been living, the law, in the absence of proof that he has not been heard of within the last seven years, will in general presume that he is still alive, unless after a lapse of time considerably exceeding the ordinary duration of human life. In the civil law, the legal presumption of life ceases at the expiration of one hundred years from the date of the birth, and the same rule appears to have been adopted in Scotland. In England, however, no definite period has been conclusively fixed during which the presumption is allowed to prevail.

Inference of fact allowed. 48.4. Speaking of the English law, one may state that though there is no presumption of law as to the continuance of life, an inference of fact might legitimately be drawn that a person who was alive and in health at a certain time, was alive a short time after. There is presumption of fact in favour of the continuance of life, and the onus of proving his death lies on the party asserting it.

Further, the fact of death may be proved by presumptive as well as by direct evidence. And the presumption of the continuance of life ceases at the expiration of seven years from the period when the person in question was last heard of—a rule which, in India, is to be found in the next section.

No presumption of law in England. 48.5. It should be noted that the presumption is not a presumption "of law" in England. The fact that someone was alive at an antecedent date may justify an inference that he was alive at a subsequent date. "This point is relied on so frequently that it is not uncommon for language to be used suggesting that the presumption of the continuance of life is the outcome of some special rule of law, but no decision suggests that this really is so."

In the U.S.A., it is stated that certain rebuttable presumptions have developed as a matter of expediency or public policy. Amongst them is the presumption that a person is presumed dead after seven years of unexplained absence.

Reduction of period not favoured. 48.6. We have considered the question whether the period of thirty years in section 107 should be reduced, having regard to the fact that, in some cases, it may produce an artificial consequence. After careful consideration, we have come to the conclusion that it may not be desirable to reduce the period. It is true that with the increasing complexity of life and growing

---

1 Cross & Wilkins, Outline of the Law of Evidence (1971), page 42.
2 (a) Lapalce v. Grierson, 1 H.L.C. 498;
(b) Re Phenix's Trusts, L.R. 5 Ch. 139;
(c) R. v. Lumley, L.R. 1 C.C.R. 196.
3 (a) Smale v. Pentthapple, 2 Lord Rang. 999;
(b) Thosmerton v. Wallon, 2 Rs. 461.
4 (a) R. v. Willshire, 6 Q.B.D. 366;
(b) R. v. Jones, 15 Cox 284;
5 Cross & Wilkins, Outline of the Law of Evidence (1975), page 41-42.
6 Johns v. Burns, 6750 2d. 265 (Fla. 1953).
urbanisation, the number of accidental deaths may increase; but it is also to be borne in mind that in general, the average span of life is increasing, not only in India but also in other countries, and to reduce the period already provided for in the section, might, in practice, create an artificial result in a larger number of cases than at present.

48.7. It is also to be pointed out that at least one exception to section 107 is created in section 108. Even where section 108 does not apply — that is to say, where the statutory period of seven years under section 108 is not satisfied — it is still open to the party on whom the burden of proving death lies, to produce cogent evidence to persuade the Court that death did, in fact, occur.

The definition of "proved" in section 3 reads—

"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

This may not be regarded as imposing an unduly stringent burden. We are not, therefore, inclined to recommend any reduction of the period in section 107.

IV. SUGGESTION OF THE MYSORE HIGH COURT CONSIDERED

48.8. So much as regards the section and the corresponding principle in English law. It remains now to refer to a suggestion made in a judgment of the High Court of Mysore with reference to this section. The High Court of Mysore made¹ the following observations in that judgment:

"Before leaving this aspect I should like to mention that under the changed circumstances, the continuance of section 107 would be a source of immense trouble. We are in an age of aeroplanes and sputniks. Death in unknown places and under unidentifiable circumstances is a matter of every day occurrence. That being so, section 107 would work to the detriment of the heirs of the deceased. Hence it might be advisable to delete that provision."

48.9. We have given careful consideration to this suggestion, but, with great respect, we are unable to agree with it in its totality.² The section is based on a sound principle of common sense. It is not, in its essence, a merely technical rule of evidence. Even outside the courts of law, laymen think a hundred times before they take a man whom they knew to have been alive, to be dead. Ordinarily for believing that he has died, they would require very reliable material in support. It is true that the scope of the material which laymen would regard as acceptable would be wider than the material admissible in a court of law. It is also true that laymen do not go by a fixed and immutable period (of 30 years), as in the section. These, however, are matters of detail. The principle underlying section 107 should not be regarded as unsound, even in the present circumstances.

²For a milder amendment, see infra.
48.10. At the same time, we think that there is a case for modifying the section so as to allow the court a discretion not to draw the presumption of continuance of life, where it appears to the court likely that the person concerned was involved in an accident or calamity. Modification of the rigidity of the section is desirable to that extent.

V. RECOMMENDATION

48.11. We, therefore, recommend that the following proviso should be inserted below section 107, for the purpose mentioned above,

"Provided that where it appears to the court from the evidence that the person concerned had been involved in an accident or calamity in circumstances which render it highly probable that the accident or calamity caused his death, the court may, for reasons to be recorded, direct that the provisions of this section shall not apply."
CHAPTER 49

PRESUMPTION OF DEATH—SECTION 108

I. INTRODUCTORY

49.1. To the rule contained in section 107,—presumption of continuance of life — there is a proviso which appears in the Act in a separate section as section 108. It is usually described as dealing with the presumption of death. Appearing in the form of a proviso, it enacts that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive, is shifted to the person who affirms it. It is well recognised that section 108 is an exception to section 107, and takes the case out of section 107.1 Of course, this does not mean that in every case, for applying section 108, it is also necessary that section 107, should otherwise be applicable on the facts.

49.2. The period of seven years mentioned in section 108 has a history. In England, the period of seven years was inserted by an old statute of Charles II, concerning leases for lives.2 A similar period was provided in the statute in force in the seventeenth century for the punishment of bigamy. The period has since been adopted, by analogy, in other cases.3 The rule is not, in England, codified. But judicial decisions have asserted, or assumed, a rule that there is a convenient presumption, applicable to certain cases of seven years’ absence, where no statute applies.4

II. STATUTORY PROVISIONS ANALOGOUS TO SECTION 108

49.3. In order to understand the utility of a provision creating such a presumption, it will be useful to state that the question of death may arise in a variety of proceedings. It would be of interest to note statutory provisions relating to the procedure whereby the death of a missing man can be presumed.

In England, the procedure, according to a study5 that was made during the Second world War, may take one of the following forms:

(1) A certificate of death issued by a Coroner under Regulation 30A of the Defence (General) Regulations, where the supposed death is the result of "war operations."

(2) An inquest held by a Coroner under section 18 of the Coroner’s (Amendment) Act, 1926.

(3) A return made by the master of a British ship to the Registrar-General of Shipping and Seamen under section 254 of the Merchant Shipping Act, 1894, where the subject is missing at sea, and the subsequent issue of certificate.

(4) Presumption of the death of a sailor soldier or airman by the Admiralty, the War Office, or the Air Ministry. A certificate issued by

---

2The Cestui qui Vie Act, 1666 (18-19 Car. 2 c. 11). See para. 49.4, infra.
3See para. 49.5, infra.
one of these authorities that death has been recorded is normally accepted by
the Court as proof of death. Of course this is not regarded as conclusive.

(5) A petition under the Matrimonial Causes Act for presumption of
death and the dissolution of the marriage.

(6) An application by an executor or administrator to the High Court
for leave to sear death. In estates of small amount, the application is made
to the Registrar.

49.4. Besides these, there are, in England other statutory provisions relevant
to the determination of death. The cestui que vie Act, 1666, provides that
if person on whose lives estates depend remain beyond the seas or elsewhere
absent themselves in this realm for the space of seven years, they shall be ac-
counted as naturally dead.

49.5. Then, section 57. of the Offences against the Persons Act, 1861,
defines the offence of bigamy. The proviso to that section, so far as is
material, enacts:

"Provided that nothing in this section shall extend............. to any
person marrying a second time whose husband or wife shall have been
continually absent from such person for the space of seven years last past,
and shall not have been known by that person to be living within that
time............."

It is sometimes said that the legislature, by this proviso, sanctions a pre-
sumption that a person who has not been heard of for seven years is dead; but the whole point of the proviso is that the accused escapes the penalty for
bigamy even though the other spouse is still proved to be alive. Indeed,
unless the life of the other spouse is first established, the prosecution fails in
limine.

The effect of an honest and reasonable mistake of fact will be further
dealt with later.

The period of seven years mentioned in the proviso to section 57 can be
traced to the original statute of 1603. It was subsequently adopted by
analogy in the common law rule that a person may be presumed dead when
he has not been heard of for seven years by those who would be likely to hear
of him if he were alive.

49.6. In relation to matrimonial proceedings, in England, the Matrimonial
causes Act, 1973, permits the court, in proceedings brought by a married
person, to make a decree presuming the death of the other spouse on reasonable grounds and dissolving the marriage. A rebuttable presumption of the propositus' death arises if he has been continually absent from the petitioner for seven years and the petitioner has no reason to believe that the propositus was living during that time. The reasons for believing in the continued existence of the propositus which prevent the presumption arising must be found in the seven-year-period. The fact that the propositus would have been unlikely to get in touch with petitioner during the seven-year-period is immaterial, so that this is wider than the common law presumption of death.

49.7. Certain statutory provisions in India also deal with absence for a particular period. By way of example, mention may be made of the provisions contained in penal and matrimonial legislation.

Section 494 of the Indian Penal Code, which punishes bigamy, has the following exception relevant to the subject under discussion.

"Exception—This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction.

"Nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge."

It should be noted that the statutory exemption in section 494, Indian Penal Code, does not require that the accused must have made inquiries on the subject of the whereabouts of the spouse.

49.7A. Under Section 27(b) of the Special Marriage Act, 1954, and section 13(viii) of the Hindu Marriage Act, 1955 if a person has not been heard of as being alive for seven years or more by those who would naturally have heard of him had that person been alive, it is a ground for divorce at the instance of the other spouse. This provision is similar to section 16(2) of the Matrimonial Causes Act, 1950, which was in force in England when the two Acts were enacted in India. The present provision in England on the subject is contained in section 19 of the Matrimonial Causes Act, 1973, already referred to.

III. ABSENCE FOR LESS THAN SEVEN YEARS

49.8. So much as regards various other provisions relevant to the presumption of death, after an absence of seven years or more. It is to be noted that the fact that the law does not specifically provide for the case where a man is unheard of for less than seven years, does not mean that the court has no power to presume death in such circumstances. The special circumstances of the case may warrant such a presumption. Such special circumstances may be illustrated by the cases where, for example, the person in question

1Thompson v. Thompson, (1956) 1 All E.R. 603.
3Section 494, Indian Penal Code.
4Thompson v. Thompson (1956) 1 All E.R. 603.
5Para 49.6, supra.
embarked on a vessel, which was not heard of and which was long overdue, or where the habit and character and domestic relations and necessities of that person made it certain that if he were alive within that period, he would have returned to or communicated with persons at his place of residence or domicile.\(^1\)

### Illustrative cases of absence for less than seven years.

49.9. To take one more example from an English case, as failure to apply for money which are due to the person concerned might also be strong evidence in favour of a presumption of death. In Re: Beasley’s Trust,\(^2\) a person who was entitled to the dividends on stock payable in April and October every year applied for his dividends in April, 1860, and was last seen in August of that year in a very bad state of health.\(^3\) He never applied for his half-yearly dividend in the ensuing October. It appeared that he was of very dissolute habits, and that he chiefly depended on dividends for his maintenance. The question was whether he died before November 1860. It was held that since he had not applied for the dividend due to him in October 1860, and having regard to the state of his health when last seen, the presumption must be that he died before November, 1860.

Remarriage by wife, before seven years under mistake of facts.

49.10. Then, where the wife of a missing man wishes to remarry before the expiry of seven years believing in good faith after proper inquiries that the husband is dead, the act is not an offence. Indeed, during war, if her husband has been missing for so long a period that there is no chance of his being reported as a prisoner of war, she might be reasonably safe in so doing.\(^4\)

Whether, if the husband appeared subsequently, the women could be prosecuted for bigamy depends upon the facts of the case principally on her ability to prove good faith\(^5\) and due inquiries. This will be a question of fact, depending on the circumstances of each case.

49.11. Even where the first husband or wife has not been continually absent for seven years, it is well settled in England that it is a good defence to prove a bona fide belief upon reasonable grounds that at the time of the second marriage the first husband or wife was dead,\(^6\) if proper and reasonable inquiries have, in fact, been made by the prisoner.

49.12. In \(R. \text{ v. Tolsan}\)\(^7\) the accused was deserted by her husband, and afterwards heard that her husband had been lost at sea. Five years after last seeing her husband, the accused went through a ceremony of marriage with another man. It turned out that her husband was still alive. The accused was convicted by the trial court of bigamy, under section 57 of the Offences against the person Act, 1861. Her conviction was, however, quashed by the Court for Crown Cases Reserved. The fact that section 57 itself\(^8\). Provided for the situation where 7 years’ absence was proved, was taken as not excluding the general defence of mistake of fact. In other words, the argument that the exception in section 57 was the only case intended to be excluded, was not accepted. Honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicated an innocent one was held to be

---

\(^{1}\)American cases cited in Sarkar on Evidence Act, under section 108.

\(^{2}\)Re Beasley's Trust (1869) Law Reports 7 Equity 498.


\(^{5}\)Sections 76—79, Indian Penal Code.


\(^{8}\)Para 49.5, supra.
a good defence. The section, so far as is material, may be quoted. It was in these terms: "whosoever, being married, shall marry any other person during the life of the former husband or wife,.......shall be guilty of felony......

Provided that nothing in this section contained shall extend.................to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years than last past, and shall not have been known by such person to be living within that time........"

This specific exception, confined to 7 years' absence, was held not to exclude the defence of honest and reasonable mistake of fact.

In India, the position would be the same. Under section 79 of the Indian Penal Code, nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

49.13. Reverting to section 108, we may note that the rule in section 108 is one merely creating a presumption, thus varying the burden of proof. The rules enacted in some of the statutory provisions to which we have referred, do not treat the matter merely as one of evidence. They take the matter beyond the mere region of presumptions and have the status of rules of substantive law. For example, if after seven years' absence, a wife petitions for dissolution, the absence is itself a substantive ground for dissolution in the sense that she need not allege any other ground of relief.

IV. DATE OF DEATH-PRESENT LAW

49.14. It is to be noted that there is, under section 108, no presumption of the date of death. Previously, some misunderstanding seems to have prevailed as to whether there is any such presumption. That there is no such presumption, was made clear in Lal Chand's case, by the Privy Council. In that case, the Privy Council observed, "Searching for an explanation of this very persistent hectarby, their Lordships find it in words in which the rule both in India and in England is usually expressed. These words, taken originally from Re Phene's Trusts run as follows:

"If a person has not been heard of for seven years, there is a presumption of law, that he is dead; but at what time within that period he dies is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

The Privy Council added:

"Following these words in the case of Re Phene's Trusts, it is constantly assumed — not perhaps unnaturally — that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. But, this is not accurate. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or four periods of seven years. It would be accurate to say that the period of disappearance should be "seven years or more" or "not less than seven years".

These observations of the Privy Council, with respect, state the position accurately, so far as the present section goes.

---

1Para, 49.7 supra.
49.15. Reference may also be made in this connection to the earlier decision of the Bombay High Court in *Rango Balaji v. Mudiappa*.1

Shanker died in September, 1878, leaving a Widow Raghubai. One year before his death, his only son (Bala), a child of eight years old, had left his home and was never heard of again. A few days before his death, Shankar adopted the plaintiff (his nephew), and executed a deed of adoption, which stated that he had no hope that his son Bala was alive, and that he had, therefore, adopted the plaintiff.

The deed further declared the plaintiff to be the owner of all Shankar's property with all the rights of a natural son, but provided that if in the event of the lost son returning, he the (plaintiff) should have half. In 1892, the plaintiff, as Shankar's adopted son, brought this suit to recover some of Shankar's property, which was in the hands of the defendants, who claimed it as Shankar's heirs. They *inter alia* impeached the plaintiff's adoption.

It was held that, in order to recover the property as the adopted son of Shankar, it lay on the plaintiff to prove a valid adoption. It was a condition precedent to prove that, *at the date of the adoption*, Shankar was without a son. It was, therefore, for the plaintiff to prove that Bala was then dead. There was, at that time, no presumption that Bala was dead, and there being to evidence on the point, it was impossible to say when he died, or consequently that the adoption was valid. However, the plaintiff succeeded on a different ground in his capacity as the donee under the deed.

49.15A. This being the position, when a person is not heard of for seven years and no specific *date of death* can be proved, *the earliest date to which death can be ascribed can only be the date on which the suit was filed*. Where the court has to determine the date of the death of a person who has not been heard of for a period of more than seven years, there is no presumption that he died at the end of the first seven years or at any particular date.4

49.16. There have been numerous decisions of the High Courts during recent years, from which it would appear that the above position is now well settled.

A few cases on the subject are listed in the footnotes:4–5

---

In relation to marriage, the question may arise where A, having a wife alive who has not been heard of, wishes to marry again. The provisions contained in certain Acts, for example, section 494, last paragraph, of the Indian Penal Code or section 13(1)(vii) of the Hindu Marriage Act, 1955, or section 27(h) of the Special Marriage Act, 1954, may afford some help, but, then, the ingredients of those provisions must be satisfied (particularly, section 494, I.P.C.) and, moreover, in cases under the Hindu Marriage Act or the Special Marriage Act etc. the spouse must formally obtain divorce by a petition to the district court.1

In the law of succession, again, the question may arise where it becomes necessary to prove the date of death of a particular person—e.g. whether the legatee died before the testator or (Under the law of intestate succession), where the immediate heir is dead at the time of controversy and the question is whether the intestate dies before the immediate heir.

It may also arise in testamentary succession, e.g., in the case of joint legatees.2

It would, in our view, be convenient if the presumption is made applicable as respects a period before suit.

49.18. In view of what is stated above, it appears to us to be desirable to insert a rebuttable presumption that, as respects the period after the expiration of seven years from the date on which such person was last heard of, he was dead. Such an amendment in the section will make the position more certain than at present. The section, as it is now worded, merely enables the court to assume that he was dead at the time of institution of the suit. This does not have much practical utility, as has already been pointed out above.3 The presumption, in our view, should be so framed as to provide that he is not to be taken as alive at any particular time after the expiry of seven years—unless, of course, specific evidence in rebuttal is produced.

49.19. As already stated, such a provision would be convenient in many instances where it is necessary not simply to prove that death has occurred (e.g. for the purposes of life insurance), but also to prove that it occurred before a certain event (e.g. before a particular marriage). In fact, even in England, the strict view has not been followed in cases,4 where, for the purposes of succession, a child of the testator was presumed to have died seven years after the child was last heard of. This view produces more convenient results.

49.20. In the light of the above discussion, we recommend that section 108 be revised as follows:

“108. Notwithstanding anything to the contrary contained in section 107, when the question is whether a man is alive or dead, or was alive or dead at a particular time and it is proved that he has not been heard of for seven years or more by those who would naturally have heard of him if he had been alive—

(a) the burden of proving that he was alive in any period after the expiry of seven years is shifted to the person who affirms it, and

(b) the court shall, as respects any such period, presume that he was dead.”

1As to criminal liability supra.
3Para 49.14, supra.
5As to the meaning of “shall presume”, see section 3.
CHAPTER 50
PROPOSED NEW SECTION
SECTION 108A—COMMORIENTES

I. INTRODUCTORY

50.1. Sections 107 and 108, which we have discussed so far, do not deal with one question which has assumed some importance in modern times. The question relates to the situation where many persons die in a common catastrophe. This is usually discussed under the topic of “commorientes.”

50.2. “Commorientes” are persons who perish at the same time in consequence of the same calamity. These are difficult cases which pose vexed problems to jurists, and their complexities have not, in any way, abated despite the enunciation of several principles not always all-embracing.1

Simultaneous deaths may occur in consequence of a variety of circumstances, usually, they are, the result of ship-wrecks, air-crashes, collisions, bomb explosions, conflagrations, earthquakes, fatalities during war, and other similar calamities, involving a number of persons. On the priority, in point of time, of the death of one over the other commorientes, regardless of the brevity of interval between the deaths, valuable rights of third parties very often depend.2

II. PRESENT LAW

50.3. In India, there is, in the absence of statutory provision,3 no presumption of law arising from age or sex to the effect that the younger or the female survived for some time, when a number of deaths took place in a common catastrophe.4 Nor is there any presumption that all persons involved in a common catastrophe died at the same time. If the survivorship of one person cannot be established by evidence, so that, on the evidence, the court cannot come to a conclusion as to whether A survived B in a common catastrophe, the normal rules as to burden of proof will be applied, and he who has the burden of proving the death will suffer if there is want of evidence. This general rule is, of course, subject to one special statutory rule to which we shall advert later, contained in the Hindu Succession Act. The matter of survival, in all other cases, is treated as a question of fact. The courts may, of course, draw their own deductions by taking into consideration the circumstances, the minutes of the disaster and the manner of deaths of the parties, or take assistance from other circumstances tending to show who outlived whom. Facts might be examined which might suggest as to who was best able to struggle for life as against others.5 But there are no legal presumptions.

In one Bombay case—Y. N. Kulkarni v. Laxmibai Kesheo6—Macleod C.J. did give importance to the fact that out of the deceased, the younger man was 18 years old and the other was aged 60. The Chief Justice observed—

1In the matter of Mahabir Singh v. Prithviraj Dillon, A.I.R. 1963 Punj. 66, 72.
2In the matter of Mahabir Singh v. Prithviraj Dillon, A.I.R. 1963 Punj. 66, 72.
3Section 21, Hindu Succession Act, 1956.
5In the matter of Mohabir Singh v. Prithviraj Singh Dhillon, A.I.R. 1963 Punj. 66, 72.

562
".............................. when the evidence on the question, who
died first, is so evenly balanced, I think we are entitled to say that the pro-
babilities are in favour of the younger man surviving the elder".

But, this view may be taken as impliedly overruled by the later Privy Council case.¹

50.4. Section 21 of the Hindu Succession Act² provides for the application of the presumption (until the contrary is proved) that the younger survived the elder. The section does not apply to the property of the persons other than Hindus.

However, in the absence of such specific statutory provisions, the matter is left to be decided on the basis of onus of proof. This creates difficulties and anomalies, since the answer given depends on the accidents of litigation.

III. ROMAN LAW AND CIVIL CODES

50.5. It would, at this stage, be useful to discuss a few comparative aspects. The continental jurists endeavoured to solve the difficulty by recourse to artificial presumption where the circumstances connected with deaths were unknown.³ These presumptions, though artificial and arbitrary, are based on probabilities of survivorship resulting from physical strength, age and sex. Some of these presumptions to which the jurists in Rome resorted in the event of a common catastrophe resulting in the deaths of several persons, may be noted. They are:

(a) *cum bello batar cum filiola perissat*—when in war, father and son die together;

(b) *uxor axul cum marito decesserit*—husband and wife die together. There were also what may be called biological considerations. Thus, a grown-up son was presumed to have survived his parent;

(c) *cum explorari non possit uter prior extinctus sit, humanius est credere fillum diustius vivisse.*

This means that when it is not possible to determine who between the father and the son, died first, it is more natural to believe that the son survived the father. Similarly, the Code Napoleon⁴ provides as follows:—

"Si plusieurs personnes respectivement appellassis a la succession lune de lature, perissent dans un meme evenement, sans quon puisse reconseitrc laquelle ait determinee par les circonstances du fait, etc, a leur defaut par la force du lage et due sexe."

The above passage may be rendered thus:⁵

"If several person who are respectively to succeed one to the other, perish in the same happening without one's knowing who died first, the presumption of survival is determined by the circumstances of the case and, in their absence, by considering their age and sex."

50.6. In some cases the presumptions were considerably elaborated in the legislative provisions such elaboration ostensibly resting on natural probabilities.

¹Agra Mir Mohammed, A.I.R. 1944 P.C. 100, Infra.
⁴Article 720, Code Napoleon.
⁵In re Mahabir, A.I.R. 1963 Punj. 66, 72.
Thus, the French Code assumed that of those under the age of 15, the eldest survived, and in the case of those above 60, the youngest survived. If one of those parties were under the age of 15 and the other above the age of 60, the former was presumed to have survived. If all were between 15 and 60, the males were presumed to have been the survivors if the ages were equal or the difference in ages not greater than one year; in other cases the youngest was presumed to be the survivor. The Civil Codes in other continental countries and in some States of America are modelled on the Roman pattern, for example, Civil Codes of Austria, Germany, Italy, Portugal and Spain.

IV. HINDU LAW AND MUSLIM LAW

50.7. It has not been possible to trace the rules of Hindu law, if any, on the subject, Mahomedan Law, in the case of persons perishing together, is stated thus by Baillie:

"Where several persons have been drowned or burnt together and it is not known which of them died first, we treat them all as having died together. The property of each will accordingly go to his own heirs, and none of them can be heir to another, unless it is known in what order they died, when those who died last will inherit to those who died before them. And the rule is the same when several are killed together by the falling of a wall or in the field of battle, and it is not known which of them died first."

Section 21 of the Hindu Succession Act reads—

"S. 21. presumption in cases of simultaneous deaths.—Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved that the younger survived the elder."

If the husband and wife die in the circumstances stated and if the husband is older than the wife, then, unless the contrary is proved, it is to be presumed that he died before the wife so that the wife would be the sole heir of the husband (if there are no other relatives mentioned in Class I of the Schedule to the Act) and the property of the husband would devolve upon the heirs of the wife (under section 15) and not of the husband (under section 8).

50.8. At this stage, a few cases on the subject may be noted. Thus, where a woman and her married daughter died in a fire in their house but there was no evidence as to who died first, it was held that the mother must be presumed to have died first; the daughter therefore became her heir and was entitled to the mother’s property and on the daughter’s death her husband as her heir became entitled to it. Where mother and daughter were murdered on the same day and at the same time, the presumption is that the younger survived the elder. It was held in a Mysore case.

50.9. In a Punjab case, the testator and his wife were killed on November 14, 1955 by gun-shot wounds; the testator had, by his will, bequeathed all his

---

1In re Mahabir, A.I.R. 1963 Punj. 66, 73.
property to his wife, and the wife’s mother claimed the right to obtain letters of administration as the heir of her daughter; the claim was resisted by the testator’s nephew who claimed to be the heir of the testator on the allegation that the wife had died before the testator and the property would go as on intestacy.

The Punjab High Court held that section 21 of the Hindu Succession Act, being only procedural, had retrospective operation and applied; the wife must be presumed to have survived her husband and the property belonged to her under the will and would pass on to her mother as her heir. 1

Section 21 applies to testamentary as well as to intestate succession. 2

V. ENGLISH LAW

50.10. At common law, there was no presumption of survivorship in respect of “Commorientes”. The matter was left to be decided by evidence if possible, failing which the rules as to burden of proof applied.

50.11. This position has, however, been altered in England, so far as title to property is concerned, by a statutory provision—section 184, of the Law of Property Act, 1925—subject to certain amendments made separately. The section was mainly intended to deal with cases of “Commorientes”—though the language seems to be wide enough to cover all situations in which uncertainty arises. 3

The section reads—

“184. In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to an order of the court), 4 for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.”

It should incidentally be noted that the section does not deal with the factum of death. It assumes that death has occurred, and deals with the order of deaths.

50.12. This provision must now be read with section 46(3) of the Administration of Estates Act, 1925. That section, as amended by the Intestates Estates Act, 1952 (15 and 16 Geo. 6 & 1 Eliz I. c. 64) (which contains the revised law), is quoted below. 5

“46 (3). Where the intestate and the intestate’s husband or wife have died in circumstances rendering it uncertain which of them survived the other, and the intestate’s husband or wife is, by virtue of section 184 of the Law of Property Act, 1925, deemed to have survived the intestate, this section shall nevertheless, have effect as respects the intestate as if the husband or wife had not survived the intestate.”

50.13. In case involving spouses, one should bear in mind that most husbands are older than their wives and a common effect of a rule favouring the wife’s survival in regard to intestate succession would be to negate the wishes of a

---

3 Section 184, Law of Property Act, 1925 (15 & 16 Geo. 6 c. 20).
5 The words “subject to an order of the court”, are usually understood as allowing specific evidence for rebuttal. For criticism of these words, see infra.
6 Section 46(3), Administration of Estates Act, 1925, as amended in 1952.
husband in favour of those of his wife—unless it can positively be shown that she predeceased him. Even in modern times men are usually better off than women; few men, it seems, accidentally want to benefit the families of their wives to the detriment of their own, but this could be a curious effect of the rules in regard to intestate spouse cases.¹

This seems to be a good reason for not applying to spouses a rule of survivorship of the younger, whether they died testate or intestate.

The principal object of the provision of section 40, Administration of Estates Act, 1925 is to deal with the case of spouses. The effect of this special provision is, that if the question arises—

(i) on intestacy,

(ii) between husband and wife—,

then the rule given in the Law of Property Act—Section 184—does not apply, and is replaced by a provision whereunder the intestate is deemed to have died without spouse. The result is that only his heirs get the estate, and not the heirs of the spouse.

50.14. Reverting to section 184 of the Law of Property Act, 1925, we may refer to a few reported cases thereon. In Hickman v. Peacey,² the House of Lords, by a majority, held that when four persons die in a house as a result of one bomb explosion, they were to be taken to have died in the order of their respective ages. It was also observed that the section would apply even where the death did not occur in a common calamity.

Thus, according to the observations made in this case, where a husband goes on a voyage and his ship disappears in circumstances from which the fact of his death (as opposed to the time of his death) could be inferred, while his wife dies in another operation, and there is no means of ascertaining which of them died first, the section would apply.

50.15. Section 184 itself incorporates the words “subject to any order of the Court”. It is doubtful, however, whether those words have any meaning. In re Lindop, Lee-Barber v. Reynolds³, Bennett, J. said that they did not give the court a discretion not to apply the section because it might be unfair in the particular case. Subsequently, it has been observed, that the words are obscure, if not meaningless.⁴

50.16. The effect of section 184 is to cause the property to pass from the older to the younger, and then from the younger to the person entitled under his will or upon intestacy. There is, therefore, a double passing, and estate duty is normally charged upon each “passing”. However, section 29(1), Finance Act, 1958, provides that for the purposes of estate duty only, both people are deemed to have died at the same instant.

50.17. Under the intestacy rules, where a married person dies, his or her spouse becomes entitled to certain benefits. The effect of section 184 in the event of virtually simultaneous deaths was—assuming the husband to be the elder—to cause his property to pass to his wife, and it would then, in the absence of children, pass to her family. By virtue of the Intestates Estates Act,

¹Article in 119 New Law Journal 325.
1952, section 1(4) in the case of post—1952 deaths, where it is uncertain which of the intestate husband and the wife survives the other, each is regarded as having survived the other.

VI. NEED FOR CHANGE

50.18. So much as regards the English law and the law in other countries. The question to be considered is, whether a statutory provision should be inserted in our Act on the subject of deaths in a common catastrophe. The Select Committee which discussed the Evidence Bill did consider the subject briefly, but that Committee described the provision contained in the laws of several countries on the subject as “somewhat arbitrary”, and treated the matter as an instance of the rule as to the burden of proof. “The person who affirms that A dies before B must prove it. This is the principle adopted by the English Courts.”

50.19. It should be noted that the law in England has now been altered by statute.—Moreover, we are not convinced that the fact that a statutory rule would be arbitrary is a conclusive argument against its adoption. The present position leads to anomalies, by leaving the matter to the general rule as to burden of proof of particular facts in section 103. This will be clear from a comment made on the Bill. Clause 95 in the original Evidence Bill, had an illustration under the topic of “burden of proof”, in the clause which dealt with burden of proof as to particular facts. According to the illustration to that clause, A and B, husband and wife, are both drowned in the same wreck. C is entitled to certain property if B survived A, while D is entitled to that property if A survives. If C claims the property, he must prove the survival of A. That was the gist of the material part of the illustration to clause 95. Now, it was pointed out, in one of the comments on the Evidence Bill, that this was unsatisfactory. “In the illustration given, it would appear impossible to prove whether A or B died first: so if C and D for property, D will win; if D sues C, C will win; the effect would be that whichever first get possession of the property would keep it. But if the property were in the possession of E, A’s executor, he, E might retain it; for though it would clearly belong to either C or D, neither of them would be able to get a decree”.

It is remarkable that this very incisive comment came not from a lawyer but from an Army Officer—Major Wilkinson.

There is considerable force in this criticism. In our opinion, there is a strong case for inserting a statutory provision on the point under consideration.

50.20. As to the precise content of the statutory provision, we would favour adoption of the English rule—with one modification which we shall mention in due course. Where the matter is difficult to prove, not much damage would result if an arbitrary rule is adopted. After all, the present position, under which the matter is decided by the rule of burden of proof, is also arbitrary in its operation in the sense that the accidents of litigation may tilt the scales. The

---

5The countries were not mentioned.
6Section 184, Law of Property Act, 1925 as amended (supra)
7Clause 95, now section 103.
8The illustration did not appear in the Bill as passed.
10Emphasis supplied.
11See Major Alfred Wilkinson’s comment on the Evidence Bill, supra.
statutory rule adopted in England has the merit of certainty, even if such a
 provision is arbitrary. Major Wilkinson, in his comment on the Evidence Bill,
 had brought out the anomaly under the present position.

It may further be added, that if the rule in India is brought into harmony
with the rule in England and other countries which have adopted such a rule,
it will lead to convenience, because such a course would avoid conflicting
presumptions as between Indian courts and the courts of various other countries
—an aspect that becomes important where the persons concerned have immov-
able property situated in more countries than one.

VII. INDIAN CASES

50.21. It may be of interest to study by taking actual cases, how the proposed
amendment would be useful. Thus, in a Privy Council case, the facts were as
follows:

Sir Shamas Shah, a retired officer of the Political Department of the
Government of India, aged 68, and his wife Lady Shamas Shah, aged 26, who
were staying in a bungalow in Quetta, were killed in the earthquake and buried
under the debris. The question was, whether Lady Shamas Shah survived her
husband for a moment. This question was material for determining the order
of succession. The appellants were her parents. The appellant's case was, that
the lady was taken alive when she was extracted at about the same time as
her husband's body was recovered, and that she thus survived her husband,—
though she expired immediately thereafter. On the hypothesis that the lady
survived, the appellants; her parents, could claim—one-fourth of her husband's
estate, because, under the Muslim law, the widow was entitled to one-fourth,
and, on the widow's death, that one-fourth devolved on the parents. If she
did not survive her husband, then the respondents were entitled to the entire
estate.

The legal proposition laid down in this case by the Privy Council was, that
where the two individuals perish in a common calamity and the question arises
who died first, there is no presumption that the younger survived the elder; the
question is a pure one of fact, the onus lying on the party asserting the affirm-

50.22. An Oudh case may also be referred to. Two brothers died in a fire,
and the widow of one of them sought to succeed to the entire property, on the
ground that her husband, being the younger, must be deemed to have survived
the other brother. The Court held, that there was no such presumption, and
pointed out that the rule laid down in the English Act of 1925 was an artificial
rule of statute law, and not one of evidence.

Incidentally, the Oudh judgment refers to the opinions expressed by other
courts—the view that the probabilities are in favour of the younger surviving
the elder, and "ordinary presumption in human nature that the elder man died
first." It did not, it seems, share their view.

The adoption of the English provision would, in such cases, introduce an
element of certainty by avoiding the need for deciding questions of fact too
difficult of proof.

---

5Gopal Chandra v. Padampanti, (1913) 18 Ind. Cases 814
VIII. COMMENTS ON THE ENGLISH SECTION

50.23. The English provision thus furnishes a useful precedent; but we should refer to a few points arising from the English provision. In a case which arose in Victoria (Australia), the words “subject to any order of the court” in section 184 of the Property Law Act, 1958 (Victoria), which, in this respect, follows section 184 of the Law of Property Act, 1925 (England), were considered, and Adam, J. of the Supreme Court of Victoria (after reviewing the cases), concluded as follows:

“This survey of the judicial pronouncements on the bracketed words suggests, at best, that if they mean anything at all, they add nothing to the section, and at worst, that they are simply meaningless, Section 184 would not suffer, I think, by their now being omitted.”

In an article on the subject published in Australia, the words in question have been criticised as an example of a “deplorable legislative habit” of using words which apparently give a power to affect private rights without stating the circumstances in which the power is exercisable. The words should, therefore, be avoided, when drafting the proposed section.

50.24. The provision made regarding the intestate’s estates by the Act of 1952 in England, should extend to testate succession between spouses also.

IX. NEED FOR CHANGE

50.25. We are, therefore, of the view that it is desirable to adopt the English provision with the modifications mentioned above. It would be an improvement on the present position. At present, the party asserting (i) concurrent death or (ii) survivorship of one person or (iii) predecease of one person, has to prove it; instead, a fixed rule will come into play if the English provision is adopted. This would not be more arbitrary than the present position, because even now, it is the chance situation of A or B having to institute the legal proceeding, that decides the onus for the purpose of that proceeding. This aspect was very well elaborated in one of the comments on the Evidence Bill, to which we have already referred.

It will be more beneficial in its working, because it will—

(i) introduce certainty;

(ii) apply whether there is litigation or not, and

(iii) apply to all cases and not merely as between the litigating parties.

X. RECOMMENDATION

50.26. In the light of the above discussion, we recommend that the following new section should be inserted—say, as section 108A in the Evidence Act. As a consequential change, section 21 of the Hindu Succession Act, should be repealed.

2 Emphasis added.
4 Major Alfred Wilkinson’s Comment (supra).
5 Section 21, Hindu Succession Act, 1956 to be repealed.
"108A. Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, for all purposes, be presumed to have occurred in order of seniority, of age and accordingly the younger shall be deemed to have survived the older.

"Provided that where the question arises in respect of title on intestacy or testamentary rendering it uncertain which of them survived the other, and the husband or wife is, by virtue of this section, deemed to have survived the intestate.

or the testator, then the law of succession shall, nevertheless, have effect as respects the intestate or the testator as if the husband or wife had not survived the intestate or the testator."1

1Section 21, Hindu Succession Act, 1956, to be deleted in consequence.
PARTNERSHIP. TENANCY AND AGENCY

SECTION 109

51.1. The continuance of human affairs which formed the basis of the presumption of life in section 107 provides, in part, the basis for another presumption. Under section 109, when the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in these relationships respectively, is on the person who affirms it.

The provision in section 109 really consists of two parts. In the first place, it provides that, if parties have been acting as partners etc. then the burden of proving that they do not stand in that relations is on him who so asserts. Secondly, the burden of proving that they have ceased is on the person asserting. The first part, in effect, creates a presumption of the existence of a relationship from the de facto action. The second part creates a presumption of the continuance of that relationship.

51.2. A tenancy or a partnership or other state of things continues until the contrary is proved. That is the gist of the second aspect. In fact, as the judicial decisions as to joint Hindu families show, such a presumption could be made in respect of other relationships also.

According to Phipson, the presumption of continuance from previous existence is to be found in many cases in different branches of law. For example, there will be a presumption of continuance of sanity, insanity, marriage etc. Thus, what the section enacts is a specific illustration of a very wide rule.

Incidentally, it may be noted that the section confirms the previous law on the subject.

51.3. The three relationships specifically mentioned are (a) partnerships, (b) tenancy, and (c) agency. The law is substantially the same in England as to all these relationships. When the existence of a relationship or state of things is proved, the law presumes that it continues till the contrary is shown or some other presumption arises. This general rule has already been mentioned. In particular, a partnership, agency, tenancy, or other similar relation, once shown to exist, is presumed to continue till it is proved to have been dissolved.

51.4. So, when a partnership was admitted to exist in 1816, it was presumed to continue in 1838. In an American case—Cooper’s case—a partner brought

---

1Obhoy Churn v. Huri Nath, (381) I.L.R. 8 Cal. 72, 79.
2Phipson, Evidence (1963) page 292.
3Rungo Lal v. Abdul Guggoor, (1878) I.L.R. 4 Cal. 314, 317 (Garth C.J. a McDonald J.).
(b) Brown v. Wan, (1895) 1 Q.B. 390.
5Smout v. Ibery, 10 M. & W., 1.
7Clark v. Alexander, 8 Scott, N.R. 161, and see Anderson v. Clay, 1 Stark, 404.
8Cooper v. Dedrick, 22 Barb. 516 (Amer.) cited in Lawson’s presumptive Evidence, p. 175.

American and English case law is taken from woodroffe.
an action on a note. It was contended that the plaintiffs were not partners. It was proved that three years prior to the action they were partners. It was held that the presumption was that they continued to be so. From the same presumption of a continuance of things once shown to exist, it follows that after expiration of the term limited by the articles of partnership, it is prima facie presumed that such of the provisions of the articles as/are not inconsistent with a partnership at will continue to apply.\(^1\) This presumption has been made the subject of positive enactment in India.\(^2\)

\[51.5\]. This presumption will be rebutted and a contrary one raised, if it is shown that annual accounts between partners ceased on a certain date and a final balance was then struck. If after this, some of the partners carried on the business with interference from the others,\(^3\) it means that the partnership had already been dissolved.

\[51.5A\]. In regard to landlord and tenant — who are expressly mentioned in the section,—it is pertinent to point out that under section 116 of the Transfer of Property Act, 1882, when a tenant holds over after the expiration of his lease he does so on the terms of the lease, on the same rent and on the same stipulation as were mentioned in the lease.

\[51.5B\]. As to the relationship of agency, there are no special comments.

\[51.6\]. The above discussion does not disclose any need for amendment of the section.

\(^1\)Taylor, Ev. Section 196 and cases there cited.
\(^2\)See the Indian Partnership Act.
\(^3\)Joopoodi Sarayya v. Lakshmanawamy, (1913) I.L.R. 36 Mad. 185 (P.O.).
CHAPTER 52

POSSSESSION — SECTION 110

I. INTRODUCTORY

52.1. Under section 110, when a person is in possession of property, the burden of proving that he is not the owner lies on the person so asserting.

Possession affords prima facie presumption of ownership for men generally own what they possess. To put the matter in a different form, the law leans in favour of the legality of an act; and if a person is in possession, it is presumed that the possession is lawful; in other words, the person in possession is also presumed to have a title to do so.

The juristic interest of possession is very vast. But we are concerned mainly with possession as establishing a link with ownership. It is therefore proposed to discuss in brief some aspects thereof, though the discussion does not point to any need for amendment of the section.

II. VARIOUS ASPECTS OF POSSESSION

52.2. Section 110 gives effect to a well-known principle of law, common to all systems of jurisprudence, that possession is prima facie evidence of title.1 But possession has several other aspects, which may be briefly dealt with.

52.3. Possession may itself become a root of title2, when it has been retained over the statutory period of twelve years—what is known as adverse possession. This is governed by the Limitation Act, 1963.

52.4. Then, under certain statutory provisions3, possession, even though its duration is not for the specific period of twelve years, is itself the foundation of a right to recover possession, unless the dispossession was in the ordinary course of law.

Thus, under the Specific Relief Act,4 if any person is dispossessed of immovable property without his consent and otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof notwithstanding any other title that may be set up in such a suit. In such a suit,—as is clear from the terms of the section—title is not in issue, while possession is a fact in issue.

52.5. Implied in the absolute conception of ownership is a sharp distinction between ownership and possession. The Roman Law did not protect possession as such, but one of the most important parts of the praetorian system was constituted by the “interdicta” (special types of remedy), which protected an existing possession irrespective of its rightfulness, i.e. anyone wishing to interfere with it must bring an action and prove his title. If he interfered on his own authority, the praetor would see that the original state of affairs was restored.5

1Lachho v. Harhai, (1890) I.L.R. 12 All. 46, 49 (Mahmood J.).
3Section 6, Specific Relief Act, 1963.
4Section 6, Specific Relief Act 1963.
5H. P. Jollowals, in Encyclopaedia Britannica under “Roman Law — Possession” page 452, also Bond: “Possession in Roman Law, 23 L.Q.R. 259.

573
52.6. It would appear that the proposition that a suit should be allowed on the basis of mere possession was also recognised in Roman Dutch law. The remedies in the Roman Dutch law were somewhat more complicated, the principal remedy being available to persons who had enjoyed quiet and undisturbed possession for more than a year and a day and were—

(i) dispossessed by force, or

(ii) lost their possession.

In an appeal from Ceylon, the Privy Council reversing a decision of the Supreme Court of Ceylon held as follows:

“If A enters on land possessed by B, and neither A nor B asserts that the land belongs to him by an investitive fact, there is nothing unreasonable in saying that B should be protected in his possession against A. To use the expression of Paul as between A and B, B has the better right to possession (D. 43.17.2). In a controversy between them, it is immaterial that B does not claim to have any right of property founded on any investitive fact; for A is in the same position”.

52.7. Apart from statutory provisions like section 6, Specific Relief Act, mentioned above, a person in possession of land without title has, according to the majority view, an interest in the property which is heritable and good against all the world except the true owner—an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will or by execution—sale, just in the same as it could be dealt with if the title were unimpeachable. Although decisions on the subject are not unanimous, this is the usually accepted view.

52.8. In the cases so far mentioned, possession has more than evidentiary value. In the case under section 110, it has an evidentiary value, and creates a presumption. Even apart from section 110, perhaps, possession would have constituted evidence of title, but section 110 not only places the matter beyond doubt, but also goes further and creates a presumption.

This aspect is important when there is a suit on title. Section 5 of the Specific Relief Act, 1963, provides that a person entitled to the possession of specific immovable property may recover it in the matter provided by the Code of Civil Procedure, 1908. This is a suit on the basis of title,—as is clear from the word “entitled”. In such a suit, possession is not a fact in issue; the fact in issue is title, but possession creates a presumption by virtue of section 110 of the Evidence Act, and would, therefore, be a relevant fact.

Thus, possession has several aspects.

(i) If it has lasted for the statutory period (twelve years) and is adverse, it becomes a source of title;

(ii) If it has not lasted for the statutory period (twelve years), it still can confer a cause of action in a suit under section 6, Specific Relief Act 1963. Such a cause of action is valid even against the true owner who dispossesses the occupant otherwise than in the ordinary course of law.

(a) Price, The Possessory Remedies in Roman Dutch Law
(c) Abdul Aziz v. Abdul Rehman, (1911) A.C. 746 (P.C.).
(iii) If it has not lasted for the statutory period (twelve years) and the suit is not under section 6 of the Specific Relief Act, even then, it can be defended against all except the true owner—according to the view of the majority of the High Courts.

(iv) Even in other cases, it is evidence of title under section 110, Evidence Act.

III. SUIT BASED ON POSSESSION

52.9. The question has been often discussed whether possession itself (not being possession for the statutory period so as to amount to adverse possession) confers a good title where the suit is not under section 6 of the Specific Relief Act, 1963. This is the third aspect of possession mentioned above. For the present purpose, it is unnecessary to consider this question, which is not an easy one to answer. It is enough to state that there are decisions holding that a possession on the part of one party which is not shown to have commenced in wrong, can only be disturbed by distinct proof of superior title in another party. If, as against the possession of the defendant, the plaintiff can show a prior possession on his part and the circumstances are such that the title of the plaintiff can be inferred by invoking section 110, the plaintiff is entitled to a decree for ejectment unless the defendant can show a better title.

52.10. It has been held by several High Courts that a person in peaceful possession can defend it against a person who cannot show a better title. This includes Allahabad, Bombay, Madras, Mysore and Patna—to mention a few. In some of the decisions, section 110 is relied upon while in others, the decision is based merely on previous possession.

The preponderance of judicial authority is thus in favour of the view that apart from section 6 of the Specific Relief Act, a possessory title can be asserted in the ordinary way, at least as against a trespasser. But the Calcutta view is different.

IV. CONCLUSION

52.11. This discussion of the various aspects of possession was needed in order to distinguish between cases where possession is itself a fact in issue, and cases where it is only a relevant fact. We have no further comments on the section, and we do not recommend any change therein.

7Likhu v. Amar, A.I.R. 1936 Pat. 602, 603
10SeeKiran Chandra v. Prasanna, A.I.R. 1934 Calcutta 561 38 C.W.R. 435 (reviews cases); one of the earliest Calcutta cases in Nisa Chand v. Kanchiram, (1890) I.L.R. 17 Cal. 256.
CHAPTER 53
GOOD FAITH
SECTION 111

53.1. Section 111 provides that where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. Although the section does not use the words “undue influence” in the sphere of contracts, it is sometimes invoked in cases where there are allegations of undue influence and abuse of fiduciary relationship in contract.

53.2. It is, therefore, pertinent to refer to the analogous provision in the Contract Act—Section 19A. Under that section, when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. “Undue influence” is defined in section 16 of that Act which expressly saves section 111 of the evidence Act. Section 16 reads—

“16(1) A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where, he stands in a fiduciary relation to the other, or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reasons of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).”

53.3. Both the provisions relate to transactions entered into by persons between whom there is a fiduciary relationship, and both contain rules as to the burden of proof. But there are points of distinction between the two. Under the Evidence Act, the mere fact of one party to the transaction being in a position of active confidence shifts the burden of proving good faith to the party who is in that position. But, under the Contract Act, it is only when the transaction appears, on the face of it, or on the evidence adduced, to be unconscionable, that the burden of proof is thrown on the party who is in a

\[\text{Section 19A, Indian Contract Act, 1878.} \]
\[\text{Md Abdul Rehman v. Md Abdul Ghana Khan, A.I.R. 1937 Oudh 56.} \]

576
position to dominate the will of the other. If the transaction does not, on the face of it, appear to be unconscionable, the party seeking to avoid the contract has to establish that the person in the position of domination has actually used that position to obtain an unfair advantage for himself.

53.4. The difference between the two provisions may provoke a query whether it is not desirable to make the two provisions uniform in language. This may, at the first sight, sound an attractive course. There are, however, certain reasons why it would not be an appropriate course. In the first place, section 111 is a general provision; and as it is applicable to all transactions, it would not be appropriate to adopt the language of the Contract Act, because that language — and particularly, the expression “undue influence” — may not be appropriate for non-contractual transactions.

Secondly, the provisions in the contract Act are a bit cumbersome, because it is only when two ingredients are satisfied, namely, the dominating position of one party and a transaction which is apparently unconscionable, that the burden of proof is placed upon a party in a dominating position. The provision in the Evidence Act is, on the other hand, a simpler one.

Thirdly, the existing language in the evidence Act does not seem to have caused any difficulty in its application.

53.5. We do not, therefore, propose to disturb the section on this point.

---

2(a) Poosathurai v. Kannappa Chettiar, A.I.R. 1920 P.C. 65;
(b) Rathunath Prasad v. Sarju Prasad Sahu, A.I.R. 1924 P.C. 60.
CHAPTER 54

PRESUMPTION OF LEGITIMACY—SECTION 112

I. INTRODUCTORY

54.1. What is commonly called the presumption of legitimacy is dealt with in section 112. The section provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

The principal object of the section is to prevent paternity and legitimacy from being disputed except to the extent specified in the section.

54.2. The concept of legitimacy¹ and the distinction between legitimate and illegitimate children have a place in family law in most legal systems.

The ancient Greeks had elaborated the distinction by rules relating to inheritances.² Roman Law added its contribution of patrim potestas and the notion of family. In Western European systems today a legitimate child, being a member of a family, gets his father’s name and rights of aliment, parental care and succession. At common law he takes by inheritance and succession those things that are gained by inheritance or succession — the father’s surname — a right, in the case of an eldest son or coparcener daughters, to take real property as heir before heirship was abolished — a right to succeed as next of kin upon intestacy. An illegitimate child, or bastard, does not share in this. He gets his surname not by inheritance, but by repute.

Modern systems differ in their requirements of legitimacy.³ In France today, the law is no longer as Pothier stated it; for by the Civil Code, article 331, a formal legal recognition of the children by the parents is required, either before or at the marriage ceremony. In some states of the United States of America, some form of ancillary registration is a condition of legitimacy by subsequent marriage. And, in Australia, registration has been required by some of the State statutes. On the other hand, under the German Code of 1900, and in some other systems, subsequent marriage automatically effects legitimation. Paternity is then simply a basic fact. If questioned, it must be independently established.

54.3. In canonical jurisprudence the purpose of the doctrine was to encourage the parents to enter into matrimony for their own spiritual welfare. Its method was to deem a marriage to have taken place before the birth of the legitimate child. Its essential condition was the capacity of the parents to have married at that date.⁴

It can be said, as Lord Phillimore once observed⁵ that “it is a possible jural conception that a child may be legitimate though its parents were not and

²See Potter, Antiquities of Grees, pages 655-659.
could not be lawfully married. This principle was admitted by the canon law which governed western continental Europe till about a century ago."

54.4. So much as regards the concept of legitimacy, and some of the probable approaches thereto. Section 112 adopts one of the possible approaches by treating as legitimate a child born during a valid marriage. The date of birth is the crucial date, to start with. The date of conception is irrelvant. However, this position can be displaced if absence of access is proved. For the purpose of proving absence of access, the possible period of conception becomes relevant.

In a consideration of the section, it is important to bear in mind two moments of time which are allotted by the section for two different purposes. The first moment of time is that relating to birth. In this regard, the section provides that it must have taken place during the continuance of a valid marriage. The second moment of time which is important for the purposes of the section is to be found in the latter half, where it is permissible to show that the parties had no access to each other at any time when the child could have been begotten. Here we are taken to the moment of conception.

Therefore, while as a matter of law in order to confer legitimacy, it is enough if birth takes place during the continuance of a valid marriage, as a matter of evidence, it is also important to note the moment or possible period of conception.

The section would then emerge in two of its important aspects — (i) the section operating as a rule practically of substantive law, and (ii) the section operating as, or dealing with, a rule of evidence. As a rule of substantive law, the section is important inasmuch as conception before the marriage of the parents becomes immaterial to the legitimacy of the child, if the parties are married subsequently. We describe this as a rule of substantive law, because it deals with the status of legitimacy and because in regard to that matter it is the principal provision of Indian statute law. Moreover, in this respect, the section departs from the Hindu law, as will be explained later.

54.5. It should be noted that the presumption under section 112 can be rebutted only by proof of non-access. For the purpose of the section, "Access" does not mean actual marital intercourse. Opportunity for intercourse is enough, according to the law enumerated by the Privy Council which has been reiterated by the Supreme Court. In Bhagwan Buksh the relevance of such evidence was assumed by the Privy Council.

54.6. Birth must have taken place while the marriage continued. In England, the presumption does not apply where the husband and wife have been separated by judicial order. But it does apply where there is a maintenance order against the husband or where the parties are living apart under a separation agreement or a decree nisi of divorce has been pronounced.

In India, such matters would have to be decided on an interpretation of the word "continuance" of the marriage in the section and—where such evidence can be adduced—also on a consideration of evidence of non-access.

54.7. The critical moment is birth. For the application of the section, it is immaterial that the parties were not married at the time of conception. The

(b) Ettenfield v. Ettenfield, (1940) 1 All. E.R. 29.
presumption of legitimacy at Common Law applies even in the case of a child born to a woman so shortly after marriage that it must have been conceived before the marriage took place.\(^1\) This is also the position in Australia,\(^2\) and under section 112 of the Act, in India. In this respect, the so-called "presumption" really amounts to much more than a mere evidentiary rule. It deals with a topic of family law—the boundaries of legitimacy.

54.8. The rule of English Common Law (Russell v. Russell) under which the husband or wife was not permitted to give evidence of non-access after marriage to bastardize a child born during lawful wedlock does not apply in India. In England also, the rule was abrogated by statute in 1949, and the relevant provision has been successively re-enacted in legislation relating to matrimonial causes.\(^3\)

54.9. At this stage, we would like to point out that since the section was enacted, matrimonial law in India has developed in several directions, adding to its richness and content, and several of our notions as to various legal aspects of the married status have been clarified—for example, as to void marriages. Apart from this purely legal aspect, notice must also be taken of certain scientific developments\(^4\) which make it possible to give fairly cogent, even if negative, proof of paternity—proof which was not so well-known at the time when the section was enacted. Due account will also have to be taken of the fact that the statutory law of marriage as it was in the last century and the statutory law of marriage as it now stands are poles apart from each other, at least as regards Hindus. It would, therefore, be appropriate if the section is examined in the light of these developments. We are making these prelatory observations in order to indicate why the section has been considered in some detail in the discussion that follows.

54.10. At the outset, we would like to mention one aspect which, though it has not been the subject of direct judicial authority, may become important. The presumption under section 112 can be rebutted only by proof of non-access. It is well recognised that, for the purpose of invoking the presumption under this section, all that is required to be proved initially is birth during the specified period.

The section postulates the potency of the husband, and, therefore, enables the presumption of legitimacy to be drawn from the mere proof of birth, as stated above. The position would, of course, be different and the presumption under the section may not arise if the assumption of potency is successfully challenged.

54.11. In this connection, we may incidentally observe that the question may arise whether the presumption arising under this section would not be excluded if it is shown that the husband has sterilised himself.

54.12. The question to be considered would be the meaning of access. It appears to us that, if such a question arises, courts will have to decide in the first instance as to whether the sterilisation of the husband alleged is proved and whether it is shown to the satisfaction of the court that such sterilisation was properly carried out, so that, in the light of the medical opinion, the husband is to be regarded as incapable of procreating. In such a case, the courts may

---
\(^1\)**Poulter Peerage case**, (1903) A.C. 395 (H.L.).
\(^3\)**Section 48(I), Matrimonial Causes Act, 1973.**
\(^4\)**See "Blood group evidence", infra.
have to ask themselves whether there is sufficient proof of "non-access" in the legal sense. Access implies procreative capacity and opportunity for sexual intercourse. The question we do not express any opinion or refer to this problem incidentally at this stage.

II. TWO STAGES

54.13. Reverting to the present section, it is useful to remember that the section applies to—

(a) birth during the continuance of a valid marriage, and

(b) birth within two hundred and eighty days after dissolution of such marriage, provided the mother remains unmarried.¹

This is stating the obvious, but this analysis becomes crucial for a consideration of several points. As to the first stage, we shall have a few comments to make on the meaning of 'valid marriage'. As to the second stage also, there are a few points which will require consideration.

We need not go into decided cases dealing with birth that takes place more than two hundred and eighty days after termination of marriage — a situation which is outside the section. Though several reported decisions relate to this situation, the question that arises is essentially one on which precise and universally applicable presumptions cannot be framed.

54.14. As to the two stages mentioned above, the section really provides for the "conclusive" proof of two elements, if a valid marriage is proved namely—

(a) that the person concerned is the "son" of the husband, and

(b) that that person is the "legitimate son" of the husband. It thus provides for—

(i) paternity, and (ii) legitimacy. The latter touches on substantive law,² though couched as a presumption.

54.15. The presumption is rebuttable by evidence of non-access throughout the possible period of conception.

Of these two stages of presumption, the first we shall reserve for later discussion,³ and we proceed to consider the second.

III. LEGITIMACY

54.16. The second aspect relates to legitimacy as one author puts it,⁴ legitimacy is a question of fact, and can be determined only by reference to three questions. First, who was the child's mother? Secondly who was the child's father? Thirdly were the father and mother validly married at the time of conception or at the time of birth? The first question is not often in issue. The second question, however, is material to the present discussion. The third question is also relevant.

Although the question as to who is the father of a child is, in the last resort, one of fact, it was recognised very early that it would be intolerable to insist

¹The aspect of rebuttal will be considered later.
²See "Criterion of Legitimacy", Infra.
³See discussion as to rebuttal, Infra.
that the paternity of every child be proved affirmatively. The law, therefore, established the rebuttable presumption that every child born to a married woman is also the child of the husband.

The presumption operates not only (i) in the situation where a child is both conceived and born during marriage, but also where the child has (ii) been conceived outside marriage yet born within it, and (iii) been conceived during marriage but born after the marriage has been terminated by judicial decree or death.¹

54.17. It must be noted that legitimacy as a concept postulates two things, namely—(i) that the natural parents were married to each other and (ii) that they were lawfully married to each other. There is also the time element. When one describes a child as legitimate, one really asserts that the child was born of parents who were lawfully married to each other at the relevant time. The expression “relevant” is used in this discussion for convenience.

This general concept is common to most legal systems, but differences between the legal systems may arise because of their differing attitudes as to what should, for this purpose, be regarded as the relevant time. The Roman law, as already noted,² regarded, as legitimate, children whose parents married subsequently, so that the relevant time in the eye of that law was not confined to the moment of birth or conception. English common law treated the moment of birth as the relevant time. Hindu law—if the exposition of that law to be made later in this discussion is accurate—took the moment of the conception as the relevant time.

The significance of section 112 lies in this, that it selects, as the relevant time, what was adopted by English common law. This aspect of the matter is not explicitly mentioned in the section. But it indirectly follows from the provisions of the section in so far as they enact that the son shall be presumed to be the legitimate son of the persons concerned.

54.18. In relation to legitimacy, then, the criterion adopted by the section is the married status at the time of birth. The alternative test of married status at the time of conception (a test which seems to have been in vogue under Hindu law),³ is not adopted in the section. In this respect, the section follows the English common law, which, in its turn, followed, pro tanto, the Roman law. A brief comparative discussion therefore follows.

IV. COMMON LAW

54.19. The rule enacted in the section is the rule of the common law, in so far as the criterion of legitimacy adopted is the moment of birth. The common law does not require that a child, in order to be legitimate, should be conceived during the marriage. It is sufficient if its parents have been married before its birth. This rule might have been derived from the Roman law, under which also the child was legitimate even if the conception occurred before marriage. In fact, the Roman law even permitted legitimation by subsequent marriage—a rule which the common law did not adopt. To provide for it, a statute was required in England.⁴ Further, according to the common law, birth during lawful wedlock raised a presumption of legitimacy which could be rebutted only by certain types of evidence.

²See supra.
³See discussion as to Hindu Law, infra.
⁴See discussion as to Common law, infra.
⁵Legitimacy Act, 1926, was the first such general statute.
54.19A. The history of the strength of this presumption is interesting. At one time, in England, the presumption of legitimacy was so strong as to be irrebuttable unless it could be proved that it was impossible for the husband to be the father because he had "dwelt beyond the four seas"—*ex quattor mariis*—during the whole period of his wife's pregnancy, or was impotent. Thus, it was stated\(^1\) that "the legitimacy of a child born shortly after marriage, whether first or subsequent, was in fact, as impregnable as if it had been also conceived in wedlock, though it was admittedly not begotten by the husband: and ante-marital incontinence with another was not a ground for bastardizing. Redwell's case, 18 Edw. I, Rolle 356; I.H. 63; Fitz, Bast., Pl. 1; Abr. Bast (F) Coke, Litt. 244a."

54.20. But the doctrine of *ex quattor mariis* (beyond the four seas) had become obsolete by 1732\(^2\), and the presumption became rebuttable in the case of a child conceived and born during the marriage, where the evidence establishes that no sexual intercourse took place between the spouses at any time when the child could have been conceived\(^3\).

According to early English cases, the presumption of legitimacy continues despite adultery\(^4\) of the mother.

54.21. The operation of the presumption remains unaffected by the fact that conception occurred before the relevant marriage was celebrated\(^5\) or birth took place after it was terminated\(^6\). In the latter case, the presumption is obviously easier to rebut than in other cases: but it is not rebutted simply by proof of remarriage before the child is born.

In course of time, the strength of the presumption was diluted. Judicial decisions in England seem to have allowed rebuttal of the presumption not only by evidence of non-access, but also by certain other evidence though the rebuttal evidence was expected to be of high probative force\(^7\). We shall refer later to this aspect of the Common law rule,\(^8\) as also to an important statutory development relevant to the subject.\(^9\)

V. ROMAN LAW AND CIVIL LAW

54.22. In this respect, Roman law, as already noted,\(^10\) was still wider than English law. By the *Roman law*\(^11\) and by the laws of *France*\(^12\) and *Scotland* which, on this subject, are based upon that law, the marriage of the parents at any time renders legitimate all their children, whether born before or after such marriage.

Pothier, for example\(^13\) wrote of the Constitution of Constantine (to which he pointed as the origin of legitimation by subsequent marriage) as having provided

---

\(^1\)Hooper, Law of Illegitimacy, (1911), page 12.
\(^2\)Pendrell v. Pendrell, (1732) 2 Str. 925; 93 E.R. 945.
\(^5\)Wright v. Holdgate, (1850) 3 Car. & L. 158; 175 E.R. 503.
\(^8\)Francis v. Francis, (1959) 3 All R. R. 206.
\(^9\)See discussion as to rebuttal, infra.
\(^11\)See supra.
\(^12\)Institutes of Justinian, Lib. I. Tit. X. 13. and note by Sander, Mackenzie's Roman Law, pages 130-134: all referred to by Benneril, Marriage and Stridhana, (1923), page 176.
\(^13\)Cide Napoleon, Articles 331-333. Bannerji, Marriage and Stridhana, (1923), page 176.


38—131 LAD/ND/77
that not only should the marriage give the woman the title and the rights of a lawful wife "but should give equality to the children whom he should have had of that woman while she was no more than a concubine the title and all the rights of lawful children".

54.23. The general idea of legitimation, originated in later Roman law after the Empire had become Christian. Several methods of legitimation were then recognised by law. The effect of each was to bring the legitimated offspring within patria potestas, thus bringing them into the family, making them filii familias as if they had been born ex justis nuptiis. They could succeed to their father's property, but this, it seems, was always a secondary consideration to bringing them into patria potestas. Because legitimation involved subjectio to patria potestas an illegitimate child could not be legitimated against his will.

It was Constantine who, early in the fourth century, first provided for legitimation by subsequent marriage. Originally, this was confined to the offspring of concubinage, and did not extend to bastards generally. Concubinage, was a Semi-matrimonium, recognised by social custom and not regarded with censure. It was monogamous relationship. A man might not have a wife and a concubine or two concubines. The position of the concubine was below that of a matron, but it was not dishonourable. She shared her husband's bed and board, but did not enjoy his honours. Pothier was later to speak, somewhat inaccurately perhaps, of the morganatic marriages of Germanic custom as a survival of the Roman practice of concubinage.

Constantine's law was re-enacted by Zeno, and extended by others. Justinian gave it a general application. It was no longer confined to marriages with concubines. The Church took over this doctrine. And, by the combined effect of canon law and civil law, it has continued, in slightly differing forms, to have a place in most continental systems of law. Any child born out of wedlock is made legitimate by his parents marrying, provided that no impediment existed to their marriage when the child was conceived or born. Which was the critical time is a question on which jurists differed.

54.24. We find in the California Civil Code a provision for the legitimation by the marriage of parents, in these terms:

"25. A child born before wedlock becomes legitimate by the subsequent marriage of its parents."

VI. HINDU LAW

54.25. If Roman law stands at one extreme, Hindu law (as given in the texts) stood at the other extreme. Although the Privy Council took a different view on the subject, it would appear that the Hindu Law of Legitimacy was more strict than even the English law. For example, Manu defines the avara son (son of the body) thus.—

"Him whom a man has begotten on his own wedded wife, let him know to be the first in rank, as the son of his body."

---

2See Professor Jolowicz, Roman Foundations of Modern Law, page 197.
4Pedda Amnoli, (1874) I.R. 1. Indian Appeals 293 (P.C.).
5Banerji, Marriage & Stridhana (1923) page 177
6Manu, IX, 166.
To the same effect are the texts of Vasistha, Devala, Baudhayana, Apastamba and Yajnavalkya.

54.26. According to the Hindu sages, therefore, in order to constitute legitimacy, there must be not only birth but also procreation in lawful wedlock; and some of the leading commentators, such as Kulluka, Vijnaneswara, and Nilkantha, confirm this view of the texts of the sages.

54.27. But the Privy Council took a different view. Sir Barnes Peacock, in delivering judgment in the case of Pedda Amani v. Zemindar of Marungapuri, observed:

“The point of illegitimacy being established by proof that the procreation was before marriage, had never suggested itself to the learned counsel for the appellant at the time of the trial, nor does it appear from the authorities cited to have been distinctly laid down that, according to Hindu law, in order to render a child legitimate, the procreation as well as the birth must take place after marriage. That would be a most inconvenient doctrine. If it is the law that law must be administered. Their Lordships, however, do not think that it is the Hindu law. They are of opinion that the Hindu law is the same in that respect as the English law”.

54.28. It should be noted that in the comments received on the draft Evidence Bill, it was stated by one of the Government Pleaders that it would be more in consonance with the notions of Hindus and Muslims if an artificial rule linking up the legitimacy with the date of birth were not introduced. He pointed out that a full grown child born five months after its mother’s marriage with a Hindu or a Muhammadan will never be considered a legitimate issue of the marriage.

“Natives look to the date of conception, and not to the date of birth in question like this.”

However, the framers of the Bill seem to have preferred the English rule, either because it would avoid minute inquiries as to possible date of conception in border line cases, or because of their view that as a matter of social policy it is enough if the married status and the birth coincide.

VII. POINTS FOR AMENDMENT—VOID AND VOIDABLE MARRIAGES

54.29. So far we have discussed matters relevant to broad principles. While there is no need to disturb the broad principle underlying the section, we would like to consider a few points on which an amendment is needed in the section.

54.30. In the first place the section does not apply unless there is a valid marriage. A marriage which is void would be outside the section,—though a voidable marriage may perhaps be covered. We are of the view that the section

---

1 Celebrake's Digest, Bk. v, 193, 195, 196, 199 and 200, referred to by Banerji, Marriage and Stridhana (1923), page 177.
2 Mitakshara, Ch. 1, sec. XI, 2; Vyavahara Mayukha, Ch. IV, section IV 41.
3 Banerji, Marriage and Stridhana (1923) page 177.
5 Emphasis supplied.

should apply to viiod marriages, in those cases where a statutory provision applicable to the marriage in question declares that notwithstanding that the marriage is void, the children shall be legitimate. We, therefore, recommend that the earlier half of the section referring to the continuance of a valid marriage should be amended for the purpose. Section 16 of the Hindu Marriage Act—to take one example—provides that any child begotten or conceived before the decree of nullity, who would have been the legitimate child of the parties to the marriage, if the marriage had been dissolved instead of having been annulled, shall be deemed to be the legitimate child of the marriage notwithstanding the decree of nullity. (To the same effect is section 26 of the Special Marriage Act, 1954).

54.31. In the Indian Divorce Act, 1869, a somewhat similar provision is in section 21 which is limited to a marriage annulled on the ground that a former husband or wife was living, and operates only where the consequent marriage was contracted in good faith, or where marriage is annulled on the ground of insanity. The section is confined to children begotten before the decree. The legislative policy underlying these provisions should be reflected in section 112.

54.32. This point concerns the earlier half of section 112. In the latter half of the section also, the case of annulment of a void marriage or of avoidance of a voidable marriage should be covered. A marriage can be annulled by a decree of nullity under section 12 of the Hindu Marriage Act, 1955 and section 25 of the special Marriage Act, 1954—to take only two examples. For instance, a Hindu girl is married to A, and gets the marriage annulled under section 12 of the Hindu Marriage Act, 1955 (on the ground that her consent was obtained by fraud), on the 1st April, 1962, and the girl is delivered of a child—say, on the 1st September, 1962. Section would not apply, because the child has not been born “during marriage”, and the case of a birth after annulment is not covered by the section in express words. Of course, the fact can be proved by evidence, but we do not see any reason why such a case should be treated differently from dissolution, at least where a statutory provision of nature contained in the Hindu Marriage Act applies.

Doubt as to nullity.

54.33. We may add that it is not clear whether the assimilation of a decree of nullity to the dissolution of the marriage, which is provided for by section 16, Hindu Marriage Act or corresponding provisions in other Acts, would attract section 112 of the Evidence Act. This doubt arises because the rule in section 112, though, in substance, one of substantive law, is, in form, one of evidence, vide the words “conclusive proof”. Moreover, under section 16, Hindu Marriage Act, conception before the decree has first to be proved, before the deeming provision in the section regarding legitimacy can be drawn upon. On this interpretation, section 16. Hindu Marriage Act, would not operate unless such conception is first proved.

This position is different from that flowing from the Evidence Act, under which the date of conception need not be proved, and proof of the date of birth is sufficient to lead to legitimacy.

Need for change.

54.34. It seems, therefore, desirable to extend the scope of the section to cases of annulment of a void marriage or the avoidance of a voidable marriage. These events should, for the purpose of the section, be treated on the same footing as the dissolution of a marriage. The legislative policy reflected in section 16 of the Hindu Marriage Act, 1955, and similar statutory provisions should be reflected in the latter half. We recommend that section 112 should be suitably amended for the purpose.

1E.g., section 16, Hindu Marriage Act, 1955.
54.35. We should state that a decree of nullity "ascertains and determines the status of the party once for all". The judgment in a nullity case decrees either a status of marriage or a status of celibacy. There are, to quote Lord Phillimore, "two classes of decisions affecting the matrimonial status, those which decide that a marriage is or is not valid—judgments of declarator or of nullity and those which put an end to an unquestioned marriage—judgments of dissolution of marriage or, in popular language, divorce."

54.36. We may state here that our recommendation as to void and voidable marriages will not apply where the law of marriage is not codified. In a Kerala case, under section 488 of the Code of Criminal Procedure, 1898, a Muslim married Woman was driven out by the husband within a few days after marriage, on the ground of her concealed pregnancy. (The allegation of concealed pregnancy was later proved). A child was born of the woman within about four months after her being driven out. It was held that no presumption under section 112, Evidence Act, could be raised on the facts of the case, the marriage being void. A petition filed by the woman against the putative father for maintenance of the child was therefore held to be maintainable.

It was held that concealment of pregnancy at the time of marriage renders the marriage void in Muslim law, according to the authorities. In such a case there is no valid marriage, so as to attract the presumption under section 112, Evidence Act. Consequently, a petition under section 488 of the Code of Criminal Procedure, 1898 could be filed by her for the maintenance of the child, against the putative father of the child and the corroborated evidence of the woman that the child was of the non-applicant could be accepted, and the revisional Court will now interfere with it, though it may be that if the matter had come before the revisional Court it would have come to another decision on the facts.

54.37. This decision concerns Muslims who are governed by uncodified rules of law, and in respect of whom the personal law regards the marriage as void. Our recommendation, on the other hand, deals with cases where there is a statutory provision for the legitimacy of the children of a void or voidable marriage.

Incidentally, it may be proper to comment that in the above case relating to Muslims, the court had perhaps in mind decisions of the English Courts, which held that a decree of nullity is not necessary but is merely a matter of convenience to the party. But it must be remembered that those decisions related to marriages which were null and void, so that the party did not acquire a new status from the ceremony—for example, because the consent of a parent for marriage had not been obtained. Moreover, those decisions were rendered at a time when there was no statutory provision for the legitimacy of the children of such marriage.

VIII. REBUTTAL

54.38. The next point concerns the question whether the presumption under the section is rebuttable by evidence other than evidence of non-access. For

Decree of nullity

54.39. We may state here that our recommendation as to void and voidable marriages will not apply where the law of marriage is not codified. In a Kerala case, under section 488 of the Code of Criminal Procedure, 1898, a Muslim married Woman was driven out by the husband within a few days after marriage, on the ground of her concealed pregnancy. (The allegation of concealed pregnancy was later proved). A child was born of the woman within about four months after her being driven out. It was held that no presumption under section 112, Evidence Act, could be raised on the facts of the case, the marriage being void. A petition filed by the woman against the putative father for maintenance of the child was therefore held to be maintainable.

It was held that concealment of pregnancy at the time of marriage renders the marriage void in Muslim law, according to the authorities. In such a case there is no valid marriage, so as to attract the presumption under section 112, Evidence Act. Consequently, a petition under section 488 of the Code of Criminal Procedure, 1898 could be filed by her for the maintenance of the child, against the putative father of the child and the corroborated evidence of the woman that the child was of the non-applicant could be accepted, and the revisional Court will now interfere with it, though it may be that if the matter had come before the revisional Court it would have come to another decision on the facts.

54.37. This decision concerns Muslims who are governed by uncodified rules of law, and in respect of whom the personal law regards the marriage as void. Our recommendation, on the other hand, deals with cases where there is a statutory provision for the legitimacy of the children of a void or voidable marriage.

Incidentally, it may be proper to comment that in the above case relating to Muslims, the court had perhaps in mind decisions of the English Courts, which held that a decree of nullity is not necessary but is merely a matter of convenience to the party. But it must be remembered that those decisions related to marriages which were null and void, so that the party did not acquire a new status from the ceremony—for example, because the consent of a parent for marriage had not been obtained. Moreover, those decisions were rendered at a time when there was no statutory provision for the legitimacy of the children of such marriage.

VIII. REBUTTAL

54.38. The next point concerns the question whether the presumption under the section is rebuttable by evidence other than evidence of non-access. For

5. Hayes v. Watts, (1819) 3 Phil, 43.
the present, we shall concentrate on the first stage, i.e., during the continuance of marriage.

In English common law, the presumption was regarded as rebuttable, not only by evidence showing non-access in the sense of opportunity for intercourse, but also by other evidence showing that the child was not the result of intercourse between the mother and her husband. This negative fact can be shown, for example, by blood group evidence or, it seems, by evidence about the use of contraceptives.\(^{5}\)

Of course, the standard of proof at common law for rebutting the presumption was supposed to be high,\(^{2}\) but the matter is now settled by statute\(^{4}\) which makes it clear that the test is one of probability.

**54.39.** The present law in England permitting rebuttal of the presumption is statutory,\(^{5}\) and the provision is so worded that in civil proceedings the presumption may be rebutted by evidence which shows that it is more probable than not that the person is illegitimate or legitimate, as the case may be. The relevant provision is to be found in the Family Law Reform Act, 1969, section 26, which reads—

> "26. Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption."

**54.40.** Reverting to section 112, we may note that the rigidity of section 112 was noted in a recent Kerala case.\(^{6}\) But it is pointed out that the Legislature alone can change the rigour of the law, and not the Court. The court cannot base a conclusion on evidence different from that required, by law, or decide on a balance of probability which will be the result if blood test evidence is accepted. The following observations were made:

> "The standard of proof in this regard is similar to the standard of proof of guilt in a criminal case. These rigours are justified by considerations of public policy for there are a variety of reasons why a child's status is not to be trifled with. The stigma of illegitimacy is very severe and we have not any of the protective legislation as in England to protect illegitimate children. No doubt, this may in some cases require a husband to maintain children of whom he is probably not the father. But, the legislature alone can change the rigour of the law and not the Court. The court cannot base a conclusion on evidence different from that required by the law or decide on a balance of probability which will be the result if blood test evidence is accepted."

**54.41.** The judgement also discusses the question of blood tests. "Before a blood test of a person is ordered, his consent is required. The reason is that this test is a constraint on his personal liberty, and cannot be carried out without his consent. Whether even a legislature can compel a blood test, is doubtful. In any case, no consent was given by any of the respondents. It is also

---

\(^{1}\)Cross on Evidence (1974), page 46.
\(^{4}\)Section 26, Family Law Reform Act, 1969 (infra).
\(^{5}\)Section 26, Family Law Reform Act, 1969 (c. 46).
doubtful whether a guardian ad litem can give his consent. Therefore, in these circumstances, the Munsiff was right in refusing the prayer for a blood test of the appellant and respondents 2 and 3. The maximum that can be done, where a party refuses to have a blood test, is to draw an adverse inference. Such an adverse inference which has only a very little relevance here will not advance the appellant’s case to (any) extent. He has to prove that he had no opportunity to have a sexual intercourse with the 1st respondent at a time when these children could have been begotten. That is the only proof that is permitted under section 112 to dislodge the conclusive presumption enjoined by the section.”

54.42. A New Zealand case cited by Cross, though decided long ago, is interesting as demonstrating the absurdity to which the determination of a question of fact may be driven if the presumption is not rebuttable. In that case, the white wife of a white husband gave birth to a child of Mongol stock, her paramour being Chinese, and yet the presumption of legitimacy was held not to be rebuttable.

It was suggested to us that having regard to the emergence of blood group evidence, it is desirable to make the presumption rebuttable.

54.43. Decided cases on section 112 establish that the presumption can at present, be rebutted only by proof of non-access. This, it was stated, creates anomalies, and the resultant position is an artificial one, particularly in view of scientific developments which can now furnish very reliable evidence, at least of a negative character.

54.44. The suggestion made to us was that for the reasons given above, the presumption should be rebuttable not merely by evidence of non-access—which is already allowed—but, in civil cases, by other evidence.

In regard to criminal cases, the present position was to continue, since the rebutting evidence may not, in most cases, be able to establish guilt beyond reasonable doubt.

We are not, however, inclined to accept the suggestion even for civil cases, as we do not wish to add to the kind of evidence that may throw any doubts on the legitimacy of children.

IX. SUCCESSIVE MARRIAGES

54.45. A difficult question relating to the section must now be dealt with—namely, the case of two successive marriages and the operation of the presumption in that situation. We have referred above to the two stages at which the section applies—(i) the duration of the marriage and (ii) the stage thereafter. The first stage covers the period of marriage. The second stage relates to the subsequent period. The presumption under the section might lead to unrealistic consequences in the case of a child born during the second marriage of a woman, where the second marriage and the birth take place soon after dissolution of the first marriage. Since the mother does not remain unmarried,

---

1Cross on Evidence (1974), page 118.
2See “Blood group evidence”, infra.
7 Cf. section 26, Family Law Reform Act, 1969 (Eng.).
8See discussion under “Introductory — two stages”, supra.
the second stage given in the section does not apply; but the first stage, as given in the section, applies in relation to the second marriage. The first part of the section, as now worded, literally applies to such a situation in regard to the second marriage. We may keep aside the first marriage as not relevant to the present discussion. Under the first part of the section, "the fact that any person was born during the continuance of a valid marriage between his mother and any man............ shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten". The requirement that the wife must remain unmarried does not come in the way of the presumption when we are considering the second marriage. The child is to be regarded as the child of the second marriage, if born during its continuance, —except where there is evidence of non-access.

54.45A. What may be pointed out is that the general rule that birth in lawful wedlock is presumed if the child is born during the subsistence of a valid marriage—that is, the woman's present husband is presumed to be the father of the child—becomes unrealistic when the second marriage takes place soon after the dissolution of the earlier marriage and the child is born very soon thereafter. In such cases, it is not unlikely that the child was the child of the first marriage.

This situation is known in continental jurisprudence as a "turba du sanguinis", which is a situation where the child born during the second marriage must have been conceived during the existence of the first marriage.

54.46. Statutory provisions or other rules of law relating to divorce prohibit a divorced spouse from entering into a second marriage during a certain period after divorce—which period is prescribed by the particular statutory provision of rule of personal law. But, even after complying with these provisions or rules, a problem of paternity can conceivably arise.

Moreover, the statutory provisions do not apply to the death of the husband. If a widow marries soon after the death of her first husband and a child is born a presumption of paternity for the second husband cannot be regarded as appropriate. Of course, proof apart from presumption is often difficult. But the point to be made is that the drawing of a presumption would certainly not be appropriate.

54.47. In England, it is, in such circumstances, permissible to show that the child was the child of the first husband. In Re Overbery, the mother of the intestate was twice married—first, at the age of twenty-one years, on July 4, 1868, to George Rawlings who died on January 25, 1869, and second, on July 27, 1869, to John William Shephard. On September 24, 1869, the intestate (a girl) was born.

In the certificate of her birth she was described as "Matilda Rawlings", her father as "John William Shephard", and her mother as "Matilda Shephard, late Rawlings, formerly Mook". On May 28, 1941, the intestate died without issue or parents. On a summons to determine, for the purpose of the distribution of the intestate's estate, the paternity of the intestate, it was held that the

1i.e. the second marriage.
2E.g. the Hindu Marriage Act.
3E.g. the rule relating to Iddat in Muslim Law.
5Facts taken from the head-note in All England Reports.
presumption that a child born within nine months of the termination of marriage by the death of the husband was legitimate offspring of that marriage should prevail, and the intestate should be deemed to be the lawful child of the first husband, George Rawlings.

54.48. Thus, in England, the rule for this particular situation is different, even at common law. Moreover, by a statutory provision, the presumption is now rebuttable in England by less strong evidence than before.

X. BLOOD GROUP EVIDENCE

54.49. We have referred above to the scope for blood-group evidence. A brief discussion of the nature and significance of this type of evidence would not be out of place.

The characteristics which determine a person's blood group are inherited from his parents, and he cannot have any blood characteristics which one or the other parent does not have. Blood groups themselves will indicate the blood proportion of a given man, and whether he is the father of a given child—though they cannot in the present state of medical knowledge fix affirmatively a given man with paternity.

54.50. Blood tests are based on the fact that blood possesses attributes which are inherited or genetic. The four blood groups are O, A, B and AB. They refer to the absence (O) or presence of the antigen A or B or both, in the red blood cells. No person belonging to the O blood group can pass antigen A or B to a child. It follows that if a woman belongs to blood group O and her child belongs to blood group A, the child must have received antigen A from its father. Now, if the man charged with paternity of the child does not have antigen A because he belongs to blood group O or B, then he is excluded from possible paternity of the child belonging to blood group A. If, on the other hand, the man belongs to blood group A or AB, this particular test would show him not to be excluded from possible paternity.

54.51. Blood tests may be of relevance in many types of proceedings:

(a) proceedings for maintenance in magistrate's courts where the blood test may either give some corroborative evidence to the mother of the illegitimate child, or help the respondent by proving that the respondent was not the father of the child;

(b) in divorce proceedings, to support allegations of adultery or to decide paternity; or

(c) in suits in which a claim is made to the estate of a deceased person by a person (not being a child of the deceased) on the ground that he falls within the category of beneficiaries in the contemplation of the deceased person's will.

54.52. In an English case, the husband had been granted a divorce on the ground of his wife's adultery with the co-respondent. The wife had applied to

---

1Re Overbery, (1954) 3 All. E.R. 308, 310.
2Section 26, Family Law Reform Act, 1969, supra.
3See supra.
5The list is not exhaustive.
6E.g. allegations of premariial pregnancy.
the magistrate for an order against the co-respondent, and her application had
been adjourned pending the trial in regard to legitimacy. It was held that a
blood test could be taken to establish which of the two identifiable men was
the father of the child. Of course, in England, the procedure for ordering a
blood test is provided for by statute, but the point to be made is that evidence
of blood test was regarded as relevant.

54.53. Blood tests have become sufficiently sophisticated so that when the
father of the child must be one of two men both of whose blood groups are
known, one can in 90 per cent cases, obtain an exclusion result. They do not have
much affirmative value. But they are useful when the argument is that one
party before the court is not the father—assuming that that party and the
child agree to the blood test. Blood groups have been used on a large scale
in other countries by defendants in bastardy suits. Of course, a person cannot
be compelled to submit a sample of blood except by statutory provisions. But,
if a pathologist swore that the blood test showed that the husband could not
be the father, this might well be held to be evidence of adultery by the woman,
and no question of non-access will then arise.1,2

54.54. The value of blood testing rests on the principle that different
factors in each blood group are transmitted from one generation to another on
a hereditary basis, allowing for conclusions to be made respecting not only the
impossibility of a person being the father of a child but also, in varying degrees,
the probability of the person being the father of a child. Research over the
years has resulted in increasing accuracy in the identification of relevant factors,
and, in some jurisdictions, evidence of blood type may be admitted to establish
either the negation or affirmation of paternity. For example, the U. K. Parlia-
ment in 1969 enacted that:

"In any civil proceedings in which the paternity of any person falls
to be determined by the court hearing the proceedings, the court may, on
an application by any party to the proceedings, give a direction for the use
of blood tests to ascertain whether such tests show that a party to the
proceedings is or is not thereby excluded from being the father of that
person".3,4

54.55. In Courts in Europe, these tests have been recognised since 1924,
chiefly in cases of paternity. Thus, up to 1929, the tests were used in over 150
court cases in Vienna; and in Germany, they were used in over five thousand
cases up to 1929.

54.56. It would appear that in the United States, blood groups evidence is
being increasingly used in disputed paternity cases.5,6

The application of blood grouping tests in disputed maternity cases is also
recognised in the Western world.

1In re L., (1968) Probate 118 (Court of Appeal).
5Emphasis added.
6Marybury, C. J. in Shankle v. The State, (1945) 185 Maryland 437; Judgment
7Davidsohn, Levine and Wiener, Medico Legal Application of Blood Grouping Tests,
8Volume 43, Yale Law Journal 651.
Many States in the U.S.A. have statutes that give conclusive effect to an expert's determination based on blood tests to the effect that the alleged father cannot be the real father.1,2

A blood test acts only negatively. Its results can exclude paternity, but, it cannot conclusively establish it.3

XI. RECOMMENDATION

54.57. In the light of the above discussion, we recommend that section 112 should be revised as follows:—

"112. The fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution4 or after it was annulled or avoided, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Explanation.—Where, by any enactment for the time being in force, it is provided that the children of any marriage which is annulled or avoided shall nevertheless be legitimate, the marriage shall, for the purpose of this section, be deemed to be valid until it is annulled or avoided.”

2For a collection of blood test statutes, see Plescowe & Freed, Cases on Family Law, (1963), 525-556, 196.
4The expression "dissolution" could be replaced by "termination" to cover death more specifically.
CHAPTER 55

CESSION OF TERRITORY

SECTION 113

55.1. Under section 113, a notification in the official Gazette that any portion of British territory has, before the commencement of Part III of the Government of India Act, 1935 (26 Geo. 5, Ch. 2), been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

55.2. The section, as originally enacted, provided that a notification in the Official Gazette that any portion of British territory has been conceded to any Native State, Prince or Ruler shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification. The section was held to be ultra vires by the Privy Council.1 As the Governor-General in Council was precluded, by statute,2 from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, the Privy Council held that the Governor-General in Council could not, by a legislative Act3 purporting to make a notification conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession.

55.3. After this decision, the section became a dead letter. In any case, there is no place for the section in the present constitutional scheme. The section is obsolete.4 We, therefore, recommend that the section should be deleted.

---

2Section 22, Statute 24 and 25 Vic. C. 67.
3Section 113.

594
CHAPTER 56

PRESUMPTIONS — DISCRETIONARY AND REBUTTING — SECTION 114

I. INTRODUCTORY

56.1. There are certain presumptions which are made at the discretion of the court, and are not mandatory by law. Many of these are dealt with in section 114. Nothing very general can be said about these presumptions, and the weight to be attached to them depends on the circumstances of each case. However, it can be stated that they are based on the inferential value or probative force of certain facts. Even in the absence of a statutory provision, the court could have drawn the presumptions: but the merit of having a statutory provision is that the attention of the court is immediately drawn to the fact that the particular presumption could be made.

56.2. There may be cases where two presumptions are made, and then, according to Professor Morean, the solution depends on balancing the social policy underlying the presumption. For example, take a case where there is a conflict between the presumption of validity of marriage and the presumption of innocence, (that is to say, a presumption against bigamy), (on the one hand) and the presumption of continuance (on the other hand). Then the presumption of innocence should outweigh the presumption of continuance of life, because it is socially important that marriages are not lightly invalidated and that persons are not lightly to be assumed to be guilty of bigamy.

56.3. Speaking about the nature of presumptions, Prosser says: "a presumption, as a rule of law applied in the absence of evidence, is not itself evidence, and can no more be balanced against evidence than two and a half pounds of sugar can be weighed against half-past two in the afternoon."

Most presumptions are rebuttable—hence the view that presumptions are "bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts".

56.4. Section 114 deals with a group of such rebuttable presumptions. Here is the text of the section in its enacting part:

"114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The Illustrations to the section state that the Court "may presume" the following facts:

(a) That a man in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

1 Morean in 44 Harvard Law Rev. 906.
2 See Williams Criminal Law, Chapter 23, and 61 L.Q.R. 379.
4 Mackowik v. KANASAS Civ. St. 1. & C.R. Co., 94 S.W. 256, 262 (per Lamm J.).

595
(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which things or states of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) That when a document creating an obligation is in the hands of the obliger, the obligation has been discharged."

565. But these illustrations are followed by a caveat: "The Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it.

The caveat itself is illustrated by explanatory comments which can be conveniently called "counter illustrations". Thus,—

"As to illustration (a).—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;"

"As to illustration (b).—A person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;"

"As to illustration (b).—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;"

"As to illustration (c).—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence;"

"As to illustration (d).—It is proved that a river ran in certain course five years ago, but it is known that there have been floods since that time which might change its course;"

"As to illustration (e).—A judicial act, the regularity of which is in question, was performed under exceptional circumstances;"

"As to illustration (f).—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;"

"As to illustration (g).—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;"

"As to illustration (h).—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;"
"As to illustration (i).—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it."

The illustrations are taken from the important presumptions relating to innocence, regularity and continuity, which were recognised at common law.

II. RATIONALE

56.6. Woodroffe has eloquently explained the rationale underlying section 114. "The history of jurisprudence illustrates the fact that among Judges as among Legislators, there is a constant struggle, however ineffectual it may be, to approach uniformity in the law. Although every Judge understands that each case should be determined according to its own facts, he often finds different cases so nearly analogous in the facts presented that similar instructions to the jury or directions to himself are appropriate in each. Judges thus find themselves not only applying to different cases the same substantive rules of law, but they derive aid from precedents even in reaching conclusions as to the facts of a given case. This is well illustrated by the growth of presumptions of law. Out of the attempts of many Judges to deduce rules for determining the "pregnent effect of certain facts or groups of facts often recurring, have developed in England many rules called presumptions, but which widely differ in importance and intensity. English and American Courts are, however, now inclined to abandon the arbitrary rules of evidence which formerly forbade inquiry into the real facts, and but few of the numerous presumptions formerly called conclusive can now be so classified. The Act is a strongly marked instance of this tendency."

56.7. As Stephen has said, "The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration."

56.8. The principle to which legislative recognition is given in the section is obviously of an abstract character, and by reason of its generality, it is difficult to apply it to a particular case unless something more concrete is before the mind. It is because of this aspect of the matter that the legislature has chosen to give elaborate illustrations and counter-illustrations to the section. In fact, it is these illustrations which raise questions worthy of consideration, and we, therefore, proceed straightway to a discussion of the illustrations without making further comments on the enacting part of the section.

III. ILLUSTRATION (a)

56.9. Some of the illustrations require discussion in detail, while some of them raise no problems. Taking up illustration (a), the court may, under that illustration, presume—

"(a) That a man in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

---

1See Illustrations (a), (b), (g) and (h).
2See Illustrations (e), (f), (l), (i).
3See Illustration (d).
4Woodroffe, Evidence Act, comment on section 114.
5Burr. Jones, Ev. I, ss. 8, 10.
6Steph, Introd. to Evidence, p. 175.
7Emphasis supplied.
56.10. In accordance, however, with the caveat that the court shall also have regard to such special facts in considering whether such maxims do or do not apply to the particular case before it, the counter-illustration requires the court to bear in mind—"As to illustration (a)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business."

The limits of illustration (a) are illustrated in a recent decision of the Supreme Court, in which it has been pointed out that the presumption is an optional one. In that case, the explanation which the accused gave was good enough to raise a serious doubt about the sustainability of the charge of his having stolen the property. For that reason, the Supreme Court, after referring to a decision of the Privy Council,1 acquitted the accused. The case before the Supreme Court related to a stolen truck found in the possession of the accused, whose defence was that he did not know that the truck was stolen. He had been told by the person from whom he obtained possession that the truck had met with an accident, and that the accused would have to invest some amount over the repair of the truck. The arrangement was that after the amount was recovered from the plying of the truck, the truck was to be returned to the person who gave it to the accused.

56.11. On these facts, the Supreme Court held that the explanation which the accused gave was good enough to raise serious doubts about the sustainability of the charge. If the explanation given is one which the court might think reasonable to be true, then the accused is entitled to acquittal even though the court may not be convinced of its truth. This is for the reason that the prosecution would then have failed in its duty to bring home the guilt of the accused beyond reasonable doubt.

No change is needed in this illustration.

IV. ILLUSTRATION (b)

56.12. The Court may, under illustration (b), presume—

"(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars."

There are, however, two caveats, and the Court is directed to have regard to such facts as the following:

(i) A person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself.

(ii) A crime is committed by several persons. A, B, C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable.

56.13. The principal question to be considered with reference to this illustration arises by virtue of section 133, which provides that a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice. We shall deal with this point later.2

3See discussion as to section 133, infra.
V. ILLUSTRATION (c)

56.14. The Court, under illustration (c), may presume —

"that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration."

To this is attached a counter-illustration, in the following terms:

"As to illustration (c), A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence."

Under section 118, Negotiable Instruments Act, 1881, the court shall presume consideration for a negotiable instrument until the contrary is proved.

56.15. There seems to be considerable obscurity as to the proper relationship between illustration (c) quoted above (on the one hand), and section 118 of the Negotiable Instruments Act (on the other hand). Both the provisions relate to the presumption of consideration in regard to negotiable instruments. Both create rebuttable presumptions. But the Evidence Act makes the presumption discretionary, while the Negotiable Instruments Act makes it mandatory. The provision in the Evidence Act is, chronologically speaking, earlier, while the provision in the Negotiable Instruments Act is later.

56.16. The principal question is of reconciliation of the two. In a Madras case¹ it was noted that the effect of the illustration in the Evidence Act is to make the presumption regarding consideration in respect of a negotiable instrument discretionary, while, under the Negotiable Instruments Act, the Court is bound to start with the presumption. But it was stated that there was no difficulty by reason of this position, because the kind of evidence which rebutted a discretionary presumption would rebut a mandatory presumption also.

This is one way of reconciliation. Din Muhammad J. observed, in a Lahore case² — "What was merely permissible under the enactment of 1872 was converted into a statutory obligation in 1881."

56.17. While this exposition of the law is unexceptionable, the position is not very neat from the point of view of a proper legislative formulation. It is not easy to answer the question whether the provision in the Evidence Act prevails, or that in the Negotiable Instruments Act, 1881, prevails. Dealing with this point, Vardhachariar J., held in the Madras case,³ as already stated, that the considerations that can justify the court in refusing to draw a presumption (under the Evidence Act) must equally operate to rebut the presumption drawn under the Negotiable Instruments Act. With great respect, however, this does not appear to be an entirely satisfactory method of reconciling the two. The co-existence of two provisions on the statute book — not easily reconcilable — is not very desirable.

56.18. A Bombay case⁴ is of importance in this context. The facts of the case were as follows:

Professional money-lenders sued a young man recently come of age, to recover certain loans of money alleged to have been advanced by them to him on promissory notes. The defendant, who, under the will of his father, was entitled to a large property, but had not yet come into possession of it, was of


39—131 LAD/ND/77
an extravagant and reckless character. The defendant pleaded, as to a part of the consideration for the notes, that he did not receive it, and as to a further part, that the consideration was immoral. In dealing with the first plea, the Court laid down the following propositions\(^1\) not as rules of law, but as guides in considering the evidence in such a case:

1. That upon the above facts the ordinary presumption that a negotiable instrument has been executed for value received was so much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money-lenders (the plaintiffs), the obligation of satisfying the Court that they had paid the consideration in full. That is the practical effect of illustration (c) to section 114 of this Act.

2. Where the plaintiff, in an answer to such a defence, affirmed that he had paid the consideration in full, and was corroborated by his books and witnesses, the onus of proof again shifted over upon the defendant.

3. The burden of proof thus thrown upon the defendant could only be met by a perfectly truthful and harmonious statement which the Court felt able to rely upon the confidence. In the absence of this, the ordinary presumption laid down in the Negotiable Instruments Act must prevail, vis., until the contrary is proved, the presumption should be made that every negotiable instrument was made for consideration.

56.19. A similar view has been taken in other cases.\(^2\)

These cases seem to hold that the ordinary rule that a negotiable instrument has been executed for value, is so much weakened by the allegation of the defendant, a young man, that he has not received the full consideration, and this is sufficient to shift the burden of proof, and to throw upon the money-lender the obligation of satisfying “the court that he has paid the consideration\(^3\) in full.”

56.20. Thus, in a suit upon three promissory notes executed in quick succession of each other by a young man who died pending the suit leaving a young widow, it was found that he was a man of considerable property. However, he was, at the time, out of possession, the property being in the management of his elder brother. It was also found that he was a man of extravagant habits, it was held that the onus would be shifted on the plaintiff, to make out that full consideration was paid as alleged by him.\(^4\)

56.21. Some of these cases show that while the Bombay High Court, in the case already referred to,\(^5\) wished to indicate only a guideline, that guideline has been taken as a rule.\(^6\)

---

\(^1\)Summary taken from woodcroft.
\(^4\)(a) Sundarammal v. Subramania Chettiar, 29 M.L.J. 236; (b) Sami Sah v. Parthasarathy, 31 I.C. 739; (c) Cf. C.S.A. No. 59 of 1926 (Mad.) (endorsement by a Hindu widow, onus not shifted); (d) Khader Mal v. Shee Narain, A.I.R. 1943 All. 90.
Other circumstantial evidence may also be given to rebut the initial presumption.¹

56.22. The cases discussed about show that the law is not very clear, and it is desirable to reconcile the two provisions.

An plausible way of reconciling the two provisions, — i.e. section 118 and section 114 — would be to regard illustration (c) to section 114 as sounding a note of warning that the rule laid down in the illustration was not intended to override the general provision of law that a contract entered under undue influence is bad. This was the approach suggested by Din Mohammad J., in the Lahore case.²

56.23. However, with respect, it may be pointed out that undue influence is a much narrower term than mere “influence”; and the distinction between influence and undue influence is well understood.³ Where undue influence is relied on, it must be established that the person in a position of dominion has used that position to obtain unfair advantage for himself and so cause injury to the person relying upon his authority.

56.24. In this context, undue influence cannot be predicated unless there is prior indebtedness and the transaction is unconscionable. These, however, are not the requirements of section 114, illustration (c), which is wider than section 16, illustration (c) of the Contract Act and section 111, Evidence Act.⁴

56.25. The matter is not merely academic. Often in the past⁵ — for example, in the case of youngmen of extravagant habits borrowing money on a prome the controversy assumed practical importance.

It has been pointed out⁶ in an article published sometime ago that because of the obscurity of the position, litigants and lawyers are often confused as to what evidence they should lead to rebut the presumption of consideration or to support it. The question of onus becomes important where the evidence on both sides is equally balanced or is non-existent, because, in such cases, the onus is the determining factor.

56.26. In the circumstances, we recommend that section 114, illustration (c) and the counter-illustration, should be repealed, so as to leave free scope to section 118 of the Negotiable Instruments Act. It is not desirable that on the same point, the statute book should contain two presumptions, of which one is discretionary while the other, though rebuttable, is mandatory.

VI. ILLUSTRATION (d)

56.27. Under it, the Court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence.

But the Court must take into account this fact — “It is proved that a river ran in certain course five years ago, but it is known that there have been floods since that time which might change its course.”

¹(a) Singar Kanwar v. Basdeo Prasad, A.I.R. 1930 All. 568.
(b) Jawahir Lal v. Manna Lal, A.I.R. 1930 Oudh 108;
⁵See discussion, supra.
56.28. We have no comments on this illustration, except that we would like to point out that certain important cases of presumption of continuance of human affairs are dealt with in special sections — e.g., the presumption of continuance of life.1

VII. ILLUSTRATIONS (e) and (f)

56.29. Illustrations (e) and (f) to section 114 empower the court to presume—

"(e) That judicial and official acts have been regularly performed;
(f) that the common course of business has been followed in particular cases;"

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:

"As to illustration (e) — A judicial act, the regularity of which is in question was performed under exceptional circumstances.

As to illustration (f) — The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbance;"

These illustrations need no comments.

VIII. ILLUSTRATIONS (g) and (h)

56.30. Illustrations (g) and (h) empower the court to presume—

"(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person failing to produce.
(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:

"As to illustration (g) — A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;

As to illustration (h) — A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;"

These two illustrations are of particular interest in so far as they arise out of the very process of giving evidence.

IX. ILLUSTRATION (i)

56.31. Illustration (i) empowers the court to presume—

"(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged."

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:

"As to illustration (i) — A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it."

This illustration does not require any discussion.

1Section 107.
CHAPTER 57

ESTOPPEL — SECTION 115

I. INTRODUCTORY

57.1. Chapter 8 of the Act deals with estoppel. The most important section of the Chapter is section 115.

Under section 115, a person who makes a representation and induces a belief in the other person is precluded from denying its truth if the other person has acted upon it. This, of course, is not the text of the section; but it expresses the principle in ordinary language. The doctrine is known as 'estoppel' — a word which occurs in the marginal note of the section but not in the text.

57.2. "The Promise, like the wheel", said O.K. Chesterton, "is unknown in Nature and is the first mark of Man". This 'Promise' is as essential to all contractual relations, whether of individuals or States, as the wheel is to machinery. The recognition of the sanctity of the spoken or the written word, and of the responsibility attaching to a man's declaration, acts or omissions, which others have relied on, underlies the modern ESTOPPEL arising out of REPRESENTATIONS. That is the basis of the section. The principle is well understood, and needs no amendment. The discussion that follows is intended merely to elucidate certain important aspects. On a few points of detail, it will also be necessary to examine the case-law.

57.3. At common law, there were three kinds of estoppel, namely, (a) by record, (b) by deed, and (c) in pais.

(a) Estoppel by record is dealt with in sections 11-14 of the Code of Civil Procedure, 1908, and in sections 40-44 of the Evidence Act.

(b) Estoppel by deed is not the subject matter of any special rule in the Indian Legal system.

(c) Estoppel in pais is dealt with in this Chapter (Chapter 8 of the Act).

57.4. In dealing with this and the following sections, it is to be remembered that they are not exhaustive of the law of estoppel, since all rules of estoppel are not also rules of evidence; secondly, section 115 or section 116 does not enact, as law in India, anything different from the law of England on the subject of estoppel.

II. NATURE OF ESTOPPEL

57.5. At this stage, a brief discussion of the nature of estoppel may be useful. In the case of Moorgate Mercantile Co. v. Lord Denning M. R. made the following observations which succinctly describe the nature of estoppel.

---

2Casperd, Estoppel and the Substantive Law (1915), page 1.
4Sarat Chander v. Gopal Chunder 19 I.A. 203 215 (1892); I.L.R. 20 Cal. 296 (P.C.).

603
"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."

Dixon J. put the principle in these words:¹

"The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations".

57.6. An estoppel, is thus, a personal disqualification, laid upon a person peculiarly circumstance, from proving particular facts; whereas a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them². A man is estopped when he has said, done or permitted something or act, which the law will not allow him to gainsay.

57.7. It is obvious that an estoppel amounts to a fictitious statement treated as true,³ and modern estoppel has the effect of making untruth take the place of truth.⁴

57.8. However, this untruth is substituted in the interests of justice — primarily for the reason that where an untruth has led another person to act upon it and change his position, it is just and fair to him that the untruth must be adhered to by its author.

57.9. The conditions in which estoppel may arise are dealt with in section 115. In order that estoppel may arise, it is not necessary that there is any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel.⁵ Occasionally, one comes across observations to the contrary. For example, in all Allahabad case⁶ it was observed that if the appellant acted in ignorance of his rights, there could be no question of estoppel operating against him. These observations were obiter, and we do not think that the Court intended to lay down any such rule. Section 115 does not require that the person who, by his declaration or conduct, induces a belief in the mind of others, must have been aware of his rights.⁷

57.10. Owing to its use in ancient times in shutting out the truth against reason and sound policy, the doctrine of estoppel⁸ was not favoured, and was characterised as "odious". In modern times, the doctrine has lost all odium, and has become one of the most important, useful and just, factors of the law. At the present day, it is employed not to exclude the truth; its whole force being directed to preclude parties, and those in privity with them, from unsettling what has been fittingly determined, — a just principle which can be, and is daily administered to the well-being of society.

²Stephen, Introduction to the Evidence, page 175.
⁵Sarat Chunder v. Gopal Chunder, (1892) I.L.R. 20 Cal. 296 (P.C.)
⁷A.I.R. 1925 P.C. 146.
III. MINORS

So much as regards the principle of the section and the nature of estoppel. A few points of detail relating to the section may now be considered.

57.11. On the question whether section 115 applies to a minor, there seems to be some conflict of decisions, as would be apparent from a Bombay case,¹ where the case law on the subject is reviewed. It should be stated here that the controversy arose in the context of false declarations by minors as to age with reference to contractual capacity. That particular point is not of much importance now. But the views judiciously expressed in the course of the discussion, as to the meaning of “person” in section 115, are still relevant.

57.12. According to one view, the word “person” in section 115 is confined to persons having capacity to contract. This is the view taken in the Calcutta High Court in an early case² by Maclean C. J. and Prinsep J. While Ameer Ali J. was of the view that the section was not totally inapplicable to minors.

57.13. This view has found favour with many High Courts; and, in the Bombay case, to which we have just made a reference,³ Beaumont C. J. described the view as “plainly untenable”. At the other extreme is the view⁴ that section 115 applies to a minor, and a minor is estopped from pleading his minority even in relation to contractual liability if there is fraud. In between is the Bombay view, namely, that (i) section 115 applies to minors, but (ii) in relation to contractual capacity, it is overridden by section 11 of the Indian Contract Act, 1872.

57.14. In the leading case on the contractual capacity of minors,⁵ the question whether section 115 applies to minors or does not apply, was left open by the Privy Council. There are, however, observations of the Privy Council in a later case⁶ to the effect that a deed by a minor is a nullity and incapable of founding a plea of estoppel.

57.15. As already stated above, the position regarding effect of false declaration as to age is not of importance. In terms of the relationship between section 115 on the one hand, and the provision regarding incapacity of minors in the Contract Act on the other hand, the proper view seems to be that estoppel cannot override a plain statutory provision of law. In other words, section 11 of the Contract Act being a matter of substantive law, it must prevail over section 115, Evidence Act, which is merely a matter of procedure.⁷

57.16. But this does not mean that section 115 does not apply to a minor in other cases. The section could, for example, apply where the cause of action is not in contract or transfer of property, and is one not barred by a specific statutory provision. The Bombay view thus appears to be correct.

57.17. To elaborate the point, we can state two aspects of the matter thus —

(a) The law relating to estoppel must be read together with, and subject to, other laws in force, such as those relating to contract and transfer of property, and where such laws declare a minor to be free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel. An estoppel cannot alter the law, but in other cases, a minor may be estopped. A minor

¹Gadigeppa v. Balangowda, A.I.R. 1931 Bom. 561, 568 (Full Bench) (reviews cases).
²Brohme Dutt v. Dharan Das, (1898) I.L.R. 26 Cal. 381.
³Gadigeppa v. Balangowda, A.I.R. 1931 Bom. 561, 568 (Full Bench) (reviews cases).
⁴Vagar Nath Singh v. Lalit Prasad, (1909) I.L.R. 31 All. 21 (Benerji J’s view).
⁵Mohar Dibee v. Dharan Das, (1903) I.L.R. 30 Cal. 539 (P.C.).
is not liable upon a contract nor for a wrong arising out of, or immediately connected with his contract, such as a fraudulent representation, at the time of making the contract that he is of full age.¹

(b) A person under disability cannot by an act in pais, do what he cannot do by deed.² He cannot, by his own act, enlarge his legal capacity to contract or to convey. He cannot be made liable upon a contract by means of an estoppel under this section, if it be elsewhere declared that he shall not be liable upon a contract. To say that by act in pais that could be done in effect which could not be done by deed, would be practically to dispense with all the limitations the law has imposed on the capacity to contract.³

(c) But this does not mean that a minor can never be estopped. Under section 116, for example, (estoppel between landlord and tenant), a minor can be estopped.⁴ This is because section 11 of the Contract Act does not come in the way where the original tenancy was not entered into by a minor, who has now succeeded to the tenancy.

The broad assertion that the doctrine of estoppel in pais has no application whatever to infants, does not, therefore appear to be correct.⁵

Our own view has been set out at length above, in view of the doubts expressed on the subject.⁶

IV. PROMISSORY ESTOPPEL

57.18. In recent times the doctrine of promissory estoppel has emerged. It is too early to say anything very definite about its scope, but the following propositions taken from Cheshire⁷ indicate its broad features—

(1) If a promise is given by one party to a contract not to insist upon his rights under that contract and there is no consideration for the promise, the promisee cannot sue upon it.

(2) If the promisor breaks this promise and sues on the original contract, the promisee may use the promise by way of defence.

(3) To succeed in this defence, the promisee must persuade the court that it is “inequitable” to allow the promisor to sue on the original contract.

If the promisee has himself been guilty of unconscionable conduct the court will certainly not allow the equity to be pleaded. But in the present context as elsewhere the word ‘inequitable’ has a more technical significance.

The promisee must have acted or omitted to act in reliance upon the promise; and by this act or omission he must have altered his position for the worse. Thus, in the New Zealand case of P. v. P.,⁸ he was induced not to take advantage of his statutory powers.

(4) The fourth point is still the subject of controversy. It has been strongly urged that the doctrine of promissory estoppel applies only to suspend and not to abrogate the promisor’s legal rights. Such, indeed, has been its effect in most of the cases in which the question has been relevant. But it was not so restricted in the case of P. v. P., and Lord Cairns in

¹Pollock, Contracts, 6th Ed., pages 52 and 72.
⁵Cheshire and Pifoot, Contracts, (1971), pages 89, 90.
⁶Some of the footnotes have been omitted.
Hughes v. Metropolitan Rail Co.\(^1\) clearly stated the proposition in the alternative. The equitable doctrines might be applied, he said, when the promisee had been led "to suppose that the strict rights will not be enforced or will be kept in suspense or held in abeyance". The point would seem at least to be open to argument.

\(^5\)7.19. In India also, "promissory estoppel" has received consideration in judicial decisions.\(^2\) It has been debated at great length in periodical legal literature also. However, the dimensions of this concept await further definition. Apart from that, it may be stated that the topic may not properly belong to the law of evidence, since its subject-matter is nearer to substantive law than estoppel in the limited sense as known to section 115. For these reasons, we do not propose to discuss this topic in the present report.

V. NO ESTOPPEL AGAINST STATUTE

\(^5\)7.20. In general, there is no estoppel against a statute, in the sense that if a certain provision is made by statute for the public benefit, the enforcement of that provision by the competent statutory authority cannot be defeated by arguing that the competent authority had made a representation of fact which renders the statutory provision inapplicable and which estops the concerned authority from relying on the statute.

\(^5\)7.21. Where a particular act is declared to be void and unlawful by statute, a party cannot, by representation, any more than by other means, raise against him an estoppel so as to create a state of things, which he is under a legal disability from creating, as pointed out by Vice-Chancellor Beacon in Barrow's case.\(^3\)

\(^5\)7.22. "The doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes, and it is not competent to the parties to a contract to estop themselves or anybody else in the face of an Act of Parliament .............. I am of opinion that as between the parties to this contract there was no estoppel, they contracted to do a thing which in the result it was unlawful to do".

\(^5\)7.23. On the same principle it has been held* that a corporate body cannot be estopped from denying that they have entered into a contract, which it was ultra vires for them to make.

VI. RECOMMENDATION

\(^5\)7.24. In the result, the only change needed in section 115 is the addition of an Explanation as follows to clarify the position as to minors—

"Explanation.—This section applies to a minor or other person under disability; but nothing in this section shall affect any provision of law whereby the minor or other person under disability becomes incompetent to incur a particular liability.

\(^{1}\)Hughes v. Metropolitan Rail Co., (1887) 2 App. Cas. 439.
\(^{2}\)c) A.I.R. 1973 All. 230.
\(^{3}\)Barrow's case (1880) 14 Ch. D. 422-33, affirmed on appeal in (1880) 14 Ch. D. 443.
\(^{3}\)Canterbury Corporation v. Cooper, (1909) 100 L.T. 597.
CHAPTER 58

RULE EXCLUDING EVIDENCE OF TITLE — SECTION 116

I. INTRODUCTORY

58.1. A special rule excluding evidence of title is given in section 116. It reads—

"116. No tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given".

58.2. As the Evidence Act was enacted before the passing of the Transfer of Property Act in 1882, it uses the expression "tenant", while the expression used in the Transfer of Property Act is "lessee".

58.3. This section is described in the Act as a species of estoppel—vide the marginal note to the section—but, strictly speaking, where a tenant enters into occupation of premises, he does not make any representation of fact to the landlord, though he does make a promise to pay the rent. In this respect, section 116 can be distinguished from section 115. It is really estoppel by agreement.

58.4. It will be more accurate to say that since the tenant could not have got the possession of the land without admitting the right of the landlord, he should not be allowed to deny that right, so long as he is in possession.

58.5. There is, no doubt, some element of estoppel present in this case namely, that on the strength of the implied undertaking made by the tenant, the landlord put him into occupation and thereby did something to his detriment. The tenant is now estopped from denying the truth of that which was the foundation of the relationship. Thus, action taken by a person (landlord in this case) on the strength of the act of another, is the common element in sections 115-116.

II. RATIONALE

58.6. As to the rationale underlying the section, we would like to quote the observations of Baron Martin in Cuthbertson v. Irving:

"If the lessor have no title and the lessee be evicted by him who has title paramount the lessee can plead this and establish a defence to any action brought against him; but so long as the lessee continues in possession under the lease the law will not permit him to set up any defence founded upon the fact that the lessor 'nil hebuit in enemantis' and that upon the execution of the lease there is created in contemplation of law a reversion in fee simple by estoppel in the lessor which passes by descent to his heir and by purchase to an assignee or devisee....."


608
purports to grant, how does it concern him what the title of the lessor or the heir or assignee of his lessor really is? All that is required of him is that having received the full consideration for the contract he has entered into, he should on his part perform it".

58.7. The Privy Council has, after quoting this passage, observed:

"Not every word of this passage can be taken as law in India at the present time, but it is a useful exposition of the reason which underlies the well-known doctrine of estoppel which has been enacted for India in section 116, Evidence Act".

58.8. It would thus appear that the estoppel under section 116 is by reason of agreement, and is based on permissive enjoyment. If A, being in possession of land, delivers the possession to B upon his request and upon his promise to return it, with, or without rent, at a specified time, or at the will of A, then B cannot be allowed, while still retaining possession, to dispute A's title, because, to allow him to do so would be to allow him to work a wrong against A, by depriving him of the advantage which his possession afforded him, and with which he would not have parted, but for the promise (or, rather the implied agreement) of B that he would hold it from him and in his place and stead.

The broad principle is that a person who has received property from another will not be permitted to dispute the title of that person or his right to do what he has done.

58.9. Thus, the estoppel of a tenant is founded upon the contract between him and his landlord. The tenant took possession under a contract to pay rent as long as he held possession under the landlord, and give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admitted and under whose title he took possession has not a title.

58.10. The section enacts no new principle. This was so even before the Act, as is clear from the cases which arose in Calcutta, and Bombay.

III. SCOPE AND CONSEQUENCES OF THE DOCTRINE

58.11. The section covers tenants as well as licensees. There is no distinction between the relation of a tenant and that of a licensee, to whom the same principles apply. The section, therefore, specifically mentions licensees of immovable property.

Though not mentioned in the section, licensees of trade marks and patents are also covered by a similar principle—compare section 117. Even as to tenants, it is true to say that the section does not contain the whole law of the tenant estoppel.

58.12. An important consequence of the rule estopping a tenant is that a tenant cannot acquire a title against his landlord during the currency of the lease;

---

2Emphasis added.
5In re Stringer's Estate, L.R. 6 Ch. D., 9, 10. See Duke v. Ashoy, 7 H. & N., 602.
7Vasudev Daji, (1871) 8 Bom. High Court Reports 175.
8Doe d. Johnson v. Bayup, 3 A. & E., 188.
for, occupation by a tenant is never adverse to the landlord’s title, which the tenant is estopped from denying. Any encroachment by the tenant on land belonging to third parties will also ensure for the landlord’s benefit, unless a different intention is shown by the conduct of the landlord, or tenant.

IV. LIMITATIONS OF THE SECTION

58.13. It might be useful to draw attention to an important limitation on the scope of the section. In the first place, the operation of the section is restricted to the period of “continuance of the tenancy”, so that the tenant is not estopped from denying the title of the person who was his landlord, if the tenancy has expired. Usually, judicial decisions dealing with this aspect assume that this principle applies only after the tenant has surrendered possession. We shall discuss this aspect later.

58.14. The second important limitation of the section is that the estoppel is confined to the title of the landlord “at the beginning of the tenancy”. The section so provides expressly. Its application to cases of attornment is, however, a matter of some difficulty, and will be adverted to later.

58.15. In the third place, to discuss a limitation not so explicit in the section—a plea of the illegality of the transaction of lease can, according to judicial decisions, be raised by the tenant. The landlord will have to recover possession on the basis of title.

58.16. In the fourth place, if the relationship of tenancy is itself denied and not proved, the section can have no application.

V. ENGLISH LAW AS TO ESTOPPEL BETWEEN LANDLORD AND TENANT

58.17. There is, in England, a general rule that a tenant is estopped from denying his landlord’s title, and a landlord from denying his tenant’s. This is connected with the rule that if A permitted B to take possession of A’s land, B may not dispute A’s title and so plead jus tertii against him.

Estoppel is a principle of the law of evidence which, in this case, precludes parties who have created a tenancy from denying their respective capacities as against one another.

(a) Whitmore v. Rumohries, (1871) L.R. 7 C.P. 1;
(b) Att. Gen. v. Tomline, (1880) 15 Ch. D. 150;
(c) East Stonehouse U.D.C. v. Willoughby Bros. Ltd. (1902) 2 K.B. 318;
(d) King v. Smith, (1950) 1 All. E.R. 553.
See discussion as to “continuance of tenancy”, infra.
See discussion as to attornment, infra.
Abdul Aziz v. Kanthu Mallick, (1911) I.L.R. 38 Cal. 512, 515 (non registration under the Bengal Land Registration Act, 1876).
Mogarry & Wade, Law of Real Property (1960), page 651.
Thus, the landlord cannot question the validity of the tenancy that he has purported to grant, and the tenant may not question the landlord's title to grant it, unless ultra vires. The estoppel operates from the time when the landlord puts the tenant into possession.

58.18. The doctrine is not confined to lease by deeds. It applies to tenancies from year to year as well as to leases for a year, and at sufferance, and statutory tenancies under the Rent Acts; it applies even to licences; and it operates whether the tenancy was created by deed or writing or orally.

VI. ENGLISH LAW AS TO TENANCY BY ESTOPPEL

58.19. In addition to the estoppel between landlord and tenant, there are, in England, certain cases in which there is said to be a tenancy by estoppel, which has been thus explained: "If a person with no estate in land purports to grant a tenancy of the land, the grant can pass no actual estate."

"Yet, even though the lessor's want of title is apparent to the parties, both the parties and their successors in title will be estopped from denying that the grant was effective to create the tenancy that it purported to create. There is thus brought into being a tenancy by estoppel under which the parties and their successors in title have (as against one another) most of the rights and liabilities of an estate in land, although no estate is actually granted. Such a tenancy will, for example, devolve and may be alienated in the same way as any other tenancy, and the landlord may distrain for rent in the ordinary way. But since estoppels do not bind strangers, he cannot exercise his normal right to distrain goods not owned by the tenant."

VII. ATTORNEMENT

58.20. Reverting to the section in our Act, we should note that there is some obscurity as to the effect of an attornment—that is to say, how far attornment creates an estoppel, and in what manner. The view has been taken that though attornment creates an estoppel, it does so by virtue of an uncodified rule not falling within section 116. It has also been stated that attornment may create an estoppel under section 116, but only if the attornment has the effect of creating a new tenancy. It is also commonly understood that even if an attornment creates an estoppel either under the section or otherwise, it is possible for the tenant to show that the attornment was made under mistake or by fraud."

58.21. In order to appreciate the position in this regard, it may be useful to examine the nature and origin of attornment. In England, attornment originated in the feudal times, and seems to have been a concomitant of the doctrine that the tenant owed loyalty only to his landlord (until attornment). Though attornment, or the consent of the tenant to hold under the transferee, was still required up to the 16th century, the Old Nature Brevium (temp. Edward III. ed. (1449) 1 All. E.R. 413, 416, 417. Origin.}

Footnotes:
3Hall v. Butler, (1830) 10 A. & E. 204;
8(a) Doe d. Johnson v. Banyup, (1835) 3 A. & E. 188;
9(b) Compare Tadman v. Henman, (1893) 2 Q.B. 168, 171.
12Megarry & Wade, Law of Real Property (1966), page 1008.
13The Doctrine is discussed by A.M. Pritchard in 80 L.Q.R. 370.
14Footnotes referring to cases omitted.
15See infra.
16See the Bombay case, infra.
Pynson (n.d.) fo. xliv; ed. Tottel (1584), ff. 168-70 contains two forms of writ (Quid Juris Clamat, and Per Que Servitia) which can be traced back to Bracton's own day, to compel the tenant not being a tenant in tail (Bowles case (1615), 11 Co. Rep. 80a) to attorn or be attorned. Meanwhile, the passing of the Statute of Uses had dealt a further blow at the theory of feudal allegiance; for it was soon afterwards held (Heyward's case (1595), 2 Co. Rep. 35a) that a conveyance which operated by virtue of the statute passed the reversion without attornment of the tenant. Finally, in 1705, a statute (4 & 5 Anne, c. 16, s.9) abolished the necessity for attornment in all "grants and conveyances" of reversions. It would seem that at the present day, attornment is not, in law, necessary to continue the relationship of landlord and tenant on a transfer of the reversion.

58.22. A tenant is, however, protected if he pays rent to the former reversioner without notice of the transfer of the reversion. To that extent, attornment is desirable. Any act which recognises the position of the new reversioner will be sufficient as an attornment in this context.

58.23. This statement of the present position made above with reference to England would, in substance, be true of India—although, of course, we have no history of feudalism. As to the effect of attornment as estoppel, in Prasad's case, the Privy Council (Sir George Rankin) observed: "The section does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an act for rent and the parties to an act for use and occupation. Whether, during the currency of a term, the tenant by attornment to A who claims to have the reversion, or the landlord by acceptance of rent from B who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, but they are instances of cases which are outside S. 116 altogether; and it may well be that as in English law the estoppel in such cases proceeds upon somewhat different grounds and is not wholly identical in character and completeness with the case covered by the section. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a "given landlord." It provides that neither a tenant nor anyone claiming through tenant shall be heard to deny that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise—which is the case before the Board on this appeal—the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to dis-entitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel, e.g., by attornment, acceptance of rent etc. In this sense it is true enough that the principle only applies to the title of the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end.

---

1Adapted from Jenks, Digest of English Civil Law (1947), Vol. 2, page 633.
3Section 151(2), Law of Property Act, 1925.
7Emphasis added.
8Emphasis supplied.
58.24. In the above observations of Sir George Rankin section 116 was treated as not covering attornment. In a Bombay case, the application of section 116 to attornment was confined to cases where there is a new tenancy, and it was observed that when, through ignorance or fraud, the tenants had made an attornment to a particular person, they were not altogether estopped from showing that the person to whom the attornment had been made had no title at the date of the attornment. This decision follows an earlier Calcutta case,—though it may be pointed out that the observations in the Calcutta case were obiter.

58.25. While we appreciate that section 116 is narrowly worded, the effect of attornment requires consideration. It seems to us that if attornment does create an estoppel, that is not because a new tenancy in the technical sense is created. The creation of a (new) tenancy would require compliance with the formalities prescribed by the Transfer of Property Act, 1882, or other legislation relevant to the case. In our view, estoppel is created by attornment because attornment amounts to a recognition of the new status,—the derivative title of the landlord to whom the tenant is attorned.

58.26. By virtue of the recognition of the new landlord and by reason of the fact that having so recognised the new landlord, the tenant continues in possession or otherwise derives a benefit which would not have come to him but for the acknowledgement, the tenant is estopped from challenging the derivative title of the new landlord.

58.27. As regards the question whether the situation falls within or outside section 116, a doubt may be legitimately entertained, the discussion in the Privy Council case being obiter and inconclusive. But if there is a doubt, we think it should be removed by suitable amendment. The doubt arises because of the words “beginning of the tenancy” in section 116. Do they mean the tenancy with the particular person, or do they mean tenancy in the abstract?

58.28. Whatever be the true construction, we are of the view that after attornment, the relationship between the tenant and the landlord should not, so far as estoppel is concerned, be left to be governed by an uncodified rule. The rule applicable should find a place in the statute. The content of the rule could, in certain respects, differ from the rule governing the relationship of the original landlord and the original tenant. But the rule, whatever be its content, should find a place in the Act. The situation is a frequently occurring one, and it is desirable that the section should specifically deal with it. The present position is not satisfactory.

58.29. It would appear that a part of the obscurity is due to the fact that this subject of great practical importance has been totally left out of section 116—most probably because the attention of the draftsman was not drawn to it. It can hardly be denied that the principle, in its broad content, should not, after attornment, be different from that before attornment. No doubt, alleged derivative title can be challenged by the tenant. But once there is attornment, this cannot be permitted in the absence of mistake or fraud. Attornment has, as its very object, the recognition of the derivative title. Apart from any question of fraud or mistake, it is difficult to understand how a tenant can question the title of the assignee of the landlord after attornment. We are of the view that the position should be set out clearly in the section. We recommend a suitable amendment of the section for the purpose.

---

3 See the underlined words in the Privy Council case, supra.
VIII. CONTINUANCE OF TENANCY

58.30. We have already mentioned that the section, as it stands at present, is confined to the period of "continuance of the tenancy". Taken literally, this requirement would mean that if the tenancy is terminated by, say, a notice to quit, and the tenant continues in possession, there is no estoppel. This, however, is not the common understanding of the section. In fact, such a construction would lead to anomalies, where a recalcitrant tenant continues in possession after termination. It is hardly fair that he should be allowed to dispute the title of the landlord and that too as a result of his own default.

Fortunately, this is not the usual construction. According to the commonly accepted view, even if the tenancy terminates (e.g., by a proper notice to quit or by forfeiture), the estoppel continues to operate under the section.

This is well established by a series of decisions.

58.31. It appears to us that the language of the section requires a slight amplification in this regard, in order that it may reflect the judicial construction.

Of course, the above discussion is not concerned with the acquisition as a result of adverse possession by a tenant remaining in possession after termination of the tenancy.

That is a separate topic. If the tenant disputes the title of the landlord as of a date later than the period of tenancy, the section is not relevant.

58.31A. In many cities, by virtue of the legislation relating to control of rent and eviction, a tenant whose contractual tenancy has been terminated nevertheless continues in possession as a 'statutory tenant'.

Such a person would also presumably be governed by section 116.

IX. RECOMMENDATION

58.31B. In the light of the above discussion, we recommend two amendments in section 116. In the first place, after the words "during the continuance of the tenancy", the words "or at any time thereafter if the tenant continues in possession after termination of the tenancy" should be inserted.

Secondly, we recommend the insertion of a new sub-section in section 116, as follows:

"(2) Where a tenant in possession of immovable property is attorned to another, the tenant or any other person claiming through him shall not, during the continuance of the tenancy, or at any time thereafter if the tenant continues in possession after termination of the tenancy, be permitted to deny that the person to whom the tenant was attorned had, on the date of the attornment, title to such immovable property: but nothing in this sub-section shall preclude the tenant from producing evidence to the effect that the attornment was made under mistake or was procured by fraud."

---

1See discussion as to limitations of the section, supra.
4(a) Makhan v. Balakhi, A.I.R. 1919 Lah. 334;
(b) Krishna Prasad v. Adivath, A.I.R. 1944, Patna 77, 83, 84 (Discusses effect of attornment on original landlord also);
(c) Charubala v. Gomes, A.I.R. 1934 Cal. 499;
(d) Hirab v. Jivani, A.I.R. 1955 Nag. 234, 236, para 10.11 (review cases);
(e) Bhatmani Bawa v. Himmat. A.I.R. 1917 Cal. 498 (see Ashutosh Mukerji J's judgment).
ESTOPPEL OF ACCEPTOR OF BILL, BAILEE OR LICENSEE — SECTION 117

59.1. In section 116, which we have discussed so far, the estoppel dealt with rests on agreement. The next section—section 117—also deals with three other instances of estoppel by agreement, namely, (i) against the acceptor of a bill of exchange, (ii) against a bailee, and (iii) against a licensee. In all the three cases there is an express or implied agreement which forms the basis of the relationship created by the parties.

The principal provision in the section reads—

"117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license."

There are two Explanations appended to the section, which we shall deal with later.

59.2. To take up, first, the estoppel against the acceptor of a bill of exchange. The acceptance of a bill of exchange amounts to an undertaking to pay to the order of the drawer, but the transaction would be idle if, after having so undertaken, the acceptor were allowed to set up that the drawer had no authority to draw the bill. He is, therefore, precluded from doing so, for to allow him to do so would be to allow him to contradict that which the act of acceptance really imports.

59.3. To elaborate the matter, the acceptance of a bill of exchange is deemed a conclusive admission, as against the acceptor, of the drawer’s capacity to draw: and, if the bill is to be payable to the order of the drawer, then of his capacity to endorse. If it is drawn by “procuration”, then it is also a conclusive admission of the authority of the agent to draw the bill in the name of the principal. But, there is no admission on the part of the acceptor, of the signature of the payee—even where the payee is the same party as the drawer, or of the signature of any other indorser: and this is so, even though, at the time of the acceptance, the endorsements were already contained on the bill.

59.4. There are two Explanations to the section. Under the first Explanation, the acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.” It may be noted that this Explanation is a departure from the English law. In England, the acceptor is bound to know his correspondent’s signature.

59.5. That portion of section 117 which relates to the acceptor was discussed in a previous Report of the Law Commission, and a recommendation was made that the matter should be incorporated in the Negotiable Instruments Act. But this recommendation may be carried out only after the

3The provision to be recommended to be inserted in the Negotiable Instruments Act is in the 11th Report at page 113, draft section 104.

615
necessary legislation is passed to revise the Negotiable Instruments Act. It may
be noted that no such legislation has yet been initiated.

Provisions in the
Negotiable Instruments Act.

59.6. To complete this discussion, in so far as it relates to bills of
exchange, we may state that there are certain provisions creating estoppel, in
relation to negotiable instruments, in the Negotiable Instruments Act.¹

Bailee
and
licensee.

59.7. So much as regards the acceptor of a bill of exchange. The estoppel
of bailee and licensee, dealt with in the latter half of the section, is analogous
to that of landlord and tenant, and is based on a similar principle. In particular,
the estoppel against a bailee has great practical utility. For example, where a
car is delivered for repairs by X to Y, Y is estopped from questioning the
title of X,² because of this part of the section.

Second
Explanation.

59.8. The second Explanation to the section provides that if a bailee
delivers the goods bailed to a person other than the bailor, he may prove that
such person had a right to them as against the bailor.³ This relaxation of
estoppel is, in a sense, analogous to eviction by paramount title in the case of
a landlord and tenant—which also has a similar effect of relaxing the tenant’s
estoppel and leaving the matter at large.

Licences
of
and
patents
and
trademarks.

59.9. The position of a licensee of a patent who, under a licence, is
working a right for which another has a patent, is analogous to the position
of tenant and landlord, and the licensee is bound in the same way.⁴ He cannot
question the validity of the patent during the continuance of the license, though
he may show what the limits of the patent are.⁵ A right to use a trademark
may be created by license. Such a licensee is also estopped from denying the
licensor’s title or the validity of the license, even though he attempts to
repudiate the contract.⁶

No changes are required in this part of the section.

Agency.

59.10. It may be noted that the Evidence Act is silent as to estoppel
arising from agency. The law of agency is dealt with in the Contract Act but
that Act does not deal with estoppel between principal and agent, though it has
a provision dealing with “pretended agency” which would operate in favour of
third persons. It may, however, be stated that ordinarily, an agent is not
permitted to set up the adverse title of a third person in order to defeat the
rights of the principal, or to dispute the title of the principal.

59.11. As was observed by Woodroffe J., sections 115 and 116 are not
exhaustive of the law of estoppel. Hence the sections may be applied by analogy
to parties not mentioned therein. On that basis, the agent would be estopped
to the extent mentioned above. We respectfully agree with Woodroffe’s view
and do not suggest any change.

¹Sections 120, 121 and 122, Negotiable Instruments Act, 1881.
²Calcutta Credit Corporation v. Prince Peter of Greece A.I.R. 1964 Cal. 374, 377,
para 9; 68 C.W.N. 554.
³As to English law, see Biddle v. Pond (1905) 6 R. & S. 225, approved in Rogers
⁴For an exception in English, see Ex parte Davies, (1881) 19 Ch. D. 86.
⁵Clark v. Addle, 2 App. Ca., 423, In the matter of D.H.R. Moses, (1887) I.L.R. 15
Cal. 244.
⁶As to estoppel against patentee, see further:
(a) Cropper v. Smith, 26 Ch. D., 700:
(b) Proctor v. Bennis, 36 Ch. D., 749.
⁷Jagarnath v. Creswel, (1913) I.L.R. 40 Cal. 814, affirmed in Hannah v. Jagarnath,
(1914) I.L.R. 42 Cal. 262 (Trademarks).
¹Sections 142-144. Contract Act.
COMPETENCE AND COMPPELLABILITY — GENERAL RULE
SECTIONS 118-119

I. INTRODUCTORY

60.1. So far, the Act has mostly dealt with rules applicable to evidence Introductory, as such, and not to the witnesses who give it. With section 118, the Act directs its attention towards the witnesses. Oral evidence comes to the court through the medium of witnesses. It is, therefore, important to inquire into certain matters concerned with witnesses, namely:—

(1) who can be a witness;
(2) who can be compelled to be a witness:
(3) what questions witnesses otherwise competent and compellable can be compelled to answer, and
(4) what questions such witnesses can be permitted to answer.

60.2. We take up the first question. Evidence must be given by legally competent witnesses. The ordinary individual is competent, and presumed to be so. The law of competence is, therefore, practically the law of incompetence, consisting of rules of exclusion.¹

60.3. The tendency of modern legislation is to expand the sphere of competence so as to allow the witness to make his statement,² leaving its truth to be estimated by the tribunal, rather than to reject his testimony altogether.³ Competency thus becomes the rule: incompetency the exception: and incompetency is reduced within a narrow compass.⁴

60.4. Proceeding on this principle,⁵ the Evidence Act declares all persons to be competent witnesses except such as are wanting in intellectual capacity.⁶ Granted this capacity, all persons become competent as witnesses, it being left to the court "to attach to their evidence that amount of credence which it appears to deserve, from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements."⁷

60.5. Thus, absence of religious belief, nor physical defect, not involving intellectual incapacity, nor interest, arising from the fact that the witness is a party to the record, or wife or husband of such party, or otherwise; nor the

²Woodroffe, referring to Taylor, Evidence, section 1343, etc. seq.; Best Ev., sec. 622, 132, 35 seq.; Wigmore, Ev. s. 501.
⁴Woodroffe.
⁵Woodroffe.
⁶Section 118.
⁷Field, Evidence, 6th Ed., 399, 400
⁸Sections 118, 119.
⁹Section 120.
fact that the witness is an accomplice in the commission of a crime, constitutes any ground for the exclusion of the testimony. 9

Compellability.

60.6. As to the second question, namely, who can be compelled to be a witness, it is to be noted that the competency of a witness to give evidence is one thing and the power to compel him to give evidence another. 9 Though competent, a person may not be compellable to be sworn or affirmed. Heads of foreign states and other persons entitled to immunity can be cited as examples. Then, in matrimonial proceedings, to which the Indian Divorce Act applies, the parties are competent but not compellable in proceedings based on adultery, by virtue of judicial construction of certain provisions. Under the Bankers Books Evidence Act, 9 an officer of the Bank is not, in any proceeding to which the Bank is not a party, compellable to produce, or to appear as witness to prove, any bankers' books, without the order of a judge made for special causes. An accused is now a competent witness for the defence, but not compellable.

Particular questions. — privilege.

60.7. As to the third aspect, namely, what questions a witness can be compelled to answer — it is to be stated that a person who may be generally compellable to give evidence, may yet be privileged in respect of particular matters concerning which he may be unwilling to speak. This topic is more conveniently dealt with under the head "privilege". The privilege is generally based on the existence of some relationship or the nature of the subject matter which is supposed to justify a bar against inquiry into particular matters.

Particular questions disability.

60.8. Finally — coming to the fourth question — it is to be noted that in certain cases, the law will not permit the witness to speak, even if he be willing. What the exception in such cases amounts to is not a privilege, but a disability.

Broad scheme.

60.9. The procedure to be followed in order to compel the giving of evidence is regulated by the codes of Civil and Criminal Procedure, and need not be discussed here.

The broad scheme of the act, thus, is as follows:—

(a) Generally, all persons with the requisite intellectual capacity (section 118) are competent; but there are exceptions arising from specific statutory provisions.

(b) Persons competent to depose are compellable to give evidence, but there are exceptions here also. Such exceptions are usually created by statute.

(c) Compellability to be sworn or affirmed is distinct from compellability, (when sworn), to answer specific questions. A witness, though compellable to give evidence has a privilege not to answer certain questions. This pertains to the sphere of privilege.

(d) Even if a witness be willing to depose about certain matters, the Court will not allow disclosure in some cases where the statute imposes a prohibition in that regard. This pertains to the sphere of disability.

1Section 133.
2Woodroffe.
3See De Bretton v. De Bretton and Holme, (1889) I.L.R. 4 All. 49, 52.
4See Indian Divorce Act, (4 of 1869), sections 51, 52, as construed judicially. See De Bretton v. De Bretton & Holme, supra.
5Bankers Books Evidence Act, (18 of 1891)
6Sections 122, 124, 125 and 129.
7Sections 122, 123, 126 and 127.
II. SECTION 118

60.10. We now come to the sections proper. Section 118 provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

The Explanation to the section makes it clear that a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Thus, intellectual capacity is the sole test of competence.

60.11. In England, an infant may be sworn in a criminal prosecution provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath; in other words, a court has to ascertain from the answers to the questions propounded to such a witness whether he appreciates the danger and impiety of falsehood. The only cases in which oath of affirmation should not be administered are cases in which it clearly appears that the witness does not understand the moral obligation of an oath or affirmation or the consequences of giving false evidence.

This test is, however, of no importance in India so far as competence to give evidence is concerned. The test may be relevant for deciding the question whether the oath should be administered. But competence to give evidence is entirely governed by section 118.

60.12. The Explanation to section 118 applies to the case of a monomaniac or a person who is affected with partial insanity who may be a very good witness as to the points other than that on which he is insane. His evidence will be admissible if the judge finds, upon investigation, that he is capable of understanding the subject with respect to which he is required to testify. In R. v. Hill, the witness believed that he had 20,000 spirits personally appertaining to him. On all other points he was perfectly sane. His testimony as to all other matters was received.

Taifourd J. observed: in R. v. Hill.

"If the prisoner's counsel would maintain the proposition which he has laid down, that any human being who labours under a delusion of the mind is incompetent as a witness, there would be most wide-spread incompetency. Martin Luther, it is said, believed that he had had a personal conflict with the Devil. The celebrated Dr. Samuel Johnson was convinced that he had heard his mother calling him in a supernatural manner......."

The observations of Lord Campbell C. J. are also of interest: in R. v. Hill.

The rule contended for would have excluded the evidence of Socrates, for he believed that he had a spirit always prompting him."

This concludes our consideration of section 118, which needs no change.

---


*a) *R. v. Hill*, (1851) 2 Den. 25-4; 169 E.R. 495;

*b) *Spittle v. Walton*, (1871) 11 Eq. 420.


60.13. Under section 119, a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court. This in substance is the English law also. Evidence so given shall, under the section, be deemed to be oral evidence.

60.14. The requirement that the writing must be written or the signs must be made in open court is, we take it, not applicable, where, by reason of a power vested in the court, evidence is taken in camera—although the section is silent on this point.

60.15. A minor point arising from this section is the question whether signs made by dumb witnesses may be translated by an interpreter. This appears to be doubtful, in view of the words “manner in which he can make it intelligible”. In English law, signs made by dumb witnesses may be translated by an interpreter. This is the American view also. Not much difficulty, however, seems to have been caused by the absence of a provision on the subject in India, and the matter may be left as it is.

In the result, section 119 also needs no change.

(a) Baretholomen v. George, cited in Phipson (1963) page 582.
(d) Cowby v. People, 83 N.Y. 478, cited by Woodroofe.
PARTIES AND THEIR SPOUSES

SECTION 120

1. INTRODUCTORY

61.1. The special topic of competence of parties is dealt with in section 120. The section is in two parts. Under the first part, in all civil proceedings the parties to the "suit," and the husband or wife of any party to the "suit", shall be competent witnesses. Under the second part, in criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

The section is silent about compellability. At common law, competence includes compellability, but compellability on this principle may not, in England exist in the case of spouses.

The section does not expressly provide that if a witness is competent, he will be compellable. But compellability may follow, either by reason of the procedural law or by reason of the common law referred to above. Compellability may, of course, be excluded by specific statutory provisions.

61.2. The latter half of the section, dealing with criminal cases, does not mention the accused. In India, the accused in a criminal case is not compellable to be a witness; the Code of Criminal Procedure prohibits such compulsion. The Constitution also prohibits compelling the accused to be a witness "against himself". Formerly, in India, the accused was not even competent to testify on his own behalf; he could not be given the oath, nor could he swear an affidavit. Since the insertion of section 342A in the Code of Criminal Procedure, 1898, (by Act 26 of 1955)—which provision has, in substance, been re-enacted in the Code of 1973—an accused has the option to examine himself as a witness for the defence. If he exercises the option, he has to take the oath. His position is then like that of any other witness, and he can be cross-examined like any other witness. So the accused is now a competent, but not compellable.

61.3. It may be noted that in India, even comment on failure to enter the witness-box is not allowed. In England, comment on the failure of the accused to enter the witness-box is permissible. It should, however, be noted that even in England, the Court of Appeal has more than once pointed out the need for exercising caution as to comment.

This should be "proceeding".
Leach v. R., (1912) A.C. 305.
See Common Law rule, supra.
E.g. sections 51-52, Indian Divorce Act, 1869.
Article 20(3) of the Constitution.
A trial Judge who is minded to make a comment on the absence of the accused from the witness-box, has to have regard to the caution given by higher Court from time to time. In Waugh v. R.,¹ Lord Oaksey observed:

“It is true that it is a matter for the Judge’s discretion whether he shall comment on the fact that a prisoner has not given evidences, but the very fact that the prosecution are not permitted to comment on the fact shows how careful a Judge should be in making such comments.”

In R. v. Bathurst,² Lord Parker, C. J., described the following as an acceptable form of comment:

“The accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness-box.”

61.4. In the U.S.A., the Supreme Court has held³ that allowing comment by the prosecution on the election of an accused not to testify is unconstitutional, in view of the privilege against self-incrimination. (Fifth Amendment).

II. HISTORY OF ENGLISH LAW

61.5. The law on the subject in England has an interesting history. A brief historical survey of the English law may be useful at this stage.⁴

1. Common law. At common law, neither the parties nor their spouses were competent to give evidence at all. Certain statutory modifications for civil cases are as follows:

(a) Lord Brougham’s first Evidence Act, 1851: Section 2 of Evidence Act, 1851 made the parties (but not their spouses)⁵ competent and compellable. Section 3 of the Act made an exception in criminal proceedings. Section 4 made exceptions in proceedings instituted in consequence of adultery and in actions for breach of marriage.

(b) Lord Brougham’s second Evidence Act, 1853: Section 1 of the Evidence Act, 1853, made the spouses of the parties competent and compellable. Section 2, however, made exceptions to section 1 in criminal proceedings and “in any proceeding instituted in consequence of adultery”.

3. The Matrimonial Causes Act, 1857, (which created divorce courts) allowed divorce mostly on the ground of adultery. The preservation by the Act of 1853 of the common-law rule that parties and their spouses were neither competent nor compellable to give evidence in proceedings instituted ‘in consequence of adultery’ thus assumed a new importance, as most proceedings under the 1857 Act fell within the category.

4. Evidence Further Amendment Act, 1869: Sec. 1 of the Act—The exceptions made in Lord Brougham’s Acts (1851-1853) in respect of actions for breach of promise of marriage and proceedings instituted in consequence of adultery were repealed by the Act of 1869, section 1.

---

⁴Adapted from Tilley v. Tilley, (1949) Probate 240, 154 (1948) 2 All E.R. 1113, 1119, 1120.
⁵See Tilley v. Tilley, (1948) 2 All E.R. 1113, 1120.
5. Criminal Evidence Act, 1898: None of these statutes applied to criminal cases, so that the common law rule of the competence of the parties and the spouses continued to apply. The Act of 1898 made the accused competent, but not compellable, as a witness. It also made certain statutory changes pertaining to the wife of the accused.

The Act made her a competent witness for the prosecution in certain special cases, but she is still not compellable.

The present position in England, is that the parties and their spouses are (subject to privilege) competent and compellable in Civil cases. The accused is competent, but not compellable. The spouse is not competent or compellable, except in a few cases. This, of course, is a very broad statement of the position.

III. POSITION OF SPOUSE OF THE ACCUSED

61.6. We shall now refer to one point on which the section requires some consideration. Under the section, the spouse of the accused in a criminal prosecution is a competent witness. Since the Act makes no express provision to the effect that the spouse is not compellable and since there is no other statutory provision to that effect, the result is that the spouse is compellable also. Now, the question to be considered is whether this is a satisfactory position. Prima facie, one would think that the dictates of marital harmony postulate that the position should be just the reverse. Marital harmony can hardly survive if one spouse has to give incriminating evidence against the other. The spouse against whom such evidence could be given would live in a constant atmosphere of suspicion. But, worse than that, the spouse who could be compelled to give such evidence would be placed in an extremely harsh situation, where he or she may have to make a cruel choice—between telling the truth and permanently alienating the affections of the partner for life. No doubt, whenever one person has to give evidence against a relative, some embarrassment is likely to be caused. But the cases of spouses stand on a special footing. The existence of the very fabric of the relationship is threatened if one spouse cannot depend on the other. The relationship of father and son is one of blood; it is created by nature and it can survive a few shocks. But the relationship of husband and wife is man-made. By its very nature, it is a delicate one. Its very foundation is mutual trust and confidence. The law still attaches the greatest importance to the sanctity of marriage. Any act which may damage this feeling of trust would totally shake the relationship. After such an act, the soul of the relationship would be gone, and only the shell would remain.

61.7. Is it desirable that the law should allow such a situation to be created? No doubt, truth is valuable; but truth can be too zealously pursued; too intensely sought. The need for bringing the truth before the Court is not denied, but there are other considerations which may override that need. In the present case, it is suggested, the other considerations are over-powering. The law has never regarded the proposition that the truth must come before the court at all costs and through every possible medium, as a proposition without exceptions. Were it so, the various privileges embodied in sections 121 to 132 would not have found their way into the Act.

It can be argued by way of reply to the above approach that the present position has not created any practical difficulty. This, we would like to observe, misses the point. A position which is bound to cause serious harm from the sociological point of view, and which is fundamentally objectionable, should not be allowed to continue merely because no difficulty has been reported. The position is, by its very nature, likely to cause serious hardship, as explained above.

1See "Position of the spouse", infra.
61.8. Unfortunately, the various aspects discussed above were not considered by those who framed the Act—at least the recorded discussions on the Evidence Bill do not show that the point was considered.

It is sometimes taken for granted that the law before the Act was the same as it is in the Act. This is not, strictly speaking, accurate.

A Calcutta case, which arose before the passing of the Act, is usually referred to in this connection. But all that was held in that case was that the principle of the incompetence of the wife did not apply to the Mofussil, since it had not been established that the English Criminal law or the English law of evidence had been extended to the Mofussil. That case itself holds that in the Supreme Courts, the wife was not a competent witness, that being the English common law rule which did apply to the Presidency towns.

61.9. In that case — R. v. Khairulla — Peacock C.J. observed —

"Two questions have been referred in this case; first, whether upon a trial in the mofussil of a person charged with an offence his wife is competent to give evidence for or against him? Second, whether, upon a trial in the mofussil of several persons charged jointly with an offence, the wife of one of them is competent to give evidence for or against the others? I am of opinion that both of those questions must be answered in the affirmative. It is a general rule of English law, subject to certain exceptions, that in criminal cases, a husband and wife are not competent to give evidence for or against each other. But the English law is not the law of the mofussil. It is clear that the English Criminal Law was not the Criminal Law of the mofussil, and that the English Law of Evidence was never extended by any Regulation of Government to criminal trials there."

61.10. The judgement does not decide the question of compellability. Even if, for the sake of argument, it is assumed that the judgment has decided the question, it must not be forgotten that the decision was based primarily on the proposition—a proposition which need not be disputed—that in the Mofussil, the English law of crimes, or evidence did not apply. The judgment, in any case, does not express any view as to the wisdom or otherwise of the common law rule.

Thus, the previous law does not come in the way of making any change in the section—if such a change is otherwise desirable.

61.11. It may be noted that the law in England on the subject is different. In England, the accused's spouse is not, generally, a competent or compellable prosecution witness except in certain specified cases which are very limited, given below—

(a) The wife is competent and compellable in cases falling within the Evidence Act, 1877, which concerns prosecutions relating to public highway and other criminal proceedings instituted for the purpose of trying or enforcing civil rights.

(b) She is competent at common law on charges to effect that violence against herself or injury to her liberty or health has been committed by the accused. This includes buggery.

(c) Then, the spouse is probably competent and compellable on a charge of treason.

5R. v. Yeo, (1951) 1 All. E.R. 864n.
(d) The spouse is competent but not compellable in a number of cases provided by statute. These include neglect to maintain or desertion of wife or family, bigamy, most sexual offences, offences against children, national insurance offences and any offence "with reference to" the spouse or committed against the spouse's property.¹

Provided the accused consents, the wife is competent but not compellable as a witness for the co-accused.² The exceptions listed in the preceding paragraph apply here too: when they apply, the wife testifies without the accused's consent being necessary.

61.12. The accused's spouse is a competent, but not compellable witness for the accused. However, she is compellable³ in the cases covered by the Evidence Act, 1877, on charges of violence or injury to the spouse's health or liberty and in treason. The prosecution is prohibited from commenting on the failure of the accused's spouse to testify.⁴

It is obvious from the above discussion that in England, subject to very limited exceptions, the spouse cannot be compelled to be a witness in a criminal case. Even a divorced spouse is an incompetent to testify to matters occurring during the marriage as one who has not been divorced.⁵

Of course, we are not suggesting that our law should be altered merely because the English law is different. We are referring to the English cases as a matter of interest. Also, they contain some instructive observations—observations which, perhaps, apply with greater force in Indian conditions.

61.13. Let us consider the matter from the point of view of principle. It is no doubt, desirable that all available and relevant evidence which might conduct to a correct judgement should be before the Court. But this consideration has to be balanced against—(i) the undesirability of disturbing marital harmony more than is absolutely necessary, and (ii) the harshness of compelling a spouse to give evidence against the other spouse. The supposed theoretical unity of the spouses, or the likelihood that the spouse will be biased in favour of the accused, may have no place in a legislative determination as to the extent of competence and compellability. But the question of the right balance between the considerations of policy mentioned above is an important one which seems to require serious examination.

61.14. In this connection, we may refer to the discussion in the judgement of the House of Lords in Leach v. R.¹ The precise point in issue in that case related to statutory construction. As competence usually implies compellability, many people thought that section 4(1) of the Criminal Evidence Act of 1898, which made the accused's spouse competent, also made the accused's spouse compellable for the prosecution in the specified cases. The House of Lords, however, decided that this was not so.

We are not concerned with this aspect of the judgment. But let us have a look at the facts relevant to the rationale of the privilege. Leach was charged with incest with his daughter. His wife was called as a witness on behalf of the prosecution. She objected to giving evidence, claiming privilege. After an un-

²Criminal Evidence Act, 1898, section 1(c).
⁴Section 1(b) Criminal Evidence Act, 1898.
⁶See infra.
successful appeal to the Court of Criminal Appeal, he (the accused) successfully appealed to the House of Lords. The House held that the general rule that competence implied compellability did not apply in this case.

61.15. The importance attached to conjugal harmony is shown by the Judgement. The following observations of Lord Atkinson are important for our purpose—

“The principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country; and think if it is to be overturned, it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case”.

Earl Loreborn L.C. observed in the same case—

“It is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other hand it is fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of criminal kind”.2

61.16. On a careful consideration of the various aspects of the matter, we have come to the conclusion, that the spouse of the accused should not be compellable in a criminal prosecution, except in certain specified cases. We think that the present provision is indefensible in principle. It seems to have been enacted without a serious consideration of the sociological and other aspect of the matter which we have discussed above, and the matter is so important that a maintenance of the status quo may cause serious hardship and consequential injustice of a grave character. We find ourselves in entire agreement with the approach of Earl Loreborn L.C.3—already quoted.

“...it is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other hand it is fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of criminal kind.”

To put it in our own words, in the situation under discussion, the considerations of marital confidence are paramount. An important practical consideration to be mentioned is that the spouse, if compelled, will, in general, not speak the truth. So the present position would encourage perjury.

IV. RECOMMENDATION

61.17. In the light of the above discussion, we recommend that the following proviso should be inserted below section 120:—

“Provided that the spouse of the accused in a criminal prosecution shall not be compelled to give evidence in such prosecution except to prove the fact of marriage unless—

(a) such spouse and the accused shall both consent, or

(b) such spouse is the complainant or is the person at whose instance the first information of the offence was recorded, or

(c) the accused is charged with an offence against such spouse, a child of the accused or a child of the spouse, or a child to whom the accused or such spouse stands in the position of a parent.”

1Emphasis supplied.
3Leach v. R., (1912) A.C. 305, supra.
CHAPTER 62

PRIVILEGE AND DISABILITY — GENERAL OBSERVATIONS

62.1. With section 121 being a group of sections dealing with privilege or disability in regard to evidence of certain matters. We have already adverted to the distinction between privilege and disability. A privilege can be waived, while a disability cannot be waived.

The privileges and disabilities are spread over a number of sections—sections apparently heterogenous in character; but this should not obscure certain fundamental matters which are common to all or most of the sections.

62.2. It has traditionally been the position of the law that "the public has a right to every man's evidence". Obviously, a contrary rule would render orderly legal procedure both frustrating and futile. The interest of society favours procuring from each person relevant facts in order to resolve the issue being litigated or investigated.

In England, by the Act of Elizabeth, service of process requiring the person served to testify concerning any cause pending in the court could be had out of any court of record.

As the Supreme Court of the United States has observed there is a long-standing principle that the Grand Jury has a right to every man's evidence, "except that evidence which is protected by a constitutional, common law or statutory privilege".

As early as 1612, Lord Bacon declared that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery". Therefore, each citizen owed the unfailing duty to reveal all his knowledge, including its sources. To this general principle, the law creates an exception in public interest, when it grants a privilege.

62.3. In law, a privilege is an immunity or exemption conferred by special grant to a certain class or individual in derogation of a common right.

Usually, a privilege or disability is created by law on the ground of some consideration of public policy. The law excludes, or dispense with, some kinds of evidence on grounds of public policy, because it is thought that greater mischiefs would probably result from requiring or permitting their admission, than from granting a privilege or creating a disability. Where privilege is granted, it is based upon a recognition that in appropriate circumstances the public benefits more from protecting the particular relationship than it is injured by the impediments which such privileges may cause to the administration of justice.

—See discussion as to sections 118-120, supra.


5(1652) 5 Eliz., c. 9, Section 12.


Countsess of Shrewbury's Case (1613) 12 Cokd 94. See also Lord Grey's Trial, (1682) 9 How. St. Tr. 127.


627
62.4. By "public policy" in this context, we do not mean some merely political consideration. Public policy embraces considerations of paramount importance—be they political, social or any other—which the law deems it proper to take into account from the point of view of public welfare. To take one example, public interest in the maintenance of domestic harmony is the rationale underlying the privilege of spouses under section 122. Its importance is mainly social. Then, public interest in the maintenance of the security of the State is the foundation of sections 123 and 124.

62.5. The privileges recognised by the law of evidence differ in their content, but a certain binding thread seems to connect them. To the explanation given above—public welfare—may be added another element, namely, that most, if not all, of the privileges recognised by the law are needed for the proper functioning of the particular relationship. This relationship may be of various types. It may be domestic—as of husband and wife—or professional—attorney and client—or may be wider—e.g. the government's retention of certain information, or it may consist in a particular character occupied by the person concerned, e.g. the judge privileged under section 121.

But the point to be made is that the law assumes that the proper performance of the function in question, or the proper maintenance of the relationship in question, justifies the grant of an evidentiary privilege in respect of certain matters which are considered essential for that function or relationship. It is on this assumption that the privileges are founded. The assumption may or may not be acceptable to some persons. But that is not a matter with which we are concerned in these introductory remarks. We are, at the moment, concerned only with the common thread which may be discerned as underlying the apparently heterogenous provisions.

62.6. In order to indicate more clearly the common thread underlying the various privileges we may usefully refer to the California Evidence Code, section 910, which makes privileges applicable to "all proceedings." The section has the following Explanatory note which may be helpful for understanding the rationale of the privileges. The note was mainly intended to justify the broad application of the privileges (i.e. its application to administrative tribunals also) but the observations are of interest for our purposes also. The note says—

"Most rules of evidence are designed for use in courts. Generally their purpose is to keep unreliable or prejudicial evidence from being presented to the trier of fact. Privileges are granted, however, for reasons of policy unrelated to the reliability of the information involved. A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding."

The Explanatory note then gives this illustration of what has been said earlier.

"Thus, for example, to protect the attorney-client relationship, it is necessary to prevent disclosure of confidential communications made in the course of that relationship. If confidentiality is to be protected effectively by a privilege, the privilege must be recognized in proceedings other than judicial proceedings. The protection afforded by a privilege would be insufficient if a court were the only place where the privilege could be invoked."

Section 910, California Evidence Code, Explanatory notes.
62.7. In elucidation of the aspect of public policy, we may add that as recently as 1973,\textsuperscript{1} the U.S. Supreme Court quoted with approval the dictum of Mr. Justice Reid that there is a public policy involved in the claim of privilege—in that case, the executive privilege. Mr. Justice Reid had also pointed out that where the privilege is recognised in respect of State secrets, the privilege is "granted by customs or statute for the benefit of the public and not of the executives who may happen then to hold office." These observations had been made by Mr. Justice Reid while sitting in the Court of Claims in an earlier case.\textsuperscript{2}

In Clark v. U.S.A.,\textsuperscript{3} which related to the privilege of secrecy enjoyed by jurors, it was pointed out that the privilege takes as its postulates a "genuine relation, honestly created and honestly maintained".

62.8. It is clear that every matter raising an issue of privilege involves an examination and balancing of competing interests.

"This privilege, as do all evidentiary privileges effected and adjustment between important but competing interests", so observed Judge Robinson of the Court of Appeals for the District of Columbia.\textsuperscript{4}

62.9. Although, in the field of the law of evidence, privileges operate merely as exclusionary rules, they also have a wider importance, namely, that they represent a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the coercive or supervisory powers of the State and from the nuisance of its eyes-dropping.\textsuperscript{5}

It would be of interest to know that the California Evidence Code, section 911, expressly codifies the rule of law that privileges are not recognised in the absence of statute.

62.10. It should be noted that as the position is now understood, the only legally recognised source of a privilege in relation to the law of evidence is a specific statutory provision or rule of common law which recognises a privilege. The fact that the parties have, as a matter of agreement or of honour, stipulated that certain matters shall not be disclosed, is not in itself enough for a successful claim to privilege in a court of law. The particular situation or relationship must have been regarded by the laws as one conferring such privilege. It is for this reason that even where the circumstances may be such that there can be inferred or implied an obligation to maintain confidence,—as in the case of a doctor and a patient—that obligation cannot, in itself, be put forth as an excuse for claiming protection from disclosure in obedience to a summons of the court for giving evidence. Such an obligation will,—unless an evidentiary privilege is specifically recognised—be a ground only for prohibiting disclosure elsewhere than in a Court of law.

62.11. The argument that the rules of the employer forbid the disclosure of the name of the informant cannot succeed in a Court. In People ex rel. Phelps v. Faucher,\textsuperscript{6}—an American case,—a newspaper editor called as a witness before a grand jury refused to disclose the name of the author of an article on the

\textsuperscript{1}Environmental Protection Agency v. Mink. (1973) 35 Lawyers Edition 2d. 119.
\textsuperscript{2}Kaiser Aluminium & Chemical Corporation v. United States. (1958) 141 Court of Claims 38.
\textsuperscript{3}Clark v. United States. (1933) 77 Lawyers Ed. 993.
\textsuperscript{4}Judge Robinson cited in Nixon v. Sircy by remove Wilker.
\textsuperscript{5}"Unilateral, "Confidentiality ....... Privilges in Federal Court today" (1956) 31 Tulane L.R. 101, 109; reprinted in Louise and Others, Principles of Evidence and Proof (1972), 467, 468.
\textsuperscript{6}People ex rel. Phelps v. Faucher, 2 Hun 226, (N. Y. 1874).
ground that to do so would be to violate a regulation of the newspaper. The court held—

"As the law now is, and has for ages existed, no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it."

62.12. In England, in some trials in the 17th century, the obligation of honour among gentlemen was argued successfully as sufficient ground for silence.¹ This doctrine, known as "Point of Honour", was formally abandoned in the Duchess of Kingston's² cases involving a trial by the House of Lords for bigamy. Invoking his honour, a witness who was a long-time friend of the accused, refused to disclose whether the Duchess had ever admitted to the first marriage. The judges, after much heated discussion, stated: "It is the judgment of this House that you are bound by law to answer all such questions as shall be put to you."

One year later, in Hill's trial,³ the doctrine was further repudiated when the court said:

"If this point of honour was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and, therefore, it is that the wisdom of the law knows nothing of that point of honour.".

62.13. Reverting to our Act, the matters which, under the Act, are privileged from disclosure are—

(1) matters relating to conduct of judges or coming to the knowledge of judges etc. in their judicial capacity (section 121);

(2) communications which are made to spouse during marriage (s. 122);

(3) State secrets (sections 123-124);

(4) communications between a legal adviser and a client (section 126 and 129);

(5) certain title deeds (sections 129, 131); and

(6) certain incriminating matters (s. 132).

After these introductory remarks, the sections proper can be considered.

¹H. J. Wigmore, 8 Evidence, section 2286 at 537, n. 13 (3rd ed. 1940).
²Duchess of Kingston (1776) 20 How. St. Tr. 586 (1776), Notable British Trials Series (Melville ed. 1927) p. 256.
³Hill's Trial, (1771) 20 How. St. Tr. 1318, 1362.
CHAPTER 63

JUDICIAL PRIVILEGE

63.1. Certain special provisions are needed in relation to Judges and Magistrates, if embarrassment is to be avoided to them, and if they are to discharge their functions properly. Indian Statute law has a number of provisions recognising the special status of judicial officers, and special provisions exist in the substantive civil and criminal law, and also in the law of procedure, in regard to Judges and persons similarly situated. In the field of the law of evidence, the matter is taken care of by section 121, which provides that no Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

We shall deal with the illustrations to the section later.

63.2. The broad principle underlying this section is that a matter of which the Judge took cognizance in his judicial capacity, shall not be raised in evidence if the Judge objects, unless the superior court grants permission for the purpose. This does not, of course, debar examination of the Judge in regard to other matters which occurred in his presence whilst he was acting as a Judge. The section applies to Magistrates also; but, for brevity's sake, this discussion will refer only to judges.

63.3. There are three illustrations to the section. Illustration (a) applies to a Magistrate. A, on his trial before the Court of Sessions, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior court.

Illustration (b) also refers to a Magistrate. A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

In both these cases, the matters in question came to the knowledge of the Magistrate in his official capacity and the matters were, so to say, directly connected with that capacity. Hence the privilege applies.

Illustration (c) relates to a Session Judge. A is accused before the Court of Session of the offence of attempting to murder a police officer whilst on his trial before B, a Session Judge. B may be examined as to what occurred.

Thus, with regard to matters not coming to his knowledge, in Court as Judge, a Judge is as competent and compulsable a witness any other person. The illustration brings out the difference between judicial conduct and cognizance on the one hand and other matters. The fact that a judicial proceed was the occasion when the act or event occurred confers no privilege. There must be an integral connection between the Act or event and the judicial capacity.

1The Judicial Officers' Protection Act, 1855.
2Sections 76 to 79, Indian Penal Code.
4Stephen Digest Article 111 and Note XLII.
63.4. The section is generally stated to be based on the *general grounds of convenience* (e.g. the inconvenience of withdrawing a Judge from his own Court, and public policy.) But it is possible to seek its justification in a deeper rationale—that of judicial independence at least in so far as it protects conduct. If the conduct of a judge or magistrate is to be investigated—even by way of evidence—some safeguards are needed.

63.5. There is a substantially similar privilege in England, though the law on the subject is not codified. A Judge of the Supreme Court may refuse to give evidence as to judicial proceedings which have taken place before him.1

63.6. The expression 'Judge' is not defined in the section, but we can take it as broadly having the same meaning as in Indian Penal Code.

63.7. Commentaries on the Act often discuss the question whether a Judge can be a witness in the very sense under trial. In our view, there can be only answer to the question, namely, he cannot be a witness. It is somewhat unfortunate that the question is discussed at length with a citation of much irrelevant case law. We believe that the position was correctly stated by Markby J. in a Calcutta case reported in 1875—*Empress v. Donnelly.*

63.8. No ruling of importance has been reported since then, that would detract from the soundness of his exposition of the law or throw any doubt on it. In *Empress v. Donnelly,* Markby J., observed: "As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this: *Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence?*"

"It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been found, and no authority of any Judge or text-writer has been cited in support of such a proposition."

Later on, in the judgment, Markby J. observed:—

"The Appeal Court would deal with the evidence including that of the Judge. But in my opinion the evidence of the Judge, being practically incapable of challenge or contradiction, ought not to be even taken. Moreover, a Court of appeal is not a check in the same way that Judges sitting together are a check upon each other. I am, therefore, of opinion that a Judge who is a sole Judge of law and fact cannot file his own evidence and then proceed to a decision of the case in which that evidence was given."

63.9. Prinsep, J., in the same case considered the authorities quoted by Mr. Justice Norman in one of the earlier cases—(also quoted by Markby J.) as 'conclusive', that one, who is sitting as a Judge, is not competent also to be a witness.

1See—
(b) *Buchelouch v. Metropolitan Board of Works,* (1815) L.R. 5 H.S. 418, 433.
(c) *R. v. Lord Thanet,* 27 St. Tr. 836.
9For the law before the Act, see *Ramaswami v. Rama,* (1867) 3 Mad. H.C.R. 372.
1Halsbury, 3rd Ed., Vol. 15, page 420, para 754.
2Section 19, I.P.E.
We have no further comments on the section.

We would like to mention that in the United States, an unusual occasion for ascertaining the privilege of the Judges as to confidentiality arose recently. It arose in the very important case involving the validity of right of way and permits granted by the Department of Interior for the construction of the trans-Alaska Pipeline extending to 789 miles and costing $3½ billion. While the case was under consideration before the Court of Appeal, a United States Senator wired the Chief Judge of the Court, requesting him to give information to the Senator as to certain judges who were supposed to have disqualified themselves. The Senator wished to know their identity and reasons for disqualification. In the reply for the Court of Appeal for the District of Columbia by the Chief Judge Bazelon, that court exercised its privilege to protect the confidentiality of its deliberations stating as follows:—

"In re your telegram of February 5, 1973 inquiring as to whether I or more judges have disqualified themselves in the trans-Atlantic (sic) pipeline cases currently under advisement and in which you request their identities and reasons if this is the case. The opinion, when issued, will reveal the names of the judges who have participated therein. With great respect, we believe that further reply to your inquiry would not be appropriate with cordial wishes".

CHAPTER 64
MARITAL PRIVILEGES—SECTION 122

I. INTRODUCTORY

We now come to an important section dealing with what may be conveniently called "marital privilege".

64.1. In India, as the law now stands, the spouses are compellable witnesses against each other. But, even in the existing law, there is a special provision relating to the disclosure of communications made during marriage. In general, when the course of justice requires the investigation of truth, no man has any knowledge that is rightly private. But specific considerations of public policy may demand that certain matters should be kept private. Of those matters, one example is furnished by section 122, which deals with certain communications made to a spouse during marriage.

64.2. By this section, which consists of two parts, there is created a privilege and there is also created a disability. The first part of the section, which creates the privilege, provides that no person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he or she has been married.

64.3. The second part of the section, creating the disability, provides that such person shall not be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except (i) in suits between married persons, or (ii) in proceedings in which one married person is prosecuted for any crime committed against the other.

64.4. There is a semi-colon separating the two parts of the section and this seems to suggest the construction that so much of the matter contained in the latter-half of the section as begins with the words "unless the person........" and ends with the section, is not intended to govern the first-half. In other words, the exception created in the second half for the case where a person consents or where the proceedings are between married persons etc. is not to control the first half of the section.

64.5. On the merits also, this appears to be the right approach. If a spouse in the witness-box is asked about a communication made during marriage, then, even if the other spouse consents or the proceedings are between married persons etc., there is still a reason why disclosure should not be compelled. The spouse in the witness box may find it embarrassing. The other spouse may have lost an interest in the marriage relationship—say, temporarily—but the testifying spouse may still have such interest. It would not, therefore, be proper to compel him or her to disclose the communication if he or she is, unwilling to do so.

64.6. Under the section, then, a person cannot be compelled to disclose communications made during marriage by his spouse. Without the consent of the spouse he is not even permitted to do so (except in certain cases).

\(^{1}\)Section 121.
II. RATIONALE

64.7. Let us examine the rationale of the section. Traditionally, the law of evidence has demonstrated a degree of solicitude towards the sanctity of marriage—a solicitude not manifested with regard to other protected relationships. In England, until the late nineteenth century, the privilege for confidential communications between spouses was not separated from the broader principle that neither husband nor wife was competent to testify to any facts against the other. In some jurisdictions in the U.S.A. even the modern rule is not confined to a privilege for confidential statements. It rather prevents the spouse from testifying to any information gained on account of the marital relation.2

64.8. We need not, for the present purpose, go into the controversy whether there was in England a separate privilege of confidentiality.3 This privilege came to be recognised by statute in England. By and large, in most States in the U.S.A. also, whether or not they recognise the testimonial immunity of a spouse, the privilege not to disclose marital communications is recognised. We shall discuss the comparative position later in due course.4

64.9. As to the prohibition enacted by section 122, Jenkins C.J., in a Calcutta case,5 observed that the prohibition is founded on a "principle of high import" which no court is entitled to relax. In that case, one H and others had committed a murder. A few days after the murder, H committed suicide. While he was alive, H made certain statements to J, his wife, implicating certain persons in the murder. It was held that J could not disclose those communications under section 122. The same principle applies to a confession made by a husband to his wife.6

Best C. J. (later Lord Wyndford) in Doker v. Halsel7 (where the other spouse was dead), explained the rationale in these terms:

".............. I think that the happiness of the marriage state requires that the confidence between man and his wife should be kept for ever inviolable."

64.10. Similar views were expressed in England by the Commission on Common Law Procedure, in their second Report,8 submitted in 1853. The Commission observed —

"So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss light which such revelations might throw on the questions in dispute. ................. hence all communications between them should be held privileged."

The signatories to the report are Lord Jervis, C.J., Martin, B., Lord Cockburn, C.J., Lord Bramwell and Willes, JJ.

---

1See Stapleton v. Crofts, (1852) 18 Q.B. 367.
3This is discussed infra.
4See discussion as to English statutory law and law in the U.S.A., infra.
5Fatima v. Emperor, (1913) I.L.R. 40 Cal. 891.
64.11. The provisions of the section, it is unnecessary to say, are not based on any theory of the *legal unity* of the spouses. The section is based on the abiding communion between husband and wife, which is of such a nature that their mutual communications are not always to be regarded on the same footing as communications between persons who have no such intimate tie.

Greenleaf, in a very striking sentence, said that the rule is that nothing shall be extracted from the bosom of the wife which was confided there by the husband.

III. SCOPE

A few aspects of the scope of the section may be briefly referred to.

64.12. In the first place, it is necessary that the communication must be made during marriage. The privilege does not cover communications before marriage.

64.13. Secondly, on the other hand, the privilege survives the marriage, as is clear from the words “or has been married”, which occur in the section. The communication must be made during marriage. But the disclosure thereof remains privileged even after the termination of the marriage. “Miserable indeed”, said Lord Alvanley, “would be the condition of a husband if, when the woman is divorced from him, perhaps for her own misconduct, all the occurrences are to be laid at large”.

64.14. Thirdly, once the relationship of marriage is established and it is proved that the communications were made during marriage, the privilege applies irrespective of the subject matter of the communication and the nature of the proceedings. For example, the decisions in England show almost no trace of any exception for crime. One of the earliest English cases clearly to recognise a marital privilege involved a wife’s request to her husband to commit forgery.

Fourthly, it is not necessary that the spouse claiming the privilege, or the other spouse, must be a party to the proceedings.

IV. LIMITATIONS—THIRD PERSON NOT PRIVILEGED

64.15. The above points bring out the scope of the section. Attention must now be drawn to an important limitation provided in the section. The section does not present the communication from being proved by the evidence of a third person. Thus, for example, a letter written by the accused to his wife and found in the search of her house has been held to be admissible, notwithstanding the terms of this section. The result is that a document in the hands of a third party, even though it contains communications between spouses, is admissible in evidence given by the third party.

64.15A. In England, it had been held before 1968, a that a third person can give evidence of a conversation which he has heard between a husband and wife. We shall later offer our comments on this limitation.

---

4Lady Ivy’s Trial, (1784) 10 Now. St. Tr. 555, 568.
5Queen Empress v. Dophoghe, (1899) I.L.R. 22 Mad. 1.3.
6Halsbury, 3rd Edition, page 422, para 758, footnote (a), and the cases cited there.
7As to the English position in this respect after 1968, see below.
8See infra.
V. PRIVILEGE DISTINCT FROM TESTIMONIAL IMMUNITY

64.16. The privilege in regard to marital communications is distinct from any immunity that may be recognised by a particular legal system regarding testimonial compulsion against a spouse. The two may overlap, but one could conceive of cases where, while there is no testimonial immunity, yet there is a reason for claiming the privilege in relation to the marital communications. The privilege is confined to the mutual communications of the spouses. The immunity applies to their very act of giving testimony against the spouse. Wigmure on Evidence gives the history of the privilege, in a passage which, while expounding the rationale of the privilege, also discusses the distinction between privilege and incompentence.

"The privilege for communications between husband and wife is apparently, in time of origin, the second of such privileges to be enforced at common law, and yet the last to be definitely recognised and distinguished. In the second half of the 1600s an instance of its application is found; and yet the explicit statement of the privilege, as a distinct one from any other rule, did not come in England until the statutory reforms of the Common law procedure Act, just as the second half of the 1800s was beginning. The explanation of the paradox is that until that time the present privilege for communications between husband and wife had not been plainly separated from the other privileges of husband and wife nor to testify to "any facts against the other. This latter privilege was fully established by the end of the 1600s. But among the various reasons advanced for its support was the policy of protecting domestic confidence by prohibiting their mutual disclosures. In other words, the true policy of the present privilege was perceived, and yet it was not enforced in the shape of any rule distinct from the old-established privilege of each one to testify against the other as a party or interested in the suit. That the two are distinct is plain; for the privilege not to testify against the other is order in the respect that it excludes testimony to any adverse facts even though they have been learnt wholly apart from marital confidence, and is narrower in the respect that it applies only to testimony in its tenor and adverse to a party to the cause or to one in an equivalent position."

VI. ENGLISH LAW — THE STATUTORY PROVISIONS

64.17. The position under the present statutory provisions in England may now be stated. First, as to criminal cases, section 1(d) of the Criminal Evidence Act, 1898, provides as follows:—

"No husband shall be compelled to disclose any communication made to him by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage."

64.18. There was an identical provision in section 3 of the Evidence (Amendment) Act, 1863, applicable to all proceedings. But, as to civil proceedings, this was repealed by the Civil Evidence Act, 1968. 1

64.19. Section 16(3) of the Act of 1968 is as follows:

"16. (3) Section 3 of the Evidence (Amendment) Act, 1853 (which provides that a husband or wife shall not be compellable to disclose any communication made to him or her by his or her spouse during the marriage) shall cease to have effect except in relation to criminal proceedings."

2 For history of the section, see Ruming v. D.P.P. (1968) 3 All. E.R. 256.
3 Sections 16(3) and 18(3), Civil Evidence Act, 1968, (Engl.).
64.20. It should be noted, however, that the discretion of the Court is saved under section 18(5)—

"18(5). Nothing in this Act shall prejudice—

(a) any power of a court, in any legal proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion; or

(b) the operation of any agreement (whenever made) between the parties to any legal proceedings as to the evidence which is to be admissible (whether generally or for any particular purpose) in those proceedings."

64.21. The present position in England is that in a criminal case "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." In civil cases there is no privilege but there is a discretion vested in the Court.

VII. ENGLISH COMMON LAW

64.22. We have so far dealt with the statutory provisions in England. The question whether, apart from statutes, there was a privilege at common law may now be discussed briefly.

64.23. It was believed to be an old rule of the common law that any communications between husband and wife during coverture were inadmissible. The rule was not even limited to communications of a strictly confidence nature, and it applied even after the death of one party to the marriage or after the dissolution of the marriage.

64.24. A controversy, however, arose in 1939 on the question. In Shanton v. Tyler, 1 Simonds 1, in the trial court, held that a widow need not disclose communications between her and her late husband. His decision, which followed a few earlier cases, was based on the view that at common law such communications were privileged, and that section 2 of the Evidence Amendment Act, 1853, did not, in any way, modify that rule.

64.25. In the Court of Appeal, however, Sir Wilfrid Greene, M. R., in his judgment, distinguishing between "competence" and "privilege" in the rules of evidence, held that there was no common law rule of privilege protecting marital communications as such, as distinct from the general testimonial incompetence of the spouses. Because the wife was immune from testifying against her spouse, the need for privilege was not felt. But Greene, M. R., emphasised that there was no privilege in addition to the immunity of a spouse.

64.26. It would appear that before 1853, because of testimonial incompetence, the question could not arise in England in the form of a privilege. The decisions before 1853 were concerned with the incompetence of spouses to give evidence for or against the other. This was the view of Greene, M. R.

1See "English Law", infra.
2Section 1(d), Criminal Evidence Act, 1898, (supra).
3(1938) 86 L.J. 359.
7Shanton v. Tyler, (1939) 1 All E.R. 827 (C.A.)
64.27. In 1853, the privilege did find its way to the state book. The rule was recommended by the Second Report of the Common Law Commissioners of 1853, which recommended that "all communications between them (husbands and wives) should be held to be privileged," and it was enacted as the Evidence Act, 1853, section 3. That section provided that "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

64.28. The decision of the Court of Appeal did not escape criticism. In the case cited above, the Court of Appeal construed those words to mean that the privilege given by the section is not to continue after the marriage has come to an end. On this judgment of the Court of Appeal, the Law Journal wrote: "Although this may, in the present case, be a proper result, we do not feel that as a general principle it is altogether a satisfactory one, and we doubt whether it can have been the intention of the Legislature."

64.29. Even after this decision, the matter proved to be controversial. The late Sir William Holdsworth wrote in the Law Quarterly Review a note strongly criticising the judgment of the Court of Appeal on historical grounds.

64.30. The controversy again made itself manifest in 1962. In Rumping v. Director of Public Prosecutions, the House of Lords gave detailed consideration to the rules relating to the admissibility of communications between husband and wife. The appellant, Rumping, had been convicted of the murder of a young woman. Part of the evidence against him admitted at his trial was a letter written by him to his wife shortly after the killing, which virtually amounted to a confession by him to her of the murder. The letter was never, in fact, received by his wife, as he had entrusted the delivery of it to a friend who, after Rumping's arrest handed the letter unopened to the police. Rumping appealed against his conviction on the ground that the letter should not have been admitted in evidence against him.

64.31. For the appellant, Rumping, it was argued that there was a broad common law rule, quite apart from statute, which rendered inadmissible all communications between husband and wife intended to be confidential. The Court of Criminal Appeal rejected the appeal on the narrow ground that even if there existed the broad common law rule contended for, there was no justification for regarding the rule as applicable to an intended communication which never reached the spouse for whom it was intended and which could be proved by a witness other than that spouse. Rumping appealed to the House of Lords.

64.32. The House of Lords rejected the appeal (Viscount Radcliffe dissenting), on the broad ground that except for certain statutory provisions there was no rule of law nor any requirement of public policy which prevented the admission in evidence of communications between husband and wife.

64.33. In this dissenting opinion, Viscount Radcliffe made an examination of certain early authorities and deduced that is was a fundamental policy of the common law,—although nowhere made explicit,—to treat all communications between spouses during coverture as sacrosanct, in the sense that they could

---

1Shannon v. Tyler, supra.
271 L.J. 173.
3Holdsworth in 56 L.Q.R. 137.
not be the subject of disclosure in court. In his view, the policy was not "confined merely to securing that the spouses themselves do not become the agents of disclosure by appearing as witnesses", but "goes further and for reasons of public policy protects the marital confidence as such, in whatever form it is sought to expose them as material for evidence".

64.34. We shall have occasion to refer again to Viscount Radcliffe's speech. For the present, it is enough to state that while scholars and others in England are not agreed on the question of the separate existence of the privilege at common law, the matter is now regulated beyond doubt by a statutory provision.¹

VIII. LAW IN U.S.A.

64.35. The marital privilege has received full recognition in the U.S.A. The marital privilege, it is stated, is two-fold: testimonial privilege and confidential communication. The testimonial privilege is the privilege not to testify against a spouse. It lasts only as long as the marriage exists. It would include matters occurring even before the marriage. The testimonial privilege is held by the spouse against whom testimony is sought, as well as by the spouse whose testimony is sought.

64.36. Confidential communication is the other aspect. It is regarded in that country as similar to the attorney-client relationship. Although it does not exist until there is a marriage — and therefore cannot relate to pre-marriage communications — the privilege attaching to marital communications is said to last for ever.

Although the position is not exactly uniform in all States in the U.S.A., the above statement represents the law in an overwhelmingly large number of States.

Sherwood J. observed²—

"It is necessary to preserve family peace and maintain that full confidence which ought to subsist between husband and wife."

In the eloquent language of Taylor, C.J.³—

"Society has a deeply-rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore, the law places the ban of its prohibition "upon any breach of the confidence between husband and wife by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses."

New Jersey Rule. 64.37. The following provision⁴ in the New Jersey Rules of Evidence (1972) is a sample of the provision contained or recognised in most States:—

"Rule 28. MARITAL PRIVILEGE—CONFIDENTIAL COMMUNICATIONS

No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them.

¹See, "Statutory provision in England", supra.
or in a criminal action or proceeding coming within Rule 23(2). When a spouse is incompetent or deceased, consent to the disclosure may be given for such spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication”.

64.38. Although the expression used is “in confidence” or “confidential”, the general understanding in the United States in relation to that expression is that ‘all communications made during marriage’ are confidential unless the circumstances show that they were not intended to be so.

Another rule in the same State (Rule 23(2)) precludes a spouse of the accused in a criminal proceeding from testifying except in certain enumerated cases.

IX. NEED FOR AMENDMENT

64.39. It is now time to discuss a few points which require consideration with reference to the section. The marital privilege under the section does not apply in proceedings between the spouses or proceedings in which one married person is prosecuted for any crime committed against the other. This exception is expressly enacted in the section. There is however, no exception in respect of proceedings where a child of the marriage is concerned. Welfare of the child is a consideration that has assumed importance in modern legal thought, and it would not be improper if an exception is made for proceedings in which a child of the marriage is concerned. It could usefully cover children who, though not born of the marriage, are children of one of the spouses.

64.40. By way of illustration, we may cite an American case discussed a few years ago in the Boston University Law Review, where the defendant was convicted of mistreatment of his five-month old infant. The defendant’s wife voluntarily testified against her husband, and the testimony was admitted over the defendant’s objection. The Missouri Statute (which was the one at issue in the case) reads: “No person shall be incompetent to testify as a witness in a criminal cause or prosecution by reason of being the husband or wife of the accused..............provided...........wife or husband shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf............... provided, that in no such case shall husband and wife when testifying be permitted to disclose confidential communications............ in the relation of such husband and wife”.

64.41. The court held that it was a recognised common law rule that the wife may testify against her husband if the injury was to the wife. The child was regarded as an extension of the wife’s personality and, therefore, the wife could testify. The statute, it was observed, was not created for the purpose of creating new disabilities, and the common law exception remained.3

64.42. It is desirable to make the position clear, in India also. The present exception is based on the principle that where the interests of the two parties are not identical but conflicting, disclosure should be allowed. The same principle should be applied to proceedings where the interests of the child are concerned; for, in such proceedings between spouses, the interests of the parties are not identical.

64.43. Attention may be drawn, in this connection, to a provision suggested in the Model Code of Evidence, Rule 216, which (so far as is relevant) provides that neither spouse has a privilege in a case relating to a crime against the person or property of the other or of a child or either or desertion of the other or of a child of either.

We recommend that a suitable amendment should be made in section 122 on the point discussed above.

64.44. At present, section 122 does not cover communications made by the testifying spouses. An important question for consideration is whether this position is satisfactory. The present section may lead to anomaly. For example, if the husband is called as a witness, he can be forced to make a disclosure of communication made by him, though not of communications made to him. After this, the wife may be called and she, in her turn, could be forced to disclose communications made by her. But this process, the entire episode or the whole complex of communications could be reconstructed, at least to the extent to which such reconstruction is possible by fragmentary disclosures. We are not having in mind, at present cases where the spouse is made to testify against the accused — that situation may not cause this particular anomaly, because the accused is not compellable to appear as a witness. But the point to be made is that the present position might virtually render the privilege futile. It is apparently for this reason that the formulation of the privilege in some of the American States phrases the privilege in terms of "communications made between such persons and his or her spouse". The Model Code of Evidence framed by the American Law Institute has the following suggested Rules relating to this aspect of marital privileges:

"Rule 215. MARITAL PRIVILEGE: CONFIDENTIAL COMMUNICATIONS BETWEEN SPOUSES.

Subject to Rules 216, 217, 218 and 231, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that—

(a) the communication was a confidential communication between spouses, and

(b) the witness was at the time of the communication of the spouses or is the duly appointed, qualified and acting guardian of his person, and

(c) the claimant is the holder of the privilege, or a person authorised to claim privilege for him."

The Uniform Rules of Evidence contain similar provisions.

We are of the view that for the reasons given above, the privilege should cover communications whether made by or to a testifying spouse (or ex spouse) during marriage.

64.45. There is yet another point on which the section seems to need amendment. We have stated above that a third person, as the law now stands, can give evidence of a conversation he has heard or intercepted between a husband

---

1Model Code of Evidence (American Law Institute, 1942), page 155, Rule 216.
2See discussion as to section 120.
3Rule 215 of the Model Code of Evidence.
4Rules 25(2) and 28(2), Uniform Rules of Evidence.
5See supra Limitations — third person not privilege.
and wife. This may be a correct construction of the statutory provision, narrowly worded as it is. But, since the primary object of marital privilege is to protect peaceful marriage life, so that spouse can make any communication to the other without hesitation and reservation, it sounds reasonable to extend the provision to communications overheard or intercepted by others also. We recommend that the section should be so amended.

64.46. In this connection, we would like to refer to Viscount Radcliffe's dissenting speech in Rumping's case. His observations were as follows:—

"Ought the law to apply a different rule merely because the letter has miscarried and has come into the hands of the police? Considering the history and the nature of the principle that lies behind the special rules governing testimony of husband and wife in criminal trials, I do not think that it should. If it does, we must recognise the implications that, personally, I find overwhelmingly distasteful. A husband may gasp or mutter to his wife some agonised self-incrimination, intended for no ear in the world but hers: yet the law will receive and proceed upon the evidence of the successful eavesdropper, professional, amateur or accidental. It is free, I suppose, to entertain the testimony of the listening device, if properly proved. An incriminating letter may be intercepted by any means: it may be snatched from the wife's hand after receipt, taken into custody if she has mislaid it accidentally, withdrawn from her possession by one means or another: in all these cases, it is said the trophy may be carried into court by the prosecution and proof given that the prisoner is its author, the law has no rule that excludes it from weighing against him as a confession.

"I do not, for a moment, suppose, of course, that any of your Lordships is indifferent to these implications or that by this decision you desire to countenance them. But the only alternative to admitting them is to rely, as the learned Solicitor-General did in argument, upon the exercise of an inherent discretion in the judge who presides at the trial to exclude which he regards as unfairly prejudicial to the accused. Certainly, there is much discretion, and there are, for instance, judges' rules. But I cannot agree that a matter of this sort is a proper subject for so vague and uncontrollable a thing as judicial discretion. By what considerations is it to be guided? It is assumed that the evidence, if admitted, will be materially prejudicial to the prisoner. Is the guiding principle then to be some general conception as to what is fair and what unacceptably unfair in methods of police or amateur detection? I cannot think that the law should leave the prisoner's fate to be determined by discretion. After all, policemen have their duty to detect and bring home a crime; and in this very case, it must be remembered, the trial judge admitted the evidence of the letter despite the fact that the man's fellow seamen had betrayed his trust to post it to the wife and, though ignorant of the contents, had handed the closed packet to the ship's captain.

No doubt, society has an interest in the successful detection and prosecution of crime, but it is axiomatic that it postpones that interest to such considerations as the indecency of listening to evidence obtained by torture or intimidation, or improper inducement. The only question here is whether or not listening to the confidential communications passing between husband and wife should be included among those considerations."

 Recommendation.  

64.47. In the light of the above discussion, we recommend that section 122 should be revised as follows:—

122. (1) No person who is or has been married, shall be compelled to disclose any communication made during marriage between him and any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person to whom he is or has been married or his representative in interest, consents or unless the proceedings are of the nature specified in sub-section (3).

(2) No one who has overheard or intercepted or has acquired possession otherwise than by the consent of both the spouses any communication made during marriage between spouses and no one who is in possession of a communication so intercepted, shall be permitted to disclose any such communication unless both the spouses or their representatives in interest consent or unless the proceedings are of the nature specified in sub-section (3).

“(3) The proceedings referred to in sub-sections (1) and (2) are—

(a) proceedings between married persons;

(b) proceedings in which one married person is prosecuted for any offence committed against the other;

(c) proceedings in which one married person is prosecuted for any offence committed against a child of the other person or a child of the first mentioned person or a child to whom either of them stands in the position of a parent; and

(d) proceedings in which one married person is the complainant or is person to whose instance the first information of the offence was recorded, and the other married person is the accused”. 
CHAPTER 65
STATE PRIVILEGE—SECTION 123

I. INTRODUCTORY

65.1. An important point of public law arises out of the next section—section 123— which now requires to be considered. It pertains to public law in its procedural aspect.

Although the citizen may sue public bodies and the Government, it does not necessarily follows that the law and procedure applied by the courts will be the same as is applied in litigation between private citizens. Apart from substantive rules, special procedural advantages and protections are enjoyed by the State, of which one may now be considered.

In the law of evidence — as is shown by our discussion of the preceding sections — there are many situations where a party to litigation or other person may claim a privilege and thereby resist the production of a document or the giving of oral evidence on a particular subject. Apart from privilege enjoyed by private persons, the State has the right to withhold a document, or evidence, on the ground that the disclosure will be prejudicial to the public interest. This privilege is dealt with in section 123, which prohibits the giving of evidence derived from unpublished official records relating to affairs of State except with the permission of the head of the Department.

65.2. Strictly speaking, this is not a privilege which can be claimed by the State only, because it is not confined to litigation to which the State is a party; no witness can give evidence of matters privileged under this rule. "State privilege" is, therefore, only an expression used for the sake of convenience. However, the expression is correct in so far as the privilege can be waived by the State.

The use of the expression "privilege" itself has been criticised. But it has been established by usage, and this question of terminology need not detain us.

The law on the subject is stated in section 123 thus:

“No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.”

Connected with this section is the provision in section 162, under which a witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided by the Court.

That section further provides that the Court, if it seems fit, may inspect the document, unless it refers to matters of State, or take other evidence, to enable it to determine on its admissibility. (The last paragraph of the section is not material for the present purpose).

II. HISTORY AND RATIONALE

65.3. As regards the rationale of the privilege in section 123, historical material in India is scanty. Indian case-law on the subject is profuse, but those cases do not elucidate this aspect of the matter.
65.4. In England, Crown privilege is usually dealt with as an aspect of the general law of State liability. In this connection it may be noted that the Crown Proceedings Act, 1947, while making the Crown liable as a private citizen in many respects, took care to provide that its provisions should not affect this general law.

In one article, published a few years ago, it was stated—

"The source of the Crown’s privilege in relation to production of documents in a suit between subject and subject (whether production is sought from a party or from some other) can, no doubt, be traced to the prerogative right to prevent the disclosure of State secrets, or even of preventing the escape of inconvenient intelligence regarding Court intrigue. As is pointed out in Pollock and Maitland’s History of English Law (2nd ed., Vol. I, page 517), ‘the king has power to shield those who do unlawful acts in his name, and can withdraw from the ordinary course of justice cases in which he has any concern. If the king dispossesses A and transfers the land to X, then X when he is sued will say that he cannot answer without the King, and the action will be stayed until the King orders that it shall proceed’. We find similar principles applied to the non-disclosure of documents in the seventeenth and eighteenth centuries.

"But with the growth of democratic government, the interest of the Crown in these matters developed into and became identified with public interest.

".........In the early days of the nineteenth century, when principles of public policy received broad and generous interpretation.............we find the privilege of documents recognised on the ground of public interest. At this date, public policy and the interest of the public were to all intents synonymous.”

65.5. In the report of Layer’s case,3 (1722), the Attorney-General claimed that minutes of the Lords of the Council should not be produced; and Sir John Pratt I.C.J supported the claim, adding that “it would be for the disservice of the King to have these things disclosed.”

Position in U.S.A.

65.6. In the United States, the corresponding privilege, known as “executive privilege”, is definitely considered as an aspect of “sovereign immunity”. Of course, this American version of Crown privilege has never been at par as the British doctrine was known in some of the earlier cases, but we need not discuss that aspect of the matter at present.

65.7. In India, the privilege incorporated in section 123 was, perhaps, intended to incorporate a policy decision. It is not, however, very clear whether the framers of the Evidence Act examined the English law in detail.

65.8. It is possible to view the matter as one concerning the liability of the State in the adjective sphere. Though the provision is contained in the Evidence Act, it is obvious that it has important repercussions in administrative law. We are referring to this aspect in order to put the matter in its proper perspective.

65.9. The foundation for the privilege under consideration is injury to the public interest. The expression “affairs of State” is of very wide amplitude and it will cover every business activity of the State, so as to take in even day to day

3"Documents Privileged in Public Interest" 39 Law Quarterly Rev. 476-477.
3Layer's case, (1722) 16 How. St. Tr. page 224.
day routine administration — and not merely highly confidential matters pertaining to defence, foreign affairs, Cabinet minutes or what advice was tendered by the Ministers to the Governor specified in Article 163(2), secret service and the like. Therefore, the activities of a Democratic Welfare State extend to so many fields and all such activities can be brought within the compendious expression "affairs of State", if broadly construed. It only shows that any document relating to any affairs of State cannot partake the character of a privileged document, the disclosure of which would not be, without possible injury to the public interest.

65.10. Lord Reid observed in Conway v. Rimmer: 3

"It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

This aspect is of crucial importance in determining what ought to be the law.

Before we proceed to consider the present section and the changes needed therein, it will be useful to bear in mind certain aspects of the privileges.

65.11. It has been pointed out by one writer that there could be several possible situations in relation to documents—

"(1) The document may safely be seen by all the world.

(2) It would be desirable for the document to be in some measure restricted in its forensic publication; but this consideration ought to yield to the greater desirability that justice should manifestly be seen to be done.

(3) The document might be disclosed to the parties (or the opposite party, if the Crown is a party) on their undertaking to the Court, so as to render a breach a contempt of court, not to disclose its contents to any person except for the purpose of the proceedings in question or by order of the court.

(4) The document might be disclosed to the parties (or the opposite party, if the Crown is a party) on condition that it should not be produced or referred to except in close court. Any further publication would then automatically be punishable as contempt of court.

(5) The document might be disclosed to the trial judge, but not to the parties (or the opposite party, if the Crown is a party).

(6) The document might be disclosed to a judge for the purpose of determining its degree of forensic publication; but he might hold that its evidential importance is so slight that its further forensic publication is not justified in the light of its possible prejudice to the public interest.

(7) The document being of a highly secret and confidential nature, its forensic publication in any form or circumstances must be absolutely withheld."


42—131 LAD/ND/77
65.12. The same writer has further pointed out that hardship from too rigid a claim of privilege arises because of the failure to distinguish between "national security" and "public interest". "The law, indeed, appears to be unnecessarily rigid in this sphere. While there are overwhelming arguments in favour of giving to the executive an exclusive power to determine what matters may prejudice the public security, those arguments give no sanction for extending to the executive an equally exclusive power to determine what matters may affect the public interest. And since the Minister cannot fairly weigh the degree of injury to the State by the disclosure of the document against the degree of injury to a private citizen from its non-disclosure, there seem to be strong grounds for removing the decision from him and vesting it in an independent tribunal; for example, a judge of the High Court. The Minister's decision as to what evidence should be excluded by consideration of public security should be conclusive; but any claim based on his own considerations of public interest should be examinable, and should be balanced against such other considerations of public interest as are urged by those seeking disclosure. The possible injury suggested in Browne v. Broome to the morale of the armed forces if the evidence were admitted could be weighed against the probable injury to the moral or the material interests of the litigants, or one of them or to the administration of justice, if it were excluded."  

65.13. His suggestion for amendment can be thus summarised:  

"The unequal disclosure of material is inherently likely to work injustice, and there is ground for thinking that injustice has in fact been caused by the wide scope and the rigidity of the present rules. It has been submitted that the interest of the executive can be conveniently reconciled with the claims of the private litigant for justice if it were possible to stipulate various degrees of forensic publication. Of these, the most important, between absolute withholding and full disclosure, would be the hearing of the questioned evidence in closed court. It is considered that the Minister should still be given an absolute discretion to state whether any particular evidence would be prejudicial to national security, or so prejudicial to the public interest that its forensic publication in any form must be barred. If he states that full disclosure of the evidence would be prejudicial to the national security, but that it could be disclosed in closed court, there should be power to order a hearing in closed court. So far as concerns evidence of facts the disclosure of which the Minister alleges to be contrary to the public interest, unless he is prepared to certify that the forensic publication of the evidence in any form must, on the ground of its high secrecy and confidential nature, be absolutely withheld, the question of its degree of disclosure would be for a judge of the High Court. He would weigh considerations of public interest as stated by the Minister against considerations of public interest as urged by the party seeking disclosure; and would have power to order a limited forensic publication including its disclosure only in closed court."  

2Browne v. Broome.  
3This distinguishes between considerations of public security and considerations of public interest referred to in a different context the suggestion of Sachs J. that the public interest in question might be limited to specific heads.  
III. ESSENTIAL CONDITIONS

3.14. So much by way of introduction. Let us analyse the section proper. In order that the section may apply, it is, in the first place, necessary that the evidence should relate to affairs of state—a requirement expressly mentioned in the section. This expression thus possesses some importance.

Secondly, the evidence must be derived from unpublished official records relating to such affairs.

Thirdly, disclosure of information so derived is not permissible except with the permission of the head of the department concerned. So the question—who is the head of the department—is also of practical importance.

Fourthly, it is for the head of the department “to give or withhold such permission as he thinks fit”.

3.15. This, taken literally, would exclude judicial determination. These ingredients are explicit in the wording of the section. If that were all, the matter would be very simple. But, in the interests of justice, these ingredients had to be elaborated and the prohibition in the section justified on an examination of certain fundamental factors not mentioned in the section. Courts have, therefore, found it necessary to address themselves to two questions—(i) In giving or withholding permission, what ought to be the guideline to be observed by the head of the department? (ii) Is every document relating to governmental work privileged, or is there any implicit limitation to be read with the expression “affairs of state”? Broadly speaking, these queries pertain to the first and the last condition in the above analysis.

3.16. Answering these queries, judicial decisions have read into the section the test of public interest. The result—to state it very briefly for the purpose of this preliminary discussion—is that in order that a document may be legitimately regarded as privileged under the section, there must be a likelihood of some prejudice to the public interest. Whether the public interest in this context is confined to national security and foreign affairs and the maintenance of public order and the like, or whether it has a larger sweep is a matter the consideration whereof can be conveniently postponed to a later stage. The point to be made is that in order to justify the section, courts have been compelled to read into it a very important ingredient which is not explicitly mentioned in the section, though it may be implicit therein.

3.17. It is in the scope and ambit of this aspect of public interest which has proved to be controversial and which, in some respects, appears to be obscure. Because of the fact that “public interest” is not expressly mentioned, problems arise. Chief amongst them are—(i) Who decides the question if the public interest is likely to suffer by disclosure of the particular document? (ii) If it is for the head of the department to decide that question, how is the court to satisfy itself about his bona fides—assuming that the court cannot ordinarily go into the merits?

These and related queries have furnished the gist for academic and judicial mill in other countries, as also in India. Certain principles on the subject have also emerged elsewhere as in India—but it would be too much to say that their application is easy. This is evident from the fact that again and again the question whether the particular document in issue is privileged under this head comes up before the highest courts.
65.18. Reverting to the conditions expressed by the section, according to the Supreme Court in Sodhi Sukhdev Singh’s case—

(i) it is for the trial court to decide whether the first condition is satisfied (Affairs of State);

(ii) the expression “affairs of State” does not mean the entire public business of the State;

(iii) for such adjudication, the court, while it cannot permit evidence about contents of the document (section 162), can take other collateral evidence which may help the court in determining the validity of the objection;

(iv) it is for the departmental head to give or withhold permission for disclosure, and the court cannot determine whether the disclosure would cause injury to the public interest or not.

65.19. In State of Punjab v. Sodhi Sukhdev Singh, the subject was discussed and considered at length. The court was concerned in that case with minutes of discussion by the members of the Council of Ministers and with the advice tendered by the Public Service Commission to the Council of Ministers. Both were held to be privileged by the majority judgment, on the ground that the disclosure prima facie would lead to injury to the public interest. But the court took care to review the case law exhaustively and to indicate the proper principles to be followed. The court emphasised that the sole and the only test which determines the decision of the head of the Department was injury to the public interest, and nothing else. The court itself could not hold an enquiry into the possible injury to public interest: “but the court is competent, and indeed is bound, to hold a preliminary inquiry and determine the validity of the objections—to its production, and that necessarily involves an inquiry into the question as to whether the evidence relates to an affair of State under section 123 or not.”

65.20. In order to ensure that the privilege was not claimed on extraneous grounds, the court laid down the following guidelines:

“First, the initial claim to the privilege should be made through an affidavit generally by the minister concerned: if not by him, then by the Secretary of the department. In the latter case, the court may require an affidavit of the minister himself. The affidavit should indicate that such document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. The affidavit should also indicate briefly, within permissible limits, the reason why it is apprehended that public interest would be injured by the disclosure of the document. If the court finds the affidavit unsatisfactory then the person making the affidavit, whether he is the minister or the secretary, can be summoned for cross-examination on the relevant points.”

Later decisions of the Supreme Court and important cases of the High Courts will be referred to while discussing the topics to which they relate.

We do not propose to refer here to all the cases on the section or on "Crown privilege". Important cases are given in the foot-notes, and will be referred to on particular points when necessary.

IV. AFFAIRS OF STATE

65.21. The expression "affairs of State" does not seem to have been used in any legislative formulation in other context, but it is used frequently in text books and academic literature on the subject. The principal object of the expression is to indicate the distinction between matters of concern to the State, as distinct from matters of private interest.

65.22. This, of course, is not the only ingredient of the privilege, since it is further required that the matters must be of such a nature that their disclosure would be prejudicial to the public interest. The principle on which the protection is given is that where a conflict arises between public and private interest, private interest must yield to the public interest.

65.23. Every communication from an officer of the State to another officer is not necessarily relating to affairs of State. The privilege could not arise, for example, in respect of the posting registers kept by the Customs Preventive Service, the entry in question being merely a note of the times when particular preventive officers were ordered to be at their stations. The particular entry did not refer to matters of State in sections 123 and 162, though there may be other privileged entries in that book.

65.24. "Affairs of State" may cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper security of the State. Reports relating to an individual with a view to taking action under the Preventive Detention Act is a matter relating to affairs of State.

65.25. The expression "affairs of State" would also cover the advice given by a Minister. Thus, in a Rajasthan case, the plaintiff brought an action for the recovery of Rs. 1,19,000 against the State of Rajasthan, on account of a refund of a part of the excise duty paid on the stocks of matches produced by the plaintiff for consumption in the State territory. This was in pursuance of an agreement with the State Government. There was a document which embodied the minutes of the discussion and indicated the advice given by the Minister. The State claimed privilege in respect of this document under section 123. The claim of privilege was upheld by the trial court as well as by the High Court. The High Court held that the document which embodied the minutes

\[\text{References:}
(a) Dinbai v. Dominion of India, A.I.R. 1951 Bom. 72;
(a) Robinson v. State of South Australia, A.I.R. 1931 P.C. 254;
(b) Duncan v. Cammanwell Laird & Co., (1942) A.C. 623;
(c) Glasgow Corp. v. Central Land Board, (1956) S.C. 1 (H.L.) (from Scotland);
of discussion and which indicated the advice given by the Minister is certainly protected under section 123, and the Court cannot compel the State to produce it.

On the other hand, documents and letters relating to a contract with the Government for the supply of goods do not relate to affairs of State.¹

65.26. These simple situations may not present much difficulty. But the obscurity of the expression “affairs of State” is illustrated by the decisions that were rendered with reference to other matters. Returns made to income-tax officers and assessment orders may be cited as an example.

65.27. Before the enactment of a specific statutory provision on the subject, it was held that returns submitted to the income-tax officer, and statements before him or orders made by him, did not refer to “affairs of State” (section 123), nor were they made in official confidence (section 124), and the officer concerned was bound to produce them if summoned to do so.² ³

It was after these judicial decisions that section 54 of the Income-tax Act, 1922, was enacted.

65.28. Section 54 of the Income-tax Act, 1922 (now section 137 of the Income-tax Act, 1961)—to state only the gist thereof—enacted that statements made or returns, accounts or documents produced for evidence before income-tax authorities shall be treated as confidential and disclosure thereof by any public servant was prohibited, and no official shall be required to produce any such document or to give evidence in respect thereof.

65.29. The difficulty of deciding whether a matter is or is not an affair of State, is also illustrated by the case-law relating to statements made by witnesses in the cases of a departmental enquiry into the conduct of a public officer. The question arises when, after the departmental enquiry, the guilty public servants are prosecuted—usually for the offence of accepting illegal gratification, it was held by the Calcutta High Court⁴ that such statements were not privileged under section 123 to 125, and the accused was entitled to cross-examine the witnesses under section 153 with reference to the statements made by the witness at the departmental enquiry. The same view was taken by the Nagpur High Court.⁵

On the other hand, statements by witnesses in a secret and confidential investigation by the C.I.D. for ascertaining whether there is a prima facie case for a departmental enquiry against the public servant were held to be privileged by the Lahore⁶ and Orissa⁷ High Courts.

65.30. In a Punjab case,⁸ the respondent Surjit Singh had filed a suit against the State of Punjab for a declaration that his retirement from service before he reached the age of superannuation was illegal and violative of various provisions of the Constitution of India. He requested the trial court to direct the department to produce in Court the Character Rolls and confidential reports maintained in the department in respect of himself and some other inspectors

⁴Harbans v. R., 16 C.W.N. 431.
⁵Ibrahim v. Secretary of State, A.I.R. 1936 Nag. 25.
who were junior to him but were retained in service. The State claimed privilege under section 123, on the ground that the documents were unpublished official records relating to “affairs of State”. The trial court disallowed the privilege, holding that these documents did not relate to “affairs of State”.

65.31. The matter came up before the High Court under section 115 of the Code of Civil Procedure, 1908. The High Court allowed the petition filed by the State, and held that the character Rolls and confidential reports maintained for the purpose of providing an appraisal of the merit of State servants by their superiors from time to time, are in the nature of confidential communications from one officer to another, and are meant to serve as part of the material designed to maintain the efficiency of the public servants. The High Court further held that these documents would relate to “affairs of State”. The High Court dissented from two earlier cases to the contrary. Thus, conflicting views within the same High Court exist.

65.32. In a Punjab case, Khosla J. attempted to evolve a definition of affairs of State. This definition was relied on in the same High Court in a later case, but, in appeal before the Supreme Court, this definition was treated as not exhaustive.

We are referring to these cases, to show how the expression “affairs of State”, without further guidelines, is found to be imprecise.

65.33. The next important concept is that of public interest. The scope and ambit of public interest is, as we have pointed out earlier, a matter of uncertainty and obscurity. It would be convenient to examine it under its principal heads.

In the first place, where the security of the State is involved, the claim of privilege would be reasonable and well-founded, provided it is properly substantiated by adequate material. These were the circumstances of Duncan’s case. It was obviously a matter of State security at the time of the war that plans for new submarines that had been pressed in service should not be disclosed to the enemy.

Secondly—and this is a much wider ground than security of the State—the claim of privilege has been sought to be justified in circumstances where a report has been made from one public servant to another in course of his duty, the argument being that the report should be treated as confidential if it was prepared in conditions under which the official making it expected it to be so treated. The rationale in this situation, as suggested, is that if its confidentiality is destroyed, then the civil servant would not be prepared to write full and frank reports if these reports are subsequently to be produced in the litigation so as to cause prejudice to the Crown. One may conveniently label such claims as claims arising under the head of public service. It is difficult to say how far the privilege under this head is recognised in England. The argument that a confidential report will not be made frankly if there is a probability of public scrutiny has been criticised more than once by academic writers. Garner has

---

3For example, Ingris Bell in 1957 Public Law.
suggested that it really does not stand up to close examination, because "a civil servant should not be prepared to write a report that may be open to criticism or one that he does not wish to be examined in court (save on State security grounds)."

65.34. Dealing with the argument that candor of communication between civil servants might be prejudiced, if a privilege is not recognised, the House of Lords in Conway's case (per Lord Hodson) observed:

"It is strange that civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied to their other fellow subjects."

65.35. Apart from public security and public service—the two heads mentioned above—we have to consider a third variety of circumstances in which privilege is claimed. This is the residual category under "public interest". It seems, that in England this category is defined by reference to specific heads, such as, the prevention of specific crimes and the maintaining of the morale of the armed forces of the Crown. Even these specific heads have not escaped criticism, judicially and otherwise.

65.36. After Conway v. Rimmer, three subsequent cases also reached the House of Lords. In R. v. Lewes II, ex p. Home Secretary and in Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2), claims to privilege were upheld. In Norwich Pharmacal Co. v. Commissioners of Customs and Excise, the claim was overruled, and discovery of documents ordered.

65.37. In the Norwich Pharmacal case, the House of Lords stressed the need to balance the public interest in non-disclosure against the public interest in seeing that justice is done to the parties.

None of these cases takes us much further forward, but what they do achieve is to show that the judges will consider each case of a claim of privilege (or whatever else it may now be called) on its merits.

As to criminal cases, in England, it is stated not to be the practice to claim privilege on the ground of state interest.

65.38. The matters in respect of which the discretion of the court should be exercised as to inspection are not, as such, defined by statute. Suggestions have appeared that legislative action should be taken to particularise the species of public interest which should be taken into account. But no such restrictive legislation seems to have been enacted in the Commonwealth.

4Re Crosvenor Hotel (London) Ltd. (No. 1), (1965) 3 All. E.R. 426; on appeal (1964) 1 All. E.R. 92.
6Articles in—
(a) 79 L.Q.R. 37, 153, 487;
(b) 80 L.Q.R. 24, 158;
(c) (1963) Public Law 405.
11Cross, Evidence (1974), page 274.
V. AUTHORITY COMPETENT

65.39. The question which authority will determine the existence or otherwise of the privilege in relation to a particular document is one on which we find considerable disparity between the Indian law on the one hand and the English law on the other. According to Indian law—if we are to take literally what is stated in section 123—it is for the head of the department concerned to determine whether or not the document should be disclosed. On the other hand, in England, at least after the decision in Conway v. Rimmer,¹ it is definitely held that whenever an objection is made as to the production of a document, it is for the court to decide whether the objection should be upheld.² To a large extent, this disparity between Indian law and English law has been reduced by judicial decisions in India. We shall also consider section 162 in due course.

VI. PROCEDURE

65.40. Section 123 speaks of the permission of the head of the department. It has been held³ by a majority judgment of the Supreme Court that the Court is competent, and indeed bound, to hold a preliminary inquiry and determine the validity of an objection to the production of the document when privilege is claimed under section 123. This necessarily involves an inquiry into the question whether the evidence relates to “affairs of state” or not. It does not, however, permit the Court to substitute its own judgment in place of that of the head of the department as to whether the public interest would suffer by disclosure.

65.41. Although under section 123, as it is at present worded, the head of the Department has the final decision, he must apply his mind. In Amarchand v. Union of India⁴—a judgment referred to in the Court of Appeal in the English case of Conway v. Rimmer⁵—the Supreme Court rejected the claim for privilege on the ground that the statement of the Home Minister did not show that he had seriously applied his mind to the contents of the document, or that he had examined the question whether their disclosure would injure the public interest. The Supreme Court observed:

“In view of the fact that section 123 confers wide powers on the head of the department, the heads of departments should act with scrupulous care in exercising their right under section 123 and should never claim privilege only or even mainly on the ground that the disclosure of the document in question may defeat the defence raised by the State. Considerations which are relevant in claiming privilege on the ground that the affairs of the State may be prejudiced by disclosure must always be distinguished from considerations of expediency.”

65.42. It is well-known that the practice in India is for the head of the department to make an affidavit setting out the objection on behalf of the State and relevant factors. The present practice was thus described by the Supreme Court in State of U.P. v. Raj Narain⁶

¹Conway v. Rimmer, (1968) 1 All. E.R. 874.
²See particularly, the speech of Lord Morris of Borth-Y-Gest and the comments in 84 L.Q.R. 172; 46 Can. Bar Rev. 452.
⁵Conway v. Rimmer, in the Court of Appeal.
"It is now the well settled practice in our country that an objection is raised by an affidavit affirmed by the head of the department. The Court may also require a Minister to affirm an affidavit. That will arise in the course of the enquiry by the Court as to whether the document should be withheld from disclosure. If the Court is satisfied with the affidavit evidence that the document should be protected in public interest from production, the matter ends there. If the Court would yet like to satisfy itself, the Court may see the document. This will be the inspection of the document by the Court. Objection as to production as well as admissibility contemplated in section 162 of the Evidence Act is decided by the Court in the enquiry as explained by this Court in Sukhdev Singh's case.1

"This Court has said that where no affidavit was filed, an affidavit could be directed to be filed later on. The Grosvenor Hotel, London group of cases. (1963) 2 All E.R. 426; (1964) 1 All E.R. 92; (1964) 2 All E.R. 674 and (1964) 3 All E.R. 354 (supra) in England shows that if an affidavit is defective, an opportunity can be given to file a better affidavit. It is for the Court to decide whether the affidavit is clear in regard to objection about the nature of documents. The Court can direct further affidavit in that behalf. If the Court is satisfied with the affidavits, the Court will refuse disclosure. If the Court in spite of the affidavit wishes to inspect the document, the Court may do so."

65.43. It may be noted that inspection of a document which relates to "matters of State" is prohibited by section 162. In Amar Chand Butail's case,2 the appellant called upon the respondents, the Union and the State to produce certain documents. The respondents claimed privilege. The Supreme Court saw the documents and was satisfied that the claim for privilege was not justified. This case illustrates how inspection may become necessary, to determine whether the claim to privilege is justified.

VII. ILLUSTRATIVE CASE FROM ANDHRA

65.44. We may refer, at this stage, to an Andhra case,3 as illustrating some of the problems encountered by courts in the application of the section.

65.45. First, as regards inspection by the Court, it was held that "there is an absolute prohibition" of inspection of a document if it pertains to or refers to matters of State and the question of "recording other collateral evidence when such objection is raised, does not arise, as, when the document pertaining to affairs of State cannot be inspected, it cannot be proved by any indirect way of letting in other evidence, to speak to the very nature of the contents."

65.46. It was argued in that case that the notes and minutes made on the files were within the privileged class and were exempt from production. The privilege claimed by the Additional Chief Secretary could not be questioned in view of section 123. It was held that there was nothing in the affidavit to "suggest that the notes made, relate to expression of an opinion in the determination and execution of public policies",—a test suggested in Sukhdev Singh's case.4

---

2Emphasis supplied.
5Section 162.
65.47. Further, it was said that the Supreme Court has not suggested that notes and minutes made by officers other than those pertaining to the determination and execution of public policies would come within the privileged class of documents. Certain observations were also made as to the application of section 123 in relation to article 226.

65.48. We are concerned not with the actual decision—which was given on the basis of the affidavit of the head of the department—but with some of the difficulties felt by the court in the administration of the present provisions. These difficulties are apparent from the observations quoted above. A later decision of the Supreme Court also contains instructive discussion. We shall have occasion to refer to it in due course.

VIII. ENGLISH LAW

65.49. The evolution of English law on the subject presents certain interesting aspects. We have stated above that “Crown privilege” is often dealt with as a topic of state liability. Although the general law of state liability in England was put on a liberal and efficient basis by the Crown Proceedings Act, 1947, the Act failed to deal with the problem of “Crown privilege”. “Crown privilege” is the name given in England to the Government’s power to prevent evidence being given in court where it is claimed that its disclosure will be against the public interest. The expression is not a happy one but is well-known.

65.50. Judicial attitudes in England on the subject fluctuated till 1968, when in Conway v. Rimmer the position came to be settled to a large extent. The matter could be usefully considered with reference to the pre-1942 period, the period from 1942 to 1955, the period from 1956 to 1964, the period from 1965 to 1970 and the position after 1970.

65.51. Until the Second World War it was generally recognised in the courts that the power of the Crown to forbid the disclosure of specified evidence was not absolute. The Crown was entitled to claim that evidence of any description ought not to be given in court because its disclosure was contrary to the public interest, whether or not the Crown was a party to the proceedings. But, in the last resort, the court would disallow the claim if it seemed unjustified, and this had several times been done. There had to be some machinery for preventing secret information about such things as weapons of war and diplomatic negotiations from being disclosed in court; and the procedure was that a minister of the Crown swore an affidavit that disclosure would, in his opinion, be contrary to the public interest. In that case there was a conflict between the national interest and the litigant’s interest, and the latter had to give way.

65.52. In Duncan v. Connell Laird and Co., decided during the Second World War, an affidavit was made by the First Lord of the Admiral to the effect that certain blueprints relating to the construction of a submarine Thetis, in support of an objection to producing the document on the ground of the Crown’s privilege. It was held to conclude the matter; in the affidavit, the First Lord of the Admirals had stated—“I am of the opinion that it would be

---

2See infra.
4Schwartz and Wade, Legal Control of the Executive, page 192.
injuries to the public interest that any of the said documents should be disclosed to any person." The decision of the lower courts, that inspection of the documents should not be ordered, was upheld by the House of Lords.

As observed by Lord Simon in that case, the Court of law had to uphold an objection, taken by a public department when called on to produce documents in a suit between private citizens, that on grounds of public policy the documents should not be produced.

65.53. The decision in Duncan's case was criticised by several writers. While the result actually reached was stated to be sound on the facts of the case, the enunciation of a categorical rule, making the Crown officer's decision final in every case, did not find favour with writers.

The case was understood as laying down that a ministerial claim of privilege was unquestionable in law. The case itself was a plain one. The evidence required by the plaintiff widow was the plans of a naval submarine on which her husband had been killed. But it was obvious, especially in wartime, that secrecy must prevail, even at the cost of depriving the plaintiff of her legal rights. But the decision struck a new ground inasmuch as (1) the minister's affidavit was conclusive, no matter what the nature of the case was, and (2) also because the House ruled that the minister might say that the evidence belonged to a class of documents which the public interest required to be withheld from production.

65.54. After this judgment, cases started being decided on the basis of "class". It is easy for a government department to persuade itself that all sorts of official papers are better kept confidential, that candid reports will not be made if there is the remotest chance of their being used in public, and that the only safe course is to give the public interest the benefit of every doubt. Under this policy, privilege was coming to be claimed, as one law Lord put it "in a case from Scotland, for "everything, however common place, that has passed between one civil servant and another".

Section 28 of the Crown Proceedings Act, 1947, which, in effect, preserved the Crown Privilege, was discussed at length in the Lords in the debate on the Bill. Section 28 took away the immunity of the Crown from discovery, but provided that this should be "without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest."

The speech of Lord Parker of Waddington in The Zamora. "Those who are responsible for the national security must be the sole judges of what the national security requires", was quoted in the Debates on the Crown Proceedings Bill.

Period from 1956 to 1964.

65.55. This legal position created hardships. Government, realising the extremeness of the position, made certain concessions. In June 1956, the Lord Chancellor made in the House of Lords a statement of policy in relation to future claims of Crown Privilege for documents and oral evidence.¹

²Schwartz and Wade, Legal Control of the Executive, page 193.
⁴Parliamentary Debates, Lords, Vol. 146, Col. 924 (Viscount Jowitt), Col. 926, 929 (Viscount Simon),Cols. 932-933 (Lord Simon'sa).
⁵The Zamora, (1916) 2 A.C. 77, 107.
A few months earlier, in December 1955, the House of Lords had decided that the law of Scotland was rather more favourable to the private litigant than the law of England.

65.56. The changes announced in 1956 were based on the distinction that has been mentioned in some of the cases between objections founded on the contents of a particular document, and those founded on the fact that the document belongs to a class which ought to be kept secret in the public interest. In the case of the latter, some of the objections that were formerly taken will not, it was stated, be raised any more. For example, exemption would not be claimed for reports of accidents to employees of the Crown, or for medical reports concerning civilian employees and, where the Crown or the doctor is a defendant in an action founded on the negligence of the latter, exemption would not be claimed for medical reports concerning members of the forces.

65.57. Certain further changes were announced in 1962 relating to police matters. In future, it was stated, in proceedings against the police for such matters as malicious prosecution or wrongful arrest, no claim to exclude evidence relating to the justification for the police action would be made unless its disclosure would reveal the name of a police informer. In the case of statements by civilians to the police, the claim to exclude will be made in all cases, but it will be done by affidavit and not by certificate, so that the final decision to admit or to exclude may be made by the court.

65.58. It is unnecessary to go into the details of all the English cases decided between 1956 and 1964. The judgment of the Court of Appeal in Merricks v. Nott Bowce and Re Grosvenor Hotel, London (No. 2) meet many of the criticisms of Lord Simon’s speech in Duncan v. Cammell Laird & Co. Ltd.

65.59. The modifications in the rigid rule flowing from Duncan’s case, made by executive orders were followed by certain judicial developments. The courts began to break away from the House of Lords’ sweeping rule. This movement started in 1965. For a time, the decisions swayed to and from, and confusion reigned. But, in 1968, the House of Lords unanimously repudiated its extreme propositions of 1942, and re-asserted judicial control. This was in a case where a junior police officer had brought an action for malicious prosecution against a superior officer and needed to see the reports made on him in the police service. The Home Secretary intervened with a claim of ‘class’ privilege. The House of Lords disallowed the claim, inspected the documents themselves, and order their disclosure, saying that they could see no possible danger to the public interest. They reviewed the law comprehensively and made it clear that, though the courts will naturally respect claims based on genuine secrets of State, they will not allow other claims unless the public interest in secrecy really outweighs the public interest in doing justice to the litigant; and that this is to be determined by the court, not by the executive.

See—
(a) Professor T. B. Smith in (1956) Modern Law Review 427;
(b) Sir Carleton Allen in (1956) 72 L.Q.R. 322;

*1962* Public Law, page 203.

2Re Grosvenor Hotel, London (No. 2), (1965) Ch. 1210; (1964) 2 All. E.R. 674.
3Duncan v. Cammell Laird & Co. Ltd. (1942) A.C. 624; (1942) 1 All. E.R. 787.
4Re Grosvenor Hotel, London (No. 2), (1965) Ch. 1210.
Thus, the law was in 1968 brought into general accord with the law of the United States—and, indeed, with the law of several Commonwealth countries—had refused to accept the House of Lords' earlier judgment.

2. To come more specifically to Conway v. Rimmer,\(^1\) it was established in that case that where a Minister claims that documents should not be used in evidence because their production would be injurious to the public interest, the court has power to disallow the claim and order their production, after weighing the possible injury to the public interest against the injury to the interests of justice that their suppression would cause. For this purpose, the court may inspect the documents privately, i.e. without disclosure to the parties.

The position resulting from Conway v. Rimmer can be broadly stated thus—

The Court has jurisdiction to order the disclosure of documents for which Crown Privilege is claimed, as it is the right and the duty of the court to hold the balance between the interests of the public in ensuring the proper administration of justice and the public interest in the withholding of documents whose disclosure would be contrary to the national interest; accordingly, a Minister's certificate that disclosure of a class of documents or of the contents of a particular document, would be injurious to the public interest is not conclusive against disclosure, particularly where the privilege is claimed for routine documents within a class of documents, though in a few instances (e.g., cabinet minutes), the nature of the class of documents may suffice to resist application for disclosure.

65.61. The judgment in Conway v. Rimmer was put into statutory form in 1970. The Administration of Justice Act, 1970,\(^2\) enables a court to order disclosure of documents, etc. and specifically provides that the provisions apply to the Crown except that no such order may be made if the court considers "that compliance with the order, if made, would be likely to be injurious to the public interest". The material provision is quoted below\(^3\):

"35.—(1) This part of this Act shall bind the Crown.

(2) Section 21 of the Administration of Justice Act, 1969 (power of court to order inspection, custody, etc. of property pending commencement of action) shall bind the Crown so far as it relates to property (within the meaning of that section) as to which it appears to the court that it may become the subject-matter of subsequent proceedings involving a claim in respect of personal injuries to a person or in respect of a person's death.

(3) A court shall not make an order under section 31 of this Act, nor an order under section 21 of the said Act of 1969 if it considers that compliance with the order, if made, would be likely to be injurious to the public interest.\(^4\)

(4) In this section references to the Crown do not include references to Her Majesty in Her private capacity nor to Her Majesty in right of Her Duchy of Lancaster, nor to the Duke of Cornwall."

IX. POSITION IN U.S.A.

65.62. In the U.S.A., the privilege in question is known as "executive privilege". It is an aspect of sovereign immunity in the governmental authority to withhold evidence on the ground that disclosure would be against the public interest.

\(^{1}\) Conway v. Rimmer, (1968) 1 All. E.R. 874 (H.L.).

\(^{2}\) Administration of Justice Act, 1970, sections 31-35.

\(^{3}\) Section 35, Administration of Justice Act, 1970.

\(^{4}\) Emphasis supplied.
interest. Executive privilege has been asserted both vis-a-vis congress and in cases in court. This American version of Crown privilege has, however, never been pushed as far as the British doctrine. There has never been an American counterpart of Duncan v. Cannell, Laird & Co. Ltd., in which the House of Lords held that Crown privilege could not be questioned in a court of law. American courts have consistently refused to recognize any absolute power in the executive to forbid the disclosure of evidence.

65.63. The leading case in the U.S.A. up to 1974 was United States v. Reynolds, reported in 1953. The case arose out of the crash of a military airplane on a flight to test secret electronic equipment. Several civilian observers aboard the airplane were killed in the Air crash. Their widows sued the government under the Federal Tort Claims Act. Plaintiffs moved for discovery of accident investigation report of the Air Force, but the government claimed privilege, and refused to produce the report. The court rejected the view that the assertion of executive privilege was conclusive on the question of production. It recognized that there are "state secrets" which need not be disclosed. "The court itself must determine whether the circumstances are appropriate for the claim of privilege". Only where the court is satisfied "that compulsion of the evidence will expose military matters which in the interest of national security, should not be divulged" will it refuse to require disclosure.

65.64. It would thus appear that in the U.S.A., the privilege for government secrets is qualified. The decision in United States v. Reynolds does suggest that the court might be warranteed in balancing the competing needs and policies in deciding how far it should require disclosure to the Judge himself, in determining whether the matter is indeed privileged.

65.65. It may be stated that in the United States, heads of Departments make regulations as to disclosure, which the Courts may or may not accept. American courts, it was stated in 1967, are less willing than English courts to accept a plea of privilege, and are willing to look at the documents, distinguishing between "secret of State" and mere "official information". The case decided in 1974 relating to documents whereby production was sought to be withheld by President Nixon fortifies this conclusion.

65.66. It has been pointed out by an eminent American writer that the question of privilege for official information can arise in at least five different kinds of cases not all of which should necessarily be treated alike. The cases referred to by him are: (1) criminal proceedings; (2) civil proceedings with the State as party plaintiff; (3) civil proceedings with the State as party defendant; (4) proceedings in which the State is not a party; and (5) proceedings in which disclosure of the records of public authorities other than the Central Government is sought.

On the basis of the above classification, the following detailed analysis of the position in each case has been offered by that writer:

---

1Schwartz and Wade, Legal Control of the Executive, pages 198-199.
2Schwartz and Wade, Legal Control of the Executive, page 198.
5The term used in Model Code of Evidence, Rule 227.
7United States v. Reynolds, (1953) 345 U.S. 1; 97 L. Ed. 727.
8Hood Philips, Constitutional Law (1967), page 692.
(1) CRIMINAL PROCEEDINGS

It is stated that the proper approach to be followed where claims of governmental privilege are invoked to prevent disclosure of official information in criminal proceedings is that articulated by Judge Learned Hand in *United States v. Andolschek*. In that case, the defendants were tax inspectors of a federal agency and were tried criminally for a conspiracy which included their taking of bribes. They sought discovery and the introduction in evidence of certain reports which they had made to their superiors in their official capacity. According to Judge Learned Hand, the Government could not claim privilege for these official reports in such a criminal proceeding. "While we must accept it as lawful", states his opinion, "for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose, either it must have the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

Judge Learned Hand's approach was relied on expressly by the United States Supreme Court in *Jencks v. United States*. That case involved a prosecution for filing a false affidavit with the National Labour Relations Board.

The Court held that the defendant was entitled to an order directing the Government to produce for inspection all reports of two Government witnesses to the Federal Bureau of Investigation touching upon events and activities as to which they testified at the trial, and the defendant was entitled to inspect such reports and to decide whether to use them in his defence. "We hold", the Court observed, "that the criminal action must be dismissed when the Government, on the ground of privilege elected not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. The burden is the Government's............to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure."

We shall refer later to the epoch making decision in *U.S. v. Nixon*, which is peculiarly relevant to criminal cases.

(2) CIVIL PROCEEDINGS WITH STATE AS PLAINTIFF

It can be argued that many of the considerations which apply to criminal cases apply as well to proceedings instituted by the State as party plaintiff. In such cases, too, it can be said, if the Government chooses to commence an action, it should stand in the position of the private litigant and be held to waive any privilege against disclosure of official information which it possesses if it were not a party to the litigation. As one American judge has expressed it, it is but a short step, and a necessary one, from the rule of criminal cases discussed above, to the rule that where the State is the complainant in a civil suit,

---

1 Schwartz, American Administrative Law (1958), pages 245-246.
2 United States v. Andolschek, 142 F. 2d 503 (2d Cir. 1944).
3 U.S. v. Andolschek, 142 F. 2d, 506 (2d Cir. 1944).
it should likewise be required to make its own choice—either to make disclosure or to drop the suit. ¹

(3) CIVIL PROCEEDINGS WITH STATE AS DEFENDANT³


"It is a rule, of course, which is particularly unfortunate when the person who is responsible for deciding whether they should be disclosed or not, happens also be the defendant in the action in which he is being sued. It means that every litigant against a government department—and such litigation is becoming more and more frequent as the sphere of government activities is extended—is denied, as a matter of course, the elementary right of checking the evidence of government witnesses against the contemporary documents."

As to the U.S.A., a number of American decisions apply the theory (already discussed) of waiver of privilege by the Government to cases brought under the American equivalent of the Crown Proceedings Act. Their reasoning is that the State, by consenting to be sued, has waived its privilege against disclosure of official information, just as it does when it institutes a criminal proceeding.² It should be borne in mind that the Federal Tort Claims Act (and other American statutes authorizing suits against the State) contain no limitations such as that in section 28(2) of the Crown Proceedings Act, 1947, which expressly preserved the Crown privilege rule until it was abrogated in 1970. That being the case, American judges have been able to read into the State's consent to suit, a consent to waive its privilege against disclosure of official information.

"The consent, being general, amounts to an endorsement of libel¹ with the sovereign's command 'Soit droit fait al partie'. But right cannot be done if the government is allowed to suppress the facts in its possession."³

(4) STATE NOT A PARTY

The disclosure of official information in suits to which the State is not a party, stands on a slightly different footing, even if one agrees with the view expressed in the American cases already referred to,¹ under which the State waives whatever privilege it might otherwise have, by appearing as a party.

When the State is itself a party, there is a real danger that the doctrine of privilege will be used to advance the Government's position as litigant. Where, on the other hand, the State is not a party, the suit is between private individuals alone, and the State has no direct interest in the outcome, there is much less danger of Crown privilege being used for the arbitrary suppression of evidence. And this is why some American cases permit the State to claim privilege for

¹Bank Line Ltd. v. United States, 76 F. Supp. 801, 803 (S.D.N.Y. 1948). A striking case applying this principle is United States v. Cotton Valley Oil Operators Committee, 9 F.R.E. 719 (D. la. 1949), aff'd per curiam by an equally divided Court, 339, U.S. 940 (1950), where an antitrust action by the Government was dismissed because of its failure to submit documents whose disclosure was sought by discovery proceedings.
⁴Schwartz, American Administrative Law, (1958), page 199.
¹This was an admiralty suit, hence the use of this term.

⁴131 LAD/ND/77
official information in cases in which the State is not a party. It should, however, be emphasised that, even under them, the rule on the western side of the Atlantic does not begin to approach the doctrine of “privilege by unexaminable certificate” enunciated by the House of Lords in Duncan v. Camnell, Laird & Co. The Court in the United States may still examine the evidence for which privilege is claimed to determine whether the claim of privilege is a valid one. And, where only official information not involving “state secrets” is at issue, it would seem that the American courts would not follow the approach of United States v. Reynolds, already discussed, under which the judge looks only to see whether there is a reasonable danger that compulsion of the evidence will expose matters which should not be divulged. That approach is valid only where “state secrets” are involved. In the case of other official information, the judge should determine himself whether there is, in fact, a public interest in barring disclosure. Only then should the claim of privilege be upheld, even in cases in which the State does not have the direct interest of a litigant.

(5) PUBLIC AUTHORITIES OTHER THAN CENTRAL GOVERNMENT

According to Scott L.J., in Blackpool Corporation v. Locker, nothing analogous to Crown privilege has yet been conceded by the courts to any local government officer.

The American Courts too look with disfavour upon assertions by administrative agencies, other than those of the federal government, of a privilege against disclosure of official information.

65.67. The suggestion of Schwartz as regards each situation is as follows:

(1) Criminal Proceedings: The Government must choose; either it must choose to leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

(2) Civil Proceedings in which the State is a Plaintiff: Where the State is the plaintiff in a civil suit, it should likewise be required to make its own choice, either to make a full disclosure, or to drop the suit.

(3) Civil Proceedings in which the State is a defendant: The State’s consent to be sued implies a consent also to waive its privilege against the disclosure of official information.

(4) Civil Proceedings in which the State is not a party: The State may claim privilege for official information in cases in which the State is not a party. But it is not as ‘privilege by unexaminable certificate’ enunciated by the House of Lords in Duncan v. Camnell, Laird & Co. The Court may still examine the evidences for which privilege is claimed, in order to determine whether the claim of privilege is a valid one. And, where only official information not involving “state secrets” is at issue, the court should not follow the narrower approach (under which the judge looks only to see whether there is a reasonable danger that compulsion of the evidence will expose matters which should not be divulged). That narrower approach is valid only where “state secrets” are involved.

In the case of other official information, the judge should determine himself whether there is, in fact, a public interest in barring disclosure.

The leading case in Roske v. Comings, (1900) 177 U.S. 459.
(5) Proceedings by or against other public authorities: Assertions by administrative agencies, other than those of the federal government, of a privilege against disclosure of official information are not allowed.

65.67A. According to the American Model Code of Evidence, which clearly makes a distinction between "state secrets" and "official information", the term "official information" means "information not open or therefore officially disclosed to the public relating to internal affairs of the United States acquired by a public official of the United States in the course of his duty, or transmitted from one such official to another in the course of duty." Only State secrets are privileged.

65.68. While the propositions set out above hold true even today, their application was made in dramatic circumstances in U.S. v. President Nixon, to which reference may now be made. These were the facts—

Following an indictment alleging violation of federal statutes by certain staff members of the White House and political supporters of the President, the Special Prosecutor filed a motion under Fed. Rules of Crim. Proc. Rule 17(c), for a subpoena duces tecum for the production before trial of certain tapes and documents relating to precisely identified conversations and meetings between the President and others. Having rejected the President's contentions (a) that the dispute between him and the Special Prosecutor was non-justiciable as an 'intra-executive' conflict, and (b) that the judiciary lacked authority to review the President's assertion of executive privilege, the court stayed its order pending appellate review, which the President then sought in the Court of Appeals. The Special Prosecutor then filed, in that Court, a petition for a writ of certiorari before judgment (No. 73-1766) and the President filed a cross-petition for such a writ challenging the grand jury action (No. 73-1834). The Court granted both petitions.

65.69. The President, claiming executive privilege, filed a motion to quash the subpoena. The District Court, after treating the subpoenaed material as presumptively privileged, concluded that the Special Prosecutor had made a sufficient showing to rebut the presumption and that the requirements of Rule 17(c) had been satisfied. The Court thereafter issued an order for an in camera examination of the subpoenaed material.

65.70. The Supreme Court held that neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the confidentiality of Presidential communications is not significantly diminished by producing material for a criminal trial under the protected conditions of in camera inspection, and any absolute executive privilege under Article II of the Constitution would plainly conflict with the function of the courts under the Constitution.

1Rule 228, American Penal Code of Evidence.
2The distinction was anticipated in Wigmore, Evidence, section 2378 (3rd ed. 1940).
3A similar definition is contained in Rule 34 of the Uniform Rules of Evidence, 1953.
5Facts taken from the headnote in 418 U.S. 683.
Although the courts will afford the utmost deference to Presidential acts in the performance of an Article II function—United States v. Burr\(^1\)—when a claim of Presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on the ground that military or diplomatic secrets are implicated, but merely on the ground of a generalized interest in confidentiality, the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial and the fundamental demands of the process of law in the fair administration of justice.

On the basis of this Court's examination of the record, it cannot be concluded that the District Court erred in ordering in camera examination of the subpoenaed material, which shall now forthwith be transmitted to the District Court.

Since a President's communications encompass a vastly wider range of sensitive material than would be true of an ordinary individual, the public interest requires Presidential confidentiality be afforded the greatest protection consistent with the fair administration of justice, and the District Court has a heavy responsibility to ensure that material involving Presidential conversations irrelevant to or inadmissible in the criminal prosecutions be accorded the high degree of respect due a President and that such material be returned under seal to its lawful custodian. Until released to the Special Prosecutor no in camera material is to be released to anyone.

65.71 to 65.74. No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution.\(^2\)

The following passage in the judgment is important:

"The expectation of a President to the confidentiality of his conservations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

"In Nixon v. Sirica, 159 U.S. App. D.C. 58, 487 F. ed. 700 (1973), the Court of Appeals held that such Presidential communications are 'presumptively privileged,' id., at 75, 487 F. 2d at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that 'in no case of this kind would a court be required to proceed against the President as against an ordinary individual'. United States v. Burr, 25 F. Cas., at 192."


"But this presumptive privilege must be considered in the light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer'. Berger v. United States, 295 U.S. at 88. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depends on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.'"

The decision of the Supreme Court in United States v. Nixon was unanimous. Despite press reports that there was considerable internal dispute among the Justices, it appears that they were of one mind from the beginning. The Supreme Court press officer announced that there had been only one conference of the Justice after the argument until the final opinion was issued. This implied that the Chief Justice had assigned himself to write the opinion at the initial conference for a unanimous Court. The opinion carefully examined each of the issues raised by the parties and in logical and inevitable steps declared that the President must deliver the subpoenaed tapes. Mr. St. Clair—Counsel for the President—immediately announced that the President would comply with the ruling.

The Brief for Mr. Nixon put the point thus—

"The universal view of the legal community, as reflected in the literature, was that the courts lack power to substitute their judgment for that of the Presidents on an issue of this kind and that they lack power to compel a President to make production. It was, quite literally horn-book law that 'confidential communications to and from the President are inviolate to a judicial request....................'" Forkosch, Constitutional Law 131 (1963)."

The crucial question in United States v. Nixon was that raised in the brief for the American Civil Liberties Union: —

"The issue is whether the President has the implied authority under the Constitution to withhold data from Congress (and the Courts) solely in his discretion, or whether his decision to do so is subject to constitutional limitation and judicial review."

This issue was answered squarely by deciding that the President has no such authority.

A distinguished American constitutional lawyer has thus summed up the importance of this ruling:

"Great Supreme Court cases, especially those dealing with separation-of-powers review over presidential and legislative authority are sometimes like delayed-fuse aerial bombs. They have an initial impact when they first hurl to earth, but their greater effect comes later, when their full explosive force is released.

"That is quite likely to be the legacy of United States v. Nixon. The decision's immediate effect was to order 64 taped conversations to be delivered. And the immediate rule of law in the public focus is that the President cannot withhold information from a criminal proceeding in which such information is directly relevant, on the grounds of a general claim that this would impair the confidentiality of executive communications and not be in the public interest.

"But the decision declared a larger promise that will be far more significant in the long run. It rejects the argument of some populist-minded commentators that there is no constitutional basis at all for executive privilege. The Justices were unanimous in declaring that in many key areas—the court stipulated 'military, diplomatic or sensitive national security secrets'—the President has a constitutional basis for asserting privileges and can have this enforced by the courts.

"In my view, this judgment about the Executive's need for and right to confidential communications is entirely right in principle. What it will mean in practice, however, is that from now on, the federal courts have been given the role of arbitrating both the general definitions and the document-by-document review of those presidential communications that may become central to criminal proceedings."

X. OTHER COUNTRIES

65.75. The present position in Australia would seem to be that the ultimate decision to the claim of privilege rests with the court.

Secondly, the power of the court to carry out inspection of the document is also recognised. The Court may, if it thinks fit, disclose the documents to the parties.

65.76. It seems that in France the Conseil d'Etat, can, on behalf of the parties, demand production of a document against the Government,1 and the ultimate decision is vested in the Conseil d'Etat.

65.77. A Scottish case2 shows that the position in Scotland may be more favourable to the subject than the law of England as it was understood before 1968. It also throws new light upon what is the extent of the "public interest".3 In that case, the Glasgow Corporation was seeking to establish that the Central Land Board, which, by statute, acts by and on behalf of the Crown, should disclose certain documents in litigation which challenged the aces of the Board's method of assessing development charges. The documents included, (inter alia), letters and minutes passing between the Board and District Valuers, which related to the methods whereby such charges should be calculated and determined; in other words, they were inter-departmental communications, and accordingly the Secretary or State for Scotland had certified that they ought not to be produced, because they belonged to a class of documents which it was necessary to withhold for the proper functioning of the public service. The Courts in Edinburgh, with one dissentient in the First Division on Appeal, held that they were precluded by the decision of the House of Lords in the English case of Duncan v. Cammell, Laird & Co. Ltd. from questioning the ruling by the Minister. On appeal to the Lords, the House, consisting of five Law Lords including two from Scotland, were unanimously of opinion, to quote Lord

1Hood Phillips, Constitutional Law (1967), page 692.
3Summary of the case is taken from Note by E.C.S. Wade, in (1956) Cambridge L.J. 133, 136, 137.
Radcliffe, that in Scottish Law "The power reserved to the court is the power to order production, even though the public interest is to some extent affected prejudicially. The interest of Government which the Minister should speak with full authority do not exhaust the public interest. It is open to the court to dispute with the Minister whether his view is well-founded." There may, in other words, be wider considerations of public policy which are incidental to the administration of justice. This view was mentioned by Morris L.J. in Ellis v. Home Office. Of such considerations, in Scotland the court may be the judge and may thus overrule the Minister. In the present case it exercised its discretion by upholding the Minister.

65.78. The Kenya Evidence Act has an elaborate provision on the subject in these terms:

"Privilege relating to official records.

131. Whenever it is stated on oath (whether by affidavit or otherwise) by a Minister, or by the Secretary-General of the Organisation, that he has examined the contents of any document forming part of any unpublished official records, the production of which document has been called for in any proceedings, and that he is of the opinion that such production would be prejudicial to the public service, either by reason of the content thereof or of the fact that it belongs to a class which, on grounds of public policy, should be withheld from such production, the document shall not be admissible."

This provision codifies the view taken by the House of Lords in Duncan's case—since repudiated in Conways' case.

65.79. In Sweden, every citizen, whether a party to litigation or not, has a general right of free access to official documents, with certain specific exceptions such as foreign policy, defence and police.

XI. RESULT OF THE COMPARISON

65.80. The above comparison of the salient features of the law on the subject under the Act, with the law in England and in the United States and certain other countries, is not a matter of mere academic interest; it is intended to bring out certain important characteristics of our own provision. Without meaning to be exhaustive, one may state that the Indian Act, taken literally, is more stringent in its effect on the citizen's right to summon evidence than the law in England and the U.S.A.—at least in one respect, namely, that the decision of the head of the department is, so far as the text of the section goes, final—which is not the position in England and in the United States. It may also be stated that in India, the implication of section 162, again, taken literally—is that even the judge in his chambers is not entitled to see the very document in respect of which the privilege is claimed—a matter in regard to which the present English practice seems to be different. In both these respects, thus, the law in India is stringent, on the text of the relevant provisions.

XII. POINTS FOR AMENDMENT

65.81. Should the law in India be changed? That is the question to be considered. Of course, the fact that the law elsewhere is more liberal is not a sufficient consideration, though it may show that if the experience of other countries is any guide, practical difficulties need not be apprehended.
65.82. In taking a decision on the question whether the section requires an amendment, it should not be overlooked that the present section was framed a hundred years ago at a time when the activities of the State were not so wide and all embracing as they are at present. Further, it must be borne in mind that thinking on the subject had not then crystallised as it is today; and several aspects of the privilege—its impact on the administration of justice and its effects on the rights of citizens—had not been thoroughly discussed at that time. For these reasons, one is entitled to consider the need for substantial modifications or additions and amplifications with greater readiness than one would be in the case of other provisions.

65.83. There is the very important aspect of rule of law. "In a democracy based upon the rule of law, surely the only acceptable repositories of absolute discretion should be the courts."

65.83A. We first address ourselves to the present provision barring the inspection of the document (section 162). This provision has caused serious practical difficulties. If the court cannot inspect the document, it is inconvenient for the Court to decide the question whether the document falls within "affairs of State". On principle also, where the admissibility of a document is to be decided, the materials—and more particularly the document itself—ought to be before the Court. The Court would, it is true, ordinarily accept the statement of the Minister or head of the department, if made on oath, as to whether the document is one whose disclosure would be injurious to public interest. The court may, in a proper case, get him cross-examined at the hands of a party claiming disclosure. The court will treat his objection as sufficiently, provided the objection is validly and properly taken and based on materials which the court considers evidence. But the ultimate power of inspection should always be vested in the court. In the peculiar circumstances of a case, the court may accept the view of the responsible officer, but the decision must be of the court.

65.84. It may be noted that the practice elsewhere has been liberalised. Lord Denning, who gave the dissenting judgment in Conway's case (in the Court of Appeal), referred to a number of cases from all the dominion countries for holding the view that the documents could be inspected by the court for keeping the balance between the parties even. The following observations of Lord Denning can be read with advantage:

"I know that in Duncan v. Cammell, Daird & Co. Ltd., (1942) 1 All E.R. 587; (1942) A.C. 624, the House of Lords dissented from Robinson's case, (1931) All E.R. 533; (1931) A.C. 704; but the courts of the Commonwealth being free to choose have unanimously followed Robinson's case and have endorsed the views of this court in the Grosvenor Hotel case, (1964) 3 All E.R. 354; (1965) Ch. 1210; or in other cases have acted on like principles. Let me recite the cases. They are a veritable roll call. The Supreme Court of Canada in R. v. Shinder, (1954) S.L.R. 479 and Gagnon v. Quebec Securities Commission, (1964) S.C.R. 329. The Supreme Court of Victoria in Bruce v. Waldron, (1963) V.L.R. 3. The Court of Appeal of New South Wales in Re Tunstall, Ex. F. Brown, (1966) 84 W.N. (Pt. 2) (N.S.W.) 13. The Court of Appeal of the New Zealand in Corbett v. Social Security Commission, (1962) N.Z.L.R. 878. The Supreme Court of India in

---

2Section 162.
4See also para 65.101, infra.
65.85. Our first recommendation, then, is to amend section 162 for the purpose by deleting the words which exclude from inspection a document relating to matters of State.

65.86. In addition, power to decide the question of privilege should also in our view, be vested in the Court. In practice, the Court will pay due regard to the Ministerial Certificate. But it seems to us that the legislative provision must not be rigid as at present. The ultimate decision as to whether disclosure should or should not be allowed, should, in every case under section 123, be with the Court. It is to be pointed out, in this context, that the foundation for the privilege is injury to the public interest. The expression "affairs of State" is of very wide amplitude; literally, it will cover every activity of the State so as to take in even day to day routine administration and not merely highly confidential matters pertaining to defence, foreign affairs, Cabinet minutes or advice tendered by the Ministers to the Governor under Article 163(3). The crucial test should be whether there is injury to the interest of the public, and a determination of that question should be left to the Court.

65.87. According to Wigmore, the extent to which this privilege has gone beyond "secrets of State" in the military or international sense is by no means clearly defined, and therefore its scope and bearing are open to careful examination in the light of logic and policy. According to him, in a community under a system of representative government, there can be only few facts which require to be kept secret with that solidity which defies even the inquiry of courts of justice.

65.88. We may also quote the views of Salmon L.J. Addressing the members of Justice in July, 1967, Salmon L.J. (as he then was) observed, after referring to the case law on the subject, as follows:—

"This is a constitutional question of first importance and it can be settled only in the courts. The law relating to crown privilege is entirely judge-made law. No statute is concerned. If the courts lack the will, it would be unrealistic to expect of any government that it should find the parliamentary time to introduce legislation for the purpose of conferring upon the courts a power which they have shown that they are unwilling to acknowledge, let alone exercise. The courts in Scotland have held that they have this power. So have the courts of Canada, Australia, New Zealand and India. These decisions have been upheld in the House of Lords; Glasgow Corporation v. Central Land Board, (1956) S.C. (H.L.), and the Privy Council; Robinson v. State of South Australia, (1931) A.C. 704. The Grosvenor Hotel case laid down that a similar rule of the common law prevails in England. There is, indeed, no country in which the common law holds sway, whose courts have failed to recognise that they have such

a power—to be exercised no doubt rarely and in the last resort, but nevertheless to be exercised when necessary. It would be said indeed if the courts of this country, which is the fount of the common law, should alone, and contrary to its whole spirit and all its principles, wholly abdicate a power which is vital to the true administration of justice.”

65.89. The question why the determination of the question of public interest should be by the court may be viewed from another angle. For this purpose, it is necessary to discuss in detail the expression “affairs of State”. These words have not been defined, nor has the expression “matters of State”; which is used in section 162, been defined in the Act. The shorter Oxford Dictionary explains “matter” as a “thing, affair, concern”. Therefore, one may presume that there is, for all practical purposes, no difference between the scope of section 123 and section 162 so far as this particular ingredient is concerned.

65.90. In the absence of a statutory definition of the expression “affairs of State”, one is driven to consulting the Dictionary. The shorter Oxford Dictionary explains “affairs of State” as “public business”. Now, such a meaning cannot be attributed to this expression in the context of section 123, because that will mean that all public business would be excluded from the purview of the law of evidence, unless the head of the department consents. This is not the usual understanding of the section. Such a view, though sometimes put forth on behalf of the government, has never been accepted judicially.

It may be noted that the expression “affairs of State” does not possess much importance in English common law. The emphasis is on “public interest”. In Robinson’s case for example, the Privy Council said:

“The principle of the rule is the concern for public interest and the rule will accordingly be applied no further “than the attainment of that object requires.”

Injury to the public interest was the test adopted by the House of Lords in Duncan’s case also, and in Conway v. Rimmer. It has been emphasised in India by the Supreme Court and High Courts on numerous occasions.

65.91. Having regard to the fact that the expression “affairs of State” is not defined in the Act, and that judicial decisions in India also do not give a precise definition, it is legitimate to consider the question whether the scope of the privilege should be defined in some other terms. Judicial decisions, on the whole, seem to suggest that these words have acquired a secondary meaning, namely, those matters of State whose disclosure would cause injury to the public interest. Such a reading would, in fact, be inescapable if the foundation of the privilege is injury to the public interest.

65.92. The whole difficulty arises because, under the section as is now stands, prominence is given to the expression “affairs of State”—a prominence really not deserved by that expression if the matter is viewed on the basis of principle and unhampered by the fact that section already happens to use the expression. The crucial test ought to be injury to the public interest. In fact, this has been described as the foundation of the privilege, as already stated. The difficulty arises because the test which is really crucial does not find a place in the section, while an expression which is really not crucial is used in the section—and that

1Section 162.
too without a definition. It would, therefore, be appropriate if the real test is incorporated in the section. After that is done, application of the test to each case should be with the court as is the case now with "affairs of State".

65.93 The result, in substance, would be that "relevant evidence must be excluded if its reception would be contrary to the public interest"—which is the formulation by Cross and Wilkins1 of the rule in England. This is also in accordance with what Lord Morris said in Conway’s case,2 namely,—

"Whenever objection is made to the production of a relevant document, it is for the court to decide whether to uphold the objection........... the power of the court must also include a power to examine the documents privately."

In this connection, reference may be made to the observations of Mathew J. in State of U.P. v. Raj Narain3, which were as follows:—

"As it was held in that case4 that the Court has no power to inspect the document, it is difficult to see how the Court can find, without conducting an enquiry as regards the possible effect of the disclosure of the documents upon public interest, that a document is one relating to affairs of State as, ex hypothesi, a document can relate to affairs of State only if its disclosure will injure public interest.5 It might be that there are certain classes of documents which are per se noxious in the sense “that, without conducting an enquiry, it might be possible to say that by virtue of their character their disclosure would be injurious to public interest. But there are other document which do not belong to the noxious class and yet their disclosure would be injurious to public interest. The enquiry to be conducted under section 162 is an enquiry into the validity of the objection that the document is an unpublished official record relating to affairs of State and therefore, permission to give evidence derived from it is declined. The objection would be that the document relates to secret affairs of State and its disclosure cannot be permitted, for, why should the officer at the head of the department raise an objection to the production of a document if he is prepared to permit its disclosure even though it relates to secret affairs of State? Section 162 visualizes an enquiry into that objection and empowers the court to take evidence for deciding whether the objection is valid. The court therefore, has to consider two things; whether the documents relate to secret affairs of State; and whether the refusal to permit evidence derived from it being given was in the public interest. No doubt, the words used in section 123 ‘as he thinks fit’ confer an ‘absolute discretion on the head of the department to give or withhold such permission. As I said, it is only if the officer refuses to permit the disclosure of a document that any question can arise in a court and then section 162 of the Evidence Act will govern the situation. An overriding power in express terms is conferred on the court under section 162 to decide finally on the validity of the objection. The court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. This conclusion flows from the fact that in the first part of section 162 of the Evidence

1Cross and Wilkins, Outlines of the Law of Evidence (1975), page 187, article 680.
5Emphasis added.
Act, there is no limitation on the scope of the court's decision, though in the second part, the mode of enquiry is hedged in by conditions. It is, therefore, clear that even though the head of the department has refused to grant permission, it is open to the court to go into the question after examining the document and find out whether the disclosure of the document would be injurious to public interest and the expression 'as he thinks fit' in the latter part of section 123 need not deter the court from deciding the question afresh as section 162 authorises the court to determine the validity of the objection finally (see the concurring judgment of Subba Rao, J. in Sukhdev Singh's case)."

65.94. We should also mention that on the whole, the attitude of the courts in India has also been towards liberalising the interpretation of the law, though gradually. For example, in Sukhdev Singh's case, inspection of the original documents was regarded as totally barred by virtue of section 162. But, in Amar Chand's case, a further step was taken, and to do justice to the parties, it became necessary for the Court to call for the documents. Similarly, in Sukhdev Singh's case, an examination of the merits of the privilege claimed was out of question, while, in Amar Chand's case, the court, after seeing the document, was satisfied that the claim of privilege was not justified.

65.95. Ray, C.J., in State of U.P. v. Raj Narain after examining several decisions and observing that it is injury to the public interest which is the reason for exclusion from disclosure of the documents in question, and after giving certain illustrations of documents which would be privileged, pointed out—

"In the ultimate analysis, the contents of the documents are so described that it could be seen at once that in the public interest the documents are to be withheld".

65.96. In this context, the following comment of a Judge of the erstwhile Punjab Chief Court on draft section 110 of the Indian Evidence Bill (present section 123), is also of interest—

"Upon section 110 of the Bill it may be said that there is no corresponding provision with reference to documents, and, assuming "that a corresponding section will form part of Part II, Chapter VII that the words of section 22 of Act 2 of 1855 are preferable to those which would be so substituted for them, though much difficulty often arises in practice upon the law as it stands at present.

"If the head of the department is to be the Judge whether the 'document shall be produced or not,' some such words as section XXII of Act II of 1855 contains, are necessary for his guidance.

"It can be well understood that to obtain production of a document from the Indian Foreign Department is not the same as to put in evidence a contingent bill out of the Department of Public Accounts, or a contract obtained from that of Public Works.

---

4Merriks v. Nottbower, (1964) 1 All. E.R. 717 was referred to.
5Emphasis supplied.
6Justice Boulnois (Punjab Chief Court). Proceedings regarding the Evidence Bill (National Archives), Paper No. 82 (4th September 1871), page 129.
"The pecuniary interests of Government might require the non-production of the latter as much as the general interests of public policy might require the withholding of the former, but documents should only be privileged on the ground of such general interests as are understood by the words 'public policy'. Provision should be made for documentary as well as for oral evidence on this subject in the Bill."

65.97. It may be stated that section 22 of the Evidence Act. 2 of 1855, was as follows:—

"XXII. A witness shall not be forced to produce any document relating to affairs of State the production of which would be contrary to good policy".

That section did not provide that the decision rests with the head of the department.

Under our recommendation, the decision as to the validity of the claim will be by the Court. Of course, the court will pay adequate regard to the view of the highest officer as to whether the public interest would be prejudiced by disclosure, the more so when national security is put forth as the basis.

65.98. We consider it desirable that section 123 should be amended so as to incorporate a few proposition which are of fundamental importance, or are otherwise of such a nature that the gist thereof should find a place in the section and should not be left to be deduced from judicial decisions on the subject or otherwise left in a state of obscurity. We have in the course of the preceding discussion, referred to most of them. By way of summarising the points made so far and completing the discussion, we may state the propositions that should find legislative expression in section 123.

(1) No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, unless the officer at the head of the department concerned has given permission for giving such evidence.

(This proposition does not make any substantial change in the existing provision. It operates primarily as between the witness and his superior).

(2) Such officer should not withhold such permission unless he is satisfied that the giving of such evidence would be injurious to the public interest. He should make an affidavit also in this regard. The Court may, if it thinks fit, call for a further affidavit from the head of the department.

(This proposition amplifies the section by highlighting the test of injury to the public interest—a test discernible from the case law—and by codifying the procedure already indicated judicially).

(3) Where such officer has withheld permission for the giving of such evidence, and the court, after inspecting the unpublished official records concerned and after considering the affidavit, is of the opinion that the giving of such evidence would not be injurious to the public interest, the court should record its decision to that effect and thereupon the section will not apply to such evidence.

(This proposition modifies the existing section, for reasons already given. The change is an important one, as the decision as to injury to the public interest will be with the court).

1See infra.
2Section 162 to be amended also.
Section 162 to be amended.

65.98A. Amendment of section 162, second paragraph, by removing the words "unless it refers to matters of State", should also be carried out separately.

XIII. NATIONAL SECURITY

65.99. We do not propose to exclude, from the proposed provisions for inspection by the court and final determination by the court, cases where national security is put forth as a ground for claiming privilege. No such exception has been recognised elsewhere. On principle also, it is the courts which should decide questions of privilege.

If the Executive can act with discretion, the Judge can also act with discretion.

It is rarely that in private matters, documents concerning security of the State will be in issue. If it is a case of suit for wrongful dismissal of a civil servant and the dismissal is on the ground of national security, Article 311 of the Constitution will take care of it.

65.100. We are discussing this aspect because a point of view has been put forth that where the Minister gives an affidavit to the effect that the security of the State would be affected by the disclosure, his affidavit should be final. In our view, such a step would be a retrograde one. Even now, the decisions of the Supreme Court show that the Courts claim a right of inspection, and decide the question of privilege, whatever be the ground put forth for claiming the privilege. Moreover, in all Commonwealth countries, it is the court which decides the issue, whether the matter claimed to be privileged is alleged to relate to national security or whether the claim is made on any other basis.

Recent Commonwealth practice.

65.101. We have referred already to the wealth of Commonwealth authority which was mentioned in the judgment of Lord Denning in Conway v. Rimmer in the Court of Appeal. Simply by way of illustrating from recent practice, we would refer to a New Zealand decision. In that case, the plaintiffs brought an action alleging breach of contract between themselves and the State. The Minister concerned objected to the production of documents relating to the formation of government policy on the basis that it would be injurious to the public interest to reveal to public scrutiny the inner workings of government at high levels. It was held that in this particular case, which was a claim for breach of contract, and where there was no question of the security of the country being affected by the disclosure of secret matters, where the Judge feels a doubt about the documents for which privilege is claimed, the citizen is entitled to some scrutiny on his behalf. An order was accordingly made by Beattie, J., of the Supreme Court that the documents should be supplied for the inspection of the Judge.

Position in Canada.

65.101A. The Canadian rule was recently changed; while the pre-1954 view was similar to that of England, the case of Regina v. Snider marked a turning point. The Court, it was held, had now the responsibility of determining whether on the basis of "any rational view" the public interest required that the document should not be revealed. If an affirmative finding is made on this point, the court then would defer to the Minister's claim. In

---

1To be carried out under section 162.
2Paragraph 65.98, supra.
3Meares v. Attorney General. (Supreme Court, Wellington) (18th February, 1976); Butterworth's Current Law (1976), (Case Nos. 191 and 301).
the case in which it was announced, the Supreme Court could not find any public interest requiring non-disclosure of income tax returns despite statutory provisions assuring their privacy. Moreover, dicta in the case made it clear that the judiciary was expected to exercise control of administrative discretion in this area.

In 1964, the rule was laid down in Canada practically in the same terms as it is in England now.

65.101B. In order to allay possible mis-apprehension as to the effect of the proposed amendment in regard to those provisions of the substantive law which create certain special safeguards on the ground of security of State, we should mention here that those safeguards would not be affected by the proposed amendment. This is for the reason that where the substantive law itself takes the case out of the realm of court, there can be no occasion for invoking this or any other evidentiary privilege because the matter would not be litigated at all. We are making this observation since the apprehension may arise that, in regard, for example, to the special provision as to the security of the State made in Article 311 of the Constitution the proposed amendment may have an undesirable effect. Cases under article 311 are outside the sphere of justiciability, where the dismissal or removal of the civil servant concerned is itself on the ground of security of State. This is by reason of the special provision contained in that behalf in that very Article, ruling out justiciability.

65.102. The clarification which we have recommended is needed from the practical point of view. It may be mentioned that in Amor Chand’s case frivolous pleas were raised—the document sought to be withheld was one which completely established the opposite party’s case.

65.103. Any system of law in a democratic society must have as one of its primary goals, equality before the Law and the equal protection of the laws.

A bureaucracy may become too cumbersome, proceeding by formula on its own rigid lines, and thus may not be able to understand the spirit of the law or the fine, subtle and intangible considerations of justice. It is given to the judge to steer the law between the dangers of rigidity on the one hand and of arbitrariness on the other hand. There is no sound reason why, when so many important matters are decided by courts in the field of procedure, a departure should be made in regard to the question of state privilege.

A Judge is the person entrusted, on behalf of the community, to weigh the various conflicting interests—to weigh, on the one hand, the needs of security of the State and, on the other hand, the ultimate interest of the community in justice being done and in a proper investigation being made into facts. If the judge determines that the government servant must produce the document, then no privilege should avail him to refuse.

65.104. It would be convenient to summarise our reasons for the recommendation:

- The rule of law justifies the course recommended.
- Balance of convenience is in favour of the course recommended.
- Only the Judge can decide such questions
- There is no likelihood of abuse of the power proposed to be conferred on the Judge.

1Goennen, (1964) S.C.R. (Canada)
(e) Past experience shows that having regard to the unsatisfactory grounds on which privilege was claimed, courts had to reject the claim. This shows how the proposed amendment is in the interests of justice.

XIV. CASE LAW DISALLOWING CLAIM

65.105. At this stage, we may refer to a few decided cases where the claim of privilege was rejected. Though security of the State was not put forth specifically in those cases, they are relevant to show how a claim is made sometimes on unsubstantial grounds.

65.106. In a Bombay case, the Collector of Bombay refused to renew the licence granted to the petitioner—R.M.D. Chamarbaghwalla—to run a prize competition. In support of the refusal, the Collector stated in his affidavit, "I say that Government decided and laid its general policy and confidentially circulated it for the guidance of its officers".

At the time of hearing, the Advocate-General raised a preliminary objection that the circular issued by Government was privileged from production under section 123, Evidence Act.

This objection of the Advocate-General was over-ruled by the High Court.

65.107. In a Madras case, the writ petition was filed by A. Ramachandran against the appointment of the respondent as Government Pleader by the State of Madras on 1-7-1960.

One of the allegations made by the petitioner in his affidavit was that he believed that in 1959 the name of the respondent was sent up for appointment as a High Court Judge but had been rejected on the ground that he lacked judicial experience.

To this allegation, the then Law Minister of the State replied in his affidavit as under:

"I am not in a position to disclose any matter relating to the proposals or consultations for appointment of a High Court Judge. Under Article 217(1) of the Indian Constitution, the President makes such appointments in consultation with the Chief Justice of the High Court. Their consultations are confidential and no Minister or other officer can disclose details thereof".

65.108. Dealing with this aspect of the matter, the High Court observed that there is no duty on Government to claim privilege in a case of this kind. But they have a duty to speak the truth and the whole truth whether in a case of this kind or different—and affidavits are not excepted from the scope of the rule.

65.109. An Allahabad case was a civil case between two private parties regarding the demolition of a wall in a property dispute. The plaintiff summoned the case diary of a criminal case investigated by the Police to show the existence of some windows at an earlier period. A clerk from the police department who brought the case diary to the Court claimed privilege and this was allowed by the Court, with the result that the evidence could not come on record and the suit was dismissed. On appeal by the plaintiff, the lower appellate Court held that the privilege was not claimed in a proper form, nor

---

by the head of the department and consequently remanded the case to the trial Court. Against this order, the defendant came up in the High Court. It was contended that the case diary maintained by a Police Officer during the investigation of a crime was a confidential document with regard to which privilege could be claimed and no evidence could be allowed to come on the record. The High Court held that a part of the case diary containing the confidential communications or reports are privileged but not the statements of witnesses or other allied matters contained therein.

65.110. The High Court further held that the same inference can be drawn on a consideration of section 123. The term “affairs of State” is a general one, but it cannot include all that is contained in the record. Where an open enquiry is made, statements recorded during the open enquiry cannot be deemed to be confidential and, similarly, any application or complaint made by a person cannot be held to relate to the “affairs of State”.

65.111. In an Andhra case,¹ the revision petitions were filed by the Public Prosecutor in the High Court against the orders of a magistrate, over-ruuling a claim of privilege under sections 123 and 124 in respect of some documents summons for by the respondent.

65.112. The respondent who was the President of a Cooperative Society was prosecuted for criminal breach of trust in respect of a sum or Rs. 4807/- belonging to the Society. The respondent applied to the magistrate for summoning the records of enquiries made by the Sub-Registrar of the Cooperative Societies and the Audit reports for the years 1953-54.

The Deputy Registrar who was summoned to produced those documents did not produce the same, and, instead, filed an affidavit of the Registrar of the Cooperative Societies and claimed privilege on the ground that these are unpublished official records relating to “affairs of State” and their disclosure will be prejudicial to public interest.

65.113. The Magistrate, after considering this claim of privilege under section 123, passed an order negativing it on the ground that the documents related to the conduct of cooperative Societies and had nothing to do with the “affairs of State” in any manner.

65.114. The Public Prosecutor, Andhra, filed a revision petition against the said order. The High Court held that the magistrate was right in over-ruuling the claim of privilege. The revision petition was dismissed.

XV. RECOMMENDATION

65.115. In the light of the above discussion, we recommend that section 123 should be revised on the following lines:—

“123. (1) Subject to the provisions of this section, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, “unless the officer at the head of the department concerned has given permission for giving such evidence.

Such officer shall not withhold such permission, unless he is satisfied that the giving of such evidence would be injurious to the public interest: and where he withholds such permission, he shall make an affidavit containing a statement to that effect and setting forth his reasons therefor:

Provided that where the court is of opinion that the affidavit so made does not state the facts or the reasons fully, the Court may require such officer or, in appropriate cases, the Minister concerned with the subject, to make a further affidavit on the subject.

(3) Where such officer has withheld permission for the giving of such evidence, the court, after considering the affidavit or further affidavit, and, if it so thinks fit, after examining such officer or, in appropriate cases, the Minister, orally,—

(a) Shall issue a summons for the production of the unpublished official records concerned, if such summons has not already been issued;

(b) shall inspect the records in chambers; and

(c) shall determine the question whether the giving of such evidence would or would not be injurious to the public interest, recording its reasons therefor.

(4) Where, under sub-section (3), the court decides that the giving of such evidence would not be injurious to the public interest, the provisions of sub-section (1) shall not apply to such evidence."

Recommendation.

65.116. The above recommendation is subject to reservation by two members—Shri Dhavan and Shri Sen-Verma—who have written a separate note.¹

¹Amendment of section 162, second paragraph, by deleting the words "unless it refers to matters of State", to be carried out separately.

²Note by Shri Dhavan and Shri Sen-Verma.
COMMUNICATIONS IN OFFICIAL CONFIDENCE—SECTION 124

I. INTRODUCTORY

66.1. Besides section 123, there is yet another section relevant to official matters, the disclosure whereof would be injurious to the public interest. Under section 124, no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure.

66.2. It may be recalled that section 123—the preceding section—provides that no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. To some extent, sections 123 and 124 may seem to overlap; in certain respects, they differ from each other. They overlap insofar as evidence which is derived from unpublished official records, and which consists of communications made to a public officer in official confidence, falls under both the sections.

66.3. Of course, as already stated, the two sections are not identical in all respects. Section 123 is not confined to a public officer, while section 124 is so confined. On the other hand, section 123 is confined to a written communications, while section 124 is not so confined.

66.4. Section 123, as it now stands, vests the decision in the head of the department. Section 124 leaves to the public officer deposing in the case the decision of the question whether he should disclose the matter or not. Section 124 is concerned with confidential official communications—to use a convenient label, though it is not very accurate—while section 123 is concerned with unpublished official records.

66.5. In certain cases—say, in regard to oral official communications—it is enough to comply with section 124. Such cases do not present problems of magnitude. But the overlapping to which we have referred may create difficulties, where both the sections apply. In particular, while under section 123, as it now stands, it is for the head of the department, to give permission; under section 124, it is for the public servant to decide whether the public interest would suffer by the disclosure. It will be necessary to revert to this aspect later.

II. ENGLISH LAW

66.6. Before we discuss the need for amendments in the section, it would be useful to refer to the English law on the subject. The general principle in England is that relevant evidence must be excluded if its reception would be contrary to the public interest. It is this general principle that seems to regulate the disclosure or non-disclosure of communications in the conduct of official affairs. There is no separate rule for official communications in addition to that applicable for official papers. In particular, the Crown is not allowed to object to the giving of any oral evidence by a witness, even if he be a civil servant. The witness must attend, and objection must be limited to questions relating to matters claimed to be covered by the doctrine of public policy—whatever be the proper scope of that doctrine.

The case of *Broome* is an illustration. The wife had sued the husband for dissolution of the marriage, on the ground of cruelty, alleging, *inter alia*, that when she joined the husband in Hong Kong, where the husband was posted as a sergeant in the army, the husband took her to a filthy apartment of a standard far below his means and failed to provide her with any assistance and kept her short of money. For proving this allegation, the wife caused a subpoena (for oral evidence and for producing certain documents) to be served on one Mrs. Allsop, who was, at the material time, the sole representative of the Soldiers' Families Association in Hong Kong. The Secretary of State for war, by a certificate, recorded the opinion that it was not in the public interest that "the documents should be produced or the evidence of Mrs. Allsop given orally". We are, at the moment, concerned with the latter part of the certificate relating to oral evidence. Sachs J., held that it was wrong on the part of the Minister to adopt a procedure which would prevent the witness from giving any evidence, whatsoever, of any sort. On the merits also, he was not persuaded that, in the circumstances of the case, there was a legitimate justification for claiming the privilege. But, in any case, the form of the certificate was not such as to enable the court to ascertain what really was the nature of the evidence for which privilege was being claimed. He also pointed out that in the present case, the evidence of Mrs. Allsop as to the way in which the wife was received at the Quay at Hong Kong and the sort of accommodation available and connected matters was relevant and of assistance to the court and in none of those matters was there any apparent cause for any intervention in the name of Crown privilege.

66.7. So are as could be gathered from the case law on the subject, there is, in England, no separate privilege of confidential communications to public servants—at least according to the modern theory. The principle of injury to the public interest applies, and it would appear that whatever rule applies to written records, applies to oral communications. However, it is said that the procedure which may be appropriately followed in respect of oral evidence may have to be worked out.

Lord Simon, in *Rogers v. Secretary of State*, observed—

"I am not, for myself, convinced that there is any general privilege protecting communications given in confidence (see *Smith v. East India Co.*, but cf. *Alfred Crompton Amusement Machines Ltd. v. Comrs. of Customs and Excise*)."

After advertiring to the circumstances from which the law might itself infer confidentiality, he observed:

"But if this is a correct classification, it would suggest that the privilege (a true privilege being waivable) is that of the impartor of the information and not that of recipient."

While Lord Simon was cautious enough not to make a categorical statement, the treatment of the subject in some of the recent works on *evidence* seems to suggest that cases of confidential communications made for official purposes are not separately dealt with, but are subsumed under the general category of public interest.

---

4 *Smith v. East India Co.*, (1844) 1 Ph. at 54.
III. POINTS FOR AMENDMENT

66.8. It would, thus, appear that in England a separate rule is not considered necessary on the topic forming the subject of section 124. If this view is correct, then it can be said that the developments that have taken place in England as to Crown privilege in relation to the production of documents will effect the law relating to oral communications also.

We may now revert to the survey of the two sections in our Act, and the overlapping to which we have already referred. A question arises for consideration whether, in so far as the two sections overlap, it is not desirable that the overlapping should be removed.

66.9. Dealing with this question, we are, in the first place, of the opinion that, in the interest of clarity, overlapping between the two sections should be avoided, and the only possible method of doing this is to confine section 124 to matters which are not in the form of unpublished official records. For brevity, we may call them "oral communications"—though that expression does not very accurately indicate the scope of section 124 as it now stands. We use the expression "oral" simply as a convenient label to exclude unpublished official records. These are dealt with in section 123 and we do not see the need for any additional protection for unpublished official records consisting of "communications in official confidence". All unpublished official records—whether made in "official confidence" or otherwise—should be governed by section 123. The privilege as provided in that section—subject to the amendment which we have recommended in that section—should be adequate for the purpose. There is no reason why evidence derived from unpublished official records relating to affairs of State should, besides enjoying the protection conferred by section 123, also be subject to a special protection under section 124. At present, not only the permission of the head of the department must be obtained, but also the willingness of the public servant must be secured. Since such a double safeguard is hardly called for, we recommend that whatever falls within section 123 should be excluded from section 124. In the result, section 124 will be needed only for the residuary category—briefly, oral official communications made in official confidence whose disclosure may injure the public interest.

66.10. Secondly, as regards this residuary category of oral official communications, the proper test should be injury to the public interest. Section 124 already so provides,—by the words "the public interests would suffer by its disclosure". The test is sound. As to the authority which should apply this test, we deal with the question below.

66.11. The third question to be considered is whether the application of this test—i.e. whether the decision of injury to the public interest likely to be caused by disclosure of the communication—should be left to (i) the public servant concerned, as at present, or (ii) the head of the department, as in section 123 (as it now stands); or (iii) the court, as it our recommendation relating to section 123.1

66.12. According to section 124, as it now stands, the question as to whether a communication was made in official confidence, is a matter subject solely to judicial decision. But, if the Court comes to the conclusion that the communication was made in official confidence, then it is for the officer alone to whom the communication has been made to decide whether the disclosure should be made.

1See Chapter 65, supra.
This is laid down in the case law under section 124 which—though the cases actually related to documents—were decided with reference to section 124 also.

66.13. It appears to us that this position cannot be allowed to continue. In this case also, the Court should be the judge of the likelihood of injury to the public interests. No doubt, this can be ensured only if the materials available to the public servant are made available to the court also. On this latter score, however, no difficulty should arise, because the public servant concerned can, without disclosing all the materials to the parties, disclose them to the judge in chambers—a course which could be expressly provided for in the section.9

66.14. It is after careful consideration that we have come to the conclusion that the decision should be with the court. It is too much to leave the question of injury to the public interest to the decision of the public servant who may happen to be deposing in the particular case. He may be a petty public servant while the judge may be a person with a much higher official rank. Apart from that, however, there does not seem to be any serious probability of grave injury to the public interests if the decision is left to the court, instead of to the public servant. If necessary, the court can ascertain in chambers the nature of the evidence to be given and the objections likely to be made by the public servant concerned. But it would be more in consonance with the general scheme of the Act to give to the court the power to decide the objection in question. We recommend that the section should be so amended.

66.15. It is to be noted that even now, the question whether the communication is to be regarded as one made in official confidence is primarily to be decided by the court in which the privilege is claimed. The only change of substance recommended by us is that while, at present, the public officer has to decide the question of injury to the public interest, our recommendation is to transfer the power to the Court. This will avoid arbitrary or capricious decision by the public servant—a situation which not infrequently arises.

It may be pointed out that the approach suggested above, namely, that the decision should be with the court, will bring uniformity between sections 123 and 124. In this connection it is pertinent to observe that the fact that these two sections really should be based on the same consideration does not represent anything very radical. In the leading Bombay case in which the matter was considered fully by a Division Bench, Wassodew J. observed—

“This section (124) as well section 123 protects the discovery of documents referring to matters of State. That is based on the general rule that no person can be compelled to give evidence of matters which are State secrets including communications between public officers in the discharge of their public duties. (Halsbury, Volume 22, paragraph 597, at page 427).”

(b) In re Makky Moithu, A.I.R. 1943 Mad. 278; 279 (Horwill J.).
(c) Ijatali Talukdar v. Emperor, A.I.R. 1943 Cal. 539.
(d) Nagaraja v. Secretary of State, I.L.R. 39 Mad. 204.
See para 66.17, infra.
9Emphasis supplied.
66.16. We find that a substantially similar suggestion was made by a Judicial Commissioner in his comment on the Evidence Bill (under draft section 112—which is now section 124). The suggestion was as follows:—

"Section 112. It might be well to add to this section the words 'unless with the permission of the Court'. It is sometimes very necessary for the ends of justice, that the source whence information was derived, especially by the Police, should be known."

66.17. Having regard to all these considerations, we recommend that the power to determine the question of public interest should be in the Court. An examination of the public servant in camera for ascertaining the nature of the objection and the reasons therefor should be provided for, as a safeguard.

IV. MEANING OF OFFICIAL CONFIDENCE

66.17A. A few other points not calling for amendment may now be dealt with. We may note that there is some obscurity as to the expression "official confidence" as used in the section. According to the view of Oldfield J. in a Madras case, the dominant intention in section 124 is to prevent disclosure to the detriment of the public interest and nothing special turns upon the word "confidential". On this view, the expression "communication in official confidence" imports no special degree of secrecy, but includes generally matters communicated by one officer to another in the performance of their duties, where detriment to the public interest may result. It has been said that an easier and more probable explanation of the phrase "official" is evolved by comparison with the expression "professional confidence" in section 126.

66.18. According to the Bombay view, however, the communication contemplated by section 124, necessarily involves the wilful confiding of secrets with a view to avoiding publicity by reason of the official position of the person in whom trust is reposed. The Bombay view could not include within the section all communications to public officers, but would leave the court free to examine the nature of the communication—broadly on a determination of the question whether the need for secrecy was expressed or can be implied.

66.19. We are of the opinion that the Bombay view is to be preferred. The wider view taken in Madras would make the section all-embracing, and we do not think that the section was intended to be so. However, since injury to the public interest is a vital ingredient of the section, this controversy does not have much practical importance.

66.20. In some of the judicial decisions, the test applied is whether the document was prepared in pursuance of a legal process, or whether it was prepared otherwise than under a legal process. With great respect, however, it appears to us that this would not be a universal test suitable for every case. It may be true to state that if the document is prepared under a legal process, then it cannot ordinarily be a confidential one, because it has to be submitted to some judicial or quasi—judicial authority. That does not, however, imply that all other documents would be regarded as made in official confidence.

---

1Mr. P. S. Melvill, an Official Judicial Commissioner C.P. in Paper No. 69, page 72, under section 112 (papers regarding Evidence Act, 1872) (National Archives).

2See para 66.13, supra.

3Nagaraja v. Secretary of State, I.L.R. 39 Madras 304, 310-312 (Oldfield, J.); Vyabji J. did not go so far.

4Nagaraja v. Secretary of State, I.L.R. 39 Madras 304, 310, 312.


6In re Suryanarayana, A.I.R. 1954 Mad. 278 (reviews cases).
For example, every routine paper of a trivial nature sent to a public office and not made under a legal process,—such as an application for leave,—can hardly be contemplated as falling within section 124 under the category of a communication made in official confidence. Therefore, the test referred to above would create anomalies in practice, and theoretically also it is not sound, there being no logical basis for an assumption that the absence of the element of judicial process implies the presence of the element of confidence.

66.21. In this connection, we may quote what viscount Dilhorne observed in Norwich Pharmacal Co. v. Customs Commissioner¹—

"I do not accept the proposition that all information given to a government department is to be treated as confidential and protected from disclosure, but I agree that information of a personal character obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose, is to be regarded as protected from disclosure, even though there is no statutory prohibition of its disclosure".

V. RECOMMENDATION

66.22. In the light of the changes needed in the section as discussed in this chapter,² we recommend that section 124 should be revised as under:

"124. (1) No public officer shall be compelled to disclose communications made to him in official confidence, other than communications contained in unpublished official records relating to any affairs of State, when the court considers that the public interests would suffer by the disclosure.

(2) Where a public officer who is a witness is asked a question which might require the disclosure of any such communication, and he objects to answering the question on the ground that the public interests would suffer by its disclosure, the court shall, before rejecting his objection, ascertain from him, in chambers, the nature of his objection and reasons therefore."

66.23. We should note that this recommendation is subject to reservation by two Members—Shri Dhavan and Shri Sen-Verma. The reservation made by them in regard to section 123 applies to section 124 also, since both the sections are concerned with injury to the public interest.

²Para 66.9, 66.10 and 66.17, supra.
CHAPTER 67

INFORMATION AS TO OFFENCES—SECTION 125

I. INTRODUCTORY

67.1. The disclosures of matters injurious to public interest in general has Introducory.
been discussed so far. A particular species of matters involving the public interest is dealt with in section 125. Under section 125, no Magistrate or Revenue Officer or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

"Revenue Officer" in this section means any officer employed in or about the business of any branch of the public revenue.

67.2. The principle underlying the section is this. While it is perfectly right Principle.
that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner, on the other hand, it is absolutely essential to the public welfare, that the names of parties who give information should not be divulged; for otherwise, - be it from fear, or shame, or the dislike of being publicly mixed up in enquiries of this nature, — few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequences would be that many great crimes would pass unpunished.¹ For the same reason, counsel for the defence is not entitled to elicit from a witness for the prosecution that he is a spy or informer.²

67.3. While the principle may be taken as sound in a broad sense, it must Rule without be noted that the rule is enacted in the section without any express limitations. limitations.
The source of information may be a very material fact in the proceeding in question, and yet the section makes no exception. The broad question to be considered then, is whether it is absolutely essential that the section should be retained with its present broad sweep, or whether some exceptions should be created, in the interest of justice, to meet hardships which are likely to be caused in practice, to which we shall presently advert. Before discussing those hardships, let us have a look at the (i) previous law in India, and (ii) the English law. The previous law was much narrower than the present section, and so is the present English law, as will be evident from the ensuing discussion.

II. PREVIOUS LAW

67.4. Before the passing of the Act, the law in India was narrower than Previous law.
what it is under the section. It was held³ by the Calcutta High Court that the rule which laid down that a witness cannot be examined about the information given by him to the Government for the discovery of offender, was confined to offences against the State or breach of revenue laws. The propositions so laid down would seem to be in accord with the English law as was understood at that time.⁴

²Amrita v. R., (1815) I.L.R. 42 Cal. 957.
³In re Moresh Chandra, 1810, 13 Weekly Reports, 1, 10, (Calcutta).
⁴Reg. v. Richardson, 1865, 3F. & F., 693, see para. 67.6, infra.

687
III. ENGLISH LAW

67.5. This matter is usually discussed under the head of informer’s privilege. The “informer’s privilege” is recognised in England also but the privilege is not absolute or unlimited. The channel of communication of detection of a crime, it is said, is exempt from disclosures, but the privilege is stated to be subject to the consideration that no injustice is caused to the accused. That the identity of police informers must, in the public interest, be kept secret, is not disputed. But the consideration of justice, referred to above, prevails. In Rogers v. Secretary of State, for example, Lord Simon of Glaisdale observed:

“Sources of police information are a judicially recognised class of evidence excluded on the ground of public policy “unless their production is required to establish innocence in a criminal trial”

Although Lord Simon’s observations speak merely of establishing innocence, some earlier cases state the limitation in wider terms.

Lord Esher M. R. in Marks v. Beyfus observed that if, upon the trial of a prisoner, the Judge should be of opinion that the disclosure of the name of the informer was necessary or right in order to show the prisoner’s innocence, then, one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. Lord Esher was dealing with one aspect of injustice, but the scope of the limitation is wider.

Regina v. Richardson furnishes an example. It was an indictment for administering poison with intent to murder. The police had, in consequence of certain information, found the bottle containing the poison in a place used by the prisoner — a maid servant. It was held, that the police were bound to disclose from whom they had the information. The disclosure was compelled because the court found it material to the ends of justice.

Then, in Hardy’s case the following question was put to a witness: “How came you to go there?” (to the seditious meetings). He replied, “I was sent by a gentleman”. He was asked, “By whom?” This question was objected to, and Eyre, C.J., said, “He has said what is proper and material for the purpose, I do not think it is proper;” and the question objected to was withdrawn. Another witness was afterwards asked, without objection, whether he gave the information to a magistrate; which he answered in the negative. The next question was; “Then to whom was it?” This was objected to by the Attorney-General, who said, he could not see what it had to do with the justice of the case. Eyre, C.J., said, “It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed. If it can be made to appear that really and truly it is necessary, for the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it.”

4Emphasis supplied.
6Regina v. Richardson (1863) 3 F. & F. 693 Sussex Spring Assizes (Cockburn C. J.).
7Hardy (1794), 24 St. Tr. 751.
8Emphasis supplied.
67.6. There is, in the English case law, sufficient material for taking the view that the privilege relating to information concerning an offence originated in regard to matters of high state policy, that is to say, offences against the State or the revenues of the State. In fact, the Reporters's note to the case of Reg. v. Richardson, quotes the views of Greenleaf, Tayor and Best, to the effect that the privilege is confined to offences of a political nature.

We are referring to these authorities to show an important limitation on the privilege of the informer in England.

67.7. Finally, it may be mentioned that the Lord Chancellor announced in 1962 that in future, in proceedings against the police for such matters as malicious prosecution or wrongful arrest, no claim to exclude evidence relating to the justification for the conduct of the police will be made unless its disclosure would reveal the name of a police informer.

We have so far considered one limitation of the privilege in England. The second limitation should also be noted. The rule in England does not seem to apply to a private prosecution.

IV. AMERICAN LAW

67.8. It will be possible to refer to only a few important features.

67.9. The privilege which protects from disclosures the identity of informers is not applicable in all situations in the U.S.A. The United States Supreme Court has said that no fixed rule with respect to disclosure of the identity of an informer is justifiable; that the problem is one that calls for a balancing of the public interest in protecting the flow of information against the individual's right to prepare his defence; and that whether a proper balance renders non-disclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defence, the possible significance of the informer's testimony, and other relevant factors.

There is authority for the proposition that once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

67.10. The privilege is also held to be inapplicable where, in claiming it, the government seeks to avoid disclosure of the contents of a communication from the informer, but, in fact, it appears that the contents of the communication will not tend to reveal the informer's identity.

67.11. The most important limitation on the applicability of the privilege of non-disclosure of the identity of an informer arises from the fundamental requirements of fairness. Thus, it is held that where the disclosure of an informer's identity is relevant and helpful to the defence of an accused, or is essential to a fair determination of the cause, the privilege must give way. In the Scher Case, the Supreme Court said that "Public policy forbids disclosure of an informer's identity unless essential to the defence, as, for example, where this turns upon an officers' good faith."

---

1Reg. v. Richardson, (1863) 3 F. & F. 693 (Cockburn, C.R.).
4Stephen's Digest, Article 115.
6Scher case, 305 U.S.A. at 254.
67.12. Subject to important limitations, it is a general rule applicable in the U.S.A. — applicable in civil as well as criminal cases — that the Government is privileged to withhold from disclosure (notwithstanding its relevance), the identity of persons who furnish information relating to violations of law to officers charged with enforcement of that law.

67.13. The privilege is founded upon public policy, and seeks to further and protect the public interest in effective law enforcement. It recognises the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers, and by preserving their anonymity, encourages them to perform that obligation. The privilege is designed to protect the public interest, and not to protect the informer.

67.14. In the United States, the leading case on the subject is *Revialo*. In that case, the Supreme Court stated that the purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The theory is that if persons desirous of assisting law enforcement are constantly threatened with exposure of their identity, the utilisation of informants would virtually disappear. From the statements and discussions contained in the various text-books and in the literature on the subject, it would appear that in this context, by the 'informant' is meant a professional informer. In other words an informant is a person who regularly supplies information to the law enforcement agency and who is compensated in some form for the furnishing of the information. The emphasis is on the paid informant, of the quasi criminal supplier of information—the paid informer receives money while the latter is compensated not in cash but by premises of immunity or of lessened charges or punishment. Wigmore has described the privilege in these words:

“A genuine privilege, on fundamental principle must be recognised for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer’s identity is disclosed. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities.”

67.15. In many States in the U.S.A., the statutory provision requires the court, in effect, to balance the interests of the competing parties. Thus, the California Evidence Code allows the privilege if disclosure of the identity of the informer is not in the public interest—in other words, if the need to preserve the confidentiality of the identity outweighs the necessity for disclosure in the interest of justice.

67.16. It would appear that one method of placing the competing interests in proper perspective is a review of the informant’s disclosures by a magistrate in order to determine the question whether revealing his identity is necessary. This method has been held to be constitutional, and is generally favoured.

---

1 Annotation in 1 L. Ed. 2d. 1998-2000.
2 Annotation in 1 L. Ed. 2d. 1998-2000.
4 John H. Wigmore, Evidence (Roston; Little, Brown, 1961), Sect. 2374 & a Emphasis added.
5 Section 1041 a (2), California Evidence Code.
6 An illustration of this method will be found in *Mc Cray v. Illinois*, (1967) 386 U.S. 300.
V. NEED FOR CHANGE

67.17. We now revert to a consideration of the Indian Law and we cannot help the comment that the section states the rule too widely and overlooks certain important limitations which ought to have been taken note of.

If regard be had to the limitations recognised in the U.S.A. and in England as set out in the above discussion, it seems that the Indian Law is more stringent than the rule in these countries. That in itself is not a ground for changing the law; but it shows that the limitations cause no harm in other countries. In our view the existing section is likely to cause serious hardship in a few situations. For example, where a person takes civil proceedings for defamation or malicious prosecution against another person who had given false information to the police or a Magistrate, it would be impossible for him to prove an essential part of his case—namely, that the defendant was the person who gave the information—if disclosure thereof is not allowed.

Secondly, a person who wishes to prosecute another person for making a false charge or for instituting false criminal proceedings or for giving false information to a public servant, would find it difficult to prove that the person against whom the prosecution is now filed took the initiative in making the false charge or in instituting criminal proceedings or gave the false information, unless the rule contained in the section is relaxed.

We do not, of course, imply that in a suit for malicious prosecution, nothing else is to be proved. There are other ingredients essential to create liability; but we are concerned, at the moment, with one feature which is essential, namely, the giving of false information. In the proceedings to which we have referred, irremediable hardship would be caused if the provision prohibiting disclosure of the information is enforced rigidly. The right to recover compensation for malicious prosecution or to take the other proceedings mentioned above would be rendered almost nugatory if the section is not relaxed.

67.18. We need not go into the difficult question—in what cases a person who gives false information to the police can be liable in damages for malicious prosecution. It cannot be disputed that a person who gives false information to the police or the magistrate or other law enforcement officer may, in certain circumstances, be liable to such action. In Gaya Prasad v. Bhagat Singh, the argument that only a person who had made a formal complaint to a court could be sued for malicious prosecution, was rejected by the Privy Council in these terms:

"In India the police have special powers in regard to the investigation of criminal charges and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the Magistrate—it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him."

Section 211, Indian Penal Code.
Section 182, Indian Penal Code.
Decisions of High Courts make it clear that the defendant is liable if the prosecution was by the police for the State at his instance and on his information.

67.19. In determining the liability for malicious prosecution, an important question to be considered is, who is the real prosecutor. The defendant’s conduct before and during the trial will be material in deciding it. This is a question of fact, and the onus is on the plaintiff to prove the affirmative. The point to be made is that if the plaintiff wishes to sue for malicious prosecution, the name of the informer would be a very material circumstance and the non-disclosure thereof would constitute a serious obstacle. This hardship in itself is, again, not a conclusive argument against the privilege. But it can legitimately be taken into consideration.

67.20. To draw an illustration from an Orissa case, it was held relying on the case law, that if the defendant gives information of the commission of a cognizable offence and names the accused in that report, in consequence of which a charge-sheet is filed by the police after investigation against the persons mentioned in the information, it can be said that the defendant is the prosecutor. In that case, the defendant also attended the hearings on some dates, but the High Court did not rely merely on that fact, and expressly dissented from an earlier ruling where the proposition was enunciated that the mere giving of false information cannot give a cause of action to the plaintiff in a suit for malicious prosecution.

It would thus appear that in the very interests of law enforcement, a false information should not be protected from disclosure — since its disclosure would really encourage law enforcement — i.e. the enforcement of remedy of malicious prosecution — in the situation discussed above.

67.21. If the hardship likely to be caused in certain cases, as explained above, is to be removed or reduced, there are several alternatives, as follows:

(i) The scope of the section could be limited to offences against the State and offences against the revenue — which was the previous law in India.

(ii) Suits for damages or malicious prosecution or defamation or prosecutions for making a false charge may be excluded from the prohibition imposed by the section.

(iii) The court may be given a discretion to dispense with the requirements of the section in the interests of justice.

Alternative (i) may perhaps be considered radical. In that case, either the second or the third alternative should be considered. On the merits, in our opinion, the third alternative is the best, because, while leaving the matter elastic,

---

1(a) Amalda v. Sakhaji, A.I.R. 1963 All. 580;
(b) Nitya Nanda v. Binayak, A.I.R. 1955 Orissa 129;
(c) Mohan Singh v. Birgunath, A.I.R. 1952, Pt. 283;
4(a) Radha Krishna v. Kedar Nath, (1924) I.L.R. 46 All. 815;
4See para. 67.4, supra.
it will ensure that the privilege is relaxed only where the interests of justice so require. Such a relaxation would not be in conflict with the principle underlying the section. A person honestly — even mistakenly — giving information of an offence should have nothing to fear by such disclosure. At the same time, a person dishonestly giving false information does not deserve protection where the person aggrieved by his conduct wishes to pursue his lawful claim for compensation.

VI. RECOMMENDATION

67.22. For the reasons stated above, we recommend that the following exception should be inserted in section 125:

Exception:—Nothing in this section shall apply where it appears to the court that the giving of the information is a fact in issue on which the liability of a party depends or is otherwise a material fact, and the court, for reasons to be recorded and in the interests of justice, directs the disclosure of such information by the Magistrate, Police Officer or revenue Officer.
CHAPTER 68

LEGAL PROFESSIONAL PRIVILEGE—SECTIONS 126-129

I. INTRODUCTION

68.1. In our introductory observations about privileges, we referred to the aspect of relationship and stated that, in general, when the law recognises a privilege, it does so on a consideration of public policy for the proper functioning of a relation. This aspect of relationship assumes prominence in a group of sections (sections 126 to 129), dealing with what is commonly known as legal professional privilege. This expression does not quite accurately indicate the nature of the privilege. The privilege is not of the legal profession, but of the client. However, it does arise out of the professional relationship.

68.2. It is necessary to deal with the aspect of confidence when discussing this privilege. In law, a confidential relationship does not, in itself, create a privilege in regard to disclosure by way of evidence in a court of law. Where a communication is made in confidence, and the confidence is regarded as one deserving of legal protection, the legal remedy against violation of the confidence (where available) could assume one of several forms. There might be a contractual action permitted by the law, for breach of the confidence; there might, in some cases, be the possibility of an injunction being granted by the court; and there might even be criminal prosecution1 if the violation of the confidence is punishable by a specific statutory provision. But the fact that confidence is protected in certain respects, does not necessarily mean that the communication made in confidence will be protected from disclosure in a court of law. For that purpose, specific rule in the law of evidence is required.

68.3. Which of the various remedies is allowed, is a matter of substantive law. In order to distinguish the situation where the remedy is given by substantive law, from the situation where the sanction is contained in the law of evidence, one must bear this aspect in mind.

Examples of equitable doctrine

68.4. Coming to fields other than the law of evidence, there is, in the first place, the developing equitable doctrine that a man shall not profit from the wrongful publication of information received by him in confidence. This doctrine, said to have its origin in Prince Albert v. Strange,2 has been frequently recognised as a ground for restraining the unfair use of commercial secrets transmitted in confidence.

During the development of the bill of discovery in equity, a number of grounds of privilege from discovery came to be accepted.3

68.5. These heads of privilege were reduced considerably in number by the Civil Evidence Act, 1968. The notes to the Supreme Court Practice 1973, volume 1, state the three main heads as extending only to documents with legal professional privilege, documents tending to incriminate and documents privileged on the ground that production would be injurious to the public interest. Indeed, in numerous cases in equity, it was accepted that the basis of the first two heads

1Of section 40, Administration of Justice Act, 1970 (infra).
of privilege was to be found in the "well-being of society". We are referring to this aspect to show the origin of equitable relief in this field and also to show the approach of equity. So far as legal professional relationship is concerned, there is a broader basis. In Coco v. A. M. Clarke Ltd., Negarry J., reviewing the authorities, set out the requirements necessary for an action based on breach of confidence to succeed:

"In my judgement three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M. R. in the Saltman case, must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

68.6. The law has shown its determination to protect confidential information in a number of recent cases in England. The majority of these cases have been brought by the owner of the information himself to prevent its use by the defendant to his financial or commercial benefit. Therefore, in some of these cases, the court has required, as a condition to granting relief, some detriment to the third party. The detriment, whether expressly required or not, would in all cases, save for exceptional cases like Prince Albert v. Strange, be tangible in form. Sometimes, in these cases, there is a contract which may be said to have been broken by the breach of confidence, but it is clear, that the doctrine applies independently of contract.

68.7. There may be an implied contractual relationship imposing an obligation of confidence. Unlike the ordinary debtor and creditor relationship, that of bank and customer entails an implied contractual duty on the banks to ensure that confidentiality concerning the condition of customers' accounts is maintained.

Incidentally, in England, it is an offence by statute to unduly publicise the existence of any debit with the object of concerning the debtor to pay. The offence is labelled as the offence of "unlawful harassment".

68.8. These cases mainly concern business. It is not until the decision in Argyll v. Argyll that the principle of protecting confidential communications by an independent action was applied to domestic secrets, such as those passing between husband and wife during marriage. It was held in that case that the plaintiff wife could obtain an order to restrain the defendant husband from communicating such secrets, and the principle is well expressed in the headnote in the official Law Reports.

---

1Southmark Water Co. v. Quick, 3 Q.B.D. 317.
2See infra.
6Prince Albert v. Strange, 2 De G. & Sm. 652.
7Saltman Engineering v. Campbell, (1903) 3 All. E.R. 413.
8See—
   (a) A. G. v. Jonathan (1975) 3 All. E.R. 484, 494,
   (b) Re x (1975) 1 All. E.R. 697.
10Section 40, Administration of Justice Act, 1970 (Eng.).

45—131 LAD/ND/77
".........a contract or obligation of confidence need not be express but could be implied, and a breach of contract or trust or of faith could arise independently of any right of property or contract. .......and that the court in the exercise of its equitable jurisdiction, would restrain a breach of confidence independently of any right at law".

68.9. This extension of the doctrine of confidence beyond commercial secrets has never been directly challenged, and was noted without criticism by Lord Denning M. R. in Fraser v. Evans.¹

Incidentally, we may mention that some protection is afforded to correspondence without prejudice.²

II. RATIONALE

68.10. Let us now examine in brief the rationale of legal professional privilege. A communication made to a legal adviser is certainly made in confidence, and in almost all countries some kind of protection or other has been afforded to such communications, even in regard to their disclosure in a court of law. But this does not mean that the privilege rests on the confidence itself, because there are certain requirements to be satisfied which we shall consider presently.

68.11. Though legal professional privilege has been said³ to be based on the necessity of securing full and unreserved intercourse between the adviser and the advised, this would not be a complete statement of the true position. As has been pointed out,⁴ this statement obviously presupposes some other basis, because the necessity of complete confidence may also exist when the advice is financial, and yet communications between, say, a banker and customer are not privileged against disclosure in a court of law. There is, of course, a statutory provision relating to the production of Bankers' books, but that confers no privilege as such. It relates to the method of proof.

It has, therefore, been explained⁵ that the privilege for communications between solicitor and client rests "not upon the confidence itself, but upon the necessity for carrying it out"; and this necessity is not usually regarded as extending to the confidence reposed in members of other professions.

The philosophy underlying the exemption from disclosure of privileged⁶ communications is well stated in Anderson v. Bank of British Columbia,⁷ a case relating to the professional relationship of lawyer and client. The court speaking through Jessel M. R., said:

"The object and meaning of the rule is this: That as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his right or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of

¹Fraser v. Evans (1969) 1 All. E.R. 8, 10, 11.
²See section 23.
⁵Russell v. Jackson (1851) 9 Hare 387, 391 (Turner v.).
his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent); that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

68.12. There is also the moral aspect, namely, that a professional legal adviser would hardly find it consistent with his profession to disclose what was communicated to him by the client. Wigmore comes to the heart of the matter when he states:

"The consideration of 'treachery', so inviting an argument for Bentham's sarcasms, is after all not to be dismissed with a sneer. The sense of treachery in disclosing such confidence is impalpable and somewhat speculative; but it is there nevertheless,...... If the counsellors were compelled to disclose, 'No man... of a noble or elevated mind would stoop to such an employment.' Certainly the position of the legal adviser would be a difficult and disagreeable one; for it must be repugnant to any honourable man to feel that the confidences which his relation naturally invites are liable at the opponent's behest to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the same time solicitor and the revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner. Its concrete impropriety could not be over balanced by the recollection of its abstract desirability. If only for the sake of the peace of mind of the counsellor, it is better that the privilege should exist."

68.13. As Judge Wyzanski has observed, "It is in the public interest that the lawyer should regard himself as more than a predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations."

68.14. In the U.S.A., the Attorney and client privilege is recognised as having a common law origin, and the basis of the privilege was thus stated in a case which arose in California.¹

"The privilege is given on the grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defence of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading: the law suit will be conducted along improper lines, the trial will be full of surprises........... Unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavourable facts."

68.15. The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest of administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.²

¹Wigmore, cited by Louisell etc. Evidence and Proof (1973), page 169.
²City and County of san Francisco v. Superior Court. (1951) 31 Cal. 2d 27 (California).
³Note "Attorney Client Privilege" (1965) 74 Yale L.J. 539, 545, foot note 36.
Other purposes for the privilege have been suggested, e.g. regard for human
dignity and inviolate personality, deference to strong sentiment of loyalty attached
to attorney-client relationship, and the duty of fidelity.

In the early history of the privilege, its purpose seems to have been to protect
the attorney's oath and honour.

Thus, a variety of considerations serve as the justification for the privilege,
and this seems to bear out Judge Wyzanski's comment, mentioned above.

68.16. To sum up the points mentioned above, the privilege is founded
on the impossibility of conducting legal business without professional assistance,
and on the necessity, in order to render that assistance effective, of securing the
fullest and most unreserved communication between the client and his legal
adviser. Further, a compulsory disclosure of confidential communications is so
opposed to the popular conscience that it would lead to frequent falsehoods as
to what had really taken place. It is quite immaterial whether the communica-
tions relate to any litigation commenced or anticipated; it is sufficient if they
pass as professional communications in a professional capacity; if the rule were
so limited, no one could safely adopt such precautions as might eventually
render any proceedings successful or all proceedings superfluous.

III. SECTION 126 — PRINCIPLE AND SCOPE

68.17. So much as regards the rationale of the privilege. We now come
to the sections proper. So far as the disability of the lawyer is concerned, the
principal section is section 126. This is how the operative part reads —

"126. No barrister, attorney, pleader or vakil, shall at any time be
permitted, unless with his client's express consent, to disclose any com-
munication made to him in the course 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 conditions 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."

Under the proviso to the section, nothing in this section shall protect from
disclosure —

"(1) Any such communication made in furtherance of any illegal
purpose;

Gardner, "A Re-evaluation of the Attorney-Client Privilege" (1963) 8 Villanova Law
Rev. 270, 308, 316, 511, 519, cited in the note "Attorney Client Privilege" (1963) 74 Yale
L.J. 539, 545.

Privilege" (1965) 74 Yale L.J. 539, 545.

Radin, "The Privilege of Confidential communication between lawyers and client",
(1928), 16 Calif. L. Rev. 487, 492, 497.

Wigmore Vol. 8 Article 2290, cited in Note, "Attorney Client Privilege" (1965) 74
Yale L. J. 539, 545, footnote 36.

Judge Wyzanski, quoted supra.

(a) Grenough v. Gaskell. 1 M. & K. 103;
(b) Lyell v. Kennedy. 9 App. Cas. 85;
(c) Holton v. Corporation of Liverpool. 1 M. & K. 99;
(d) Goldey v. Richards, 19 Beav. 404;
(e) Ex parte Campbell, 5 Ch. App., 705.
(g) Southward Co. v. Quick, 3 Q.B.D. 317.
(h) Munshershaw Beznaji v. New Dhumruay, etc. Co., (1880) I.L.R. 4 Bom. 276
(West 1).
(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 made clear that it is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

It is also made clear (vide the Explanation) that the obligation stated in this section continues after the employment has ceased.

Here are three illustrations appended to the section. —

(a) A, a client, says to B, an attorney — "I have committed forgery, and wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney — "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure."

Sections 127 and 128 contain certain supplemental provisions. Section 129 deals with the client's privilege.

68.18. It is to be noted that sections 126 to 128 which apply when the legal adviser or his clerk etc. is interrogated as a witness, do not make a distinction between a party to a suit and a witness. Section 129, which applies when the client himself is interrogated also applies whether such client be a party to the case or not; of course, it is only communications which have passed between a person and his legal professional adviser that are privileged.

The rule is established for the protection not of the legal adviser, but of the client, and the privilege, therefore, may only be waived by the latter.¹

68.19. The question how far legal professional privilege can be lost by a third party learning of a confidential communication or obtaining a confidential document was raised in England in the controversial decision in Butler v. Board of Trade.² The plaintiff in that case sought a declaration that the Board of Trade was not entitled, in criminal proceedings in which the plaintiff was the accused, to adduce in evidence a copy of a privileged letter from his solicitor. Goff J. held that though there is no privilege as regards copies of privileged documents, there is jurisdiction to restrain the production of such copies because

---

¹See section 128.
²Butler v. Board of Trade, (1971) Ch. 680.
³See—
(a) C. Tapper, "Privilege and Confidence" (1972) 35 M.L.R. 83;
they contained confidential information, at least in private prosecutions and civil litigation. In public prosecutions, however, the interests of the State prevail over the individual's property interests, so that then the documents must be disclosed.

In India, since the law is codified, third parties can be compelled to disclose communications overheard by them.

IV. SECTION 126—THE EXCEPTION FOR ILLEGAL PURPOSE

68.20. The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's assistance is sought in an activity which the client knows to constitute a crime or tort. This is sometimes called the "future crime or tort" exception. In England, the exception is sometimes described in narrow terms as confined to "criminal activity"; but, it is generally understood that the exception covers all illegal activities.6

68.21. Sometimes, however, it may be difficult to apply the exception very strictly. If, for example, a client is engaged in a continuing offence, a statement of his intention to continue is necessarily inseparable from a confession of past conduct.

68.22. In Gartside, the proposition is enunciated that there are some confidential communications which should not be protected by the courts. In this case the plaintiff's clerk had taken documents which, he alleged, showed fraudulent transactions on the part of the plaintiffs. On the question of the confidentiality of the documents, Wood V. C. said:

"You cannot make me the confident of a crime or a fraud, or be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist."4

There is thus a moral basis for the exception regarding crime or tort. There can also be advanced a juristic reason. A legal adviser does not undertake to assist in illegal activities. He, on the other hand, is expected to act in furtherance of the law.

68.23. In jurisdictions in which the privilege of a patient in regard to communications made by him to his physician is recognised, that privilege is also subject to the exception regarding activities undertaken for a criminal or illegal purpose. For example, the patient's privilege does not cover a request to procure narcotics illegally.

68.24. In England, the rule that communications in furtherance of fraud or crime are not protected, is subject to the rule that there must be some definite evidence produced, or charge made, of fraud or illegality.5

68.25. In the U.S.A., the method adopted by the Uniform Rules of Evidence for invoking the "future crime or tort exception" is of interest. As to the attorney-client privilege, it provides, "such privilege shall not extend......"
“to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding (of illegal purpose) .....................”. The source of this procedure is the English case of O’Rourke v. Darbishire, in which the court denied an application for a bill of discovery, which merely alleged that communications between client and solicitor were in furtherance of a wrongful act, on the ground that “there must by something to give colour to the charge ...... some prima facie evidence that it has some foundation in fact.”

Later, the Supreme Court of the U.S.A. endorsed the rule in the context of a dispute over the admissibility of juror testimony, but only a small number of cases have held rigidly to this requirement that a foundation for the exception be laid solely in extrinsic evidence.

V. SUGGESTED NEW EXCEPTION

68.26. So much as regards the exception for illegal acts. Section 126 does not make any exception for cases where the suit itself is between a person and his legal adviser, or where a legal adviser is prosecuted for an offence against the client or vice versa. We are of the view that in such a case also, the privilege should not apply for the following reasons:—

(i) the application of the privilege in such a case would shut out essential evidence and no other evidence would be available, and

(ii) by taking such a proceeding, the client can be presumed to have waived the privilege if the proceeding is by the client and for the sake of mutuality, the same principle should be applied where the proceeding is against the client.

This aspect does not seem to have received detailed attention in India. But a simple illustration could be cited to show how the point could arise. ‘X’, a client, gives instructions to his legal adviser for conducting certain litigation. The litigation is decided against ‘X’, and ‘X’ files a suit against his legal adviser for professional negligence in not conducting the case properly.

68.27. The defence of the legal adviser is that the instructions given by X were not adequate. In such a case it may be necessary to communicate to the court the instructions given by the client, their exact purport and text. Under the existing section, however, this cannot be done.

68.28. Taking a converse case, where a client is sued by his legal adviser for remuneration, the disclosure of communications made for the purpose of the previous litigation may become necessary. In both cases, strict application of the privilege would work hardship, and an exception should, therefore, be made for such cases.

The following provision in the California Code of evidence may be noted:


There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.”

1O’Rourke v. Darbishire, (1920) A.C. 581, 604.
2Clark v. United States, (1933) 289 U.S. 1, 14.
4Section 958, California Code of Evidence.
The following comment is appended to the section quoted above:

“Comment . . . . . . . It would be unjust to permit a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defence of the charge or to refuse to pay his attorney’s fee and invoke the privilege to defeat the attorney’s claim. Thus, for example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defence, communications between the lawyer and client relevant to that issue are not privileged. See People v. Tucker, 61 Cal. 2d 828, 40 Cal. Rptr. 609, 395 p. 2d 449 (1964). The duty involved must, of course, be one arising out of the lawyer-client relationship, e.g., the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his client’s property, or the clients’ duty to pay for the lawyer’s services.”

VI. SECTION 126—DOCUMENTS

68.29. It is necessary now to refer to that part of section 126 which deals with documents. The gist thereof is that a legal professional adviser is not permitted to disclose the contents of documents with which “he became acquainted” for the purpose of, and in the course of, the professional relationship. Now, there is a dictum in a Gujarat case¹ that “The protection against production or disclosure, however, does not extend to any original document which might have come into the possession of the advocate from his client.” This is followed by the observation—“The advocate is but the agent of the client to hold the document, there is no reason either on principle or authority on which the advocate can refuse to produce the document.”

68.30. In the Gujarat¹ case, a letter received from the State Government by the complainant, which was in the possession of the advocate of the accused, was the subject-matter of dispute, the letter being of material importance in the present prosecution for defamation. The precise question before the court was whether section 94, Cr. P. C. 1898 (power to issue a search warrant), could apply to the document, and that question was answered in the affirmative. This was on a construction of section 94, which contained no exception for section 126, Evidence Act. This conclusion as to the scope of section 94 need not be questioned. Section 94 has not been construed to apply to the accused, whether it excludes the lawyer, we need not discuss.

But the dictum that section 126 does not seem to extend to any original document which might have come into the possession of the advocate does not, with respect, appear to be consistent with the express language of section 126.

68.31. In the Evidence Act, the section relevant to mere production of a document, is section 162, and, a document in respect of which there is any objection must, nevertheless, be produced; that section expressly so provides. It is for the court to determine the objection—a rule which applies as much to a document privileged under section 126, as to any other.

68.32. A Madras case² on section 94, Cr. P. C., also contains a similar dictum as to the scope of section 126. The document in question was a letter written by accused 1 to accused 6 and in the possession of the counsel for accused 6. The High Court observed—“Prima facie, those letters are not

¹Chandubhai v. The State, A.I.R. 1962 Guj. 290, 293, Paragraph 3 (P. N. Bhagwati, J.)
privileged communications by accused to his lawyer under section 126..........
With respect, the dictum seems to go contrary to the plain language of the
section.

Since however, both the observations are obiter dicta, and since the words
of section 126 appear to be specific, we do not recommend any amendment on
this point.

68.33. As a matter of interest, however, we would like to note that in
England, "a solicitor cannot be compelled to disclose the contents of docu-
ments (which are) professionally entrusted to him, and which he is acquainted
with only by virtue of professional conduct".1 He is not permitted even to
disclose the date when his client's documents were entrusted to him.2 Nor can
he disclose the condition of the document when they were in his possession;
for example, whether they were stamped, indorsed, or bearing erasures.3

Of course, this does not allow the solicitor to withhold a deed which the
other side is ordinarily, in the course of things, entitled to see, merely because
the solicitor had obtained it in the course of his profession for the purpose of
the litigation.

What documents the opposite party is entitled to see is a subject governed
by the law of procedure. In general, a party is entitled to see documents which
are essential for the case of the party desiring inspection.

"In England, it is considered contrary to the interest of justice to compel
a litigant to disclose to his opponent before trial the evidence to be adduced
against him.................. so to do would give undue advantages for cross-
examination and lead to endless side issues; and would enable witnesses to be
tampered with, and give unfair advantage to the unscrupulous." This principle,
which was laid down by Lindley, L. J. in Re Strachan,4 has been applied by the
Court of Appeal in an interlocutory appeal, by the defendants in the case of
Brooks v. Prescott.5

VII. SECTION 126—SOME POINTS OF DETAIL

68.34. Section 126 does not speak of "confidential communications", while
section 129 is so limited expressly. It has, however, been held6 that
section 126 is also confined to private and confidential communications. Thus,
a communication made in the presence of a third person, or a communication
with a view to its being communicated to the other party, is not privileged,7 not
being confidential.

68.35. We shall now deal with a question of phraseology. In protecting
against the disclosure of communications made in professional confidence to
a legal practitioner by or on behalf of a client, section 126 uses the word
"employment" at several places. It seems to us that the word "employment"
is not quite appropriate to denote the relationship between a client and his
legal adviser. We would prefer the word "engagement", and recommend that it
should be substituted.

1Dwyer v. Collins, (1852) 7 Exchequer 639.
2Tourquand v. Knight, (1836) 2 M. & W. 798.
3Wheatley v. Williams, (1836) 1 M. & W. 533.
4Re Strachan, (1895) 1 Ch. 439, 445, citing Benbow v. Law, (1880) 16 Ch. D. 93.
5Brooks v. Prescott, (1948) 1 All. E.R. 907, 910, relying in particular on O'Coweke v.
Durhshire, (1920) A.C. 581, 605.
6Pramji v. Mohan Singh, I.L.R. 18 Bom. 263, 271; Kali Kumar v. Raja Kumar, A.I.R.
1932 Cal. 148; I.L.R. 58 Cal. 1379.
7Kali Kumar v. Raja Kumar, A.I.R. 1932 Cal. 148; I.L.R. 58, Cal. 1379.
68.36. Another verbal point may be mentioned. In dealing with the privilege regarding communications between a client and his legal adviser, section 126 speaks of "barrister, attorney, pleader or vakil". For brevity, it may be desirable now to use the word "legal practitioner"—an expression used in the Constitution. It may also be desirable to extend the provisions of this section to persons who, though they cannot be regarded as legal practitioners, tender professional advice in legal or semi-legal matters. Important illustrations of these are chartered accountants who can practise as income-tax practitioners and sales-tax practitioners, and also advise companies. It may be convenient to frame a definition of legal practitioner so as to include such persons. We recommend that the section should be suitably amended for the purpose.

VIII. RECOMMENDATION

68.37. In the light of the above discussion we recommend that section 126 should be revised as follows:

"126. No legal practitioner shall, at any time, be permitted, except with his client's express consent, to disclose any communication made to him in the course and for the purpose of his professional engagement, 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 such engagement, or to disclose any advice given by him to his client in the course and for the purpose of such engagement:

Provided that nothing in this section shall protect from disclosure—

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any legal practitioner in the course of his engagement as such, showing that any crime or fraud has been committed since the commencement of his engagement.

(c) any such communication when required to be disclosed in a suit between the legal practitioner and the client arising out of the professional engagement or in any proceeding in which the client is prosecuted for an offence against the legal practitioner or the legal practitioner is prosecuted for an offence against the client, arising out of the professional engagement.

Explanation 1.—The obligation stated in this section continues after the engagement has ceased.

Explanation 2.—In this section and in sections 127 to 129, the expression 'legal practitioner' or 'legal professional adviser' includes any person who is, by law, empowered to appear on behalf of any other person before any administrative authority; and the expression 'client' shall be construed accordingly.

Explanation 3.—For the purpose of clause (b) of the proviso to this section, it is immaterial whether the attention of such legal practitioner was or was not directed to such fact by or on behalf of his client."

[Illustrations as at present, with substitution of "engagement" for employment in illustration (c) and with substitution of legal practitioner for attorney in all illustrations].

1See proposed definition, infra.
IX. SECTIONS 127 TO 129

68.38. This takes us to section 127, which reads—

"127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils."

The words "barristers, pleaders, attorneys and vakils" should be replaced by "legal practitioners";¹ and we recommend accordingly.

68.39. Section 128 reads—

"128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose."

The words "barrister, pleader, attorney or vakil" should be replaced by the words "legal practitioner", and we recommend accordingly.

Section 129 reads—

"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 communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others."

It needs no change.

¹Cf. Recommendation as to section 126.
CHAPTER 69
INCRIMINATING DOCUMENTS AND TITLE DEBTS—
SECTION 130 AND 131

I. INTRODUCTORY

69.1. Certain affairs of a man's personal life may require special protection for reasons of public policy. This may be so even though no professional relationship is in issue. A privilege relevant to such affairs is created by section 130 in respect of two kinds of documents—title-deeds and incriminating documents. In its earlier half, the section provides that 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. In its latter half, the section provides that no such witness shall be compelled to produce any document the production of which might tend to criminate him.

In both cases, a written waiver is permissible—as is provided in the following words—"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."

II. TITLE DEEDS

69.2. It will be convenient to consider the two parts of the section separately. The earlier half of the section, which enacts the rule that a witness who is not a party shall not be compelled to produce his title deeds to any property, is derived from the English law. In English law, this rule was said to be founded upon a consideration of the great inconvenience and mischief which might result to individuals if they are compelled to disclose their titles by the title deeds. The rule was, however, criticised by Cross, writing in 1958 (when the rule was in force), in these words—

"It is doubtful whether a privilege of this nature ought to survive in modern times, although it is difficult to think of cases in which its continued existence can do much harm."

The law on the subject has now been altered in England by the Civil Evidence Act, which abolishes the privilege in relation to civil proceedings. The relevant provision of the Act reads—

Abolition of certain privileges
16(1). The following rules of law are hereby abrogated except in relation to criminal proceedings, that is to say—

(b) the rule whereby, in any legal proceedings, a person other than a party to the proceedings cannot be compelled to produce any deed or other document relating to his title to any land."

It may be of interest to note that in India also, section 130 has been criticised in these words—

"In England the law's failure to protect title adequately by legislation and the inevitable risk which was thereby created for even bona fide titles

The expression "title deeds" is used for brevity to cover documents of pledge and mortgage as well.

1Cross, Evidence (1958), page 244.
2Section 61(1)(b), Civil Evidence Act, 1968.

706
furnished a sufficient explanation, if not a justification. But under a system of compulsory public registration in such privileges there is neither necessity not utility."

69.3. In our view, there is considerable force in this criticism. Registration of most documents concerning immovable property is now compulsory or, where an exemption from registration is granted, it is based on some special principle. If a person does not register a document voluntarily, he takes the risk of loss, and should need no special protection whether or not it is compulsorily registrable. If a person gets the document registered, he also needs no special protection, because the title is publicly recorded, and privately. The need for privacy is hardly a valid consideration in respect of proprietary documents which are registered. Even where the document is not registered, it is, in modern times, more likely than not to have acquired some publicity. We therefore recommend deletion of this part of the section.

69.4. It may be noted that section 130 does not deal with the position of parties. So far as parties are concerned, the duty to produce the documents in their possession is a matter entirely outside the section. The rule in the law of procedure is that a party may refuse to produce title deeds — or, for that matter, any other document, — if the document relates only to his case and does not relate to or tend to prove or support the opponent's case and does not contain anything impeaching his own case. This position is not affected by the section.

69.5. The matter seems to be more one of procedure than of evidence so far as the parties are concerned, and primarily pertains to the subject of divorce. The following observations in a Madras case, which state the position in India, bear reference to the Code of Civil Procedure, and not to the Evidence Act:

"The documents have been filed as relating to matters in issue in the suit, and we think the opposite parties should be allowed to inspect and take copies of them unless they, as privileged in law, relate exclusively to the case of the parties producing them as containing nothing supporting or tending to support his opponent's case."

We do not, of course, recommend any change in this provision of the Civil Procedure Code.

III. INCriminating Documents

69.6. This disposes of the earlier half of the section 130. The latter half of the section provides that no witness who is not the party shall be compelled to produce an incriminating document. An analogous to this provision is the one in section 132, relating to incriminating questions.

69.7. One of the fundamental canons of the Anglo-Indian system of criminal jurisprudence is that the accused shall not be compelled to incriminate himself. The principle was based on a feeling of retribution against the methods adopted in the Star Chamber. The principle was extended to the

1Halsbury, 3rd Edn., Vol. 12, pages 38, 39, para. 55, and page 59, para. 78.
2As to discovery, see Order 11, Rules 13, 14, 15. Code of Civil Procedure, 1908.
3Halamonrov v. Romanwamy Chettiar, I.L.R. 30 Mad. 231.
4See also Vinnepik v. Narottam, I.L.R. 17 Bom. 581.
5See discussion relating to section 132. Infra.
6John Liburns case, 5 State Trial 1315.
production of documents by an accused person in response to a subpoena or other from of legal process. Mansfield C.J. observed in *Noe v. Harvey*:

"In a criminal or penal cause the defendant is never forced to produce any evidence though he should hold in his hand."

**Aspect of privacy.** 69.7A. In modern times, the concept of the right to respect for private life has come into some prominence. A person's family and personal life, his intimate spiritual life and "the life he lives at home with the door shut" is being recognised to an increasing extent in the interest of the protection of the dignity of the individual. In this context, the provisions of this section assume importance. The disclosure of embarrassing facts relating to a person's private life is one factor of the field of privacy. The material which might damage a person's honour and reputation in his private life (as distinguished from his public life) might raise issues analogous to privacy. The question then to be considered is whether such disclosure ought to receive absolute protection of whether there should be any limitations in that regard. Section 130 strikes a compromise between conflicting considerations by providing that a witness who is not a party to a suit shall not be compelled to produce any document, the 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. Parties to the suit are, therefore, excluded from the protection. But all others receive the protection unless they have already waived it in writing.

This is not to say that harm to reputation is the only consideration which would have weighed with the Legislature in providing this protection. The likelihood of prosecution would harm person and property also.

Section 130—latter half—party.

69.8. It may be noted that the accused is now a competent witness, but not compellable. The question whether the latter half of the section applies to the accused in his capacity as a witness has not arisen so far. Under article 20(3) of the Constitution, a person accused of any offence cannot be compelled "to be a witness" against himself. The Supreme Court, in *State of Bombay v. Kathi Kalu*, construed the expression "to be a witness" in article 20(3), but the judgement does not specifically discuss the topic of production of documents under section 130. We may, however, note that with reference to section 94 of the Code of Criminal Procedure, 1898, which was the provision empowering the Court to issue summons for production, it has been specifically held by the Supreme Court that it does not apply to the accused. This was as a matter of construction.

In *Bedfem v. Bedfem*, Bowen L.J. stated:

"It is one of the inveterate principles of English Law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure."

69.9. There is, in England, a general rule of evidence that a person should not be compelled to say anything which might tend to bring him into the peril and possibility of being convicted as a criminal. Hence a party cannot be compelled to produce documents for inspection or to answer interrogatories if the production or answer would tend to subject him to any punishment.

---

whether by way of criminal prosecution, the payment of penalties, or forfeiture, and the rule applies even if a negative answer will not imperil him.\(^1\)

In England, the privilege has been held to apply\(^9\) to incriminating documents where the possible charge was one of—

(a) theft;\(^4\)
(b) incend;\(^4\)
(c) subornation of perjury;\(^4\)
(d) assault and false imprisonment;\(^4\)
(e) forgery;\(^7\)
(f) embezzlement;\(^4\)
(g) fraud;\(^4\)

IV. RECOMMENDATION AS TO SECTION 130

69.10. In the light of the above discussion, we recommend that section 130 should be revised as follows:—

"130. No witness who is not a party to a suit shall be compelled to produce any document the production of which might tend to criminate him unless he has agreed in writing to produce the document with the person seeking its production or some person through who such person claims."

V. SECTION 131

69.11. Section 131 provides that no one shall be "compelled" to produce documents which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production. Now, the word "compelled", according to its grammatical meaning, would lead to the result that the exercise of the privilege is optional, so that if the person in present possession of the document waives the privilege, production of the document would be lawful. For example, where the confidential communications between a client and his adviser are in the possession of the client's clerk who is called upon to produce them, and he chooses to produce them, he can produce them, because he is not "compelled". This is an anomalous position, as it would certainly defeat the client's privilege. This is only one illustration. There could be many others — e.g. the agent temporarily in possession of the principal's documents, the safe custodian of documents, and so on.

The proper course should be to provide that the person in present possession of the document should not be "permitted" to produce the documents without the consent of the person entitled to the privilege.

\(^1\)Halsbury, 3rd Ed. Vol. 15, page 50, para. 72.
\(^3\)Cartwright v. Green, (1883) 8 Ves. 405.
\(^4\)Claridge v. House, (1807) 14 Ves. 59, 65.
\(^5\)Baker v. Pritchard, (1742) 2 Aik. 387.
\(^6\)Glynn v. Houston, (1836) 1 Keen, 329, 337.
\(^7\)Lloyd v. Passingham, (1809) 16 Ves. 59.
\(^8\)Waters v. Earl of Shaftesbury, (1864) 14 W.R. 259.
\(^10\)Portion relating to title deeds is omitted.
If the privilege is of the third person then the third person must have the choice.

We may also state that the section appears to be intended for persons who are temporarily in possession — as is apparent from the words "any other person entitled to the possession". This aspect should be brought out.

69.12. This appears to be the only just principle. Otherwise, the privilege can be bartered away by a dishonest agent, or lost through his indifference. The section should be revised to avoid such an anomalous situation. Accordingly, we recommend that section 131 should be revised so as to read as follows:

"151. No one shall be permitted to produce documents in his temporary possession which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production."
CHAPTER 70

INCRIMINATING QUESTIONS — SECTION 132

I. INTRODUCTORY

70.1. Section 132 deals with the important subject of self-incriminating questions. While the subject of incriminating documents was dealt with in the latter half of section 130, incriminating questions are governed by section 132, where the questions relate to a matter not relevant to the matters in issue -- there is a separate provision in section 148 intended for incriminating questions intended to impeach the credit of a witness. But questions relevant to the matters in issue are governed by section 132. A witness, it provides, 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.

This is subject to a proviso whereunder 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 in a prosecution for giving false evidence by such answer.

Both in practice and in theory, it is the proviso which is of importance, since it now takes the place of the positive protection that was available at common law in respect of incriminating questions. The protection is taken away by the main paragraph. The proviso really confers an immunity from subsequent prosecution, and not a present "privilege" to refuse to answer. However, for the sake of convenience, we shall refer to it as a privilege.

70.2. The privilege against self-incrimination has been said to represent many fundamental values and aspirations. It is "an expression of the moral striving of the community ... a reflection of our common conscience ...". That is why it is regarded as a fundamental part of the Constitutional fabric of the U.S.A. despite the fact that "the law and the lawyers ... have never made up their minds just what it is supposed to do or just whom it is intended to protect".

In the U.S.A. the constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, and the government cannot make use of statements so elicited.

70.3. It should be noted that the position at common law is different from that under the section, inasmuch as the privilege is to refuse to answer the questions, and the rule at common law is not merely concerned with immunity from prosecution.

70.4. A similar privilege was formerly recognised in India before the Act of 1855. It would also be of interest to mention that one of the earliest English

---

2 Kalm, "Invoking the Fifth Amendment—Some Legal and Impractical Considerations", Bull, Atomic Sci. 181, 182.
3 See e.g., Counselman v. Hitchcock, 142 U.S. 547 12 S. Ct. 195.
cases relating to the privilege against self-incrimination had a factual connection with India. In that case, the defendant refused to "disclose" certain information in the proceedings in an English court, on the ground that it might subject him to punishment in the courts of another country (India). The court unanimously held that the privilege against self-incrimination precluded a witness in an English court from being compelled to give testimony which could be used to convict him in the courts of another jurisdiction.

70.5. The privilege available at common law, was, in India, withdrawn by section 32 of Evidence Act, 2 of 1855, which is re-enacted in present section 132. The law in India thus denies to the witness a protection which was recognised by English law. But protection of a different nature is extended to the witness, who is now indemnified against a future criminal prosecution, except where he has perjured himself. The Legislature in India thought that the existence of the privilege "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 solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision."

70.6. To put the matter in a different form, the rule in section 132 secures to the cause of justice the benefit of the answer of the witness and, at the same time, secures to the witness the benefit of the common law rule (that no one shall be compelled to crimate himself) by affording protection to the witness when (in future) a criminal proceeding is instituted against him.

II. IMMUNITY

70.7. This protection is a qualified one — immunity for the future. It may be stated that immunity as a substitute for the privilege has also a history. Soon after the privilege against compulsory self-incrimination became firmly established in law in England, it was recognised that the privilege did not apply when immunity, or "indemnity" in the English usage, had been granted. Parliament for example, enacted an immunity statute in 1710: directed against illegal gambling. 9 Anne, c. 14, ss. 3-4 (1710), which became the model for an identical immunity statute enacted in 1774 by the Colonial Legislature of New York, Law of March 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894). These statutes provided that the loser could sue the winner, who was compelled to answer the loser's charges. After the winner responded and returned his ill-gotten gains, he was "acquitted" indemnified (immunized) and discharged from any further or other punishment. Forfeit or Penalty, which he may have incurred by the playing for, and winning such Money . . . . . . . ."

70.8. Immunity statutes are quite common in the United States, and have been the subject matter of numerous controversies raising the question how far they satisfy the constitutional privilege against self-incrimination. We need not go into details of this constitutional question, but, in general, where the immunity

---

7 9 Anne, c. 14, ss. 3-4 (1710); Law of March 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894).
is total, the privilege is not violated by the legislation that substitutes the immunity for the privilege.

III. TWO DOCTRINES

70.9. In order to appreciate the significance of this section, it is desirable to refer to a few juristic doctrines. There are several doctrines relevant to the question under consideration:

(a) the right of the accused to be silent;
(b) the privilege of the witness against incrimination of oneself;
(c) the privilege against incrimination of the spouse;
(d) immunity as a substitute for the privilege.

Two of these seem to be important. According to the rule relating to the right of the accused not to be questioned, neither the judge nor the prosecution is entitled at any state to question the accused unless he chooses to give evidence. "At the common law", says Blackstone, "nemo tenetur prodere seipsum: and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men".

Then, there was another rule, namely, the privilege of any witness to refuse to answer an incriminating question: this is not in every respect identical with the rule relating to the right not to be questioned, which applies only to persons accused of crime, and prevents the question from being asked at all. Although the two doctrines very often overlap, and although the first is usually discussed alone with the second, there is at least one situation where they do not overlap, namely, where a witness (who is not the accused) is asked incriminating questions. The privilege to be considered in such a case is merely that against self-incrimination, and not the right not to be questioned. Of course, Indian statute law does not incorporate the privilege in this particular form (section 132, proviso), but that aspect is not material at present, since what we are considering is the doctrinal background, and not the actual content of the law.

70.10. Since the eighteenth century, English and American courts have recognized that an accusation should not come from a person's own mouth, and that nobody called as a witness in any kind of proceeding should be forced to reveal incriminating matter. It does not matter what the nature of the proceeding is. It can be a legislative committee hearing, an administrative agency proceeding, a civil case in any of its phases or a criminal case in any of its stages. However, the privilege is not a general one against taking an oath and testifying. Instead, it extends only to a right to refuse each individual answer as it is sought by the questioning authority.

70.11. The proposition that the accused could not be compelled to testify in a criminal case, and the idea that no one could be obliged to jeopardize his life or liberty in answering questions on oath, are two ideas which, when necessity arises, could be kept distinct. The privilege not to testify in a criminal case when one is accused of the charge, originated in the unpopularity of the procedure adopted in the Star Chamber, under which those who were charged with an offence were interrogated on oath. The idea that no one

---

*Williams, The Proof of Malt, Chapter 3.
*Indian law will be discussed later in detail.
*Cass on Evidence (1979), pages 146 and 243.
could be obliged to jeopardise his life and liberty by incriminating questions, came to be applied to all witnesses in all proceedings in the course of the seventeenth century. It is possible that the right of the accused not to be questioned and the privilege of the witness, were recognised in the same century. But the two are not identical.

Right to silence.  

70.12. We have referred above to the right to silence. The position has been thus stated with reference to England—

"Police officers are entitled to question any person, whether suspected or not, from whom they think that useful information may be obtained, whether or not that person has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted, "but if there are reasonable grounds for suspecting that a person has committed an offence, a caution must be given before any further questions are put."

We may refer to one case which illustrates its practical impact, though the actual point related to adverse inference from silence. In Hall v. R. the accused was convicted of the unlawful possession of ganja. A policeman told the accused after the search of his home (where ganja was discovered) that the co-accused had said that the ganja belonged to the accused Hall. He remained silent. He was convicted in Jamaica. He appealed to the Privy Council against his conviction.

Lord Diplock observed:

"It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordship's view silence alone or being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation. This is well-established by many authorities such as R. v. — Whitehead, (1929) 1 K. B. 99; (1928) All E.R. 507, C.C.A."

70.13. We are referring to this case as indirectly illustrating the right to silence. This right came to be recognised in the 17th century. Right down to the middle of the seventeenth century, the examination of the accused is the central feature of the criminal procedure of the common law. Nor do we read anywhere that a witness could refuse to answer on the ground that his answer might incriminate him. It was in the Commonwealth period that this

---

4Emphasis supplied.
5Hall v. R., (1971) 1 All. E.R. 322 (P.C.);
6For Indian statutory provisions, see sections 161(2), 164(2), 175(1), 313(3), 316, Cr. P.C. 1973.
8For later cases, see R. v. Sparrow, (1973) 2 All. E.R. 129.
9The first instance of this seems to have been R. v. Reading, (1679) 7 S. T. at page 296.
privilege to refuse to answer incriminating questions is accorded to accused persons. Its existence was well established after Restoration; and it was then extended to ordinary witnesses.

70.14. It is possible that the decision of the common law to allow a party the privilege of refusing to answer questions at the suit of his opponent, assisted indirectly the establishment of the privilege of parties and witnesses to refuse to answer incriminating questions—a privilege which made its appearance in the middle of the seventeenth century. At any rate, the introduction of this privilege was helped forward by the hostility of the common law courts to the opposite methods pursued by the ecclesiastical courts in the exercise of their criminal jurisdiction.

70.15. Although, in practice, greater importance is attached to the privilege of the accused, it should not be forgotten that the privilege is not of the accused merely, but of the witnesses as well. The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the Judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the Judge regards as reasonably likely to incriminate him. Civil liability, however, is not an excuse.

70.16. The distinction made above, namely, the distinction between the right not to be questioned and the right not to answer self-incriminating questions, is brought out in clear terms in the California Evidence Code. Section 930 of that Code provides as follows:

"PRIVILEGE OF DEFENDANT IN CRIMINAL CASE"

S. 930. Privilege not to be called as a witness and not to testify—

To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify."

Section 940 of the California Evidence Code is in these terms:

"PRIVILEGE AGAINST SELF-INCrimINATION"

S. 940. Privilege against self-incrimination—

To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has privilege to refuse to disclose any matter that may tend to incriminate him.

Section 404 reads—

"S. 404. Determination of whether evidence is self-incriminating—

Whenever the proffered evidence is claimed to be privileged under section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence

\[\text{[a]}\] King Charles' Trial, (1649) 4 S. T. at page 1101;
[b] Lilburn's Trial, (1649) 4 S. T. at page 1292-1293, 1341.
is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege."

IV. ENGLISH LAW

70.17. The principal doctrines relevant to section 132 having been dealt with, we now proceed to a consideration of the manner in which and the extent to which they have found recognition in the law. We shall first consider the English law. It is a deep-rooted principle of the common law that no one should be obliged to incriminate himself out of his own mouth. This is one branch of the privilege. The other branch of the privilege concerns penalties and forfeitures. Civil actions for penalties or forfeitures are liable to be oppressive and this accounts for the other branch of the privilege — prohibition of questions which may lead to penalty or forfeiture.

This common law rule as to self-incrimination was recognised in England in a number of statutes. Section 2 of the Evidence Act, 1851 (14 and 15 Vict. c. 99), for example, rendered the parties to a cause competent and compellable to give evidence, but section 3 expressly provided that nothing therein contained "shall render any person compellable to answer any question tending to incriminate himself." A similar provision was made in section 5 of the Foreign Tribunals Evidence Act, 1856 (19 and 20 Vict. c. 113) and section 4 of Evidence by Commission Act, 1859 (22 Vict. c. 20). The protection of the English rule applies equally to parties and to witnesses, and a witness cannot be forced to answer questions or interrogatories having such a tendency.

70.18. As this rule, howsoever wholesome, was prone to be abused, certain limitations are recognised by the Courts both in England and in America. In K. v. Boyes, Cockburn, C.J. observed that the object of the law was to afford to a party accused upon to give evidence in a proceeding, inter alia, protections, against being brought, by means of his own evidence, within the penalties of the law; but it would be to convert a statutory protection into a means of abuse, if it were to be held, that a more imaginative possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. It was also observed that the danger to be apprehended by the person must be real and appreciable, having regard to the ordinary operation of law in the ordinary course of things and not a danger of any imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

It was also laid down that to entitle a party called as a witness to the privilege, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

It must be noted that the Civil Evidence Act, 1968, abolishes the rule whereby a person cannot be compelled to answer any question or to produce any document or thing if to do so would tend to expose him to a forfeiture; the section is confined to civil cases.

70.19. Even at common law, the privilege against self-incrimination does not extend to questions tending to expose the witness to any other civil liability (including liability to an affiliation order) or to a finding of adultery.

---

1Cross, Evidence (1974), page 83.
3See also Re Reynolds, (1882) 20 Ch. D. 294; 15 Cox's C.C. 108 (C.A.).
4Witnesses Act, 1806.
6Blunt v. Park Lane Hotel, (1942) 2 K.B. 253; (1942) 2 All. E.R. 187.
70.20. It may be stated that in England, the privilege against incriminations of self or spouse in civil proceedings has been the subject matter of a statutory provision, — section 14, Civil Evidence Act. 1968.

Sub-section (1) of that section makes two provisions as to the right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty. In the first place, it provides that the right shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law. In this respect, a narrow scope is given. But it also provides that the right shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the husband or wife of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

By sub-section (2), any existing enactment recognising such a privilege shall be construed as providing also that any answer or evidence given by the person concerned shall not be admissible in evidence against the husband or wife of that person in the proceedings or class of proceedings in question.

Under sub-section (3), references to “giving evidence” are construed as references to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

70.21. As regards forfeiture, which is also mentioned in section 132, it was held in Prev v. Butterfield, that a witness may refuse to answer a question which tends to show that he has done an act which would render him liable to forfeit property. That was an action of ejectment. The court refused to compel the defendant to answer interrogatories, where the answer would tend to show that he had incurred forfeiture by breaching the covenant not to under-let.

The following is from the judgement as reported in the Law Journal:

“Cockburn C.J. ...................... According to the authorities which have been cited and the expressions used by the text-writers who have written upon the subject, those rules are perfectly fixed and established, that no man shall be compelled to give an answer which shall have an effect leading to the forfeiture of his estate .....................”

“Crompton J.: ..................... It is a principle of the law of evidence which these courts have always recognised as applicable to the examination of witnesses, and everything shows that they were averse to extending the power of discovery to cases of forfeiture. From the earliest times the rule has been adopted in the court of equity with regard to discovery .............”

Mellor J. concurred.

The equitable rule against assisting a common informer or aiding a forfeiture was noted by Lord Esher. Equity did not grant discovery or order interrogatories in aid of a forfeiture of property, and that seems to be the origin of the prohibition against questions the answer where to would tend to establish liability to forfeiture. In England, this part of the privilege has, in civil cases, been abolished by statute, as already stated.

1Section 14, Civil Evidence Act, 1968 (C-64).
2The Act does not apply to criminal proceedings.
5Cross, Evidence (1974), page 244.
6Section 1(1)(a), Civil Evidence Act, 1968.
70.22. As to questions imposing a penalty, the rule that a witness cannot be obliged to answer a question which would expose him to the risk of a penalty seems to have originated in the doctrine that equity would not insist on a common informer for making an order of discovery in his favour.\(^1\)

70.23. There have been statutory exceptions in England to the privilege against self-incrimination. We are at the moment concerned with the most important one, applicable to the accused. An accused who gives evidence on his own behalf under the Criminal Evidence Act,\(^2\) cannot object to answering a question because of its tendency to criminate him as to the offence charged. There are other statutes under which the privilege cannot be invoked in special proceedings, such as examinations in bankruptcy. For example, under section (3) of the Theft Act, 1968, a witness may not refuse to answer any question in proceedings for the recovery, of administration of property or the execution of a trust on the ground that to do so might incriminate him or his spouse of an offence under the Act; but the witness’s answers are not admissible against him in subsequent proceedings for an offence under the Act, or, unless they married after the answer was given, his spouse. Several other statutes contain similar provisions for special situations.

70.24. After this discussion of the background in which the section was enacted and of certain theoretical aspects, we proceed to deal with a few points that require consideration.

V. TENDENCY TO INCrimINATE

70.25. The privilege conferred by section 132 applies if there is a “tendency” to incriminate. This is based on the English law. The tendency must, however, be real and appreciable. In Queen v. Boyes,\(^3\) a witness had declined to answer a question on the ground that it might tend to incriminate him, but the plea was rejected because he had already been pardoned and the pardon was produced by the Solicitor-General. As to the objection of the witness that he could still be impeached by Parliament, the court held that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things.

70.26. At the same time, it should be noted that the privilege applies not only to answers directly incriminating the witness, but also to answers that tend to do so indirectly. A number of such answers taken together, or taken with other evidence, might incriminate the witness in such a way that if he is forced to answer, the danger avoided by the privilege will occur.

70.27. But the witness’s own view is not necessarily to be accepted: the court can override it. As Goddard L.C.J. observed:\(^4\)

“The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for. This rule was laid down by the Queen’s Bench in R. v. Boyes,\(^5\) and the words in which I have stated it are those of Stephen, J. in Lamb v. Munster.\(^6\)”

---

\(^{1}\) Cross, Evidence (1974), page 244.
\(^{2}\) Section 1(c), Criminal Evidence Act, 1898 (Eng.).
"A party can also claim privilege against discovery of documents on the like grounds: see Huminos v. Williamson."

VI. POSITION OF THE ACCUSED

70.28. It is now necessary to deal with an important point relating to the accused. We have referred above to two privileges: the right to silence (the right not to be questioned) and the privilege against self-incrimination. When the accused offers himself as a witness, he certainly waives the first privilege, referred to above, namely, the right not to be questioned. The question arises whether he waives the second privilege also, namely, the right not to be compelled to answer incriminating questions. If he is not deemed to have waived the second privilege, the next question is, is it desirable to make a provision in the opposite direction, that is to say, to the effect that he can be compelled to answer incriminating questions and to what extent?

70.29. In India, in 1955, when the accused was made a competent witness in all criminal cases by amending the Code of Criminal Procedure, 1898, then in force, this question was not dealt with specifically in the relevant statutory provision. But there appears to be need for a specific provision on the subject. Sarkar has drawn attention to the need for specific provisions as to the situation where the accused becomes a witness. He has stated:

"As to the competency of an accused to testify for the defence, it was at long last recognised by the legislature by a slovenly addition of section 342A to the Criminal Procedure Code, 1898 (by Act 20 of 1955) which leaves unsolved many important problems like the answering of any incriminating question by the accused in his cross-examination, or any question tending to show that the accused has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is a bad character & c. & c. These and many other questions would naturally crop up when an accused comes to offer himself as a witness for the defence. These and other intricate questions have been dealt with in the English Criminal Evidence Act, 1898, (61-62 Vic. c. 36), section 1(e), (f), (g) & c. of that Act. Section 342 of the Burma Criminal Procedure Code, as amended by Burma Act, 13 of 1945, which proceeds on the lines of the English Criminal Evidence Act, 1898, is a better piece of legislation."

70.30. We are dealing with this question because it is one of importance, and also of some difficulty. Judicial decisions are scanty, and take the view that the accused is in the same position as a witness. But the question is not merely whether what has been laid down should be codified. There are a few other aspects also to be considered.

In Laxmipat's case, the following observations were made by the Supreme Court in regard to a person who was not the accused, after referring to article 20(3) of the Constitution and section 132. Evidence Act.

"A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be a witness against himself because he is then not a witness against himself but against others Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself.

---

1Huminos v. Williamson, (1883) 10 Q.B.D. 459.
3(a) In re Khandaswami, A.I.R. 1957 Mad. 727, 734.
"In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article, since he is subjected to cross-examination and may be asked questions incriminating him."

The observations were, however, obiter.

70.31. So far as the narrow legal aspect of the matter is concerned, in taking a decision on the question, two sides of the matter must be borne in mind. On the one hand, the Code of Criminal Procedure can only make the accused a competent witness; it cannot make him a compellable witness, in view of the provision in article 20(3) of the Constitution. And, if it cannot make him a compellable witness, then it could be argued (in theory) that it cannot make him a compellable witness in relation to particular questions.

On the other hand, however, if incriminating questions are entirely excluded when the accused becomes a witness, cross-examination of the accused (as a witness) would be rendered almost impossible. Practical considerations, thus justify the later course.

By this course, the constitutional provision in article 20(3) is not violated, since the accused voluntarily offers himself as a witness and it would be a reasonable view to take that he waives the privilege.

70.32. We are of the view that the position regarding the extent to which the accused, when appearing as a witness, may be compelled to incriminate himself should be dealt with more specifically than at present and that in the interests of neatness and clarity the situation of the accused should be dealt with in a separate sub-section.

70.33. It may be noted that in England, in the case of the common law privilege of refusing to answer incriminating questions, it is perfectly lawful and proper for the question to be put, and it is for the witness to claim privilege if he thinks fit. But, as already stated, an accused person who elects to give evidence on his own behalf cannot claim privilege in respect of the offence with which he is charged. There is a specific statutory provision on the subject in England.

70.34. This is as regards the incriminating questions which are relevant to the matters in issue. So far as questions which are put to a witness relating to his credit are concerned, the matter pertains to section 148. Should be accused have to face every question which is asked to impeach his credit, including questions about his past offences or convictions? That point will be considered under section 148.

70.35. Our recommendation, then, on the subject of cross-examination of the accused concerning his capacity as a witness under section 132, is as follows:

An accused person who offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, may be compelled to answer questions which incriminate him as to the offence charged. This provision should be added in section 132 of the Act. The matter should be dealt with in a separate sub-section.

---

1Emphasis added.
2Boyle v. Wiseman, (1855) 10 Exch. 647.
3Para. 70.24, supra.
VII. PROVISO—EXTENSION TO SPOUSE

70.36. This takes us to the proviso to section 132, which (in effect) provides that if a witness is compelled to give certain answers to incriminating questions, the answers shall not subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence. It is to be noted that there is no protection for a question which may incriminate the spouse of the witness. An interesting point that can be raised in this connection is, how far a witness ought to be forced to incriminate his spouse. The principle that the peace of families should be preserved, is well-known to the law of evidence. It is on this principle that section 122 protects from disclosure communications during marriage. The protection given by section 122 rests upon the ground that the admission of such testimony would have a powerful tendency to disturb the peace of families and to weaken the mutual confidence upon which the happiness of the married status depends.

70.37. On this principle, it is desirable that under section 132 also, a witness should not be placed in a position where he would be made to answer a question that might harm the interests of the spouse. It is true that section 120 makes the parties and their spouses competent witnesses. But that does not necessarily imply that there should be no protection for particular kinds of communications, or questions which are of importance with reference to the husband-wife relationship.

70.38. In English law a witness can refuse to answer questions incriminating a spouse. For civil cases, this is now specifically recognised by statute.

In criminal cases, the rule that the privilege extends to the spouse, is a rule which applies by virtue of the common law. The rule at common law is that no witness, whether party or stranger, is (except as specified cases) compelled to answer any question or to produce any document, the tendency of which is to expose the witness (or the wife or the husband of the witness), to any criminal charge, penalty or forfeiture.

70.39. One possible objection to the suggestion made above may be answered here. It may argued that in England the witness is completely protected and may refuse to answer incriminating questions, while, in India, the privilege of the witness is limited—he must answer the question, but once he gives the answer, is not used against him later. This distinction, however, is not of any practical consequence for the point under consideration, because the quality of the privilege is not material; what needs to be stressed is, that whatever protection the law gives to a witness in respect of incriminating questions concerning the witness himself, should be available in respect of incriminating questions concerning his or her spouse also.

---

1Halsbury, 3rd ed., Vol. 15, page 422, paragraph 760.
2Civil Evidence Act, 1961, section 14(1)(b).
3R. v. All Saints Worcester, (1817) 6 M & S 194, 201 (spouse).
4Section 132, proviso.
70.40. We, therefore, recommend that section 132 should be extended to questions incriminating the spouse.

VIII. PROVISO — THE MEANING OF "COMPULSION".

70.41. The meaning of the word "compelled" as used in the proviso to section 132 also requires to be clarified. Judicial decisions on the subject disclose a controversy. Does the word "compelled" contemplate that the witness must have been forced to answer the question put by the court and must have made his unwillingness known to the court? Or, is the requirement indicated by that word satisfied even if the witness does not object to the question? On this point, there seems to be a conflict of decisions.

Three views have been expressed on the above point, which may, for the sake of convenience, be described as the narrow view, the wide view, and the intermediate view.

70.42. The narrow view is taken in a Bombay Case. It was decided in *Emperor v. Gunna* that unless a person objects to any question the answer to which is likely to incriminate him, he cannot be said to have been "compelled" to give such answer within the meaning of the proviso. Mr. Justice Hayward observed: "If a man voluntarily makes an incriminating statement, he must take the consequences for it. He can also plead protection if he has specifically declined to make the statement, and has been specifically compelled to do so by the Court". This was approved by a Full Bench in *Bai Shanta's Case*.

70.43. This view bases itself upon the fact that the words "which he is compelled to give" must be given some meaning: these words contemplate two situations — (i) where the witness raises no objection, (ii) where he raises an objection. In the first case, he can be taken as having acted voluntarily, and is not "compelled". It is only in the second situation that he is "compelled" and can therefore claim the immunity provided in the proviso.

70.44. In an earlier Bombay case, there was a difference of opinion between two judges (on the one hand) and one judge on the other hand. The majority (Bayley Ag. C.J. and Persons J.) took the view that protection is afforded only to an answer to which the witness has objected. Birdwood J. held that the compulsion is operative whether or not the witness asks to be excused. This controversy, so far as Bombay is concerned, is now settled by *Bai Shanta's case* taking the narrow view as stated above.

70.45. This is one view of the matter. According to what may be called the wide view, there is compulsion, at least where the witness makes an objection expressly. Compulsion is implicit in the legislative scheme, according to this

---

3*Queen Empress v. Ganu*, (1887) I.L.R. 12 Bom. 440.
view. This view was strongly put by Muttuswami Aiyar J. in his dissenting judgement in the earliest Madras case on the subject. In that case, there was a difference of opinion between the majority (3 judges) and the minority (2 judges). While the majority took a narrow view, the minority (Kernan and Muttuswami Aiyar, JJ.) took a wide view. According to that view, a witness giving evidence on oath when summoned by the court is, in every case, protected, since the compulsion arises by law.

This was also, in substance, the view of Walsh J. in Emperor v. Ganga Sahai (an Allahabad case). He observed:

"that a witness in a civil suit cannot be prosecuted for defamation in respect of an answer made by him to a question asked by the Court". For this conclusion, he relied, inter alia, on section 132, proviso. He expressed disagreement with two judgments of his own Court, and held that the word "compelled" refers to the obligation under the law to answer questions. In that case the question was asked by the Court, but the judgement does not rest on that consideration.

70.46. One of the Madras judgements in a later case can be said to take the intermediate view. These are the pertinent observations:

"Whether the witness seeks the protection of the Court in a set form of words, or not, if the witness is made to understand directly or indirectly that he had no option in the matter but to answer all the questions put to him, I conceive he would bring himself within the proviso to section 132. I am not prepared to hold that the proviso would only apply to witness who ask in so many words the protection of the Court under section 132. The words of the proviso should be understood in the ordinary sense and the word "compelled" means forcing or insisting upon a witness to answer the question. The witness may not know that he should apply for protection; but any reasonable man ought to know that any statement defamatory of another would expose him to a charge of defamation. If he hesitates to answer and the court tells him he must answer the questions, I would hold that hesitation and the direction of the court to the witness to answer would bring the witness within the proviso".

This view recognises that a claim to protection may be implied.

70.47. The intermediate view is also represented by an Allahabad case. It was held that it would be too narrow an interpretation to say that the word "compelled" must involve the necessity of a formal objection to giving the answer. Whether there was or was not compulsion, depended on the facts of each case.

70.48. The Calcutta view is that section 132, proviso, does not apply unless pressure is put upon a witness after he is in the box and when he asks to be excused from answering a question.

---

1Queen Empress v. Gopal Das, (1878-1881) I.L.R. 3 Mad. 271.
2Emperor v. Ganga Sahai, (1920) I.L.R. 42 All. 257; 18 A.I.J. 112
3Emphasis supplied.
4Peddappa v. Varada, A.I.R. 1929 Mad. 236, 239 (Devadoss J.
5Emphasis supplied.
6King Emperor v. Banarsi, A.I.R. 1924 All. 381. (Walan & Ryves, JJ.).
7Moher Sheikh v. Queen Empress (1894) I.L.R. 21 Cal. 392 (Trevelyan and Rampin, JJ.)
In that case, with reference to the view expressed by Muthuswami Aiyar J. in his dissenting judgement, in the Madras case, it was stated that it is not correct to say that the Judge has nothing to say in the matter, or that it is a mere formality for the witness to seek protection. It was observed— “the Judge has to decide whether the question is relevant to the matter in issue and upon that determination partly depends the obligation to answer”.

With great respect, this explanation does not satisfactorily or completely answer the principal query, namely, if the question is held to be relevant to the matter in issue, has the court a discretion to disallow the question on the ground that it would incriminate the witness? If so, what is the statutory provision constituting the authority for that discretion?

70.49. According to the later Madras view, a witness who answers a question put to him by counsel without claiming the protection of this section is not entitled to any protection. With respect, however, one may point out that the section, as it stands, if construed literally, confers no “protection” in the main paragraph, and does not contemplate the seeking of a protection by the witness. In fact, the main paragraph denies a protection to the witness, because it begins with the negative provision—

“No witness shall be excused .........................”

70.50. The narrow view stresses the relative clause beginning with the word “which” in the proviso. To this, answer has been given:

“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 the 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 criminating question that is material only in so far as it injures his character, and thereby affect 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 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?”

Need to remove conflict between main paragraph and proviso.

70.51. It seems to us that this controversy must continue so long as the present wording of the section is not changed. There seems to be fundamental lacuna or want of logic in the section. This lacuna becomes apparent when one reads the main paragraph of the section in contrast with the proviso. In the main paragraph, the section enacts the rule that a witness shall not be excused from answering incriminating questions—we are concerned only with questions pertaining to matters relevant to the matters in issue. This negative provision implies that there is no immunity and a witness is bound to answer the question in every case.

1Queen Empress v. Gopal Das, (1878-81) I.L.R. 3 Mad. 271 (supra).


The proviso, however, says that no such answer which a witness "shall be compelled to give" shall subject him to arrest or prosecution etc. The proviso creates the impression that there is a discretion — vide the relative pronoun "which". But if there is no immunity, compulsion must follow,— unless the law gives a discretion to the court to allow or not to disallow the question. Hence, the relative expression "which" creates difficulty. The use of the word "which" suggests that there is a distinction between case and case, and that two alternative situations are contemplated—one in which compulsion exists and another in which compulsion does not exist.

70.52. Unfortunately, however, the section does not contain any provision in express terms indicating that such a choice or discretion exists in the court. In this connection, reference may be made to the fact that in those sections of the Act where a discretion in the court is contemplated, there is an express provision—for example, sections 146(3), 147 and 148, which deal with the exercise of discretion in regard to questions intended to impeach the credit of a witness. If the provisions of section 132 had in express terms conferred such a discretion, then one can understand those judicial decisions which hold that the words "shall be compelled" in section 132 apply only where the court puts pressure on the witness and the witness in response makes a request for being excused for answering the question.

Such is not the case and in the absence of an express provision conferring discretion, one cannot be over-critical of the view that the ordinary layman, unacquainted with the technical terms of the section, may reasonably be regarded as a person compelled to answer all questions that are put by counsel or by the court. The difficulty arising from the present scheme of the section was emphatically described by Muttuswami Aiyar J. in his dissenting judgment in the Madras case where he observed:

"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."

70.53. Having taken into consideration all aspects of the matter, we are of the view that in the case of a witness compulsion must be taken as arising by law, since a court has no power to excuse a witness. This is the only reasonable construction of the main paragraph. It is necessary that the proviso should be brought into line with this proposition enacted in the main paragraph.

IX. RECOMMENDATION

70.54. In the light of the above discussion, we recommend that section 132 should be revised as below:

"132. (1) 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 the spouse of the witness or that it will expose, or tend directly or indirectly to expose, such witness or spouse to a penalty or forfeiture of any kind."

2Emperor v. Banarasi. A.I.R. 1924, All. 381
3Queen Empress v. Gopal Dass. (1878-1881) I.L.R. 3 Mad. 271, 284
4Parn 70.43, supra.
(2) An accused person who offers himself as a witness under section 315 of the Code of Criminal Procedure, 1973, shall not be excused from answering any question as to any matter relevant to the matter in issue in the prosecution on the ground that the answer to such question will criminate or may tend directly or indirectly to criminate the accused or the spouse of the accused or that it will expose, or tend directly or indirectly to expose, the accused or the spouse to a penalty or forfeiture of any kind.

(3) Where by virtue of the obligation imposed by sub-section (1) or sub-section (2), a witness or the accused is bound to answer a question, no answer which the witness or the accused gives to that question shall subject the witness, the accused or the spouse of the witness or the accused, as the case may be, to arrest or prosecution, or be proved against the witness or the accused or the spouse, as the case may be, in any criminal proceeding, except a prosecution for giving false evidence by such answer."
CHAPTER 71

PRIVILEGE OF FAMILY COUNSELLORS: SECTION 132A

SECTION 132A

71.1. We have so far dealt with existing provisions of the Act which concern privileges and disabilities in the field of evidence. Before we part with this topic it is necessary to consider one matter on which there is no provision creating a privilege or disability in the present Act. The matter is an important one deserving consideration, having regard to the current thinking on the subject of disputes arising in family law.

So far as the law of evidence is concerned, what we have in mind is the protection from disclosure of statements made to a person appointed by the Court for the purpose of effecting reconciliation between the parties to a dispute concerning the family. In order to appreciate the need for such a provision, it is necessary to give a short background of certain trends in thinking and legislative developments on the subject.

71.2. It is now being increasingly realised that disputes relating to family law—in particular, matrimonial proceedings—require a different approach from the conventional method adopted in relation to other disputes. The court does not take any active part in ordinary litigation. But family disputes stand on a different footing. Such disputes concern not merely the immediate parties thereto, but the children and—to a wider view—society as a whole. It is for the good of the society that such disputes ought to be prevented from arising, as far as possible; but if unfortunately a dispute does arise, it is in the interest of society that its resolution should be effected with as little acrimony as possible and after bearing in mind the wider interest to which we have made a reference. In this connection, it is pertinent to refer to the Report of the Law Commission on the Code of Civil Procedure. We stressed in that Report the need for certain special procedural provisions in relation to disputes in the field of family law. Our recommendation has, in substance, been implemented by the insertion of a new Order—Order 32A—in the Code of Civil Procedure as recently amended. We recommend, inter alia, a statutory provision calling upon the Court to make efforts at reconciliation. That has also been implemented by the insertion of an appropriate provision in the Code.

71.3. In order that the amended provision may be properly carried out, it may be necessary for the Court to appoint counsellors who could give their advice to the parties. For brevity's sake, we shall describe such persons as family counsellors. Such counsellors would find their task smooth if communications made during the course of the proceedings held by them are protected from disclosure. That is how the matter becomes relevant to the field of the law of evidence.

71.4. The existing law of evidence does not meet the situation. Communications made by one spouse to another are privileged under section 122: but that section is based on the consideration of maintenance of marital confidence between married person, and is confined to their mutual communications. What we have in mind is a slightly different consideration, namely, the social interest in the preservation of a marriage which, through it threatens to come to an end, could yet be saved by wise and careful action on behalf of the society. of

which the family counsellor is a representative. And the communications for which the privilege is intended need not take place between spouses. It is in the interests of society generally that the spouse who is willing to confide in the family counsellor about his conduct should be encouraged to do so. The proceedings for reconciliation may then have a reasonable prospect of success, or at least the spouse making such communications will have the satisfaction that the truth is known to one person who is neutral and impartial and who is acting for the benefit of both the parties. When we speak of "spouses", we do not imply only matrimonial disputes.

71.5. If the approach which we have outlined above is to be implemented, a question of detail arises, namely, should be privilege be that of the communicating spouse, or should be privilege be that of the family counsellor? On this question, much can be said on both sides. The grant of a privilege to the spouse would be in symmetry with the provisions of the Act concerning legal advisers. But it can be said, on the other side, that the position of the family counsellor is not totally similar to that of a legal professional adviser. The proposed privilege is to be created in the interest of society, in order that the family counsellor may function effectively and the privilege should exist irrespective of the fact that the family counsellor is or is not engaged by the party. On this reasoning, the privilege should be of the family counsellor. The communication should be protected, because society has an interest in the preservation of marriage. We think that on the whole the privilege should be of the family counsellor.

71.6. But the privilege should not apply to proceedings against the counsellor — where the proceedings are based on a cause of action arising from matters concerning the action of the counsellor.

71.7. It would be of interest to note that in England, a privilege regarding such communications seems to be recognised,—though the privilege is of the spouse. Thus, in Mctaggart v. Mctaggart, a probation officer was obliged to give evidence concerning that which had passed at an interview between the parties, at which he had been present. The spouses each gave evidence about this interview, and the Court of Appeal accordingly, held that such privilege as attached to their statements to the probation officer had been waived: but the Court had no doubt that the statements were privileged, although the privilege was that of the parties. In Mole v. Mole, it was decided that the privilege existed even when only one of the parties had enlisted the services of a probation officer, so that he could not give evidence about a letter written to him by the other party without that person's consent. It was emphasised that a similar privilege would apply when one or other of the parties approached a doctor, clergyman or marriage guidance counsellor with regard to his or her matrimonial differences and there was said to be a tacit understanding that negotiations were to be without prejudice in such cases.

In Henley v. Henley, the initiative in endeavouring to effect a reconciliation was taken by a clergyman, a friend of the parties, and it was held that the privilege attached to statements made to him.

In Pais v. Pais, it was observed after referring to Cross's opinion that the privilege should be of the adviser—

"It may be that it would be very convenient and just that it should be the law, but in my judgment it is not the law of England that there is a privilege

---

4Cross, Evidence (1974), page 262.
5McTaggart v. McTaggart, (1949) Probate 94; (1948) 2 All E.R. 754.
attaching to a priest or other professional man, or to any other marriage guidance counsellor as such. The privilege of communications between lawyer and client is the privilege of the client, not the privilege of the lawyer. So, too, the privilege of communications between priest and spouse, and I am dealing only with the case of conciliation, is the privilege of the spouse not the priest."

71.8. This is the English common law. In some countries, the matter has been dealt with by statute. There was, for example, in the Australia (Matrimonial Causes) Act, 1959, section 12(1) (recently re-enacted), a provision that a marriage guidance counsellor is neither competent nor compellable as a witness in respect of communications made to him in that capacity.

It appears that the privilege has been recognized in New Zealand and in the New York State. It has also been enacted in regard to the Los Angeles County Family Court, and in the Rules in force in New Jersey.

71.9. The New Jersey Rule on the subject reads—

"28A—1. Any communication between a marriage counsellor and the person or persons counselled shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver, except where the marriage counsellor is a party defendant to a civil, criminal or disciplinary action arising from such counselling, in which case, the waiver shall be limited to that section."

71.10. In the above discussion, we have mentioned counsellors appointed by the court. For the present, we do not recommend that the protection proposed by us be extended to marriage guidance counsellors who are consulted privately by the parties in connection with disputes concerning the family. In India, such counselling is nascent institution. Some such privilege may be needed even for private counsellors, if they are to function effectively. When such institutions take root, it will be necessary to deal with the matter. A day might come when counselling and conciliation will be available not only to spouses who approach the court, but also to married people who seek to avoid that result. It is vital to the preservation of the social fabric, if it is to withstand the onslaughts that are bound to be made by the winds of "modernisation", that there is available disinterested and competent advice. The process of divorce is merely a remedial one in the legal sense, and not a preventive one. We hope that preventive social therapy to avoid disputes will be available.

71.11. Although the amendment recommended by us will be primarily important where the reconciliation relates to the main issue in matrimonial proceedings, it may not be improper to point out that there might be many other issues in respect of which reconciliation or common agreement could be worked for. Even where the parties cannot agree to resume their married life, it might well be advisable to ensure that as far as possible the question of financial provisions and custody of children, including, in particular, the crucial question of access to children are settled by agreement. It is not to be overlooked that though orders on these matters are regarded as incidental orders, it is such matters that constitute the heart of the real dispute. From the sociological point of view, they are much more important than the dissolution of the marriage or other relief prayed for, however important the latter may be to the legal eye.

---

Where children are concerned, the court may like to direct and supervise meaningful negotiations and to review all arrangements so as to ensure that the rights of children are protected.

Access to a child is an intrinsic aspect of arrangements or dispositions made for the child’s custody, care and upbringing. The purpose of access is to recognise a child’s interest in a continuing relationship with each parent.

Recommendment.

71.12. In the light of the above discussion, we recommend the insertion of a new section on the following lines:—

"132A. (1) No communication between a family counsellor as such and the person or persons counselled shall be compelled or permitted to be disclosed.

(2) The provisions of sub-section (1) shall not apply where the family counsellor is a party to a civil or criminal proceeding arising from such counselling.

Explanation 1.—In this section, “a family counsellor” means a person appointed by the court for the purpose of effecting reconciliation between parties to a proceeding wherein the court is empowered or required by law to appoint such a person.

Explanation 2.—This section applies to the proceedings referred to in Explanation 1 as well as to any other proceedings.”
CHAPTER 72

PATENT AGENTS—SECTION 132B

72.1. There is another matter which raises questions of privilege, on which at present there is no specific provision in the Act. Under the Patents Act, a patent agent can practise not only before the High Court, but also before the Controller General of Patents, Designs and Trademarks (briefly described as the Controller) in proceedings under the Act. To this extent the functions of patent agents are analogous to those of professional legal advisers. In the Evidence Act, however, there is no provision protecting their confidence. Patent agents do not enjoy any privilege in regard to confidential communications. Since the very nature of the proceedings under the Patents Act implies that in most cases, a communication between a patent agent and client will be confidential and should deserve protection, we are of the view that a provision is necessary in the Evidence Act on the subject.¹

72.2. It may be noted that in England, provision has now been made conferring privilege in respect of certain communications relating to patent proceedings. The relevant provision, which is contained in the Civil Evidence Act, 1968, is as follows:—²

"Privilege for certain communications relating to patent proceedings.

15.—(1) This section applies to any communication made for the purpose of any pending or contemplated proceedings under the Patents Act, 1949 before the Comptroller or the Appeal Tribunal, being either—

(a) a communication between the patent agent of a party to those proceedings and that party or any other person; or

(b) a communication between a party to those proceedings and a person other than his patent agent made for the purpose of obtaining, or in response to a request for, information which that party is seeking for the purpose of submitting it to his patent agent.

For the purpose of this sub-section, a communication made by or to a person acting—

"(i) on behalf of a patent agent; or

(ii) on behalf of a party to any pending or contemplated proceedings,

shall be treated as made by or to that patent agent or party, as the case may be.

(2) In any legal proceedings other than criminal proceedings a communication to which this section applies shall be privileged from disclosure in like manner as if the proceedings mentioned in the foregoing sub-section had been proceedings before the High Court and the patent agent in question had been the solicitor of the party concerned.

(3) For the purpose of this section, a communication made for the purpose of a pending or contemplated proceeding under the Patents Act, 1949 shall be treated as made for the purpose of contemplated proceedings

¹Sections 126-127, Patents Act, 1970.
²See para 72.3, infra.
³Section 15, Civil Evidence Act, 1968 (c. 64).
under that Act before the Comptroller or the Appeal Tribunal of every kind to which a proceeding of that description may give rise, whether or not any such proceedings are actually contemplated when the communication is made.

"(4) In this section—

"the Comptroller" and "the Appeal Tribunal" have the same meanings as in the Patents Act, 1949;

"patent agent" means a person registered as a patent agent in the register of patent agents maintained pursuant to the Patents Act, 1949 or a company lawfully practising as a patent agent in the United Kingdom or the Isle of Man; and

"party", in relation to any contemplated proceedings, means a prospective party thereto".

Indian Act as to patents

72.3. In India, under the Patents Act in force,¹ a patent agent whose name is entered in the Register is entitled² to practise before the Controller and to prepare all documents, transact all business and discharge such other functions as may be prescribed in connection with any proceeding before the Controller under the Act. Besides advocates, persons who have obtained a degree and passed the qualifying examination prescribed for the purpose, are qualified to have their names entered in the Register of Patent Agent.³

72.4. An appeal from the decision of the Controller (The Controller General of Patents, Designs and Trade marks) lies, to the High Court in certain cases.⁴ The Act contains no provisions as to the privileges of patent agents. Having regard to rapid scientific progress in the country and the growing importance of inventions and patents, it can be reasonably asserted that the institution of patent agents will assume practical importance in the not distant future. Correspondingly, the law of evidence should also give due recognition to their functions and grant a privilege that will enable them to discharge their functions smoothly—a protection which is required in the public interest.

Recommendation.

72.5. We, therefore, recommend that the following new section should be inserted in the Evidence Act. It should apply to civil as well as criminal proceedings:

"132B. (1) This section applies to any communication made for the purpose of any pending or contemplated proceedings under the Patents Act, before the Comptroller or the High Court, being either—

"(a) a communication between the patent agent of a party to those proceedings and that party or any other person; or

(b) a communication between a party to those proceedings and a person other than his patent agent made for the purpose of obtaining, or in response to a request for, information which that party is seeking for the purpose of submitting it to his patent agent.

²Section 127, Patents Act, 1970.
³Section 126, Patents Act, 1970.
⁴Section 116(2), Patents Act, 1970
Explanation.—For the purpose of this sub-section, a communication made by or to a person acting—

(i) on behalf of a patent agent, or

(ii) on behalf of a party to any pending or contemplated proceedings; shall be treated as made by or to that Patent agent or party, as the case may be.

(2) In any legal proceedings, a communication to which this section applies shall be privileged from disclosure in like manner as if the proceedings mentioned in sub-section (1) had been proceedings before a Court and the Patent agent in question had been the legal professional adviser of the party concerned.

(3) For the purposes of this section a communication made for the purpose of a pending or contemplated proceeding under the Patents Act shall be treated as made for the purpose of contemplated proceedings under that Act before the Comptroller or the High Court of every kind to which a proceeding of that description may give rise, whether or not any such proceedings are actually contemplated when the communication is made.

(4) In this section—

(a) “the Comptroller” has the same meaning as in the Patents Act;

(b) “Patents Act” means the Patents Act, 1970;

(c) “patent agent” means a person registered as a patent agent in the register of patent agents maintained pursuant to the Patents Act, or a company lawfully practising as a patent agent in India;

(d) “party”, in relation to any contemplated proceedings, means a prospective party thereto.”

*The intention is that the new section should apply to civil as well as criminal proceedings.*
CHAPTER 73

ACCOMPlice Evidence

SECTION 133 AND SECTION 114, ILLUSTRATION (b)

I. INTRODUCTORY

73.1. With section 133, the Act deals with particular witnesses. Two provisions relating to the evidence of accomplices should now be considered. The first is section 133. It provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

The second is section 114, illustration (b), which cautions the court that the court may presume that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars.

73.2. There is a certain amount of disharmony between the two provisions—which is usually solved by stating the proposition that the rule that an accomplice is unworthy of credit unless corroborated, is a rule of prudence and not one of law. Nevertheless, the present duality creates complications in practice. We shall deal with this aspect later.

73.3. Two propositions are enacted in section 133. The first proposition, that an accomplice is a competent witness against an accused person, is a proposition which is really superfluous in view of section 118.

The section does not make a distinction between one kind of accomplice and another, nor does it confine the expression “accomplice” to a person who is an approver.

It should be noted that the expression “accomplice” is not an expression used in the Indian Penal Code, or (except as a marginal note) in the Code of Criminal Procedure. It appears only in the Evidence Act.

The expression “testimony”, which occurs in section 133, is also not ordinarily used in Indian statutory law. These are, however, questions of mere semantics, and we may proceed to discuss more substantial matters.

II. NEED FOR SECTION 133 DOUBTED

73.4. It is not quite clear why section 133 was inserted at all in the Act. Markby has dealt with the point thus—

“It was not necessary, as section 118 makes all persons competent to testify; except those there enumerated. Nor is there any rule which requires that the evidence of an accomplice should be corroborated. But the emphatic statement in this section might lead persons to suppose that the Legislature desired to encourage convictions on the uncorroborated evidence of an accomplice. This, however, cannot have been the case, because, in section 114, we find given, as one of the presumptions based on the common course of human conduct, the presumption that an accomplice is unworthy


\(^2\)See discussion as to meaning of “accomplice”, infra.

734
"of credit, unless he is corroborated in material particulars'. Moreover, no conviction based on the uncorroborated evidence of an accomplice would be allowed to stand by a court of appeal, except under very rare and exceptional circumstances and if a Judge in his charge to the jury omitted "to warn them against the danger of convicting on such uncorroborated evidence, he would be held to have misdirected them. It would, however, have been better to omit this section. The law on the subject would then have been the same as it is now, and the awkwardness of appearing to sanction a practice so universally condemned would be avoided."

73.5. Perhaps, the draftsman of the Act thought that since several points were discussed in various cases (holding that legally a man may be convicted on uncorroborated testimony of an accomplice provided the judge had called the attention of the jury to the fact that this was the sole evidence), it was proper to codify all those points.

III. VARIOUS SITUATIONS WHERE ACCOMPLICE

73.6. There are numerous situations in which an accomplice may become a competent witness. A person may have been granted pardon under the Code of Criminal Procedure (popularly known as the Queen's pardon in England) and he is then said to become an approver. Or, he may not have been pardoned, but may be under trial separately from the other accused—a course which is not illegal, though usually inconvenient. He might have already been convicted, for example, where the other accused has absconded, so that he is no longer the 'accused'—and therefore, he becomes a competent and compellable witness. Or, though a prosecution was instituted against him, it may have been withdrawn, so that he ceases to be the "accused". In the alternative, for some reason—say, insufficient evidence of or factual ignorance on the part of the police or otherwise—he might not have been charged at all, and if it now transpires that he was also involved in the offence and was a guilty associate in crime.

Again, though a co-accused, he may choose to give evidence. In every case, he is an accomplice, and his evidence will be subject to the safeguard indicated in section 114, illustration (b). Of course, the extent of corroboration needed will differ from case to case.

73.7. How an accomplice becomes a witness even though he has not received pardon in accordance with law, is illustrated in a Bombay case. A large number of persons were prosecuted for offences of conspiracy under section 120B of the Indian Penal Code, for importing and bringing into India gold in contravention of the provisions of the Sea Customs Act, 1878. They were convicted. In appeal against the convictions, the defence argued in the High Court that two of the accomplices ought to have been prosecuted along with the accused, as there was sufficient evidence against them. If the customs authorities wanted to use their evidence against the accused, they (the authorities) ought to have proceeded to obtain the same by the procedure prescribed by the Code of Criminal Procedure or otherwise by law, but they had no right, on their own responsibility, to choose particular persons as witnesses and prosecute the others.

---

Note the word "exceptional".

Emphasis added.

Mark by on Evidence, page 98, quoted by Field.


The enumeration is not intended to be exhaustive.

73.8. The High Court rejected this contention of the defence, and held that
if it is desired to use an accomplice as a witness without the procedure of
pardon, his trial can be separated, and he may either be tried first and then be
examined as a witness, or he may be examined as a witness first and then
tried.

73.9. The High Court observed that this is not to say that the police were
not to charge-sheet a particular accused. The prosecution should obtain either
pardon in accordance with section 337 of the Code of Criminal Procedure,
1898, or the accused should have been discharged, or acquitted under section 494.
The police may charge him separately, and he may plead guilty. But these
points did not affect the competence of the person concerned to give evidence.

73.10. The point came up before the Supreme Court in *Sirajuddin*.1 In
that case, there were charges under the Prevention of Corruption Act, 1947,
against the accused, who was the Chief Engineer, Madras. During the course
of investigation of the case, the police promised “pardon” to some other
officials, who were the subordinates of the accused and had assisted him in the
commission of his malpractices. The police thought that if the subordinate
officials were prosecuted along with the accused, the case might fail for lack
of evidence. The police issued “certificates” to two subordinates officials,
assuring them immunity from prosecution for the part played by them.

73.11. The Supreme Court, while upholding the conviction on the merits,
oberved that the granting of immunity to two persons who are sure to be
examined as witnesses for the prosecution was highly irregular and unfortunate.
Neither the Code of Criminal Procedure nor the Prevention of Corruption Act
recognises the immunity from prosecution given under these “assurances”; the
grant of pardon was not in the discretion of police authorities. However, it
may be noted that this irregularity does not seem to have been treated as
affecting the position regarding evidence given by the persons concerned.

73.12. Many cases could be cited from the High Courts in which the
examination of one of the suspects as a witness was not held to be illegal, and
accomplice evidence was received (subject to safeguards) as admissible evidence
in the case. In those cases, section 342 of the Code of Criminal Procedure, 1898,
and section 5 of the Indian Oaths Act (then in force) were considered, and the
word “accused” as used in those sections was held to denote a person actually
on trial before a court, and not a person who could have been so tried. The
witness was, of course, treated as an accomplice. The evidence of such an
accomplice was received with necessary caution in those cases. These cases
have been mentioned in *Re Khandaswami Gounder*2 and were approved by the
Supreme Court in *Lakshmipat’s case*.3 The leading cases of the High Courts are:

(Case law as to trial of accomplice)

*Queen Empress v. Mona Puna*, (1892) I.L.R. 16 Bom. 661;
*Banu Singh v. Emperor*, (1906) I.L.R. 33 Cal 1353;
*Empress v. Durant*, (1899) I.L.R. 23 Bom. 213;
*Akhoy Kumar Mookerjee v. Emperor*, I.L.R. 45 Cal. 720; A.I.R. 1919 Cal. 1021;

---

IV. MEANING

73.13. So much as regards the position in the law of procedure. The meaning of the expression “accomplice” is a matter of some interest. In the new Oxford Dictionary, it is stated that the word “accomplice” may be spelt as “a complice”, meaning a partner in crime, an associate in guilt.1

The term “accomplice” is not defined in the Evidence Act. The Penal Code does not even refer to it. The Code of Criminal Procedure does not use it; it merely refers to the term “accomplice” in a marginal note, which reads thus: “Tender of pardon to accomplice”.

The term “accomplice” signifies a guilty associate in crime; or when the witness sustains such a relation to the criminal act that he could be jointly indicated with the accused he is an accomplice.2 This definition is based upon U.S. v. Nevers3 and White v. Com.4

The Patna case of Kailash Misir v. Emperor5, the Oudh case of Jagannath v. Emperor6, and the Sind case of Chetumal v. Emperor7, have adopted this definition of “accomplice” which was also adopted in a few other cases. The terms was explained in Ismail Hussain Ali v. Emperor8, as follows:—

“The expression ‘accomplice’ has not been defined in the Evidence Act, but there can be little doubt that it means a person who knowingly or voluntarily cooperates with or aids, and assists another in the commission of a crime.”

73.14. In Emperor v. Mathews,9 Cuming J. made the following observations elucidating the various grades of accomplices:

“It is to be remembered that there are, it may be said, many grades of accomplices. They vary from the man who, for example, with his own hand committed a murder, to the man who as in the present case it is alleged, offered a bribe to another when the latter is being tried for taking the illegal gratification and to that extent aided the accused in committing his offence of taking an illegal gratification.

“For, this man is not strictly speaking guilty of the offence of which the other is being tried, and he certainly does not come strictly within the meaning of the term “accomplice” if we accept the definition of term “accomplice” as given by Subrahmanya Ayyar J. in the case of Rama...
73.15. Every "participation" in the physical act which constitutes an offence does not make a person an accomplice. There must be a guilty association in crime. It depends upon the nature of the offence and the extent of the complicity of the witness in it. There must be mens rea.

73.16. In particular, mere presence at the scene of crime does not constitute complicity in crime unless there is guilty association. *R. v. Coney* decided that non-accidental presence at the scene of the crime is not conclusive of aiding and abetting. The jury has to be told by the judge in clear terms, what it is that has to be proved before they can convict of aiding and abetting; what it is of which the jury must be sure as matters of inference before they can convict of aiding and abetting, in such a case where the evidence adduced by the prosecution is limited to non-accidental presence. What has to be proved is stated by Hawkins J. in a well-known passage in his judgment in *R. v. Coney*, where he said:

"In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not, of necessity, amount to aiding and abetting; it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

An accessory after the fact is an accomplice,*.4

On the meaning of "accomplice", the observations of Ramaswami J., in *Ambujan Ammal, In re* are worthy of perusal:

"An accomplice is a person who has concurred in the commission of an offence.........*.

"The word 'accomplice' means a guilty associate or partner in crime, or who in some way or other is connected with the offence in question, or

---

2 Queen v. Ram Sahoy, 20 M.R.Cr. 19.
who makes admissions of fact showing that he had a conscious had in the offence. It includes an accessory after the fact. Variety of situations.

73.17. The scope of the concept of accomplice has raised interesting problems with reference to a variety of situations in India. For example, is a person who offers a bribe to public officer an accomplice? The question has been answered in the affirmative.

73.18. The question of spies has also come up. A distinction is sometimes made between an agent for the prosecution who is a mere spy and a person who associates with criminals with a criminal design. The former is not an accomplice, and his evidence does not require corroboration, though the weight to be attached depends on the character of the individual witness; the latter is an accomplice whose evidence requires corroboration.4 6

If the position of a witness is analogous to that of an accomplice, corroboration in material particulars would be required. 8

A few leading cases on the subject, apart from those of Supreme Court (referred to separately) are—

(a) Those of the Privy Council, Blubani Sahu v. The King6 and Mahadeo v. The King8, and


(d) the Bombay case of Papa Kamal Khan v. Emperor,19 the Nagpur case of Ghudo v. Emperor.19

---

Footnotes:

(b) Emperor v. Burn, 11 Bom. L.R. 1153.


4(a) R. v. Chhagan, I.L.R. 14 Bom. 331;


4In re S. A. Sattar Khan, A.I.R. 1939 Mad. 283.

4In re Addanki Venkadu, A.I.R. 1939 Mad. 266.


4Vayasa Rao v. The King, 12 M.L.J. 283.

4Mutukumaraswami v. Emperor I.L.R. 35 Mad. 397.


4In re B. K. Rajagopal, A.I.R. 1944 Mad. 117 (F.B.); (1943) 2 M.L.J. 634.


(e) the Oudh case of Jaganath v. Emperor,1 the Lahore case of Ismail v. Emperor,2 and the Patna case of Kallash Missir v. Emperor.3

V. ENGLISH LAW

73.19. Evolution of the law in England is of interest. In the leading case of R. v. Baskerville,4,5 reported in 1916, Lord Reading, Chief Justice, delivering the judgment of the court of Criminal Appeal (which included Scrutton, Averty, Rowlatt and Atkin JJ.) observed:

“There is no doubt that the uncorroborated evidence of an accomplice is admissible in law...... but it has long been a rule of practice at common law for the judge to warn of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice and in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence.”

Statham v. Statham6 reported in 1929, contains a useful analysis of the whole law relating to corroboration of the evidence of accomplices. Lord Hanworth M. R. referred to the cases of Thompson v. The King, (1918) A.C. 221, R. v. Jellyman, (1838) 8 Car. & P. 604; 173 E.R.637, R. v. The Tate (1908) 2 K. B. 680 and R. v. Baskerville, (1916) 2 K. B. 658 and deduced three propositions from them. First, that the evidence of an accomplice is not accepted without corroboration. Second, that a conviction may be quashed in an appeal court where a trial judge had omitted to caution a jury against convicting on the uncorroborated evidence of an accomplice. Third, that the corroboration must be found in some material particular tending to show that the accused had committed the acts charged. The evidence must also be such as affected that accused by connecting him or tending to connect him with the crime. This case shows a more stringent approach.

Later, in Davies v. D.P.P.,7 the following propositions were enunciated by the House of Lords:

“(1) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term ‘accomplice’. But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule: viz.,

(2) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (R. v. Jennings, (1912) 7 Cr. App. R. 242 ; R. v. Dixon, (1925) 19 Cr. App. R. 36).

(3) When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, on his ‘having committed crimes of this identical type on other occasions, as proving system and intent and negativing accident; in such

---

1Jaganath v. Emperor, A.I.R. 1942 Oudh 221.
5This was cited with approval in Rameshwar v. The State. (1952) S.C.R. 377, 385:
cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration (R. v. Farid (1945) 30 Cr. App. R. 168) .........."

The position as to "traps" will be discussed later.\(^1\)

The following are not accomplices in England:

(a) a child under the age of criminal responsibility assisting in a crime;\(^2\)
(b) a child victim of a sexual assault,\(^3\) and
(c) a woman upon whose immoral earnings the accused is alleged to have lived.\(^4\)

73.20. But, in general, a warning has to be given if a witness has some purpose of his own to serve\(^5\). It is the same with any witness of dubious and doubtful character\(^6\) so that, in practice, a warning would be given about the evidence of a woman on whose immoral earnings the accused is alleged to have lived.\(^7\) It may be stated also with reference to children who are helpers in crime and child victims of assaults, that corroboration will be required even though they are not "accomplices", in view of separate rules based on different grounds.

VI. ENTRAPMENT

73.21. An important point connected with the subject of accomplices is that concerning "traps". The subject of trap witnesses from the point of view of the law of evidence has been thus dealt with\(^8\) by the Supreme Court:

"The correct rule is that if such witnesses are accomplices who are particeps criminis, their evidence must be treated in the same way as that of accomplices; if they are not accomplices but are partisan or interested witnesses concerned in the success of the trap, their evidence must be treated in the same way as other interested evidence by the application of diverse considerations, and in a proper case the court may even look for independent corroboration. To convict upon such partisan evidence is neither illegal nor imprudent, but inadvisable."\(^9\)

73.22. In some countries, the use of traps has repercussions on substantive liability and "entrapment" may even constitute a defence to criminal liability. Though we are not concerned with the question of substantive criminal liability it will not be improper to refer to the cases relating to the effect of entrapment on substantive liability.

It is settled in the U.S.A. that if the police or other government agents act as agents provocateurs—that is, going beyond mere infiltrators affording the opportunity or facility for criminal activity—the defence of "entrapment" may

---

\(^1\)See "Entrapment" infra.
\(^7\)See in R. v. King, (1914) 10 Cr. App. R. 117, 119, Reading L.C.J.
be raised in defence of any subsequent prosecution. This was clearly established by the Supreme Court in Sorrel v. U.S.\(^1\) In the lower federal courts, it had clearly been the practice for some time.\(^6\)

73.23. In Sorrel, Chief Justice Hughes commented:

"It is well settled that the fact that officers or employees of a govern-
ment merely afford opportunity or facility for the commission of the
offence does not defeat the prosecution............ A different question is
presented when the criminal design originates with the officials of the
government, and they implant into the minds of an innocent person the
disposition to commit the alleged offence and induce its commission in
order that they may prosecute."

73.24. The facts of the later Supreme Court decision in Sherman v. U.S.\(^3\) illustrate the problem. In August 1951, K., a narcotics informer met S. at a
doctor’s office, where, apparently, both men were being treated for drug
addiction. From that time K. and S. met frequently at that same office and
at the pharmacy. At these “accidental” meetings, conversation ensued.

After some time K. asked S. if S. knew of a source of drugs as K. said
he was not responding to the treatment. S. tried to avoid the issue, but after
a number of requests he gave way and on several occasions following S.
obtained drugs and shared them with K. who contributed to the cost. K. then
informed the police and on three subsequent occasions in November the police
observed S. giving drugs to K.

73.25. In the Supreme Court, Chief Justice Warren drew a distinction
between infiltration and the manufacture of ‘criminal’ activity and made the
following observations:

"To determine whether entrapment has been established a line must
be drawn between a trap for the unwary innocent and a trap for the
unwary criminal."

In a separate judgment, Frankfurter J. stated the policy underlying the
defence of entrapment in these words:

"The courts refuse to convict an entrapped defendant not because his
conduct falls outside the prescription of status, but because even if his
guilt be admitted the methods employed on behalf of the government to
bring about a conviction cannot be countenanced."

Warren, C.J. elucidated the aspect of manufacturing a crime in these
words:\(^4\)

"The function of law enforcement is the prevention of crime and the
apprehension of criminals. Manifestly, that function does not include the
manufacturing of crime. Though stealth and strategy are necessary
weapons in the arsenal of a police officer for detecting criminal activity,
these become objectionable police methods if the criminal design originates
with the officers of the Government and is implanted into the mind of
an innocent person."

---

\(^1\)Sorrel v. U.S., 77 L.Ed. 413, 416.
\(^3\)Sherman v. U.S., 2 L. Ed. 2d 848, 850, 855.
Chief Justice Warren further observed that such objectionable police methods are in the same category as coerced confessions or unlawful search. To quote the Chief Justice:

"Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."

Mr. Justice Frankfurter while dismissing the indictment (when the case was remanded), examined the principle of entrapment and observed:

"No matter what the defendant's (accused person's) past record and present inclination to criminality or the depths to which he has sunk in the estimation of the society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. The possibility that no matter what his past crime and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not for ever outlaw the criminal and open him to police practices aimed at securing his repeated conviction from which the ordinary citizen is protected. The whole ameliorative hopes "of modern penology and prison administration strongly counsel against such a view."

73.26. While recognising that it is the obligation of the police to detect those engaged in criminal conduct and ready and willing to commit further crimes, should the occasion arise, Frankfurter J. further observed:

"It does not mean that in holding out inducements they should act in such manner as is likely to induce to the commission of crime only those persons and not others who would normally avoid crime and through self-strengthen resist ordinary temptations. The power of Government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who left to themselves might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without Government adding to them and generating crime."

73.27. The English approach to the problem, starting from Brannan v. Peek¹ this has been reviewed by the Court of Appeal in a number of cases. The Court of Appeal has refused to accept the proposition that "entrapment" can amount to a defence, but observed that it may be a proper matter to be taken into account when assessing sentence.

73.28. Thus, no defence of "entrapment" is available in English law—as it is in America—to one who has been led by the police into committing a crime. It has been held in England² that while it is wrong for the police to encourage the commission of an offence which otherwise might not be committed, they may, in order to trap the criminal, participate in an offence which has already been "laid on" and is going to be committed in any event.²

Entrapment is, however, a matter which may be taken into account in fixing the sentence in England. Thus, where there was possibility that a theft might not have been committed but for a police trap, the accused was sentenced as if he had been convicted of a conspiracy to steal, rather of actual theft.³

48-131 LAD/ND/77
73.29. The case of Birles\(^1\) illustrates this. In that case Lord Parker observed: "... there is, as it seems to this court, a real likelihood that he would not have committed ......, he had previously remarked that there was (appellant) was encouraged to commit an offence which otherwise he "a real possibility .......... that the appellant was encouraged by the informer and indeed by the police officer concerned. A five year sentence was consequently, reduced to one of three years. However, although the appeal had originally been against conviction and sentence, the appeal against conviction was abandoned at the hearing and so no argument was heard on the point of guilt.

73.30. These were cases of public servants laying traps. A private citizen cannot take it upon himself to instigate crime. This is clear from the case of Smith\(^2\) where a private citizen took it upon himself to instigate a crime though with the object of procuring a conviction, and was himself convicted.

73.31. Although English law on this important topic is not very definite, it appears that from case law the following propositions may, according to one article,\(^3\) be deduced.

(1) There is a dividing line between permissible police practice and acting as agent provocateur.

(2) If the police or their informers act as agents provocateur, such evidence may be excluded in the discretion of the trial judge.

(3) If such evidence is not excluded and the defendant is convicted, the sentence imposed may still be mitigated in its severity.

In the same article,\(^4\) it is stated:

"Clearly, proposition (2) has the least authority to support it. However, it would, in this writer's view, be prudent policy, if imperfect jurisprudence, to allow the exercise of judicial discretion to exclude such evidence as appears to have been illegally or unfairly obtained in such circumstances, and thereby putting clear restraints on how far legitimate police 'investigation' may go."

Indian cases.

73.32. In India also, judicial decisions have unanimously condemned the use of illegitimate traps to secure evidence against an accused.\(^5\)

73.33. In the Supreme Court\(^6\), this question came up for consideration in a case reported in 1954, where the following observations occur:

"It may be that the detection of corruption may sometimes call for the laying of traps, but there is no justification for the police authorities to bring about the taking of a bribe by supplying the bribe money to the giver where he has neither got it nor has the capacity to find it for himself. It is the duty of the police authorities to prevent crimes being committed. It is no part of their business to provide the instruments of the offence."

73.34. Having passed strictures on the action of the Additional District Magistrate their Lordships further stated that they would completely eliminate from consideration the evidence of the Additional District Magistrate, Shantilal

---

\(^{1}\) Birles, (1969) 53 Cr. App. R. 469.

\(^{2}\) Smith, (1960) 2 Q.B. 423; (1960) 1 All. E.R. 256.


\(^{5}\) (a) A.I.R. 1938 Mad. 893;
(b) A.I.R. 1968 Kerala 60.

Ahuja, who was the principal trap witness to prove the illegitimate trap. In the well-known case of Ranjanam Singh v. The State of Bihar, their Lordships expressed themselves in more sympathetic terms against the laying of illegitimate traps. To quote their Lordships:

"...that this was not a case of laying a trap, in the usual way, for a man who was demanding bribe, but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerably emphasis and decision.

"Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of the law. However regrettable the necessity of employing agents provocateurs may be (and we realise to the full that this is unfortunately often inevitable if corruption is to be detected and bribery stamped out), it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done.

The very best of man have moments of weakness and temptation, and even the worst times when they repent on an evil thought and are given an inner strength to set Satan behind him; and if they do, whether it is because of caution, or because of their better instincts, or because some other has shown them either the futility or the wickedness of wrong doing, it behoves society and the State to protect them and help them in their good resolve; not to place further temptation in their way and start a fresh a train of criminal thought which had been finally set aside. This is the type of cases to which the strictures of this Court in Shiv Bahadur Singh v. State of Vindhy Pradesh apply."

In Shiv Bahadur Singh, the Supreme Court had set aside the order of the High Court and restored the order of the trying court acquitting the accused.

VII. RECOMMENDATION

73.35. We have discussed so far the scope of the concept of accomplices and the effect of participation in crime in general. Coming specifically to the sections, it remains now to consider the question of reconciling the provisions of section 114, illustration (b) and section 133. Notwithstanding the judicial pronouncements to the effect that the first is a rule of prudence and the second a rule of law, the impression still survives that the approaches underlying the two provisions are not in perfect harmony with each other. That a conviction is not illegal even if based on the uncorroborated testimony of an accomplice, may be true in theory; but, according to current trends, such convictions have not been upheld.

73.36. The true position is that it is section 114, illustration (b) which has to be given the prevailing effect. The correct position emerging from the case law, is obscured by reason of the existence of the two provisions—and that too at two different places in the Act. To remedy this defect, it was suggested to us that we should give a prominent place to section 114, illustration (b)—a rule of prudence which overrides the bare legal rule in section 133. If at all it is

considered necessary to retain section 133, it could be by way of retaining the earlier half. But the matter should be dealt with by one section, which would incorporate section 114, illustration (b) as the general and mandatory provision and (ii) combine with is section 133, earlier half.

73.37. The observations of Stephen on these sections unfortunately fail to explain why it was felt necessary to insert both section 114, illustration (b) and section 133. These observations do not also explain why it was considered proper to place the two different provisions in different chapters—except that the rule in section 114, incorporating a presumption based on ordinary commonsense, covers a much wider field than the rule in section 133. Moreover, whatever may have been the position in 1872, the rule of prudence requiring corroboration has now practically attained the status of a rule of law'.

# Observations of Ameer Ali J.

73.38. The observations of Ameer Ali J. in *Kamla Prasad* state the position thus:—

"The principle underlying the rule against the acceptance of an accomplice’s evidence without corroboration proceeds upon certain reasons. Those reasons have been set forth in a number of cases which it is not necessary for us to refer here. Primarily an accomplice’s evidence requires to be accepted with a great deal of caution and scrutiny, because it is naturally supposed that, when a person is concerned in a crime and has been discovered as being so concerned, he is likely to swear falsely in order to shift the guilt from himself. It is also supposed that an accomplice, in other words a participator in the crime, is a person of bad character, and that his evidence, although given under the sanction of an oath, is open to suspicion, and thirdly, evidence given in expectation of any hope of pardon is sure to be biased in favour of the prosecution. It is for these reasons, although the law declares that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice, that the Courts have held, that ordinarily speaking the evidence of an accomplice should be corroborated in material particulars, and the practice which has been laid down has become, one may say, a part of the law itself".

73.39. As to the correct position, it is enough to refer to a fairly recent Supreme Court case.¹ In that case, so far as is material, the testimony of the accomplice had not been corroborated, the charge being one of forgery by means of tampering with certain dates in a register. The error of the High Court, in failing to notice that the evidence of the accomplice had not been corroborated, was described by the Supreme Court as an error in law. It pointed out that there was no evidence offered by any of the prosecution witnesses examined from the appellant’s office to show the dates when the application were received.

73.40. In a Supreme Court judgment reported in 1970, it was observed that an accomplice is competent to depose but, as a rule of caution, it will be unsafe to convict upon his testimony alone. These observations were made with reference to the evidence of an approver. As to the nature of corroborative evidence, it was laid down clearly that it must confirm that part of the testimony

---

¹See case law, *Infra*.


which suggests that the crime was committed by the accused. On the facts, corroborative evidence was held to be sufficient. In an earlier case, it was even said that the test of reliability of approver’s and accomplice’s evidence was for the court to be satisfied that there was nothing inherently impossible in their evidence. After that conclusion is reached as to reliability, corroboration is required.

73.41. It would appear that while for some time, particularly in the Bombay and Madras High Courts, there existed a controversy or uncertainty as to whether there was a rigid rule that the evidence of the accomplice must be corroborated, there has now come to be recognised a mandatory rule to that effect. It is in this sense that the latter half of section 133, which provides that the conviction is legal, is a dead letter. The first half of section 133, which provides that an accomplice is a competent witness, though a redundant provision in view of section 118, is harmless. But the latter part cannot be described as merely harmless, because it creates a noticeable conflict with section 114, illustration (b), as judicially construed. In other words, if one reads the judicial construction especially during the recently decided cases, on section 114, illustration (b), one cannot deny that it is squarely inconsistent with the latter half of section 133.

73.42. The view taken by the majority judgment in the Madras case and the minority judgment may be cited as examples. The majority would take the view that a court may be warranted in declining to draw the presumption. Section 133 declares the law, while section 114 merely lays down certain presumption of fact. The minority would take the view that the presumption under illustration (b) must first be drawn.

In the minority judgment, Shankaran Nayar J. recognised the possibility of exceptional circumstances, but recent Indian decisions do not recognise even this possibility.

The current view goes beyond the minority view. Even exceptional circumstances are not recognised.

73.43. That the presumption under section 114 is mandatory, though not so expressed in the language, is fairly clear from the reported cases. In MacDonalds case, the Privy Council observed that “by every code of evidence, the testimony of a professed accomplice requires to be carefully scrutinised with anxious search for corroboration”. These observations, though not made, with reference to the Indian Act, state the correct principle.

73.44. Thus, the position briefly is that (i) section 114, illustration (b) is construed in practice as mandatory, and (ii) section 133, latter half, is a dead letter. The suggestion in concrete terms was to substitute one section, in place of section 114, illustration (b) and section 133.

73.45. While we entirely agree that an amendment is needed so as to remove the apparent inconsistency between the two provisions, we do not wish to make the provision in section 114, illustration (b), a mandatory one. As regards section 133, we think that the entire section should be deleted, instead of retaining its earlier half as was the suggestion.

Our recommendation, then, is that a section 133 should be omitted, and that in section 114, illustration (b), the words “by independent evidence” should be added after the words “material particulars”, that being the general understanding of the nature of corroborative evidence required in respect of accomplices.

---

2) I.L.R. 35 Mad.
CHAPTER 74
MINIMUM NUMBER OF WITNESSES
SECTION 134
I. INTRODUCTORY

74.1. We have noted in the introductory discussion that the modern tendency of the law is to dispense with a minimum number of witnesses. In conformity with this trend, section 134 provides that no particular number of witnesses shall in any case be required for the proof of any fact. The section thus makes a clean sweep of all antiquated rules of the common law requiring a certain minimum number of witnesses for proving particular facts.

74.2. In general, then, it is not necessary to produce a particular number of witnesses or a particular type of evidence, to prove a fact. This principle is well recognised in England—subject, of course, to certain specific exceptions; and it is also recognised in our law.

74.3. The volume of legitimate evidence required for judicial decision is no longer the subject of any mandatory rule. One of the great differences between the modern English law of evidence and that prescribed by the canon or civil law, which usually applied the maxim testis unus testis nullus (One witness is no witness), consists in the absence of any general requirement of a plurality of witnesses. But the rule, where adhered to rigidly, was felt to impose an obstacle in the administration of justice. Hence, it did not find favour in England.

74.4. Section 134 corresponds to section 28 of the repealed Act 2 of 1855. But the previous section was more directly and in terms in accord with the English law on the subject than the present section, as will be noticed presently.

II. HISTORY

74.5. In Anglo-Saxon and Norman Times and before the development of the common law, proof was, according to the importance of the case, made six-handed, twelve-handed, etc., he who had the greater number of witnesses prevailing. Attempts were not lacking to import this system into the common law; but, though various statutes were passed requiring two or more witnesses in particular cases, the attempts failed, and from about the middle of the sixteenth century onward the present rules began to be more or less effectively recognised. By 1800, the rule was well-established.

74.6. In 1551, in the case of *Reniger v. Fogossa*, the Attorney-General argued that the testimony of one witness was “not sufficient in any law”, because

---

1Cross, Evidence (1974), page 168.
2Best, Evidence (1922), para 597-598.
4See para 74.17, infra.
5(a) *Reniger v. Fogossa*, (1551) Plowden 1, 8, 12;
(b) *Articuli Cleri*, (1605) 2 How. St. Tr. 131 (143-144);
(c) *R. v. Tong*, (1662) 6 How. St. Tr. 225.
8*Reniger v. Fogossa*, (1551) Plowden 1, 8, 12.
it was contrary to the law of God. To this objection, this was the answer given by Brooke —

“As to that which has been said by the King's Attorney, that there ought to be two witnesses to prove the fact; it is true that there ought to be two witnesses at least where the matter is to be tried by witnesses only, as in the civil law, but here the issue was to be tried by twelve men, in which case witnesses are not necessary, for in many cases an inquest shall give a precise verdict, although there are no witnesses, or no evidence given to them.”

74.7. In the proceedings on Bacon's impeachment\(^1\) in 1620, Coke thought it necessary to combat the idea that more than one witness was necessary:\(^2\)

“It is objected that we have but one single witness; therefore no sufficient proof. I answer that in the 37th of Eliz, in a complaint against Soldier-Sellers, for that having warrant to take up soldiers for the wards, if they pressed a rich man's son they would discharge him for money, there was no more than singularis testis in one matter.”

74.8. The rule in the Star Chamber was different. In 1632, in Sherfield's case, Heath, C. J. commented on the fact that there was only one witness to prove one part of the charge. Indeed, it would seem from the two cases of Adams v. Canon\(^3\) and R. v. Newton\(^4\), that it was almost an accepted rule of the Court of Star Chamber that a charge must be proved by two witnesses; though, from what was said by Lord Cottington in the Bishop of Lincoln's case,\(^5\) it would seem that it was not an invariable rule. “It is not always necessary in this court to have a truth proved by two or three witnesses. ... And singularis testis many times shall move and induce me verily to believe an act done when more proofs are shunted.”

The rule was stated in the widest terms by Strafford\(^6\) on his impeachment. He is reported as saying,—“that the testimonies brought against him were all of them single, not two one way; and therefore could not make faith in the matter of debt, much less in matter of life and death”.

III. PRESENT ENGLISH LAW

74.9. The present position in England is that as a general rule, Courts may act on the testimony of a single witness, even though uncorroborated; or upon duly proved documentary evidence without such testimony at all. And, where that testimony is unimpeached, they should act on it, and need not leave its credit to the jury.\(^7\) One credible witness outweighs any number of other witnesses.\(^8\)

This is subject, in the first place, to statutory exceptions and, in the second place, to those rules which, though non-statutory, have been evolved in the course of centuries as to the need for corroboration in particular cases.

---

\(^1\) *Bacon's Impeachment*, 2 S.T. at page 1093.
\(^2\) Holdsworth, H.E.L. Vol. 9, pages 206, 207.
\(^3\) S. T. page 545.
\(^6\) Bishop of Lincoln's case, (1637) 3 S. T. at page 786.
\(^7\) Strafford, (1640) 3 S.T. at page 1450.
\(^8\) Wright v. Talham, 5 C. & F. 670
\(^10\) Davis v. Hardy, 2 B. & C. 225.
74.10. The following may be cited as illustrations of cases in which corroboration is required by statutory provisions in England—

(a) Offences relating to places of public worship;  
(b) Personation;  
(c) Perjury and allied offences;  
(d) Prostitution of women or girls for prostitution or unlawful sexual intercourse, and administering drugs to facilitate intercourse;  
(e) Unsworn evidence of a child of tender years;  
(f) Affiliation proceedings.

74.11. The gist of the provisions in England in regard to affiliation is that on the hearing of a complaint by the mother of an illegitimate child, a Magistrates court may, if the evidence of the mother is corroborated in some material particulars by other evidence to the satisfaction of the court, adjudge the defendant to be the putative father and make an affiliation order against him. An appeal lies to the Crown Court, but that court also cannot confirm the affiliation order or reverse the order of the Magistrate refusing an affiliation order unless the evidence of the mother is corroborated as above.

74.12. In bastardy cases, it was the rule of English common law that, before an order of affiliation can be made, the evidence of the mother must be corroborated in some material particular by other testimony. "This rule has been wisely established," says Taylor, "in order to protect men from accusations which profligate, designing or interested women might easily make, and which however false, it might be extremely difficult to disprove."

74.13. Finally, section 2 of the Evidence Further Amendment Act, 1869, enacts that "the parties to an action for breach of promise of marriage shall be competent to give evidence in such action; provided always that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

74.14. Besides the statutory rules requiring corroboration stated above, there are, in England, rules of the common law on corroboration. In the following cases, the warning to the jury as to the need for the corroboration is given as a matter of course, because experience has shown that it is always dangerous in those cases to act on uncorroborated evidence. These cases are—

(a) accomplices;  
(b) sexual offences—even in cases where there is no statutory provision requiring corroboration.

---

1Places of Religious Worship Act, 1812.  
2Section 146(5), Representation of the People Act, 1949. (At least two credible witnesses are required).  
3Section 13(1), Perjury Act, 1911.  
4Sections 2, 3, 4, 22 and 23, Sexual Offences Act, 1956.  
5Section 38(1), Children and Young Persons Act, 1933.  
7Sections 4(2) and 8(2), Affiliation Proceedings Act, 1957.  
9Taylor, cited in Field.  
1032 & 33 Vict. cap. 68.  
(c) matrimonial causes—where a sexual offence is involved, or where the proceedings are for a declaration of nullity, and impotence is alleged;

(d) sworn evidence of children;

(e) claims against the estates of deceased persons, unless the circumstances are exceptional.

74.15. The reason why corroboration of the evidence of adultery is regarded as desirable in proceedings for divorce, is that a charge of this type is particularly difficult to rebut. Further, where the witness is the woman, the person who is making the accusation is in the same kind of position as the position of an accomplice.

In Alli v. Alli it was observed:

"In our opinion, therefore, there is abundant authority to support Sir Boyd Merriman, J.'s statement of the practice of the court in B. v. B', namely, that the court demands that, when a matrimonial offence, whatever it is, is charged, if "possible the evidence of the spouse making the charge should be corroborated. To sum up, then, our view of the authorities so far:

(a) where a matrimonial offence is alleged, the court will look for corroboration of the complainant's own evidence; (b) the court will normally, before finding a matrimonial offence proved, require such corroboration if, on the face of the complainant's own evidence, it is available; (c) these are not rules of law, but of practice only. They spring from the gravity of the consequences of proof of a matrimonial offence; and because, he would add, experience has shown the risk of a miscarriage of justice in acting on the uncorroborated testimony of a spouse in this class of case; (d) it is, nevertheless, open to a court to act on the uncorroborated evidence of a spouse if it is in no doubt where the truth lies; (e) these statements are equally applicable to proceedings in courts of summary jurisdiction as to those in the High Court."

74.16. It will be useful finally to refer to the observations of Lord Morris in a recent case—

"LORD MORRIS OF BORTH-Y-GEST: The accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons for this are diverse. There are some suggestions which can really be made but which are only with more difficulty rebutted. There may in some cases be motives of self-interest, or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse. Some times it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from

---

4Re Hodson, (1885) 31 Chancery Division 177.
falsehood. It must, therefore, be sound policy to have rules of law or of practice which are designed to avert the peril that findings of guilt may be insecurely based. So it has come about that certain statutory enactments impose the necessity in some instances of having more than one witness before there can be a conviction. So also it has come about that in other instances the courts have given guidance in terms which have become rules. Included in such cases are those in which charges of sexual offenses are made. It has long been recognized that juries should in such cases be told that there are dangers in convicting on the uncorroborated testimony of a complainant though they may convict if they are satisfied that the testimony is true. As this is no more idle process it follows that there are no set words which must be adopted to express the warning. Rather must the good sense of the matter be expounded with clarity and in the setting of a particular case. Also included in the types of cases above referred to are those in which children are witnesses. The common sense and the common experience of men and women on a jury will guide them when they have to decide what measure of credence and dependence they should accord to evidence which they have heard.

All the rules which have been evolved are in accord with the central principle of our criminal law that a person should only be convicted of a crime if those in whose hands decision rests are sure that guilt has been established. In England it has not been laid down that such certainty ought never to be reached in dependence upon the testimony of but one witness. It has, however, been recognized that the risk of danger of a wrong decision being reached is greater in certain circumstances than in others. It is where those circumstances exist that rules based upon experience, wisdom and common sense have been introduced."

IV. PREVIOUS LAW IN INDIA

74.17. It may be noted that in India the law before 1872 made an exception for treason. Section 28 of the repealed Act 2 of 1855, was as follows:

"28. Except in cases of treason the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

74.18. This is a fuller statement of the position than the present section — more elaborate and more in conformity with actual practice. In the well-known case of Queen v. Lal Chand Kowrah,1 it was laid down, with reference to this section of the old Act, that the uncorroborated evidence of a single witness in a case of perjury was insufficient, and that there must be proof adduced, independent of the oath of one of the parties. But, it was also held, under the old Act, that the comparison of signatures is one kind of corroboration, which would justify a conviction on the testimony of a single witness in a case of false evidence.2

74.19. The most important decision under the previous law is a Full Bench ruling of the Calcutta High Court in Queen v. Lal Chand Kowrah,3 where Peacock, C. J. observed:

1Queen v. Lal Chand Kowrah, (1866) 5 W.R. (Cr.) 23 (Calcutta).
2Queen v. Bakhtee Chowdhry, 5 W.R. (Cr.) 98.
According to the law as administered in the exercise of original criminal jurisdiction, the evidence of only one witness uncorroborated is not sufficient to convict for perjury, because it is governed by the rule of the law of England. I do not mean to say that every rule of the law of evidence as administered in England applies to the Mufassil. But I cannot think that we ought to put such a construction upon section 28, Act 2 of 1855, as would allow a person to be convicted of perjury at Alipore, or in other parts of Mufassil upon the uncorroborated testimony of a single witness, when such evidence would be insufficient for a conviction in Calcutta before the High Court in the exercise of its original criminal jurisdiction. Such a construction would not be very consistent. But if the law is so, we are bound by it. If there was any rule or practice in the Sadar Court or in the Courts in the Mufassil which, before Act II of 1855, prevented a conviction for perjury upon the evidence of a single witness without any corroboration, it appears to me that such Courts fall within the proviso in section 286. Now, there is a case which was decided by Mr. Samuells in the Sadar Court, in which the rule was laid down as follows: “Perjury is not to be assumed because the story of one man appears more credible than that of another. There must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false.” That is to say, the oath of one man is not sufficient to convict another of perjury, when he has sworn to the contrary: that you are not to take the evidence which by an accident is the more credible for the purpose of convicting of perjury, but you must bring something corroborative, or something more than the evidence of one witness. The rule, which was laid down by the Sadar Court in this case, is supported by other cases, and is in accordance with the principle of the English law. Indeed, I think, I may safely say that it was the practice of the Sadar Nizamat and of the Mufassil Courts not to allow a conviction for perjury upon the uncorroborated evidence of a single witness; consequently the case does not fall within the general rule of section 28, in as much as it is taken out of that rule by the provision, which says that the rule is not to affect any rule or practice of any Court that requires corroborative evidence of a single witness in case of perjury.”

74.20. In the case of Queen v. Bakhoree Chowbey, the accused was charged with giving false evidence by denying that he had verified or presented a certain written statement, and it was held that the corroboration derived from a comparison of signatures, was sufficient to sustain a conviction.

74.21. In the earlier Bombay case R. v. Hedger, the rule that required more than one witness in the case of a trial for perjury, if applied as an inflexible rule of law, was criticised, but it was also pointed out that, at the same time, the principle on which the rule rests is of great value in the “difficult task of weighing evidence.” In this connection, it may be noted that while the Act of 1855 specifically saved a rule or practice requiring corroborative evidence in support of a witness in the case of perjury, on such saving provision is found in the present Act.

1A suburb of Calcutta just outside the local limits of the original jurisdiction of the High Court, and the headquarters of the district of the Twenty-four Parganas.
3Queen v. Bakhoree Chowbey, 5 W.R. (Cr.) 98, cited by Field.
4R. v. Hedger, (1852) referred to by Woodroffe, in his commentary under section 134.
74.22. In a Calcutta case, the Session Judge had observed:

"The only doubt that arises in my mind in this case is whether, if a complainant deposes on oath to the existence of certain facts which go to establish the charge *instituted by him*, and he produces no witness who can support his charge, a Criminal Court is justified in finding the accused guilty on the complainant's evidence alone, however trustworthy."

The High Court did not share the doubt, and held—

"A conviction on the strength of the evidence of the complainant is lawful."

V. PRESENT LAW IN INDIA

74.23. The effect of the present section is that in any case the testimony of a single witness (if believed by the Court or jury) is sufficient for the proof of any fact. Thus, a conviction upon the statement of a complainant alone is lawful.¹

74.24. The effect of the section was noticed in a case under the Muslim law of pre-emption, which held that it is not necessary for the performance of a valid 'talab-i-issahad' that it should be made before at least two witnesses, or any number of witnesses, but it would suffice if it can be proved that the 'Ishhad' was made before a witness or witnesses for purposes or proving that fact. The requirement of making the 'talab-i-issahad' in the presence of at least two witnesses, which under the general Muslim Law of Evidence was only necessary to prove its performance, was a matter governing procedure which has been replaced by the Evidence Act. The omission from the Evidence Act of a provision for the proof by means of at least two witnesses for the enforcement of a right of pre-emption is significant in that Legislature did not consider it necessary to require at least two witnesses for the proof of a pre-emptive right.

VI. PERJURY

74.25. As regards the offence of "giving false evidence", the framers of the Indian Penal Code, for reasons stated in Note G. to their Report dated the 14th October, 1837, thought it proper to discard the English law of "perjury", and to draft the provisions of the Indian Penal Code in this respect upon the lines of the French Code Penal regarding "faux témoignage".² The Indian Law Commissioners were afterwards pressed to at least allow the word "perjury" to be retained in their Code, as being one familiar to the people of India and long in use; but they refused to give way on the ground that "the authors of the Code thought it inexpedient to use the technical terms of the English law where they did not adopt its definitions, and so materially departed from it in substance".

74.26. It has been held that in India in cases relating to the offence of giving false evidence, though the law does not provide that there must be corroboration

¹Kullam Mundal v. Bhowani Prasad, (1874) 22 W.R. Cr. 32 (Cal.).
²Draft Penal Code, Note G.
³Parl. Papers, 3rd August, 1838, Indian Law Commission, 673.
⁴Parl. Papers, 16th May, 1846, Indian Law Commission, 330, para 130 of the Report dated the 24th June, 1847.
to support a conviction, the rule of English law which is based on substantial justice may be followed as a safe guide.\textsuperscript{3}

74.27. The Code of Criminal Procedure also provides additional safeguards in regard to the offence of perjury, inasmuch as a written complaint of the court before which the offence is committed is necessary in order to proceed with the prosecution. Previously, a private party could apply for "sanction" for prosecution. But since it was found that this position often led to action inspired by feelings of revenge, the law was changed and the present law is as stated below.

74.28. The case of a solitary witness who is neither an accomplice nor in a position analogous to that of an accomplice was considered by the Supreme Court in \textit{Vadivelu Thevan v. State of Madras}.\textsuperscript{4} The Court held that as a general rule the court may act on the testimony of a single witness though uncorroborated. The court, it was held, could do so except where corroboration was required by statute, or where the nature of the testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted upon, and that the question whether corroboration of the testimony of a single witness was or was not necessary, must depend upon the facts and circumstances of each case.\textsuperscript{5}

In the case of \textit{Mohammad Sugal Esq Maunser Rer Alalah v. The King} (an appeal from Somaliland where the Indian Evidence Act and the Indian Oaths Act, 1869, had been applied), the Privy Council dealt with the question of corroboration of the testimony of a child witness in a murder case. In that case, the testimony of the single witness in support of the murder charge was attacked as suffering from two infirmities, namely:

\begin{enumerate}
\item The witness was a girl of about 10 or 11 years at the time of occurrence and her evidence had not been corroborated.
\item The child witness had not been administered oath, because the Court did not consider that she was able to understand the nature of the oath though she was competent to testify.
\end{enumerate}

The second ground was rejected in view of section 13, Oaths Act, where-under "omission" to administer an oath does not invalidate the evidence. The Privy Council held that "omission" covered the case of non-administration of oath to a child witness on the ground that the witness would not be able to understand the nature of oath.

74.29. The second ground will be dealt with later. Special leave had been granted to appeal to the Privy Council, on the ground that the local courts had admitted and acted upon the unsworn evidence of a girl of 10 or 11 years of age. The Privy Council, however, ultimately upheld the conviction and sentence of death, holding that the evidence, such as it was, was admissible. The following observations were made in the judgment:

"It was also submitted on behalf of the appellant that assuming the unsworn evidence was admissible the Court could not act upon it unless it was corroborated. In England, where provision has been made for the

\begin{itemize}
\item \textsuperscript{4}(a) \textit{R. v. B. G. Tilak}. (1904) I.L.R. 28 Bom. 479, 498.
\item \textsuperscript{4}(b) \textit{R. v. Lal Chand}. B.L.R. Supp. Vol. 417 (F.B.); 5 W.R. Cr. 23:
\item \textsuperscript{4}(c) \textit{R. v. Bakhoree}. 5 W.R. Cr. 98.
\item \textsuperscript{4}(d) \textit{R. v. Ross}. 6 M.H.C. 342.
\item \textsuperscript{4}See also Ramratan v. The State of Rajasthan. A.I.R. 1962 S.C. 424, 428.
\end{itemize}
reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.”

On the facts, the Privy Council found sufficient corroboration.

VII. CONCLUSION

The above discussion does not disclose any need for amendment of the section.
CHAPTER 75

ORDER OF EXAMINATION OF WITNESSES

SECTION 135

75.1. Under section 135, the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the court.

75.2. In civil cases, the rule governing the production of evidence depends on the principles applicable to the right to begin. This is governed by the Code of Civil Procedure. Very briefly, the scheme of that Code is this: The plaintiff has a right to begin. To this, there is an exception where the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

75.3. The party having the right to begin has to state his case on the first hearing and produce his evidence in support of the issues which he is bound to prove. After this, the other party has to state his case and produce his evidence, if any, and may then address the court generally on the whole case.

75.4. There may be situations where there are several issues, the burden of proving some of which lies on the other party. The burden of proof, it may be recalled, is governed by the Evidence Act—we have already considered the relevant provisions. The party beginning may, in such a situation, at his option, either produce his evidence on these issues, or reserve it by way of answer to the evidence produced by the other party; and in that case, that is to say, where the party beginning has reserved his evidence on some of the issues, he may produce evidence on those issues after the other party has produced all his evidence. After such production of evidence the other party is entitled to reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

75.5. In criminal trials, the prosecution always begins. In fact, provisions expressing or implying this position are contained in the various chapters of the Code of Criminal Procedure applicable to the different kinds of trials under the Code. By way of example, the provisions in that Code, in so far as they are relevant to the subject under consideration, may be thus summarised as regards warrant cases and sessions cases.

(a) Warrant cases before Magistrates.

In warrant cases tried before Magistrates, if the accused does not plead guilty or though he pleads guilty, he is not convicted on that plea, the Magistrate fixes a date for the examination of witnesses. On that date, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution, but he may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined, or recall any witness for

---

1Order 18, rules 1 to 3, Code of Civil Procedure, 1908.
2Sections 101 et seq.
further cross-examination. The accused shall then be called upon to enter upon his defence and produce his evidence. After such evidence is taken, arguments are heard, and the judgment is pronounced.

(b) Sessions trials.

In a trial before a Court of Sessions, the procedure is slightly different. When the accused appears before the court or is brought before it, the public prosecutor opens his case by explaining the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. Unless the accused is discharged by the Sessions Judge on the ground that there is not sufficient proof, the charge is framed by the Court of Sessions and the accused is asked whether he pleads guilty or claims to be tried. Except when the accused pleads guilty and is convicted on that plea, the judge has to fix a date for the examination of the witnesses. On the date fixed, the judge shall proceed to take all such evidence as may be produced in support of the prosecution. But he may, in his discretion, permit the cross-examination of any witness to be deferred. If, after taking the evidence of the prosecution and the defence, the judge considers that there is no evidence that the accused has committed the offence, he shall record an order of acquittal. Otherwise, the judge shall call upon the accused to enter upon his defence and to adduce any evidence which he may have in support thereof. When the examination of the witnesses for the defence is complete, the prosecutor sums up his case.

After hearing arguments, the judge gives the judgment in the case.

75.6. It would have been noted that this scheme does not contemplate the leading of evidence initially by the accused. The prosecution always begins.

Order of examining party’s witnesses.

75.7. The provisions of the two Codes to which we have referred above regulate the order of production of evidence as between the parties. As between a party’s witnesses inter se, it is counsel’s privilege to determine, subject to the limitations mentioned in section 135, the order in which witnesses should be produced and examined; but the court has always the power to direct the order in which witnesses should be examined, if the circumstances of the case require the making of such an order.

75.8. In general, a court cannot refuse to examine a witness produced by a party. There are, however, express provisions in the Code of Criminal Procedure whereunder the court may refuse to summon unnecessary witnesses. And the same practice is followed in civil cases.

75.9. The disgraceful practice under which counsel does not call his own client who is an essential witness but endeavours to force the other party to call him and so suffer the discomfiture of having him treated as his own, the other party’s witness, has been repeatedly condemned by the Privy Council in numerous cases. Lord Atkinson dealt with the subject in *Lal Kunwar v. Chiranjil Lal*, calling it “a vicious practice, unworthy of a hightened or reputable system of advocacy.”

---

1Sections 225 to 237, Code of Criminal Procedure, 1973
2This is the new procedure.
3Achyutana Pitchiah v. Gwanila Chinhiaiah A.I.R. 1961 A.P. 420, 422 (reverse cases)
4Yaswant Singhjee v. Jar Singhjee, 2 M.I.A. 242; 6 Weekly Reports 46 (P.C.)
75.10. Generally, when a party calls the opponent as a witness, the opponent must be asked whether he is going to appear as his own witnesses. If that party then declares that he does not propose to appear as his own witness, the court should point out to the party producing him that ordinarily speaking the matter should be left as it is, and the court be left to draw any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness-box and subject himself to cross-examination. If the party, however, insists on examining the opponent as his own witness, the court should be careful not to allow the counsel for the opponent to cross-examine his own witness, because unless the witness is declared hostile, a party has no right to cross-examine his own witness.1

75.11. Certain matters are governed by the practice of the courts. For example, witnesses should be called one by one. In Lalmani v. Brijai Ram,2 Bonner, J. held that the universal practice in the courts in India is that witnesses should be called in one by one, and that no witness who is to give evidence should be present when the deposition of a previous witness is being given in the court, and this may well be termed an abuse of the process of the court, and, therefore, under section 151, Code of Civil Procedure, the court has inherent power to prevent that abuse and the court can order that such witness should not be heard as a witness.

75.12. This is a broad outline of the law and practice relating to the order of examination of witnesses. We have no changes to recommend in the section in the Evidence Act.

---

DETERMINATION OF QUESTIONS AS TO ADMISSIBILITY

SECTION 136

76.1. Section 136 is vitally important for understanding the role of the Judge in the field of evidence. Three propositions—all of importance—are set out in section 136. In order to understand their importance, it is necessary to deal briefly with the grounds of inadmissibility of evidence.

Grounds of rejection — First paragraph.

76.2. These grounds (of inadmissibility of evidence) are numerous. The legal principle that evidence must be relevant to the facts in issue is, of course, paramount and is incorporated in the first paragraph of section 136 and in section 5. But it is an important function of the law of evidence to exclude certain evidence, even though relevant, on the grounds of policy or other considerations. It is for this reason that Phipson defined evidence as "the facts, testimony and documents which may be legally received in order to prove or disprove the facts under inquiry".

The same idea is expressed—though in different words—by Professor Cross. When defining judicial evidence, Cross lays stress on what "a court will accept" as evidence of the facts in issue in a given case. What requires to be pointed out is that evidence on which a court can act must relate to facts which are legally relevant, and the means adopted for attempting to prove the facts must also themselves be those permitted by law.

Relevance.

76.3. The first paragraph of the section deals with relevance. It is for the judge to decide the question of relevance. Accordingly, the first paragraph provides that when either party proposes to give evidence of any fact, the judge may ask the party proposing to give evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

Grounds of objection.

76.4. Although this paragraph is confined to relevance, it cannot be disputed that it is for the Judge to decide other grounds of objection also. Objection to evidence can be taken on several grounds and not merely on the ground of relevance. Even where the fact is relevant, the evidence may be excluded by rules of policy. Or, the form in which it is tendered may be excluded by specific rules. Then, even on relevant matters and even where the nature of the evidence is legally permissible, the form of the particular question may be objectionable. Again, the person through whom the evidence is tendered may not be competent to do so.

Grounds of objection.

76.5. To illustrate what is stated above, it may be convenient to note some of the important grounds of objection. The list is not, however, exhaustive.

Facts

1. The fact of which evidence is proposed to be given is not relevant under any section of the Evidence Act.

---

Cross, Evidence (1974), page 4
Sections 5 and 136.
Nature of the evidence.

2. Though the fact is relevant, evidence thereof is excluded by the specific provisions regarding confessions—e.g. a confession which is excluded as involuntary.³

3. The evidence is no admissible, being hearsay.⁴—assuming that it does not fall within the recognised exceptions to that rule, e.g. section 10, sections 17 to 31, 32 to 35, section 60 proviso, and (as regards corroborative evidence) section 157 or the provision of any special law by way of exception to hearsay.

4. The evidence tendered is evidence of opinion or character, and is, therefore, inadmissible, not being covered by sections 45 to 55.

Form of the evidence.

5. The evidence tendered is excluded by the rules relating to secondary evidence.⁴

6. The evidence tendered is excluded by the rules relating to the exclusion of oral evidence by documentary evidence.⁵

Exclusions operating on particular persons

7. The evidence tendered is barred by the rule of estoppel,⁶ which prevents a particular party from testifying in support of a particular plea, inconsistent with his previous representation.

8. The evidence tendered is excluded by privilege—a protection enjoyed by the particular witness.⁷

Witness—competence.

9. The witness through whom the evidence is tendered is incompetent by reason of age or mental infirmity.⁸

Questions—nature and form.

10. The particular question put to the witness is a leading question and cannot be allowed in examination-in-chief.

11. The particular question put to the witness should not be permitted, as it is indecent or scandalous or intended to insult or annoy or is offensive in form.⁹

12. The question is by way of cross-examination and should not be allowed unless the witness is treated as hostile.¹⁰

13. The evidence tendered is not admissible, as it contradicts the answers given by the witness in answer to questions put to shake his credit.¹²

sections 24, 25 and 26.

See discussion relating to "relevant fact".

Section 60.

Section 65.

Sections 91-98.

Sections 115-117.

Sections 121 to 132.

Section 118.

Section 142.

Sections 151 and 152.

Section 154.

Section 153.
14. The witness cannot refresh his memory by referring to the writing, as it was not made at the time stated in the section.¹

Other laws

15. The evidence is excluded by the specific provisions of any other law.¹

This illustrative list will show the wide powers of the Judge in ruling on questions of evidence.

76.6. At the same time, it should be noted that, in India, the Judge has no discretion to exclude evidence if it is relevant and admissible and not excluded by any specific provision of law. In certain cases,—e.g. grant of permission to cross-examine one's own witness—the court has a limited power. In England, the powers are wider. A discretion is recognised, at least in criminal cases, particularly when the evidence is prejudicial to the accused.

Apart from the cases where there is a discretion to exclude prejudicial evidence, there exists in certain other cases also, a discretion in relation to the law of evidence. Thus, there is an absolute discretion vested in the trial Judge in England as to whether a witness is to be treated as hostile—a discretion derived from statute.² Similarly, when the accused offers himself as a witness by virtue of the Criminal Evidence Act, 1898, and the question arises how far he can be cross-examined as to character, there is a certain amount of discretion in the court to be exercised in favour of the accused.³ For example, in the case of Flynn,⁴ the accused was charged with the offence of robbery and made allegations of indecent assault by the prosecutor for money, as a hush money. It was held that the cross-examination of the past convictions of the accused was wrongly allowed, in the circumstances, since the imputation made by the accused against the prosecution witness was rendered necessary by the very nature of the defence. The trial court should not, on that ground alone, have allowed the character of the accused to be put in issue in his cross-examination.

Again, in regard to the breach of the Judges¹ Rules, while the breach itself is not sufficient to make a confession inadmissible in law, yet, where a breach of the rules has, in fact, occurred, the trial Judge is vested with a discretion to exclude the confession.⁵ It was on this ground that a statement obtained by the police without a caution, where such a caution was necessary in the circumstances under the Judges¹ Rules, was excluded. It having been held that the trial court ought not to have admitted the confession made in such circumstances.⁶

In R. v. List,⁶ Roskill J. observed that the court has an overriding discretion to disallow the admission of evidence, if the prejudicial effect would make it virtually impossible for the jury to take a dispassionate view of the crucial facts of the case.

76.7. Examples of the existence of such discretion are furnished by the rules of English law relating to evidence of similar facts,⁷ confessions,⁸ prejudicial

¹Section 159.
²E.g. section 162, Cr. P.C. 1973.
³Section 22, Common Law Procedure Act, 1854
⁴Section 11(6), Criminal Evidence Act, 1898.
facts\(^1\) and evidence illegally obtained,\(^2\) and trivial facts.\(^3\) This, list, again, is illustrative only.

In all these cases, the Judge has a discretion to exclude evidence principally on the ground of unfairness\(^4\) or some public policy. For example, in Callis v. Gunn,\(^5\) the Court of Criminal Appeal, while holding finger-prints evidence to be admissible, referred to the overriding discretion of the Judge to exclude it by stating “provided there is no suggestion of it being obtained oppressively by false representation, by trick, by bribes, anything of that sort”.

76.8. So much as regards the proposition in the first paragraph of section 136, and points allied thereto. The second paragraph of the section is concerned with facts conditionally admissible. It provides that if the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such other fact must be proved before evidence is given of the first mentioned fact, unless the party undertakes to give proof of the other fact and the court is satisfied with such undertaking. Illustration (b) illustrates this paragraph.

76.9. The second paragraph is thus concerned with questions where the admissibility of evidence of one fact depends upon the proof of some other fact. Sometimes, however, the relevancy of one alleged fact may depend upon the proof of some other alleged fact. In such a case, under the third paragraph, the judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact. Illustrations (a), (c) and (d) illustrate this paragraph.

76.10. None of the paragraphs in the section needs any change.

\(^1\)Notes, Introduction to Evidence (1967), page 85.
\(^3\)(a) Kuruma v. R., (1955) A.C. 197, 205.
\(^6\)Edmund Gabbay, Discretion in Criminal Justice (1973), page 25.
\(^7\)Notes, Introduction to Evidence (1967), page 85.
CHAPTER 77
EXAMINATION AND CROSS-EXAMINATION — SECTIONS 137-138

I. INTRODUCTORY

77.1. In the adversary system of trial, which has been adopted in India, a judicial proceeding is a contest between parties. The court does not take the initiative in collecting evidence. Nor does a person who claims to be acquainted with the facts in dispute come to the court and communicate his knowledge to the court unaided. The parties take the initiative. The medium through which oral evidence is presented is the witness. But the use of that medium is only at the instance of the parties. And since, in the adversary systems, the procedural rights of both parties have to be dealt with, it becomes necessary to demarcate the boundaries of the use of the witness—the medium—by each party, and to regulate the nature of “examination” by the parties. That, in brief, is the reason why detailed provisions on the subject appear in the Act.

II. DEFINITION AND SCOPE

77.2. The subject of examination of witnesses is spread over a number of sections. It will be convenient to consider the first two sections relevant to the subject—sections 137 and 138—together. Section 137 provides that the examination of a witness by the party who calls him shall be called his examination-in-chief. The examination of a witness by the adverse party shall be called his cross-examination. The examination of a witness by the party who called him, subsequent to the cross-examination, shall be called his re-examination. These are the principal types of examination. They are not exhaustive. After re-examination, there could be re-cross-examination, if new matter is introduced in re-examination, and so on.

77.3. The chronological order of the various types of examination is as follows:

Section 138 provides that “witnesses” shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, and then (if the party calling so desires) re-examined. The plural “witnesses”, though legally in order, is not expressive of the practice. What happens in practice is that each witness is first examined, then cross-examined and then re-examined. It is not the practice first to hold the examination-in-chief of all witnesses and then to cross-examine them. Sometimes, in criminal cases, the cross-examination of prosecution witness may be postponed; but the general position is as stated above.

In the same section, the scope of each type of examination is dealt with. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. The re-examination shall, however, be directed to the explanation of matters referred to in cross-examination; and, if new matter, by permission of the Court, is introduced in re-examination, the adverse party may further cross-examine upon that matter.

'See the General Clauses Act.
77.4. Of these three types of examination, cross-examination plays a major role. Usually, the object of cross-examination is stated to be two-fold; (a) to destroy the credit and credibility of the witness, and (b) to secure on matters not touched in the examination-in-chief answers favourable to the party cross-examining. But (b) is itself an object of a complex character. A party cross-examining would like—(c) to secure contradiction of what has been stated by other witnesses, and (d) to get support for, and confirmation of, statements made by other witnesses which are favourable to the party cross-examining.

77.5. As to impeaching the credit of a witness, it is to be noted that a party calling a witness cannot impeach the credit of that witness, unless permitted by the court to do so: It is generally stated that the reason why the party calling a witness to testify under examination-in-chief, is not permitted to impeach the witness is that that party generally vouches for the credibility of that witness. It should be noted, however, that this assumption has not gone unchallenged. And, in some countries, a different practice prevails. For example, in the U.S. Federal Rules, rule 607 provides as follows:

"607. The credibility of a witness may be attacked by any party, including the party calling him."

The Advisory Committee's Note on this Rule explains the departure from the traditional rule in these words:

"The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under rule 801 (d)(1)."

"The substantial inroads into the old rule, made over the years by decisions, rules and statutes are evidence of doubts as to its basic soundness and workability."

The Note then proceeds to refer to certain case law as also to Revised Rules 32(a)(i) of the Federal Rules of Civil Procedure (allowing any party to impeach a witness by means of his deposition), and Rule 43(b) (allowing the calling and impeachment of an adverse party or person identified with him). Illustrative statutes allowing a party to impeach his own witness under varying circumstances are also referred to as also Uniform Rule 20; California Evidence Code, Section 785; Kansas Code of Civil Procedure, Section 60-420 and New Jersey, Evidence Rule 20.

III. HISTORY

77.5A. Cross-examination is that phase of the trial which has the potentiality of being the most spectacular. It affords the opportunity for the most successful employment of an aptitude for quick thinking, sharp repartee and dramatics. Unless the judge is alert and vigilant, cross-examination may sometimes turn into an engine of torture. We shall make certain observations as to the role of the judge in this regard at the appropriate place.
History.

77.6. The use of cross-examination as a weapon for the discovery of truth is not of recent origin. In the Bible, the story of Susanna and the Elders furnishes an example of its use for the purpose of discovering the truth. Susanna was charged with adultery in the garden and the charge was made by two Elders, the allegation being that adultery had been committed with a young man. In order to test the veracity of the charge which cast an imputation on a lady of great virtue and beauty, Daniel considered it necessary to examine separately the two witnesses and asked each of them under which tree the adultery had been committed. The answer of one was the Mastic tree, while the answer of the other was holm tree. This discrepancy was sufficient to discredit their story and the result was that instead of Susanna being punished for the alleged adultery which was a capital offence, the two witnesses were sentenced to death for perjury.

Among the Greeks, cross-examination of witnesses was permissible at least a hundred years before Christ. Even in earlier Greek law, something in the nature of cross-examination was known, though it was restricted to the parties.

During the Roman period, we come across a celebrated passage in a book on rhetoric by the famous Quintilian, who was a rhetorician and occasionally also appeared as a preacher.

Coming nearer to our own times, we may note that in two noted passages of fiction, cross-examination has been mentioned and the inveterate abuse of cross-examination has also been satirized.

IV. CROSS-EXAMINATION WIDER THAN DIRECT EXAMINATION

77.7. The scope of cross-examination need not be co-extensive with the actual matters put in the examination-in-chief. Its range extends to the whole case. No matter which is in issue in the suit or proceeding is outside it. Section 136 so provides expressly, in the second paragraph, as we have mentioned above. However, in the same paragraph, the section provides that cross-examination may relate to "relevant" facts. This proposition cannot be taken as meaning that it must so relate, because facts which are not relevant to the facts in issue may yet be elicited in cross-examination where they may affect the credit of the witness.

For example, where it is alleged that a wife (party to a matrimonial proceeding) committed adultery on a certain specified occasion, and the wife denies it, she can be asked in cross-examination whether she had ever committed adultery—a question which, though not relevant to the facts in issue, is permissible as shaking her credit.
77.8. For this purpose, one can also draw an example from the position in England regarding the complainant in a charge of rape. It is now settled law that the woman who complains of rape can be cross-examined about the following matters:

"(1) Her general reputation and moral character;
(2) Sexual intercourse between herself and the defendant on other occasions;
(3) Sexual intercourse between herself and other man."

In the enumeration of cases in which the women can be cross-examined, as quoted above, item (2)—intercourse with the defendant on other occasions—would tend to show likelihood of consent, apparently because it would show presence of the element of passion between the two. As regards item (3)—intercourse with other man—the evidence would not be relevant to a fact in issue, but, in this particular case, it would be admissible as impeaching the credit of the witness.

In this connection, the provisions of section 155(4) of our Act may be compared. Contradiction of the evidence given on this subject is disallowed by law in order to avoid excessive time being spent on collateral enquiries.

77.9. As regards general reputation of the prosecutrix in cases of rape, it is almost impossible to set up a defence of consent without imputing immorality to the prosecutrix so far as previous sexual relations with the accused are concerned. On the other hand, particular acts of immorality with man other than the accused cannot be relevant, and evidence thereof is admissible only as going to the credit of the prosecutrix.

77.10. In the United States, the Rules of Evidence for United States Courts and Magistrates specifically provide that "a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination".

77.11. In India and in England, cross-examination is not confined to matters raised in examination-in-chief. However, it is to be noted it is not the law in every country that cross-examination has such a wide scope as in England or in India. In some States in the U.S.A., for example, cross-examination on matters not raised in the direct examination and not affecting credibility is not allowed without the permission of the Court. Thus, the California Evidence code provides that a witness examined by one party may be cross-examined upon any matter within the scope of the direct examination of either party to the action.

77.12. In a case decided by the Supreme Court of Pennsylvania, it was described as elementary that unless the witness is himself one of the litigants, cross-examination of his testimony should be confined to the matters upon

---

8. California Evidence Code, section 73.
which he was examined in chief. Of course, the action of the trial judge in this regard will not be reversed in the absence of an abuse of discretion or unless an obvious disadvantage results therefrom to the other party. In that case, by denying the agency of the operator of the bus, the defendant made it necessary for the plaintiffs to call the operator—an essentially hostile witness—"out of the camp of the enemy" in order to question him as to his employment. The examination-in-chief was confined to the nature of the employment of the operator, but the defendant took advantage of the situation created by the defendant himself and cross-examined the operator of the bus as to the facts of the accident. This course was strongly condemned, and the judgment was reversed and a new trial granted, by the Supreme Court of Pennsylvania.

The reason for this rule was thus stated in another case,1 which also arose in Pennsylvania.

"The underlying reason for confining the scope of cross-examination is to permit order and method in the presentation of the case. Each party must have an opportunity to present his side of the case without the introduction of matters unrelated to his case in the chief and not touched upon in his evidence. The Pennsylvania rule makes the issues as clear as possible to the jury by reducing to a minimum the possibility of the intermingling of matters purely defensive in character with the facts of the plaintiff's case."

This rule, however, does not apply to the parties, the theory being that a party should not withhold matters affecting his trial.

77.13. Restrictive cross-examination was a feature of English chancery procedure. The practice in England is summarized in Hinton,2 cases on Evidence, as follows:

"In Degen v. Eyly v. Stewart, 2 Atk. 44 (1740), the following statement was made by Lord Hardwicke: "Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine as to the same individual point, but not to any other matter; so in equity, if a great variety of facts and points arise, and the plaintiff examines only as to one, the defendant may cross-examine to the same point, but cannot make use of such witness to prove a different fact". This statement is probably correct as to the chancery practice of that period, when the written cross-interrogatories were almost as a matter of necessity based on the direct interrogatories. It seems, however, that Lord Hardwicke may have been mistaken as to the actual practice at law. In Dikerson v. Shee, 4 Esp. 67 (Nisi Prius, 1801), it was ruled by Lord Kenyon that a witness called by the plaintiff to prove one of the elements of his case was subject to cross-examination on a "distinct matter of defence. The editor has been unable to find a ruling by a court on the point."

V. INCOMPLETE CROSS-EXAMINATION

77.14. A question often arises whether the evidence of a witness can be regarded as complete until he has been cross-examined or the opportunity for cross-examination has been fully availed of. In dealing with this question, a distinction should be made between various situations in which such evidence may come up before the Court.

---

1Conley, c. Murphy, (Supreme Court of Pennsylvania) (1936) 324 Pennsylvania 577.
In the first place, where evidence given in a previous proceeding is sought to be made use of in a subsequent proceeding, section 33 specifically requires that in the previous judicial proceeding the right and opportunity of cross-examination should have been available.

In the second place, where evidence given at a prior stage of the same judicial proceeding is sought to be made use of, the position is the same by virtue of section 33. In these two situations, the earlier evidence is formally tendered, the witness having been dead or otherwise become unavailable.

The third situation, which is more frequent, arises where the evidence given in the same judicial proceeding has to be made use of for the purpose of arriving at conclusions of fact in that very proceeding. Difficulty may arise where a witness, though examined-in-chief, could not be cross-examined. The witness may die or become incapable of giving evidence, or leaves the country, or cannot be found. Literally taken, section 33 does not apply to this situation because the evidence is evidence in the very case and is not formally tendered. Technically, the evidence continues to be the evidence in the case itself, but its probative value may be very small.

In Rex v. Doolin, a prosecution witness was taken seriously ill while under cross-examination; his evidence was taken into consideration and it was held by the majority of the Judges that the conviction based on his evidence was good in law. This has been regarded as a leading case.

In Davies v. Oity, the Master of the Rolls observed:

"The evidence of Sussannah Davies must be admitted. It appears that her evidence was given on the 28th August last year, and that she died two or three days afterwards, which made it impossible to cross-examine her; but there being no impropriety and nothing wrong in examining her, and no keeping her out of the way to prevent a cross-examination. I must receive her evidence and treat it exactly in the same way that I should the evidence of any other witness who from any cause whatever, either had not been cross-examined, or whom it was impossible to cross-examine."

The matter relates not to any rule of law, but to the weight to be attached to evidence.

VI. CO-DEFENDANTS AND CO-ACCUSED

77.15. So much as regards the scope of cross-examination and the effect of incomplete cross-examination. As to the party to whom the right is available, the Act gives a right to cross examine a witness called by the "Adverse party". This raises interesting questions in criminal cases. By virtue of the expression "adverse party", one accused person may cross-examine a witness called by another co-accused for his defence, when the case of the second accused is adverse to that of the first. There might be many cases of injustice if that were not so. The section does not, however, make any special provision for the case of cross-examination of the co-accused or co-defendant. This matter bears some investigation.

2Ahmed v. Jyoit, A.I.R. 1944 All. 188(2), 190 (Allisop and Mathur, JJ.).
3Dingal Sen, A.I.R. 1929 Lah. 640.
77.16. Since cross-examination is described in the section in terms of the right of an "adverse party", the answer depends on the meaning of that expression. On the question whether an accused person who gives evidence on his behalf can be cross-examined by any of the other co-accused, neither the Evidence Act nor the Code of Criminal Procedure seems to contain a specific provision.

Though there is no reported decision on the subject, we can, having regard to the words "adverse party", assume that if one accused has given evidence against any other co-accused—that is to say, evidence implicating him, then the co-accused can claim the right of cross-examination of the accused who has given such implicatory evidence. But where the accused giving evidence has not given such implicatory evidence and their defences do not clash, is it permissible?

77.17. This question has arisen in England, and the currently accepted view is that even in such a case there is a right to cross-examine the accused at the instance of the co-accused. The position has been stated by Cross in these terms:—

"All parties have the right to cross-examine the witnesses not called by them whether or not the witness himself is a party, whether or not the witness has given evidence against the party seeking to cross-examine him and even though the witness is a co-accused."

The case of R. v. Hilton and the observation of Lord Morris in an earlier case of Murdock v. Taylor before the House of Lords, also indicate a trend in this direction.

Take the analogy of defendants. In the case of Lord v. Colvin, the Vice-Chancellor consulted the whole of the Judges, and said: "The opinion of the whole of the Judges is that a defendant may cross-examine a co-defendant's witness." In Allen v. Allen, Lopes, L.J. after quoting this decision, observed:

"If a defendant may cross-examine his co-defendant's witnesses, a fortiori, he may cross-examine his co-defendant, if he gives evidence. If it is objected that there is no issue between respondent and a co-respondent, the answer is that in most cases there is no issue between co-defendants, but still the right to cross-examine exists. In our judgment, no evidence given by one party affecting another party in the same litigation can be made admissible against that other party, unless there is a right to cross-examine, and we are at a loss to see why there should be any deviation from that rule in the Divorce Court."

77.18. In England, therefore, it would appear that when a witness has been intentionally called and sworn by either party, any other party has a right, if the examination-in-chief is either waived or closed, to cross-examine him. Or, to state the matter more neatly, any witness may be cross-examined by any party who did not call him.

77.19. The right, therefore, of a defendant to cross-examine a co-defendant is, according to the English cases, unconditional and not dependent upon the

---

5. Lord v. Colvin, 3 Drew. 222.
fact that the cases of the defendant and co-defendant are adverse, or that there is an issue between the defendant and his co-defendant. If a defendant may cross-examine a co-defendant’s witnesses, a fortiori he may cross-examine his co-defendant, if the co-defendant gives evidence.

77.20. It is well settled in England that the evidence of one party cannot be received in evidence against another party unless the latter had had an opportunity of testing the evidence by cross-examination. It has been held that all evidence taken, whether in examination-in-chief or any cross-examination, is common and open to all the parties. Since all evidence is common and that which is given by one party may be used for or against another party, it follows that the other party must have the right to cross-examine him.

Of course, the above proposition may require qualification where the law of evidence itself lays down limitations as to the parties against whom particular evidence can be used, e.g. admissions.

Thus, in a suit for divorce, the fact that the co-respondent’s counsel has raised questions in cross-examination upon the contents of letters which had properly been admitted as evidence against the respondent, does not make the letters evidence against the co-respondent, since the respondents admission are no evidence against a co-respondent. But the general position is as stated above.

77.21. The points raised above relating to the accused and co-accused do not seem to have arisen in any reported case in India in criminal trials. However, on general principles, one could state that the position in India may not be substantially different. Irrespective of the question whether a defence witness has, in his examination-in-chief or cross-examination by the prosecution, given evidence unfavourable to the co-accused the co-accused should be regarded as an “adverse party”. Once a person is before the court, all other parties have the right to utilise his knowledge of facts.

77.22. As regards civil cases in India, the current view seems to be that, even if there is no issue between the co-defendants, each defendant has a right to cross-examine a witness of the other defendant. Although sometimes it is stated that the right exists where a defendant’s witness has made a statement injurious to another defendant, it would appear from the text books and authorities cited that the right exists even if he does not make any such injurious statement. The position could hardly be different in criminal cases.

How far an accused person can, in his cross-examination, be asked questions not relevant to the facts in issue but throwing reflections on his character, is a matter which is governed by a special provision in England. This will require consideration later.

VII. CONCLUSION

77.23. The above discussion does not show any need for amending section 137. As to section 138, only a verbal change is required. The last paragraph should use the singular “witness” in view of the singular “him” which occurs in the section. We recommend that section 138 should be so amended.

1Lord v. Colvin, 3 Drewry, 222, followed in Allen v. Allen, (1894) P.D. 222.
6Mrs. Des Raj v. Pran Mot. A.I.R. 1975 Delhi 111, para. 16 (Sahib L.)
8Section 118(6), Criminal Evidence Act, 1898, (Eng.).
9Sections 145 to 148.
CHAPTER 78

CROSS-EXAMINATION — WHO CAN BE CROSS-EXAMINED — SECTIONS 139 AND 140

SECTION 139

78.1. A summons may be issued to a person either for giving oral evidence or for production of documents.

Under section 139, a person summoned to produce a document does not become a witness by the mere fact that he produced it, and he cannot be cross-examined unless and until he is called as a witness. With this section may be read provisions in the two procedural Codes which, in substance, enact that—(i) any person may be summoned to produce a document, without being summoned to give evidence; and (ii) any person, summoned merely to produce a document, shall be deemed to have complied with the summons, if he causes such documents to be produced instead of attending personally to produce the same.5

78.2. An omission to produce a document when ordered by a court is an offence under section 175, Indian Penal Code. Omission to attend the court in obedience to a summons is an offence under section 174 of the same Code.

If a witness attends the Court, section 174 of the Penal Code does not apply. In a Bombay case a witness had been summoned to produce a document. He came to court and stated on oath that he could not produce it. The Judge, disbelieving him, fined him Rs. 85/- under section 174, Indian Penal Code. It was, however, held that the section was not applicable, though the witness could have been punished under section 175, Indian Penal Code, or section 480, Code of Criminal Procedure, 1882 (then in force). He could also, if guilty of falsehood, have been prosecuted for giving false evidence in a judicial proceeding.

78.3. We have no further comments on section 139.

SECTION 140

78.4. Under section 140, witnesses to character may be cross-examined and re-examined.

It may be noted that the practice in England is not to cross-examine, except under special circumstances, witnesses who are called merely to speak to the character of the accused: but there is no rule which forbids the cross-examination of such witnesses. Presumably, the practice of not cross-examining such witnesses may be due to a desire not to prolong the proceedings by spending an unreasonably long time in collateral inquiries. Section 140 was, apparently, considered necessary by way of abundant caution in order to avoid any argument that there is any prohibition in law against the cross-examination of witnesses to character.

No changes are needed in the section.

6Section 94(2), Cr. P.C. 1898, and section 91(2) in 1973 Code.
7Emphasis supplied.
8In re Prem Chand Daulatram, (1888) I.L.R. 12 Bom. 63.

772
Chapter 79

LEADING QUESTIONS — SECTIONS 141 TO 143

79.1. Besides regulating the content of the inquiry and the order of examination of witnesses, our system of trial regulates the method of inquiry. It requires that the parties proceed by question and answer—and they must also adhere to certain forms of questions. And the restrictions as to the nature of questions are far more severe on the side that has called the witness to the stand than on the adverse side. The examination of one's own witnesses must be made without the use of leading questions—that is—questions which suggest their own answers. Such questioning may often lead to injustice, at the hand of the side calling the witness. A typical leading questions is, “was the defendant’s black car going about fifty miles an hour when you first saw it on the right, bearing down on you?” The witness may answer ‘Yes’, but it is the questioner’s version of the story that the court hears.

This consideration has led to an important point which marks the difference between examination-in-chief and cross-examination—the permissibility of leading questions in the latter, and their impermissibility in the former.

79.2. There are three sections in the Act dealing with leading questions—sections 141 to 143. Under section 141, any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

Section 142 provides that leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

Under section 143, leading questions are permitted in cross-examination.

79.3. The principal reason why leading questions in examination or re-examination are generally improper is that the witness is presumed to be biased in favour of the party examining him and might thus be prompted. In cross-examination, as the reason generally ceases, so does the rule.1

79.4. A question is leading when, by its substance or from, it suggests a desired answer, or, as some of the cases say, “when it puts the thoughts or words in the mouth of the witness to be echoed back”. If a question is made up of an unqualified statement of an assumed fact, either unproved or contested followed up by an interrogation as to that fact, it is almost necessarily leading and objectionable.

A question which purports to state a fact, and then suggests an interpretation of that fact, is leading. A question which incorporates a reference to an unproved or disputed fact, and suggests an affirmative answer, is leading. A similar question which suggests a negative answer is likewise objectionable.

79.5. A question is not necessarily leading merely because it calls for a categorical answer, if it is so worded as not to indicate the answer desired. Sometimes, a compound question, if free from suggestion, is not leading: such, for

1 Woodroffe.
example, as, “State whether or not there was any conversation between you at that time, and, if so what it was”.

Similarly, a question put in the alternative, as, for example, “Was he or was he not running at the time?” is not necessarily leading.

79.6. Stephen defined a leading question as one which either suggests the answer to that question or suggests the existence of disputed facts as to which the witness is to testify. The definition in the Act, quoted above (section 141), is briefer, but it substantially brings out the essence, the essence being the tendency of the question to “lead” the witness to the expected answer.

79.7. “A question”, says Bentham, “is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise.

“It may be used to prepare him to give the desired answers to the questions about to be put to him: the examiner while he pretends ignorance and is asking for information, is, in reality, giving instead of receiving it.”

“Thus also, a witness called to prove that A stole a watch from B’s shop must not be asked, “Did you see A enter B’s shop and take a watch?” The proper inquiry is, what he saw A do at the time and place in question; “A question shall not be so propounded to a witness as to indicate the answer desired”.

79.8. It is usually stated — following Lord Ellenborough, — that if questions are asked to which the answer “Yes” or “No” would be conclusive, then those questions would certainly be objectionable. The matter, however, is not so simple. As has been pointed out by Cross, if the question “Did you notice any traffic” is put, the answer “Yes” or “No” would be conclusive; but the question should not be regarded as a leading question if it is put to a witness who had just said that he was standing on the side of the road. Much, therefore, depends on what the point at issue is, and how the question is related to it. That is why Best said that “leading” is a relative and not an absolute term.

It has often been declared that a question is objectionable as leading which embodies a material fact and admits of answer by a simple affirmative or negative. While it is true that a question which may be answered by “Yes” or “No” is generally leading, it is not always so, as we have pointed out.

There may be such questions which in no way suggest the answer desired, and to which there is no real objection. On the other hand, leading questions are by no means limited to those which may be answered by “Yes” or “No”. A question proposed to a witness in the form “whether or not”?, that is, in the alternative, is not necessarily leading. But it may be so when proposed in that form, if it is so framed as to suggest to the witness the answer desired.

1Stephen, Digest of Law of Evidence, Article 140.
4Nichollas v. Dowding and Kemp. (1855) 1 Stark 81.
Cornish, C. J., in Audibert v. Michaud,¹ observed—

“A question is not necessarily leading because it can be answered by “Yes” or “No”. The presiding justice, who has an unprejudiced view of the entire situation, is allowed a wide discretion in this respect. The legitimate object of all examination of witnesses is the eliciting of the truth; and the danger which arises from so-called leading questions is not that the truth may thereby be extracted in an untechnical manner, but that the untrue may be stated by a witness, who is either indifferent to his oath or overzealous in the cause and eager to adopt any suggestion made by the attorney although not in accordance with the fact. It is not the mere leading, but the leading into temptation, that is to be deprecated and avoided.”

79.9. Notwithstanding the general rule that an examiner-in-chief cannot ask leading questions, an exception has been made in the interests of justice. Leading questions are often an indispensable prelude to further interrogation—which is the reason why, in many situations, the prohibition against leading questions in examination-in-chief is dispensed with. Chief amongst these situations are those relating to questions concerning introductory or undisputed matters, questions of identity, and questions which are designed to bring a witness to the point. In addition, where the matter has been sufficiently proved and it is intended to call a particular witness to confirm the evidence already given or—to take the converse case—where a matter has been vouched for by one witness and it is intended to call another witness to contradict it, the witness now called can be asked a leading question without much objection.

For example,² if a witness is allowed to remain in court while a previous witness has given evidence about the contents of a letter, he may be asked leading questions as to the letter. When the time comes for the second witness to give his evidence in chief, he says, that he wrote the letter; he can then be asked whether the letter contained a particular passage. Similarly, where a previous statement made by a person is tendered by witness A, and witness B was present when the previous statement was made, witness B may be asked the formal question whether the statement tendered is of witness A. In these cases, there is a reasonable basis for dispensing with the prohibition against leading questions in examination-in-chief, either because the reasons why leading questions are disallowed do not operate with full force or because the asking of leading questions would not cause prejudice in the particular situation.

79.10. While leading questions are, under section 143, permissible in cross-examination, yet, even in cross-examination, those which assume the existence of any disputed facts might well be disallowed in the interests of justice. The cross-examiner would then not be “leading” the witness, but misleading him.

79.11. So much as regards the present law. Administered wisely, it will not, in general, lead to injustice; but there is one lacuna in section 143 which must now be discussed. There is a categorical provision in that section to the effect that leading questions may be asked in cross-examination. This provision may be based on the assumption that a witness under cross-examination is not favourable to the party cross-examining. In a broad and general way, this, may be true. There must, however, be cases where this assumption is not true, and this suggests the query whether this rule should be allowed to retain its present unrestricted scope.

¹Audibert v. Michaud, 119 Me. 295; 111 Atl. 305. (American case) cited by Field.
²Courteen v. Tousi, (1807) 1;Camp 40.

50—131 LAD/ND/77
Although some commentators seem to be of the view that the rule is, even now, not unrestricted in its scope, the text of the section does not make any such exception. If an exception is to be recognised as a matter of policy, it would be better to provide for it expressly in the section. The question to which we address ourselves is whether such a restriction should be imposed.

It will be noted that we are not concerned, in dealing with this question, with the right of a party calling a witness to cross-examine that witness, in the situation where a witness is declared to be "hostile" to use an expression in common use though not sanctioned by legislative usage. We are concerned with the question whether there is need for a restriction on the right of the opposite party. The precise question is—should the court have a power to restrain a party cross-examining a witness who shows that he is biased in favour of the cross-examining party, from putting leading questions?

Prima facie, it would appear that in such cases the court should have a discretion to forbid leading questions, in view of the bias of the witness. Without some such restriction, the cross-examiner would be able to extract from the witness that version of the facts which the cross-examiner desires to secure. Though ostensibly "receiving" the answer, the cross-examiner gives the answer. Should a process be allowed where a witness too willing to help the party cross-examining is encouraged to do so?

**Provisions in California.**

79.12. We did consider this approach worth serious consideration. In this connection, attention was drawn to the California Evidence Code, which has the following provisions as to leading questions:

"Section 764. A ‘leading question’ is a question that suggests to the witness the answer that the examining party desires.

Section 767. Leading questions—Except under special circumstances where the interests of justice otherwise require:

(a) A leading question may not be asked of a witness on direct or re-direct examination.

(b) A leading question may be asked of a witness on cross-examination or re-cross-examination."

It may be pointed out that clause (b) of section 767 of the California Evidence Code, quoted above, is also subject to the excepting words contained in the opening paragraph of the section.

79.13. In the U.S.A., the court may forbid the asking of leading questions in cross-examination, where the witness is biased in favour of the cross-examiner and would be unduly susceptible to the influence of questions that suggested the desired answer.

**Provision in Ceylon.**

79.14. In this connection, it is also of interest to note revised section 143 of the Ceylon Evidence Ordinance—

"143. (1) Leading questions may be asked in cross-examination, subject to the following qualifications:

---

1Section 154.
2Sections 764 and 767. California Evidence Code.
4See Sarkar on Evidence.
“(a) the question must not put into the mouth of the witness the very words which he is to echo back again; and

(b) the question must not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.

(2) The court in its discretion may prohibit leading questions from being put to a witness who shows a strong interest or bias in favour of the cross-examining party.”

79.15. On a consideration of the merits of the matter, and in order to prevent abuse of cross-examination, a suggestion was made to us that section 143 should be revised by adding a proviso empowering the court to prohibit a leading question to a biased witness or in a misleading form. The precise suggestion was to revise section 143 as under:—

“143. Leading questions may be asked in cross-examination.

Provided that the court may prohibit a leading question from being put to a witness—

“(a) if the witness shows a strong interest or bias in favour of the party cross-examining the witness; or

(b) the particular question is objectionable, as likely to mislead.”

One of us, however, does not consider the suggested amendment necessary, and we are not inclined to recommend the suggested amendment in the absence of unanimous agreement.

1Shri Dhavan.
CHAPTER 80

MATTERS IN WRITING USED IN EXAMINATION

SECTION 144

80.1. Sometimes, when a witness under oral examination is giving evidence, questions arise which involve the existence or use of written statements. The witness may be giving evidence of a fact as to which, it is believed, there also exists a written evidence in the form of a written contract, grant or disposition of property or other writing, though the witness does not make a reference to the writing at all. In such a case, it is necessary to ensure that the factual position is before the Court. Or, what the witness states in court is found to differ from what he stated on a previous occasion in writing; in such a case, the adverse party may naturally like to cross-examine the witness with reference to the writing containing the contradiction. Then, there may be situations where the question is not of conflict with the previous statement of the witness, but of confirming his testimony by a previous statement made by him in writing; this time, the party calling the witness may be interested. Apart from these situations, in which the party calling, or the adverse party, is interested, the witness may, in order that he may be able to state all facts in detail, like to refresh his memory by a previous writing that was seen or approved by him. All these situations involve the question of inter-relationship between oral evidence of the witness and previous written statements to which the witness is a party or of which he is aware, and it becomes necessary for the law to lay down rules as to the procedure to be followed in the various situations. On some of these matters, rules are also found in earlier sections as to the use of the writing. But the law must also see to it that the rules contained in the earlier sections are observed at the stage of the examination of each witness. On some of the situations, the provisions of the Act discussed so far, are silent. The Act, therefore, proceeds to lay down, in the sections commencing with section 144, rules dealing with these situations. The situations themselves vary but the object of the relevant provisions, stated very broadly, is either to secure the best evidence or to ensure that what comes on the record is the truth and the whole truth, and that the best possible use is made of a previous record which, being of more permanent and reliable character, should not be disregarded.

Section 144.

80.2. Of the various situations mentioned above, the first situation — evidence as to matters in writing — is dealt with in section 144. The operative provision in that section enacts that any witness may be asked, whilst under examination, whether a contract grant or other disposition of property as to which he is giving evidence was not contained in a document; and if he says that it was (so contained) or if he is about to make a statement as to the contents of any document which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced or until facts have been proved to entitle the party to

---

5Section 144.
6Section 145.
7Section 157.
8Sections 65, 91 and 92.

778
call the witness to give secondary evidence of it. In stating the substance of the section, we have adhered to the language of the section as it now stands; but the section is not very happily expressed, as we shall show later.

80.3. According to Cunningham, section 144 merely points out the manner in which the provisions of sections 91, 92 and 65 as to the exclusion of oral or documentary evidence may be enforced by the parties to the suit. If the adverse party does not object, it is still the duty of the judge to prevent such oral evidence—a duty which can be deduced from the general provision in the Act that the judge must exclude inadmissible evidence (section 165, second proviso).

80.4. If the case is tried in a court in which there are no properly qualified practitioners, or if none be employed in the case, or if the adverse party, himself ignorant of the law and of his privilege, does not object—should the court disallow the evidence until the document be produced or until facts have been proved which entitle the party concerned to give secondary evidence? This query often arises and, as stated above, the court should certainly do so, since the Act declares it to be the duty of the judge, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. Several provisions of the Evidence Act lead to this result—e.g. the last portion of the second proviso to section 165, to which we have already referred, section 59, the word "must" in section 64, section 65 and the word "shall" in section 66.

On principle also, where evidence has been received in direct contravention of an imperative provision of the law, acquiescence, waiver or estoppel may not apply.

80.5. So much as regards the main paragraph of the section. The Explanation to the section makes it clear that a witness may give oral evidence of statements made by other persons about the contents of documents, if such statements are in themselves relevant facts. It is obvious that in such a case what the witness is deposing is not "the contents of any documents", but the statements made by other persons about the contents of documents. These statements are admissible, not as proof of the contents of the documents, but as proof of some other relevant fact—motive in the case put in the illustration to the section. Under the illustration the question is whether A assaulted B. C deposes that he heard A say to D—"B wrote a letter accusing me of theft, and I will be revenged on him". This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter. The witness, in the case put in the illustration, is not deposing to any terms of a document, and is not giving extrinsic evidence affecting the contents of a document. The terms of the document are not material. The really material fact is the mental element—A's motive—which is discernible from his statement. The statement of A is received independently in evidence as original evidence, and not because it tends to prove or disprove the terms of any document. The illustration really deals with a declaration about a mental element made contemporaneously.

Nor can objection be made to evidence of that statement on the score of hearsay. The distinction between hearsay and original evidence is well-known.

---

1Cunningham, Evidence, Note to section 144, cited in Woodroffe.
2See Woodroffe.
3Shiv Chandra Singh v. Gour Chandra Pal, 27 G.W.N. 134.
4Section 14.
It is nowhere better stated than in the case of Subramaniam v. Public Prosecutor, where it was observed that—

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

The illustration satisfied this test. These points do not necessitate any amendment of the section.

80.6. There is, however, one matter in respect of which the section is in need of improvement. The scope of the section is really two-fold; first, it is intended to apply to a situation where a contract, grant or other disposition of property as to which a witness is giving evidence is contained in a document. The second situation is where a witness is about to make any statement as to the contents of "any document", (which in the opinion of the court, ought to be produced). In both these situations, the adverse party has a right to object to such evidence being given until the document is produced or a case is made out for secondary evidence. The first situation is confined to contracts, grants and dispositions of property etc. while the second situation is not so confined.

80.7. In regard to the first situation, the word "evidence" is used, and, for the second situation, the words "the statement" are used, in the earlier half of the section. But, in the latter half, only the expression "such evidence" is used. This is not a satisfactory way of drafting. Besides, it would be conducive to clarity if the section is recast to deal with the two distinct situations separately. The following redraft of the section is recommended so far as the operative part is concerned—

"144. (1) Any witness may be asked, while under examination, whether any contract, grant or other disposition of property as to which he is giving evidence was not contained in a document; and if he says that it was, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it; and if, in the opinion of the court, the document ought to be produced, the objection shall be upheld.

(2) If a witness, whilst under examination, is about to make any statement as to the contents of any document, the adverse party may object to such statement being made until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it, and, if in the opinion of the court, the document ought to be produced, the objection shall be upheld."

(Explanation and illustration as at present).

80.8. We recommend that the operative part of the section should be recast as above, while retaining the present Explanation and illustration.

1Subramaniam v. Public Prosecutor, (1956) 1 W.L.R. 965, 969 (P.C.).
2The underlined words do not occur in the present section in connection with contracts etc. But they seem to be worth adding. See, for examples the provision in section 91. Also consider the case where the document is already admitted by adverse party.
CHAPTER 81

CONTRADICTION OF WITNESSES — SECTION 145

I. INTRODUCTORY

81.1. For understanding the significance of section 145, some discussion is needed about the purposes of cross-examination. One of the purposes of cross-examination is to impeach the credibility of a witness. One method of impeaching credibility is contradiction of the witness by his previous inconsistent statements. This mode of contradiction finds an express mention in section 155(3). The procedure in that regard is dealt with in section 145, so far as written statements are concerned. The use of this section, then, is for impeaching the credibility of a witness by contradiction.

81.2. The credibility of a witness can be impeached by direct attacks upon the character of witnesses to discover intentional falsification. But much more is involved. Everything relating to a witness which discloses the probability of inaccuracy or error in his testimony is a ground for challenging his credibility. Therefore, the testing of credibility is directed to the diversified factors which enable the triers of fact intelligently to estimate the value of the testimony by judging the quality of the witness and his opportunity to know the facts.

For example, the mental deficiencies of a witness are considered in determining his credibility. Professor Weilken has, in an able article showing the greater need for expert psychiatrists, stated:

"That the court has found the witness to possess minimal degree of capacity to testify should not foreclose a showing that because of mental defect or disorder, his testimony is so untrustworthy that it should be given little weight. Some disordered persons, such as the psychopathic liar, may be so convincing that they can easily pass the test of competency; but it would be unjust to deny the other party the opportunity to show the existence of the condition and its effect upon reliability of testimony. Because modern practice admits, as competent to testify, persons proved or conceded to be mentally ill to some degree, a liberal admission policy for evidence on the effect of mental conditions upon credibility is needed."

81.3. What, then, are the mental conditions that are relevant for judging credibility? These are multifold, and were discussed by Judge Medina in the Communist Conspiracy case. He has observed:

"By what yardstick and in accordance with what rules of law are you to judge the credibility of the witness? This judging of testimony is very like what goes on in real life. People may tell you things which may or may not influence some important decisions on your part. You consider whether the people you deal

\[\text{Credibility — its wide scope.}\]

\[\text{Element in judging credibility.}\]

---

\[\text{See discussion as to section 138, supra.}\]

\[\text{Mason Ladd, "Impeachment of Witness" (1967), 52 Cornell L. Quart. 239, 242.}\]

\[\text{Weinstein, "Some difficulties in devising Rules for determining truth in judicial trials" 66 Col. Law Rev. 223, cited by Mason Ladd, "Impeachment of Witness" (1966), 52 Cornell L. Quart. 239, 242.}\]

\[\text{Weilken, quoted in Mason Ladd, "Impeachment of Witness" (1967), 52 Cornell L. Quart. 239, 242.}\]

with had the capacity and the opportunity to observe or be familiar with and to remember the things they tell you about. You consider a person’s demeanour, to use a colloquial expression, you “size him up” when he tells you anything; you decide whether he strikes you as fair and candid or not.”

“Then you consider the inherent believability of what he says, whether it accords with your own knowledge or experience. It is the same thing with witnesses. You ask yourself if they know what they are talking about.”

“You watch them on the stand as they testify and note their demeanour. You decide how their testimony strikes you.”

Wigmore’s view.

81.4. Of testing the inherent believability of a witness, one method is contradiction. It may not be inappropriate to note that according to Wigmore, the end aimed at by impeaching evidence of this kind is the same as that aimed at by impeaching evidence of specific error, namely, to show the witness to be, in general, capable of making errors in his testimony, for, upon perceiving that the witness has made an erroneous statement upon one point, we are ready to infer that he is capable of making an error upon other points. According to Wigmore, the general end obtained is the same in the case obtained by impeachment by specific evidence, that is, some undefined capacity to error which may be a moral disposition to lie, partisan bias, faulty observation, defective recollection or any other quality. No specific defect is indicated, but each and all are hinted at.

The primary object of contradiction is thus to cast a doubt on the strength of the evidence. Contradictory statements are not necessarily put in to show falsehood. That a person contradicts himself does not imply that he is telling the untruth, and even if, in the circumstances, it suggests untruth, it does not imply that there is untruth in every particular narrated by the witness.

The maxim “Falsus in uno, falsus in omnibus,” that is, “he who speaks falsely on one point will speak falsely on all” is often cited, but that may not be universally true. The maxim contains in a loose fashion a kernel of truth which no one needs to be told, and is not applicable in all cases. The real value of contradiction lies in its shaking the belief of the Court in the perception and recollection of the witness.

II. SECTION 145—HISTORY AND GIST

81.5. Five sections, namely, sections 138, 140, 145, 148 and 154, are relevant in regard to impeaching the credibility of a witness by cross-examination. We have already considered sections 138 and 140. Section 145 may now be considered.

81.6. Previous statements in writing — whether in court or elsewhere — which are inconsistent with his present evidence, are the subject matter of the section. Wigmore called such inconsistent statements “self-contradictions”. The law is that prior inconsistent statements can be proved either out of the mouth of the witness himself in cross-examination or, where they relate to facts relevant to the merits of the case, by the extrinsic evidence of other witness or documents.

Wigmore, para 1017.


Section 155(3).
81.7. The procedure in this regard in India in regard to written statements is dealt with in section 145, which incorporates two propositions, (i) a witness may be cross-examined without showing the previous writing, (ii) if it is intended to contradict him, the writing must be shown to him. We are stating very briefly the gist of the section in order to draw attention to the significance of the section.

81.8. In so far as the section permits cross-examination as to a previous written statement without the writing being shown to him or being proved, the utility of the section is limited. If the witness denies having made any written statement, but later on, on being shown the writing, admits it, that is a reflection on his memory. In so far, however, as the writing is used to contradict him, after following the procedure laid down in the section in the latter half, the utility of the section is far greater, inasmuch as whatever he said in court, if it is contradicted by the writing, loses its value—though, of course, the previous written statement does not thereby become substantive evidence in itself.†

81.9. Section 145 partly modifies the rule laid down in Queen’s case—a rule which, in England, was modified by statute in 1865. A preliminary analysis of what is known as the rule of the Queen’s case‡ is required for a comprehensive understanding of the use of inconsistent statements for impeachment.

In that case—so far as is material—it was held that the witness cannot be cross-examined at all without the writing being shown.

The rule of the Queen’s case confused the principles applicable to the best evidence rule with principles applicable to cross-examination concerning the terms of a writing of the witness, when he is being examined about the writing only for the purpose of discrediting his testimony given in court. Under the best evidence rule, where the writing itself is the subject of inquiry, the proof of the contents of the writing is the document itself. Inquiry through secondary sources as to its content cannot be made until it is shown by acceptable proof that the original document is unavailable.

81.10. If, however, the purpose of the examination into the content of the document is to discredit the witness about matters stated therein cross-examination as to whether he wrote it and what he said in it may be a most effective method of determining his credibility, if he denies making the writing or states its content to be something different than in fact it is.

The Queen’s case held, inter alia, that the writing should be shown to the witness before permitting interrogation upon its content, thus eliminating what may be an effective part of the impeachment. Likewise, in reference to an oral statement made out of court, counsel may, on cross-examination, prefer, for the purpose of impeachment, first to ask the witness what he had said, if anything, rather than confront him initially with the statement. In the situation either of a writing or of an oral statement, if the witness were asked what he said before being confronted with the statement, he might give a different story, thus disclosing his desire to evade the effect of what he had said previously.

‡See para 81.12, infra.
It is for this reason that, as already stated, section 145 modifies, in part, the rule in Queen's case.

III. ENGLISH LAW

81.11. So much as regards the gist of section 145. It may be of interest to compare the English law. In England, the present law is this—if a witness is asked whether he has made a former statement, relative to the subject-matter of the proceeding (that is, not merely relating to credit), which is inconsistent with his present testimony, the circumstances of the supposed statement being mentioned to the witness, and he does not admit that he made the statement, proof may be given that he did make it.

The statement may have been oral, and may be proved by oral evidence. If the statement was made in writing or reduced to writing, the witness need not be shown the writing, unless it is intended to contradict him, when his attention must be called to the parts of the writing which are to be used for contradicting him.

He may be handed the paper, told to look at it, and asked if he still adheres to his previous answer.

The judge may require the writing to be produced, and may make such use of it for the purpose of the trial as he thinks fit. It will be produced in any event if it has to be proved to contradict the denial of the witness. Even if the witness admits the inconsistency, counsel for the party calling the witness may require that the document shall be produced, and any privilege attaching to it may be waived by its use in cross-examination.

The principal statutory provisions are to be found in the Criminal Procedure Act, 1865, sections 4 and 5. These sections apply in both civil and criminal cases. Section 4 concerns oral statements, and section 5 concerns written statements. The two sections read—

"4. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, in consistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

"5. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention

---

1Para 81.9, supra.
2Nokes, Introduction to Evidence (1967), page 146.
5He cannot insist on seeing it: North Australian Territory Co. v. Goldborough Port & Co., (1933) 2 Ch. 381, 386 (C.A.).
7Criminal Procedure Act, 1865, section 5.
must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereafter make such use of it for the purposes of the trial as he may think fit”.

The Civil Evidence Act[1] makes previous inconsistent statements admissible evidence of the truth of what they assert, In criminal cases, the former rule that they go only to show inconsistency still continues to apply.

IV. USE OF PREVIOUS STATEMENTS

81.12. Previous contradictory statements of parties are useful as admissions also. But, in the case of other witnesses, impeaching the statements of non-party witnesses cannot be considered as proof of the facts stated in the declaration. They are limited only to discrediting the testimony which the witness has given in court. The impeaching statements of a non-party witness are confined to discrediting the testimony he gives in court. The usual reason given for this position is that the out-of-court statements are hearsay.[4]

However, it may be mentioned that in England, in civil cases, previous written statements are, by statute, made general evidence,[2] as already stated.

81.13. This position may create problems in jury trials, since a jury may find it difficult to distinguish between the impeaching effect and the substantive effect. In Bartley v. United States,[6] Judge McGowan observed:

“The error resides, rather, in the treatment of the statutory purpose for which the prior inconsistent statement was admissible. This is stated in terms to be that “only of affecting the credibility of the witness”. The differentiation, of course, is between this rigorously limited objective, and the one of proving as a fact what is contained in the statement. The crucial character of this distinction has been recognized and emphasized by this Court...

“Without the protection of an admonition or instruction from the court to the latter end, we cannot say that the jury did not give weight, when it was not entitled to do so, to the prior written statement and feel itself free to choose between the conflicting versions”.

81.14. The position, therefore, has not escaped criticism. In United States v. De Sisto,[7] Judge Friendly expressed approval of the use of prior inconsistent statements for substantive purposes, stating:

“The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge of his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence, that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that “the fresher the memory, the fuller and more accurate it is.””

---

[1] Section 3(1)(a), Civil Evidence Act, 1968.
It is, however, unlikely that this approach will find many adherents in India. Moreover, since there are no juries in India, the criticism becomes inapplicable to India.

V. POINTS FOR CONSIDERATION—ORAL STATEMENTS

81.15. Reverting to section 145, we may state that while the principle underlying the section does not require modification, certain questions of detail arise, namely—

(a) (i) Is the section applicable to oral statements?
(ii) In particular, is the section applicable to tape-records?
(b) What is the position regarding documents which are lost?

81.16. As to point (a) (i),—oral statements,—it is to be noted that the section relates only to previous statements made in, or reduced into, writing. The section does not cover the entire ground covered by section 155(3). If the previous statement was oral and not reduced to writing, it can, under section 155(3), be proved to impeach the witness’s credit, if such former statement be inconsistent with any part of the witness’s evidence which is liable to be contradicted.1 This being a permissible course, some guidance should be provided in the Act as to whether the witness should be confronted with the statement.

81.17. Unfortunately, the Act makes no express provision to the effect that the witness’s attention must first be drawn to the previous oral statement and the witness asked whether he made such a statement, before his credit can be impeached by independent evidence. As Field has pointed out, there can be little doubt that here also the circumstances of such previous statement that are sufficient to designate the particular occasion ought to be mentioned to the witness and he ought to be asked whether or not he made such a statement.

In the English case of Carpenter v. Wall,2 Patterson J. observed—

“I like the broad rule that when you mean to give evidence of a witness’s declaration, for any purpose, you shall ask him whether he ever used such expression”.

81.18. Coming to point (a) (ii)—tape records,—we may note that the proposition that tape-records are admissible, is not now disputed, though certain safeguards may have to be observed to ensure that there has been no tampering. That they can be used for contradiction is also not disputed.3 But the procedure to be followed when they are used for contradiction is not laid down in the Act and ought to be laid down. Section 145, taken literally, does not cover them. In Rup Chand,4 it was held that the record of a conversation appearing on a tape-recorder cannot be regarded as a statement “in writing or reduced into writing” within the meaning of section 145. The record which appears on a tape-recorder cannot fall within the ambit of the definition of “writing” as given in section 3(65), General Clauses Act, 1897.

It was held in that case that the expression “writing”, appearing in section 145, refers to the tangible object that appeals to the sense of sight and that which is susceptible of being reproduced by printing, lithography, photography,

---

1Section 155, Clause (3).
3Carpenter v. Wall, 3 P & D 457; 113 E.R. 649 cited in Woodroffe and also in AR.
etc. It is not wide enough to include a statement appearing on a tape which can be reproduced through the mechanism of a tape-recorder. With reference to section 155(3), it was held that a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements, can depose that while he was engaged in conversation with the witness, a tape-recorder was in operation, or can produce the said tape-recorder in support of the assertion that a certain statement was made in his presence.

81.19. It would appear that the position in this regard would be clearer if the correct procedure as to oral statements is laid down.

81.20. It may be noted that contradiction by an oral statement is a permissible means of impeaching the credit of a witness. Section 155(3) and illustrations (a) and (b) thereof, make this clear. There can be no distinction in principle between an oral and written statement. Of course, the contradiction must be in regard to a matter relevant to the issue—that being the implication of the words 'liable to be contradicted' in section 155(3). Acting on this reasoning the Orissa High Court would apply the principle of section 145 also to oral statements.

But the Nagpur and Rajasthan High Courts have taken a different view on the subject, holding that since section 145 covers only written statements, the procedure laid down therein need not be followed.

The conflict of decisions is obvious. But even if there were no conflict, it is desirable that the legislative provision should be self-contained, on such an important matter.

81.21. In view of the fact that the mode of proof for the purpose of contradiction is already dealt with by section 145, it would seem appropriate that the procedure to be followed in regard to oral statements should also be dealt with in that section. The rule in section 145 is one of substance, and not of form. Justice requires that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradiction, whether the statement be written or oral.

81.22. It may be noted that, in Srilanka, the corresponding section has been numbered as sub-section (1) and sub-section (2) has been added as follows:

“(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it: but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement.”

81.23. It would also be of interest to note that, in New South Wales, there is a specific provision in this regard. Section 54 of the Evidence Act, 1898-1954 (New South Wales), is in the following terms:

1Khadija v. Abidul Kareem (1890) I.L.R. 17 Cal. 344 (Wilson J).
7Section 145. Ceylon Evidence Ordinance, cited in Sarkar.
"If a witness upon cross-examination as to a former statement made by him relative to the subject matter of the cause or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did, in fact, make it.

But before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement".

Section 55 of the New South Wales Act is in the following terms:

"(1) A witness may be cross-examined as to:

(a) a previous statement made or supposed to have been made by him in writing or reduced into writing; or

(b) Evidence given or supposed to have been given by him before any justice, without such writing or the deposition of such witness being shown to him. But if it is intended to contradict him by such writing or deposition, his attention must, before such contradictory proof can be given, be called to those parts of the writing or deposition which are to be used for the purpose of so contradicting him... ..."

81.24. We have already referred to the English provision which is wide enough to provide for oral statements. We are of the view that section 145 should be amended to deal with the matter.

VI. SECONDARY EVIDENCE

Loss of document. 81.25. Then, — to come to point (b) — there is another matter requiring attention with reference to section 145. The Act is silent with reference to the case where the document sought to be used for contradiction has been lost or destroyed, and the question may arise whether in these or in any other cases a copy can be used (instead of the originals) for contradiction. It has been stated (with reference to the position in England) that in such a case the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that, if it were material to the issue, he might be afterwards contradicted by secondary evidence. In such a case, the cross-examining party may interpose evidence out of his turn to prove the events, such as loss, etc., relating to the document and to furnish secondary evidence thereof.

In India, such a case may perhaps fall within section 155(3), so far as the use of secondary evidence is concerned. But the procedure,—i.e. the applicability of section 145,—is doubtful. We are of the view that a suitable provision regulating the contradiction of the witness by secondary evidence should be inserted. A case for secondary evidence must, of course, be made out before it can be used for contradiction.

VII. RECOMMENDATION

81.26. The points discussed above show the need for amending the section so as to cover—

(a) oral statements, including oral statements that have been tape recorded.

---

1 Section 4, Criminal Evidence Act, 1865 (supra).
2 Para 81.15, supra.
3 Taylor, Ev. s 1447 cited by Woodroffe.
4 Para. 81.24, supra.
(b) contradiction by secondary evidence.1

81.27. In the light of the above discussion, we recommend that section 145 should be amended by adding the following sub-sections—3

"(2) Where a witness is sought to be contradicted by his previous statement in writing by a party entitled to produce secondary evidence of the writing in the circumstances of the case, his attention must, before such secondary evidence can be given for the purpose of contradicting him, be called to so much of it as is to be used for the purpose of contradicting him.

(3) If a witness, upon cross-examination as to a previous oral statement (including a statement recorded mechanically) made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and in-consistent with his present evidence, denies that he made the statement or does not distinctly admit that he made such statements, proof may be given that he did in fact make it, but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statement."

1Para 81.25, supra.
2Section 145 to be renumbered as sub-section (1).
3The specific intention of denial is considered desirable.
CHAPTER 82

IMPEACHING THE CREDIT — SECTIONS 146 AND 147

82.1. In cross-examination, the cross-examiner enjoys a wider power of interrogation than in examination-in-chief. This wider power covers not only the form of the questions, but also the substance. As to form of the questions, we have already dealt with leading questions. Apart from the fact that leading questions can be put in cross-examination, what is to be noted is that the subject-matter of the question could be somewhat larger when a witness is cross-examined than when he is examined-in-chief. Not only can the witness be contradicted by his previous statements which are inconsistent with his present evidence, but also the inquiry can travel beyond facts which are strictly relevant, in so far as credit of the witness can be impeached. Some questions are, therefore, lawful in cross-examination which are not so in examination-in-chief; the questions must relate to matters relevant to the facts in issue in the proceeding. The range of such cross-examination is dealt with in the sections beginning with section 146.

82.2. Section 146 provides that where 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 questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

82.3. Certain matters of importance, namely, in what cases the witness is compellable to answer such questions, are dealt with in latter sections—sections 147, 148, 149 and 150. Indecent and scandalous questions and insulting questions are specifically governed by sections 151 and 152. Of course, the last two sections—section 151 and section 152—are not confined to cross-examination, but, in practice, the need for invoking them arises mostly in relation to cross-examination.

The textual provisions and the decisions show that the range of questions which can be put for shaking the credit of a witness is wide enough. This renders it desirable that the witness should be protected against improper cross-examination. Certain safeguards are, therefore, provided in sections 146 to 153, as already stated.

How far answers to questions put to impeach the credit of a witness can be contradicted is dealt with in section 153. This is, in brief, the scheme of the sections.

82.4. Of the questions that can be put under section 146, the first category comprises questions intended to test veracity.

Sections 141 to 143.

Section 145.

Section 138, see and paragraph.
82.5. The expression "veracity" is a narrow one. We have already referred to the diverse factors which enable the court to make an intelligent estimate of the value of the testimony of the witness. These go beyond mere contradiction or impeachment of credit or veracity. It is important to note that a witness may believe himself to be true, and yet be mistaken. "The means of detecting both the fact and the source of error because of mistake involve a different type of resourcefulness in truth testing than the direct attack upon perjury."

82.6. Our system of evidence requires that evidence of a fact which has been perceived by the senses must be given by a witness who has actually perceived the fact—a principle described by Wigmore as the principle of knowledge. This rule involves at least three requirements, namely, capacity to observe, opportunity to observe, and actual observation. Questions which are put in cross-examination to test the existence and quality of these requirements are, therefore, admissible, since they go to the root of the matter, namely, whether the external reality comes through a medium which can be trusted.

82.7. A distinguished writer on the Law of Evidence has pointed out that human testimony cannot be assigned its proper value without a knowledge of the powers of perception, memory and narration of the witness, and of his opportunity and desire to exercise those powers honestly and efficiently in the situation under examination. "It requires no extended trial experience to demonstrate that for every perjurer there are scores of honest witnesses whose direct examination produced the effect of falsehood because its subject-matter was incorrectly or incompletely observed or inaccurately remembered or inadequately narrated. It might, then, be argued that in a judicial investigation no testimony should be received which is not tested in the fire of cross-examination."

82.8. Cross-examination on relevant matters affecting human behaviour and opportunities for knowledge constitutes the most reliable means of exposing error, apart from falsehood. Even an honest and accurate witness may, for example, be compelled to tell a lie by reason of threat or duress or other attempts to tamper with the witness. Then, unconsciously, a bias may arise by reason of the relationship between the witness and the party. Many of the factors which, at common law, were regarded as grounds for total incompetence of the witness are now factors which can be taken into consideration as relevant to weight or value of the evidence of the witness.

For example, interested witnesses were previously incompetent—particularly, the parties. Under the present law, they are competent; but, the nature and quality of their interest may legitimately be enquired into in cross-examination on the ground of bias or possibility of bias. This is not to say that in every case where a witness is related to a party, there is a possibility of bias and the witness must be taken as biased. To take a hypothetical example if, in a suit for damages for injury caused by an accident, a witness to an accident, married the defendant's daughter before the trial, his previous consistent declaration about what he had seen, which was made before he

---

1See discussion as to section 145, supra.
2See discussion as to section 145, supra.
4Morgan, "The Relation between Hearsay and Preserved Memory" (1927) 40 Harv. L. Rev. 712.

51-131 LAD/ND/77
82.9. Cases in which the capacity of a witness to observe the fact as to which he is called to give evidence is in question will be rare. Such incapacity to observe may exist as a result of some organic incapacity of the witness such as insanity, feeble-mindedness, infancy, blindness and deafness. In extreme cases organic incapacity of this kind will be obvious. In less extreme cases, for example, where the witness has poor eyesight or poor hearing, the existence of such facts, if relevant, should be elicited by the cross-examiner. There is no doubt that such questions are properly admissible, but as Wigmore observes, mere questions on cross-examination as to those matters can seldom affect much and the useful approach is usually something of a mixed nature, that is, experiments made in Court to test the witness’s powers which, according to Wigmore, should be freely allowed, subject to the discretion of the Court. He also expresses the view that extrinsic evidence of particular instances of the incapacity of the particular witness to observe would not be admissible.

82.10. In the United States, academic writings deal in detail with the psychology of testimony and it has often been pointed out that even where the witness is not wilfully telling a lie, it is important to determine his ability to recall the objective truth “to translate an outward event into words” for the use of the court. In England also, one common species of mistake is recognised, namely an event being “remembered” as belonging to a different occasion from the one on which actually happened. This is described as the error of “transference”, and commonly occurs where the customary is affixed and the departure from the usual practice goes unnoticed. It is desirable that defects of the nature described above should be remedied.

82.11. It is of interest to note that in Sri Lanka, the corresponding section also uses the expressions “accuracy” and “credibility”. This seems to be a useful improvement, inasmuch as, apart from any moral aspersions which are covered by “veracity” and “credit”—whichever the expressions used in clauses (1) and (3) of section 146—there could be cases where the cross-examiner wishes to challenge the accuracy or power of observation or memory of the witness.

82.12. Whitley Stockes says that the word “veracity” means accuracy or credibility. But this is not the ordinary sense in which the word is understood. In the ordinary parlance, “veracity” does not mean true, but certain moral overtones and is not appropriate enough to cover cases where there is no moral aspersion involved. Most of the dictionary meanings also give a primacy of place to the restricted meaning.

82.13. In so far as the witness can be contradicted by previous inconsistent statements intended to challenge the credibility of the witness, section 145 takes care of the matter. But it is not inconceivable that the mental capacity of the
witness is believed to be defective and is proposed to be challenged otherwise than by the use of a previous inconsistent statement. There should be some provision on the subject.

We recommend that section 146(1) should be suitably widened for the purpose.

82.14. So much as regards clause (1) of section 146, Section 146(2) needs no comments, but section 146(3) is of practical importance. It really consists of two propositions.

(a) The cross-examiner can put questions intended to shake the credit of the witness, and this he can do by injuring his character.

(b) For this purpose, he can even put incriminating questions.

The first proposition relates to the range of the cross-examination in general terms. The cross-examiner can shake the "credit" of the witness—i.e. the credit in the eyes of the court in relation to the evidence given in the particular proceeding. Of course, as is commonplace, an injury to credit, inflicted on one occasion, could be of an enduring nature. It could last long beyond the duration of the particular occasion. Walter Scott said that "credit is like a looking-glass, which, when once sullied by a breadth, may be wiped clear again; but if once cracked, can never be repaired." As to the second proposition, it is to be noted that the word "character" does not, in this clause, mean only disposition. Rather, it seems to mean "reputation", which is distinct from disposition. A man's character is the reality of himself. His reputation is the opinion others have formed of him. Character is in him; reputation is from other people; that is the substance, this is the shadow." In the section, the word 'character' is used in an extended sense. Of course, these observations do not necessitate an amendment of the section.

82.15. The only change required is in clause (1) of the section. As a result of the points already discussed, we recommend that in clause (1) of section 146, the words "accuracy or credibility" should be added after the word 'veracity'.

82.16. With reference to section 147, only a verbal point needs to be mentioned. The words "relevant to the suit or proceeding" in this section refer to what is relevant to a matter in issue, as in section 132. It would be desirable to make this clear, since the next section—section 148—makes a distinction between questions (strictly) relevant to the matter in issue and questions which are "relevant to the suit or proceeding" only because they affect the credit of the witness by injuring the character of the witness. We, therefore, recommend that in section 147, after the words "relevant to", the words "the matter in issue in" should be added.

---

1 Walter Scott, Co. Saying quoted in the 'D'.
2 Compare section 355.
3 N. W. Beecher, Life Thoughts.
4 Woodroffe.
CHAPTER 83

CROSS-EXAMINATION AS TO CREDIT — THE POWERS OF THE COURT

SECTION 148

I. INTRODUCTORY

83.1. In order that the right to put questions in cross-examination may not be abused, certain safeguards are needed, as we have already pointed out in our discussion of section 146. These safeguards are provided in a number of sections. We take up the principal provision in section 148, which provides that 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 swear and shall warn him that he is not obliged to swear 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's character and the importance of his evidence;

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

83.2. Commenting on this section, Markby observed:

"The provisions of sections 148, 153 are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by injuring his character: whereas some of the additional questions enumerated in section 146 do not necessarily suggest any imputation on the witness's character. Nevertheless, I think it was the intention of the Act, and I believe it to be the practice to consider all the questions covered by section 146 to be governed by the provisions of sections 148-53".

He also added:

"Sections 148-52 were intended to protect the witness against being improperly cross-examined; a protection which is often very much required. But the protection afforded by section 148 is not very effectual, because an innocent man will always be eager to answer the question and a guilty man by claiming protection almost confesses his guilt as is indicated by the last para of the section".

---

1See discussion as to sections 146 and 147, supra.
2Markby, pp. 106-107, quoted by Woodroffe.
3Markby, pages 146-147, quoted by Woodroffe.

794
83.3. In so far as the section applies to ordinary witnesses, we have no comments on it. The position of the accused as a witness, however, requires some discussion. At the time when the Act was enacted the accused was not a competent witness and the section was not framed with the accused in mind. The broad question to be decided is, should the section apply to the accused, and, if so, to what extent.

II. SPECIAL CONSIDERATIONS

83.4. In deciding the question how far the accused should be subject to cross-examination as to character, one has to strike a very delicate balance between certain competing considerations. If the accused is given complete exemption from cross-examination as to character, he would become free to cast aspersions on the prosecution witnesses without any hindrance. He would then also be free to secure the unjust conviction of his co-accused, if there be one.

On the other hand, if he is treated as liable to cross-examination on all past convictions, in order to show his lack of credit, then a possibly innocent man would be deterred from entering the witness-box and telling his own story on oath, because of the mental anguish that the unfolding of the past would cause, apart from any prejudice that might be caused in the mind of the judge. It is for this reason that in several countries, a compromise has been effected in the legislative provisions on the subject, and, in view of the considerations mentioned above, a distinction is usually made between the position of the accused and that of the ordinary witness who is not the accused. That distinction is supportable on the ground that an ordinary witness entering the witness box is not—at that moment at least—facing trial for an offence, and there is no danger of his conviction in those proceedings.

83.5. The course adopted by legislation in several countries is usually to protect the accused from disclosure about his past character except in certain exceptional cases. Those exceptional cases, to put the matter broadly are postulated on the theory that the considerations of fairness require that an exception should be made, the circumstances and the conduct of the accused in regard to the prosecution being such that the other considerations favourable to the accused, which are mentioned above, should be over-ridden by the requirements of fairness in the peculiar circumstances.

83.6. What matters is the effect of the prohibited question on the court. A veiled suggestion of a previous offence is just as damaging as a definite statement—which is the reason why the expression "tend to show" is used in some legislative precedents, on the subject. If the accused, by himself or his witnesses, seeks to give evidence of his own good character to show that he is unlikely to have committed the offence charged; he raises an issue as to good character, so that he may be fairly cross-examined on that issue, just as any witness called by him to prove his good character may be cross-examined.

Even where the accused has not raised a question of his own good character, the evidence falling within the rule that where issues of intention or design are involved in the charge or defence, questions relevant to these matters may be asked, would be admissible.

In these cases, the consideration that the court may be prejudiced or the accused oppressed is displaced by weightier considerations, and evidence, even if it goes to his credibility, is permitted.

\(^1\) Instances are cited, infra.
\(^2\) para 53.4, supra.
\(^3\) E.g. section 1, proviso (3), Criminal Evidence Act, 1898 (Engl.).
III. LEGISLATIVE PRECEDENTS

83.7. Let us, at this stage, turn to a few legislative precedents from other countries. In England, by section 1 of the Criminal Evidence Act, 1898, the accused was made a competent witness for the defence. That section then set out a series of provisos regulating his appearance as a witness. We shall refer only to so much of the section as is material for the present purpose. Proviso (e) to the section abolished the privilege of the accused in respect of incrimination of the crime in question, in these terms:

“(e) a person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged”.

As to cross-examination in regard to credit, proviso (f) to section 1 of the Act enacts that “a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character.

This proviso is itself restricted by three exceptions. The first exception deals with a situation where character evidence is relevant by some other provision of law in proof of the offence wherewith he is charged. This is not the text of the proviso, but shows its main object. The actual language used is—

“The proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is charged”.

This exception may bring up, for example, evidence of similar facts where such evidence is relevant, having regard to the questions at issue (e.g. state of mind).

Under the second exception, proviso (f) does not apply where the accused himself has made an attempt to establish his own good character or has challenged the character of the prosecutor or of a prosecution witness. The actual text reads as follows:

“Has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution”.

The third exception relates to the case where the accused “has given evidence against any other person charged with the same offence”. The exception, as is obvious, is mainly intended to empower the other co-accused to put questions as to the credit of the accused who has given evidence. On its wording, it appears to cover cross-examination by the prosecution as well.

83.8. It is unnecessary to add that the English Act does not exclude relevant evidence. In Makin v. A. G. for New South Wales, Lord Merschell, L. C., observed—

“.... the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the

---

8Section 1, Criminal Evidence Act, 1898 (Eng.).
9Notes. Introduction to Evidence (1967), page 156.
'Makin v. A. G. for New South Wales, (1894) A.C. at p. 65.'
question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In R. v. Kennaway,1 Lord Reading, C.J. said:

"It is not necessary to repeat what has often been stated in this court, that evidence which is otherwise admissible will not be inadmissible merely because it may show that the prisoner has committed other offences".

83.9. When Lord Herschell used the term "relevant to an issue before the jury", he meant, of course, an issue on facts relevant to the accused's guilt of the offence with which he was charged; he did not mean to include an issue about the accused's character, credit or credibility as shown by matters unconnected with that offence.

83.10. To complete this discussion of English law, it may be noted that exclusionary rules are applied even to trials by a professional judge sitting alone, such as a stipendiary magistrate hearing a case summarily, or a recorder trying a case on appeal. In a magistrate's courts, the law of evidence is supposed to be the same as in trials on indictment.

83.11. In Australia, many jurisdictions associated with the common law have a provision similar to that in section 1(f) of the Criminal Evidence Act, 1898, of England, permitting the previous convictions of the accused to become an issue only if, inter alia, the nature or conduct of his defence is such as to involve imputations on the character of prosecution witnesses.

Even if the provision becomes applicable, there is a discretion in the trial judge whether to allow cross-examination of the accused as to his record. In Victoria, the relevant provision contains a proviso that the permission of the judge, to be applied for in the absence of the jury, must first be obtained before the cross-examination is allowed. The proviso, as Dixon C.J. observed in Dawson's case, is taken to confer complete discretion on the trial judge. In that case, the accused had done little more than deny that a document alleged to contain material by way of admissions in question and answer form was an accurate record of what he had told the police, and to deny having made any admission. The High Court held that neither the nature of the defence nor the conduct of it involved imputations upon the prosecutor or the Crown witnesses, and even if that were not so, discretion ought to have been exercised against allowing the cross-examination.

83.12. The position in New South Wales is interesting. By Statute 55 Vic, No. 5 section 6 (1891), it was enacted that every person charged with an indictable offence:

"shall be competent, but not compellable, to give evidence in every court on the hearing of such charge:

Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution nor to be questioned on cross-examination without the leave of the Judge as to his or her previous character or antecedents.""


2Para 83.8.


5Mr. Justice Nensey (Supreme Court of Tasmania), "Rights of the Accused, etc." (1969) 43 Aust. L.J. 452, 459.

6Dawson v. The Queen 106 C.L.R. 1.

7Emphasis supplied.
83.13. The statutory provision quoted became proviso No. 1 to section 407 of the Crimes Act, 1900 (New South Wales). Thus, the Judge in New South Wales is given a discretion on general considerations of justice and fairness as they appear to him.

83.14. The legislative intention underlying this provision conferring judicial discretion may be gathered from the speech of the Attorney General when he was introducing the Bill in the Legislative Council of New South Wales. This is what he said: 1

"However, I think it desirable, as I said before that this provision should be surrounded with safeguards; and so I propose that no person charged with the commission of a criminal offence shall be questioned, on cross-examination, as to his or her previous character or antecedents without the leave of the Judge. It is necessary that that provision should be inserted, otherwise a prisoner who is giving evidence on his own behalf, and who is perfectly innocent of the offence with which he is charged today, might be placed in this position: Some twenty, or fifteen, or ten years ago he might have committed some offence against the law, and if he were asked when giving evidence today upon his trial for a particular offence, whether ten years ago he was not found guilty of another offence, a great deal of harm and great injustice might be done. I provide, therefore, that he must not be asked as to his antecedents, as to whether so many years ago he did not do this or that. But whilst I provide that, as a matter of course, he must not be asked questions with reference to previous convictions, or as to his antecedents, I reserve power to the Judge to allow such questions if he thinks that the interests of justice require that the person should be so examined. A Judge also—just as much as a Crown prosecutor; possibly more so—is imbued with a very strong sense of doing justice to the people who are unfortunately accused with the commission of certain offences, and a judge will always see that no question is allowed to be put to a prisoner which might do him an injustice unless really the public interests require it. If it is necessary for the conviction of a person who, in all probability, is guilty, and is likely to be acquitted by reason of those questions not being asked—if a judge thinks no unfair advantage will be taken of the man, he will allow the questions to be asked".

83.15. The relevant section in Victoria is 399 of the Crimes Act, 1958 substantially on the same lines as New South Wales. Incidentally, one of the exceptions to that section reads:

"Unless the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution:

Provided that the permission of the Judge (to be applied for in the absence of the jury) must first be obtained".

On this exception the decision of the High Court in Dawson v. The Queen, 1 is of considerable importance. The accused was charged with being an accessory after the fact to a burglary. He denied any knowledge of the crime, and that he had made the incriminating admissions sworn to by two police officers, and claimed that a contemporary record of interrogation produced contained much more than the couple of questions which he had been asked and answered. The trial judge had taken the view that the Crown prosecutor should be

1Speech of Attorney General, Mr. G. B. Simpson.
2Dawson v. The Queen 106 C.L.R. 1.
allowed to cross-examine as to previous offences. The Victorian Supreme Court upheld the conviction, but the High Court allowed an appeal, quashed the conviction and ordered a new trial.

83.16. The then Chief Justice, Sir Owen Dixon, in a characteristically powerful and lucid judgment, expressed the opinion that the cross-examination should not have been allowed, as not being within the exception of the sub-section, or alternatively, if that view was wrong, that it was an improper exercise of the Judge's discretion. He was of the view that the facts fell far short of satisfying the condition of the sub-section. He analysed the language to show that what is referred to is not a denial of the case for the Crown nor of the evidence by which it is supported, but the use of matter which will have a particular or specific tendency to destroy, impair or reflect upon the character of the prosecutor, etc. He considered that the word "involve" was not meant to cover inferences, logical implications or consequential deductions which may spell imputations against the character of witnesses.

83.17. On the question of the exercise of the discretion (the alternative basis of his judgment), Dixon C.J. was firmly of the view that it had been erroneously exercised. Amongst the considerations which led him to this view, the following are very important:

(a) It was necessary for the judge to consider whether the interests of justice were not best served by excluding evidence of the accused’s convictions or bad character in order that his guilt should be judged on the facts of the case and not upon the propensities which his past disclosed or the prejudices his character or career might engender.

(b) It is the thesis of English law that the ingredients of a crime are to be proved by direct or circumstantial evidence of the events, that is to say, the parts and details of the transaction amounting to the crime, and are not inferred from the character and tendencies of the accused.

(c) In England and Victoria, the accused is protected against the disclosure of a discreditable past, unless in exceptional conditions, and he could not see on what ground consistent with the general policy of the proviso, the discretion was exercised in this case against the accused.

IV. POSITION IN U.S.A.

83.18. In the U.S.A., the Uniform Rules of Evidence provide—

"Rule 21. Limitations on Evidence of conviction of crime as affecting Credibility—Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility".

83.19. In the New Jersey Rules of Evidence, the material provision reads as follows:—

"Rule 25. Self-incrimination etc.—Subject to rule 37, every natural person has a right to refuse to disclose in an action or to a police officer or other official, any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule.

Carlson, "Cross-Examination of Accused" (1966-67) 52 Cornell Law Quarterly 705.
(d) subject to the same limitations on evidence affecting credibility as applied to any other witness, the accused in a criminal action, or party in a civil action who voluntarily testifies in the action upon the merits, does not have the privilege to refuse to disclose in that action any matter relevant to any issue therein."

It may be noted that under this rule, cross-examination of an incriminating character or in respect of other offence is not allowed.

83.20. It may be noted that in the United States, the accused is a competent witness—in federal prosecutions since 1878. In Brown v. United States, Frankfurter, J. made the following observations which summarise the law applicable to criminal defendants who testify in their own behalf:

"Our problem is illumined by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defence, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. 'He has no right to set forth to the jury all the facts which tend in his favour without laying himself open to a cross-examination upon those facts'. Fitzpatrick v. United States, 178 U.S. 304, 315; and see 157 U.S. 301, 304, 305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is that reasoning, that controls the result in the case before us."

83.21. In the case of Brown, the actual proceeding related to a civil defendant, whom it was proposed to punish summarily for criminal contempt committed in the actual proceedings of the court. The petitioner admitted that she was a member of the Communist League, but denied that she belonged to a Communist Party during the period before 1946. She refused to answer questions about activities and associations that were unlimited in time or directed during the period of 1946, on the ground that the answers might incriminate her; and the District Court sustained the claim of privilege.

But the court held that the petitioner had waived the claim of privilege, and convicted her of contempt. This conviction was upheld by the court of Appeal on the ground of waiver. In the Supreme Court of the U.S.A., Frankfurter, J., speaking for the majority, declared that the rule applicable in criminal cases that, one who takes the stand and testifies thereby foregoes the right regarding matters made relevant for direct examination, was applicable equally in civil cases. Frankfurter J. referred to the two earlier cases in discussing the position of the criminal defendant.

Analysing the constitutional privilege in this setting, he adverted, inter alia, to Fitzpatrick v. United States and pointed out that a defendant has no right to set forth all the facts in his favour without laying himself open to cross-examination on these facts. The judgment contains relevant comments which seem to indicate that waiver of the fifth amendment privilege extends to matters opened up by the party on direct examination, but perhaps only that far.

Commentators have summarised Brown as laying down a constitutional rule of limited waiver. Thus, in a note in the Harvard Law Review, the Brown

1Carlson, "Cross-Examination of Accused" (1966-67) 52 Cornell Law Quarterly 705.
case is summarised as holding that a defendant who voluntarily takes the stand
waives the privilege against self-incrimination to the extent of cross-examina-
tion on matters raised by his own testimony on direct.

It is interesting to note, moreover, that Brown was cited by the Seventh Cir-
cuit as imposing constitutional limitations on cross-examination in criminal prose-
cutions.1 In reviewing a criminal conviction, that court carefully noted that
the cross-examination of the defendant who testified was related to his
direct testimony. The court went on to observe:

"In a criminal case, if a defendant voluntarily takes the stand to testify
in his own behalf, his testimony may be impeached and he may be cross-
examined. The extent of the waiver of the privilege against self-incrimina-
tion is determined by what the defendant's testimony makes relevant for
cross-examination".

These federal decisions contain distinct indications to the effect that a limited
cross-examination of the accused is required by the fifth amendment. Much
of the language militates in the direction of extending the waiver of the constitu-
tional privilege to matters opened up on direct examination, but not beyond. As
stated by one writer:2

"In the absence of special statutory provision, courts following the
federal rule hold that a defendant in taking the stand in a criminal case
waives his constitutional privilege not to testify to the extent that the fed-
eral rule permits cross-examination".

Under this view, the waiver extends only to matters touched upon in direct
examination, since this is the extent to which the federal rule permits cross-exa-
mination. Another commentator has concluded:3

"The constitutional privilege against self-incrimination and the statute
of 1878, permitting the defendant to testify have been construed as requir-
ing a restrictive cross-examination."

83.22. The doctrine of limited waiver is recognised elsewhere in the law of
evidence in the U.S.A. Most of the authorities agree that if the accused takes
the stand for the purpose of testifying on a preliminary question, such as the
voluntariness of a confession, this is not to be taken as a complete waiver.
Many cases limit the waiver to the particular issue, because it is felt that to do
otherwise would penalise the defendant for testifying.4

83.22A. Thus, in the U.S.A., the matter has been discussed from the point
of view of the constitutional privilege also, the precise question being—"Is
cross-examination beyond the scope of the direct examination prohibited by the
privilege against self-incrimination?" In 1954, the (federal) privilege against
self-incrimination was extended to the states in Malloy v. Hogan.6 Following
this extension, the privilege was applied to limit stringently pre-trial interroga-
tion of suspects by state officers,5 and to prohibit comment on the accused's refu-
sal to testify at trials.6

---

1United States ex rel. Irwin v. Date, 357 F.2d ed. 9111, 915-16 (7th Cir.).
2Cross examination of the Accused", 52 Cornell L.Q. at p. 716.
3Note (1939) 24 Iowa L. Rev. 564, 569, cited in 52 Cornell L.J. at p. 716.
215, 240 (1962); Orfield (1964). "The privilege against Self-Incrimination in Federal
5McCormick s. 131. See als. Maguire, Evidence of Guilt s. 2. 082 (2) (1959); Model
Code of Evidence rule 208, comment (1942).
The constitutional problem has obvious ramifications for those jurisdictions which permit wide cross-examination. If a rule of restricted cross-examination is constitutionally required, then a wide interrogation may be unconstitutional.

V. RECOMMENDATIONS AS TO ACCUSED

83.23. We are of the view that the special considerations to which we have referred at the outset, and which have been the basis of the legislative provisions in other countries, justify the insertion of certain restrictions as to the scope of questions as to character, in relation to the accused.

83.24. We have discussed the matter at length in view of its importance.

Our recommendations on this point are as follows:—

(a) An accused person who offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, may be compelled to answer questions which incriminate him as to the offence charged;

(b) An accused so offering himself as a witness, shall not, however, be compelled to answer questions tending to show that he has committed, or has been convicted of, or been charged with, any other offence, nor shall he be compelled to answer questions showing that he is of bad character, except in the following cases:—

(i) where proof of commission or conviction or charge of such other offence is relevant to a matter in issue (i.e. relevant to the very offence with which he is now charged);

(ii) where he himself has asked questions to a witness to establish his good character, or has given evidence of his good character; or

(iii) where the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or prosecutrix, provided leave of the Court is obtained.

The situation in (iii) may arise, for example, in a sexual offence, where the accused not only takes the plea of free consent, but in order to prove this plea, produces evidence which will tend to show that the prosecutrix is a woman of loose character. Leave of the Court should, however, be necessary in this case, to avoid abuse.

(iv) where the accused has given evidence against any other person charged with the same offence.

The last mentioned situation may arise where two or more persons are being tried at the same time and their defences are contradictory. In this case, the accused is really like any other witness against the co-accused.

SECTION 148(2)—TO BE ADDED

The following is a very rough draft of a new sub-section that could be inserted in section 148 to deal with the position of the accused on the subject:—

“(2) An accused person who offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, shall not be asked, and if asked, shall not be compelled to answer, any question tending to

1Para. 83.4, supra.
2See discussion as to section 132.
3Existing section 148 to be re-numbered as section 148(1).
show that he has committed or been convicted of or been charged with any
offence other than that with which he is then charged, or that he is of bad
character, unless—

(i) the proof that he has committed or been convicted of such other
offence is relevant to a matter in issue; or

(ii) he has personally or by his advocate asked questions of the witness
for the prosecution with a view to establishing his own good charac-
ter, or has given evidence of his good character, or

(iii) the nature or conduct of the defence is such as to involve imputa-
tions on the character of the prosecutor or the witnesses for the prose-
cution, provided the leave of the court is obtained for asking the
particular question; or

(iv) he has given evidence against any other person charged with the same
offence."

VI. DEFAMATION

83.25. We have, in our discussion of section 55, considered the question
whether, when a person sues for damages for injury to reputation in respect of
a particular facet of his character, other facets of his character should be allow-
red to be raised. We have recommended the insertion of a suitable proviso to
the Explanation to section 55, with the object of limiting roving cross-examina-
tion under the head of facts which are relevant to character. The broad object
of that amendment is to limit the inquiries into disposition or character by con-
fining them to the aspect to which the libel relates.

For ready reference, the amendment which has been recommended to sec-
tion 55, may be reproduced.

"Section 55, Explanation (Proviso to be added.)

Provided that in a suit for damages for defamation for injury to the
reputation of a person, no aspect of the character of that person, other than
that to which the matter alleged to be defamatory relates, shall be relevant
merely by virtue of this section, but nothing in this proviso shall exclude
evidence relating to any fact which is admissible under any other provision
of this Act."

83.26. This amendment, linked up with section 55, is naturally concerned
with the scope of "relevancy" of facts showing character. The question now
to be considered is, whether, in regard to section 148 also, it is desirable to
give any indication of the approach to be adopted. Section 148 relates to the
questions to be permitted in cross-examination. It must, of course, be noted
that the subject matter of section 148 is wider than that of section 55, in so
far as section 148 covers questions intended to impeach the credit of the wit-
ess, even where they are not relevant to the issue. Section 55 is confined
to facts relevant to the issues, but section 148 is not so confined. In this sense,
their fields differ. Still, we are keen that the court should be vigilant, even
when acting under section 148, in regard to the cross-examination of the plaintiff
in a suit for defamation.

See recommendation as to section 55.
83.27. Section 148 itself throws a duty on the court to determine the propriety of questions likely to injure character and sets out certain guidelines. It would not be inappropriate to draw the attention of the court more particularly to those guidelines in regard to libel suits. To achieve this object, we recommend the addition of an Explanation in section 148 as follows:

"Section 148. Explanation to be added

Where, in a suit for damages for defamation for injury to the reputation of a person, an aspect of the character of that person, other than that to which the matter alleged to be defamatory relates, is likely to be injured by a question under this section, the court shall have particular regard to the question whether, having regard to the considerations mentioned in this section, such question is proper."
CHAPTER 84

OBJECTIONABLE QUESTION IN CROSS-EXAMINATION —
SECTIONS 149 TO 152

SECTION 149

84.1. The Court is, by section 148, vested with power to determine the propriety of questions which are not relevant to the suit or proceeding except in so far as they affect the credit of the witness by injuring his character. Certain matters of detail regulating such questions, namely, the procedure to be followed by the court, and the obligation of counsel putting such questions, are dealt with in sections 149 to 152.

84.2. The first important provision, which deals with the obligation of counsel, is contained in section 149. It provides that no such question as is referred to in section 148—that is to say, a question which is not relevant to the suit for proceeding but is intended to affect the credit of the witness by injuring his character—ought to be asked unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded. It would appear from the illustrations to the section that if a barrister¹ is instructed by an attorney or vakil that an important witness is a dacoit, the instruction is regarded as a reasonable ground for asking the witness whether he is a dacoit. Then, if a pleader is told by a person in court that an important witness is a dacoit and, on being questioned by the pleader, the informant gives the factual reason, that is also a reasonable ground for putting the question. In contrast, witness, of whom nothing whatever is known, cannot be asked, at random, whether he is a dacoit. There are here no reasonable grounds for the question. The case is different if the witness, on being questioned as to his mode of life and means of living, gives an unsatisfactory answer. Thus, whether there are reasonable grounds depends on the facts of the case and in determining whether they exist, several considerations may be material—such as, the source of the information, the importance of the witness, the care taken to check the accuracy of the information, and so on.

It is, thus, primarily the duty of counsel to check the accuracy of the information. This duty is often described as a discretion.

84.3. The importance of this section cannot be over-emphasised. But it must be pointed out that the discretion vested in counsel under the section is of greater importance than the function of the court in checking improper questions. A court can, under section 148, overrule an improper question. But half the damage is done by putting the question. Once a serious defamatory allegation, particularly about a person having been guilty of a serious crime is made, the harm done may be irreparable. An innocent witness would be too eager to answer the question, but the psychological harm to the witness and the impact which the question might have on others who are not prepared to believe the denial by the witness, would be of great magnitude. Therefore, the duty placed on the shoulders of counsel under section 149 to make reasonable enquiries before putting a question which might injure the character of the witness, is a very heavy one. In this sense, section 149, though briefer than section 148, is of far greater importance.

¹These are the expressions used at present.
84.4. The considerations which weigh with the court under section 148 must, of course, be borne in mind by counsel under section 149. He must also bear in mind that the impeachment of a witness by a reference to his bad character is subject to an important limitation, namely, the misconduct alleged must be of such a nature that it affects the credibility of the witness. Even though the scope of the cross-examination as to particular acts of misconduct may have been virtually unlimited at common law, and even though section 146, where it uses the phrase "affect the credit of the witness by injuring his character", may suggest a very wide line of attack on the reputation of the witness, yet the provisions of section 148 and sections 151 and 152 are also important as to the content of the questions that are permissible. The provisions of sections 149 and 150 are equally important as to the duty of the court and as to the principles on which counsel's discretion is to be exercised. Judicial guidance and supervision, by way of an appeal to the counsel's own discretion and sense of propriety, is not therefore ruled out.

The fact that the witness has suffered a previous conviction may have a material bearing on his credibility; but, if the matter is to be considered on principle, the nature of the crime would also appear to be relevant.\(^1\)

84.5. It may be of interest to note that in view of the harm that would be caused to the witness, the original draft of the section in the Evidence Bill, as introduced by Stephen, was much more stringent as regards the obligation of counsel. In substance, that draft provided that no person should be asked a question which affects his character as to matters irrelevant to the case before the court, without written instructions; the court was even empowered to require the production of the instructions where it considered the question improper. It was further sought to be provided that the giving of such instructions should itself be an act of defamation, subject, of course, to the various rules about defamation laid down in the Indian Penal Code. As regards the person asking those questions, though he was not to be regarded as guilty of defamation, to ask such questions without instructions was to be punishable as a contempt of court.

84.6. These proposals were, however, very strongly criticised by the Bar and were also objected to by most of the local Governments. It was pointed out that the difficulty of obtaining written instructions would be practically insuperable. It was also urged that the Bar was already subject to forms of discipline which should, for all practical purposes, be sufficient. Finally, it was stated that it is of the greatest importance that the character of the witnesses should be open to full inquiry, particularly in Indian conditions, and rigid restrictions in this regard might lead to injustice.

The weight of this criticism was realised, and the sections were revised at the Committee stage, and put in the form in which they now appear. A hope was expressed by the Law Member (Stephen) that "they will be admitted to be sound by all honourable advocates and by the public".\(^2\)

84.7. It would be too much to say that the hopes expressed by the Law Member, to which we have referred above, have been fully realised. Cross-examination does, sometimes, travel beyond legitimate limits, owing to insufficient attention paid to the obligation imposed on the Court by section 148 or on counsel under section 149. Section 148, in general, and sections 151 and 152 in particular, expect the court to use its overseeing eye and to disallow questions which are improper, indecent, scandalous, insulting or annoying or

\(^1\) Cross, Evidence (1974), page 235.
\(^2\) Proceedings of the Legislative Counsel of India; Gazette of India, 30th March, 1872, Supplement, Pages 237-238.
needlessly offensive. Of course, nothing which is relevant can be scandalous, as was observed by Subramanian Iyer J. Nevertheless, there do exist certain boundaries beyond which cross-examination ought not to travel, even if the boundaries may not be very well defined.

84.8. The matter requires a balancing of considerations on the facts of each case. That there are two sides to the question was lucidly brought out by Stephen, in his General View of the Criminal Law in England. He pointed out.1

"If a woman prosecuted a man for picking her pocket, it would be monstrous to enquire whether she had not had an illegitimate child ten years before, though circumstances might exist which might render such an inquiry necessary. For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction and (might) have invented the charge for that reason."

The illustrations to the section show the general scope of the reasonable grounds which justify such questions and ought to guide legal practitioners and the court. Necessity and proportion are the two broad principles, which underlie the propositions enacted in the sections on the subject;

It has to be remembered, as was pointed out extra-judicially by Lord Birkenhead,2 that in some cases, the issues are of such a nature that severe and even very wounding cross-examination is required. "Justice in such cases could not be elucidated without the most searching, offensive and exhaustive cross-examination."

The same point of view has been expressed more pithily in the Dharma Shastras, where it is stated3 that the deceit underlying a case has got to be extracted as a physician takes from the body an iron dart by means of surgical instruments.

Finally, we may refer to what Lord Chief Justice Cockburn, responding to that toast of the Judges at a Bar dinner given in honor of the great French advocates M. Berryer, said.4

"My noble and learned friend Lord Brougham, whose words are the words of wisdom, said that an advocate should be fearless in carrying out the interests of his client; but I counsel that with this qualification and restriction that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his clients per fas but not per ne fas. It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent on him to discharge with the immutable interests of truth and justice."5

84.9. If worked in this spirit, the present law should prove to be adequate. Recommendation.

We have no further comments to make on section 149, except that the illustrations could be revised and the expression "advocate" substituted in the section also.

1Stephen, General View of the Criminal Law in England, quoted by Field.
52—131 LAD/NND/77
84.10. Under section 150, if the court is of opinion that any such question was asked without reasonable grounds, the court may, if it was asked by any barrister-pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister-pleader, vakil or attorney is subject in the exercise of his profession. The words referring to barrister etc. should now be replaced by "legal practitioner". This is a purely verbal change.

84.11. There is a point of considerable interest relating to the obligations of the counsel and their protection in respect of questions put to witnesses. Though the matter is one of substantive liability, it has some connection with the law of evidence and may be discussed while on section 150. The question has been extremely discussed in Indian judicial decisions, namely, whether, in India, an advocate can be proceeded against either civilly or criminally for the words uttered as advocate and if so, what is the extent of the protection.

84.12. That counsel enjoy a certain amount of protection is well established. First, as to the rationale, it has been observed:

"It belongs to every subject to this realm in all Courts of Justice to assert and defend his rights, and to protect his liberty and life by the free and unfettered statement of every fact, and make use of every argument and observation that can legitimately—that is, according to the rules and principles of our law—conduce to these important ends. Every man has this right, and may exercise it in his own person—he may commit its exercise to counsel, who takes it as his delegates: its nature and character is not altered by this delegation: it is still the same to be exercised in the same manner and for the same purposes and subject to the same limitation and control as it would be if the party were pleading his own cause. These considerations will at once show the fallacy of the argument that instructions to counsel are the test by which we should try whether or not the line of duty has been passed: no instructions can justify observations that are not warranted by facts proved, or which may legally be proved; and it is the duty of counsel towards their clients to use their own judgment and experience and discretion and as the result, whatever be their instructions, to exclude all topics and observations of which the case does not properly admit. Subject to its just and necessary limits, this right, when duly exercised and directed to its proper purposes, should not be fettered or impeded: for if it be (fettered or impeded), an injury is sustained, not by the advocate, but by the client, and not by the client alone, by the whole community, whose interests are inseparably connected with a right essential to the administration of justice."

The advocate, it has been stated, is not bound to consider the position in life of the person whose conduct he is condemning. His words and acts ought only to be guided by a sense of duty—duty to his client—and by a constant recourse to his own sense of right to guard against the abuse of the powers and privilege entrusted to him.

This, in a broad sense, is the rationale underlying the privilege. But it is necessary to state the position in greater detail with reference to (i) civil liability; and (ii) criminal liability.

1Per Lord Chief Justice Blackburn in Butts v. Jackson, 10 Ir. Law Rep. 120, 123.
84.13. In England, a plaintiff is not permitted to obtain compensation by reason of statements made by the defendant in certain situations, regardless of the motive of the person making the statement and regardless of the truth of such statement. The reason for such immunity lies in public policy—without this total protection from actions for libel and slander, the process of the law itself would be seriously inconvenienced. Among the statements absolutely privileged are those made during and connected with the trial of any action in court. This privilege extends to judge, jury, parties, witnesses and advocates.

84.14. The leading English case on the subject of privilege of counsel is Munster v. Lamb.¹ In that case the defendant, an advocate, was sued for having, while defending an accused, used expressions suggesting that the plaintiff was accustomed to keep and use drugs for immoral purposes. Brett, M.R., observed:

“This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as advocate for a person charged in that court with an offence against the law. For the purpose of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, i.e., to say, not with the object of doing something useful towards the defence of his clients; I shall assume that the words were uttered without any justification or even excuse and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause: and I shall assume that the words were irrelevant to every issue of fact which was contested in the court when they were uttered. Nevertheless, inasmuch as the words were uttered with reference to and in the course of a judicial enquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been. If upon the grounds of public policy and free administration of the law, the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes, judge, witness and counsel, it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel’s position is one of the utmost difficulty. He is not to speak of that which he knows. He is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to urge as best he can without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position, he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he will have his mind so embarrassed that he could not do the duty which he is called upon to perform. That rule is founded upon public policy. With regard to counsel, the question of malice, bona fide and relevancy, cannot be raised. The only question is whether what is complained of has been said in the course of the administration of the law.”²

84.15. The position in India is the same so far as civil liability is concerned. For some time, a doubt existed as to whether advocates, parties and witnesses have an absolute privilege or only a qualified privilege, so far as civil liability is

---

concerned. Though the language of the section of the Indian Penal Code suggested that the privilege was only qualified, and therefore it was thought that whether it was a civil case or a criminal case, the privilege was only qualified, the privilege is now regarded as absolute.

84.16. In one civil case, the Bombay High Court held that a member of the Bar has no absolute privilege and that an advocate who makes defamatory statements in the conduct of a case has no wider protection than a layman. This view, with respect, is not a well considered one, and is opposed to the general trend of authority.

84.17. The present view is that the privilege of parties, witnesses and counsel is absolute as regards civil liability.

84.18. In England, the protection for such statements is absolute even in criminal cases. The matter is governed by the same rules whether it be a party, witness or counsel. In England, the right of free speech is, having regard to the occasion, allowed to prevail over the right of reputation. In the Royal Aquarium case,1 Lopez L.J., observed:

"The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in Office: that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. This absolute privilege has been conceded on the ground of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them."

84.19. The position in India in criminal cases is, however, different. The matter is governed by the Indian Penal Code — section 499, 7th and 9th Exceptions. These Exceptions confer only a qualified privilege — qualified because good faith is an essential ingredient of the Exceptions in question. Good faith, as defined in section 52 of that Code, postulates —

(i) honesty of motive plus

(ii) due care and attention.

Since the use of the occasion for an improper purpose takes the matter outside the realm of good faith, the privilege cannot be described as absolute and must be described as a qualified one — if one has to use terminology that is employed in dealing with civil liability. Malice, however, is not presumed. Rather, there is, to begin with, a presumption of good faith on the part of counsel.


(a) Thiruvenkata v. Thiripurasundari, I.L.R. 49 Mad. 728; A.I.R. 1926 Mad. 906;
(c) Nikunja v. Harendra, (1913) I.L.R. 41 Cal. 514;
(d) Banerjee v. Anukul, (1928) I.L.R. 55 Cal. 85; A.I.R. 1927 Cal. 823;
(e) Bhikumber v. Becharam, (1888) I.L.R. 15 Cal. 264;
(f) Woolun Bibi v. Jazarat, (1900) I.L.R. 27 Cal. 262;
(g) Re Arha Nandu, (1906) I.L.R. 30 Mad. 222;

1Royal Aquarium etc. Society Ltd. v. Parkinson, (1892) 1 Q.B. 431, 451.
84.20. Judicial decisions illustrate the position. Where a pleader was
prosecuted for the use of defamatory words in the course of his address (calling
the witness "liables") during the trial of a suit, and convicted of defamation,
it was held, reversing the conviction and sentence, that in the absence of express
malice (which was not to be presumed), the pleader was protected by the ninth
Exception to section 499.1

84.21. In considering whether there was good faith, i.e., under section 52,
Indian Penal Code, due care and attention of the person making the imputation
must be taken into consideration. The good faith of an advocate is well
expressed by the Master et Roils (Lord Esher) in Munster v. Lamb: 2 "The
advocate speaks from instructions; he reasons from facts sometimes true, sometimes
false. He does not express his own inferences, his own opinion or his
own sentiments, but those which he desires the tribunal, before whom he appears,
to adopt. This duty the law allows, almost compels him to perform. Such
being his duty, it seems that where express malice is absent (and it ought not
to be presumed) "a court having due regard to public policy would be extremely
cautious before it deprived the advocate of the protection of Exception 9 to
section 499, I.P.C."

It is clear from the reported decisions that the presumption in the case of
pleaders asking questions in cross-examination is that such questions are put
in good faith for the protection of the client's interests within the Exception
to section 499, Indian Penal Code.

84.22. It must be then presumed that the counsel acted honestly and without
malice. If this were not so, counsel could not possibly discharge their
duties to their clients. If a counsel renders himself liable to a prosecution for
defamation every time he makes serious allegations in a pleading on
instructions, it would be quite impossible for him to carry on his duties at all. He
is under a duty to his client to plead the allegations which his client
makes, always provided that they are not so wild and reckless that no one
would possibly accept them.3

84.23. The Court should presume, when a complaint is made against a legal
practitioner for defamation, that the remark was made on instructions and in
good faith, and that there can be no defamation unless the circumstances showed
that the remark was made wantonly, or from a malicious or private motive.4

84.24. Regarding the extent of immunity which an advocate enjoys under
the 9th Exception to section 499, Indian Penal Code, for words uttered in his
capacity as advocate, the following observations of Mookerjee, A.C.J., in
Satis Chandra v. Ram Dayal 5 are pertinent.

"In this country questions of civil liability for damages for defamation
and questions of liability to criminal prosecution for defamation do not,
for purposes of adjudication, stand on the same basis, as regards the former,
we have no codified law, as regards the latter, relevant provisions are
embodied in the Penal Code."6

1In re Nagaradas, (1894) I.L.R. 19 Bom. 340.
2Munster v. Lamb, 11 Q.B.D. 588, 603.
3See In re Nagari Trikamji, I.L.R. 19 Bom. 340.
(b) Muhammad Taqi v. M. A. Ghani, A.I.R. 1945 Lah. 97.
7Satis Chandra v. Ram Dayal, 48 Cal. 388; A.I.R. 1921 Cal. 1; 59 L.C. 143; 22 Cr.
L. 1, 51 (S. B.);
84.25. The position appears to be that the immunity which an advocate enjoys in a criminal proceeding for words uttered or written in the performance of his functions as an advocate is not in the nature of an absolute privilege, but of a qualified privilege. It is highly improper for counsel to misuse the privilege of free speech which they enjoy when examining witnesses or presenting arguments for the consideration of the Court. They owe it to the Court and to the profession, of which they are members, not to indulge in their arguments in defamatory remarks of a gratuitous nature about the complainant, accused or witnesses in the cases, entirely irrelevant for the purpose of protection of the interest of the party whom they are representing. The weight of authorities appears to be in favour of the view that such gratuitous remarks reflecting on the conduct of a party, if made with a malicious intent to lower him in the estimation of his fellow-men in a case where the party’s character is not in issue or relevant for the purposes of a right determination of the case, would not protect counsel from criminal defamation.

84.26. The responsibility of a lawyer for putting defamatory questions was thus dealt with by Bardswell, J., in Bashyan Ayyangar v. Andal Ammal:

"Where a pleader is charged with the offence of defamation punishable under section 500, I.P.C., in that he unnecessarily in cross-examination put to the complainant, who was a witness in a criminal case, certain questions which imputed immoral character and there is no allegation, and much less proof, that the pleader in putting the questions was actuated by any motive of private malevolence and was not acting in the interests of his clients, the pleader is entitled to the benefit of Exception 9 to section 499, I.P.C., and the charge which imputes no ill-faith but merely refers to the questions as having been put unnecessarily cannot stand and that therefore the entire proceedings against the pleader ought to be quashed."

These observations, with respect, state the law correctly.

84.27. It is, however, difficult to agree with the dicta in Maaras in Sullivan v. Norton and some later cases of that High Court, that the privilege is absolute even in criminal cases. Not only does section 499 of the Indian Penal Code give an indication to the contrary, but also section 2 of that Code puts the matter beyond doubt by providing expressly that all acts punishable under the Code shall be punished "under the Code and not otherwise". The invocation of rules of the English common law in relation to offenses under the Code is excluded by section 2, where the matter is governed by an express provision.

84.28. Questions relating to civil liability for defamation are determined with reference to the rules of the English common law, to the extent to which those rules are shown to be applicable. This is on the principle that where no specific statutory directions are given, judges act on justice, equity and good conscience, and "justice, equity and good conscience" — generally, but not invariably, — mean the principles of English common law applicable to a similar state of circumstances. But the position in respect of criminal liability

---

See also in re Nagarji Trikamji, I.L.R. 19 Bom. 340; Emperor v. Ganga Parsad, I.L.R. 29 All. 685.

5. Mayor of Lyons v. East India Company, (1836) 1 Moore Indian Appeals 176.
for defamation in India is not precisely the same. In cases of criminal prosecution for defamation, the court is bound to apply the codified law of India as contained in section 499 of the Indian Penal Code; and Exceptions 7 and 9 to that section (which are the Exceptions mainly relevant to the situation under discussion) recognise only a qualified privilege. With the exception of certain Madras rulings, the general trend of decisions in India now is that the privilege of counsel is a qualified one, being governed by the Penal Code.

84.29. We have discussed these points relating to the privilege of counsel in order to show how important it is that counsel must exercise due care in putting questions making imputations against witnesses. The existence of a privilege from legal liability — whether qualified or absolute — does not affect their moral accountability to society as the members of an honourable profession. In fact, the greater the exemption, the higher may be the ethical standard expected by society of those so exempt.¹

84.30. In Genden Lal v. Rex, the applicant in the revision was one Lala Gendal Lal. He (the applicant) was an accused person in a case, Habib v. Gendal Lal, under section 324, Penal Code, in the Court of the Bench Magistrates at Muzafarnagar. Habib (the complainant) was represented in that case by an advocate, Mr. Banarsi Das. It was alleged that, while arguing the case for Habib, Mr. Banarsi Das made two defamatory statements regarding Gendal Lal. The first statement was that he, Gendal Lal, had abducted a Khatri woman. The second statement was that he had illicit connection with a Jain woman. These statements were quite unnecessary for the purposes of argument in the case and the case of Gendal Lal in the present revision was that they were deliberately made with a view to lowering him in the estimation of his fellow men. The lower Court had acquitted Banarsi Das of defamation, presumably under section 499, 9th Exception, I.P.C.

Dismissing the application for revision, Sapru J. made these observations:

"There is not the least doubt that Mr. Banarsi Das was perfectly reckless in the manner in which, in the course of his argument, he attacked the accused, Gendal Lal. From the point of view of presenting the case for his client, it was absolutely unnecessary for him to make statements of a prima facie defamatory character against the applicant, Gendal Lal, particularly when in cross-examination such questions which would have been in any case of an irrelevant nature had never been asked of the witnesses produced on his behalf. The only excuse that can be advanced for Banarsi Das and which has appealed to the Courts below is that these reckless statements were made by him in a moment of excitement, without premeditation and forethought. The reason for this excitement appears to have been the fact that counsel for the opposite party had in the course of his arguments indulged in an attack on his client. It is because of this consideration and the fact that the lower courts were not satisfied that he was actuated by malice that I have not considered it proper to interfere in this revision. Further this Court is reluctant to interfere in applications by private parties for revision against orders of acquittals."

He added that though technically, the case did not fall within section 500, I.P.C., yet the conduct of Banarsi Das was not worthy of a member of one of the most honourable professions in the world.

¹Satish Chandra v. Ram Dayal, A.I.R. 1921 Cal. 1, 11-13 (Reviews case).
²Genden Lal v. Rex, A.I.R. 1946 All. 409 (Sapru J.).
84.31. With respect, we may point out that if the statement of Banarsi Das was "reckless", then he could hardly claim exemption from criminal liability. The exemption requires good faith, and good faith requires due care and attention. Comments made recklessly cannot be privileged within the Ninth Exception to section 499, I.P.C.

84.32. The above discussion was intended to deal with certain questions allied to the subject matter of section 150. So far as the section is concerned, only a verbal change is needed, regarding the expressions "barrister" etc. Those expressions should be replaced by "advocate".

84.33. The following redraft of section 150 is recommended:

**REVISED SECTION 150**

"150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any advocate, report the circumstances of the case to the High Court............."

**SECTION 151**

84.34. The gist of section 151 can be thus expressed. The Court has a power to forbid scandalous or indecent questions or inquiries, unless they relate to facts in issue or are necessary to find out whether facts in issue existed. In practice, the question that arises most frequently with reference to the prohibition in this section is whether the inquiry is scandalous and irrelevant, or whether it is relevant, for nothing can be rejected as scandalous if it is relevant.

According to Taylor —

"The law excludes, on public grounds, evidence which involves the unnecessary disclosure of matter that is indecent, or offensive to public morals, or injurious to the feelings of third persons. A disclosure is for this purpose 'unnecessary' whenever the parties themselves have no interest in the matter, except what they have impartently created. The mere indecency of disclosures will not exclude them, where the evidence is necessary for the purpose of civil or criminal justice; as, on an indictment for a rape; or on a question upon the sex of one claiming an estate tail, as heir male or female; or upon the legitimacy of one claiming as lawful heir, or on a petition for dissolution of marriage, for judicial separation, or for damages on the ground of adultery. But where the parties have impartently interested themselves in a question, tending to violate the peace of society by exhibiting an innocent third person in a ridiculous light, or to disturb his peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers or contracts, respecting the sex of a third person, or upon the question whether an unmarried woman has had a child."

84.35. There are cases in which the subject matter of the enquiry is such that questions will have to be asked which cannot be fit for the drawing room, or which may appear to be scandalous. "Nothing could be more scandalous than a wife proclaiming her infamy from the witness box; but the latter part of the section expressly provides that if such questions relate to matters in issue, they shall be allowed." These observations were made in a Bombay case where a woman claimed maintenance for her illegitimate child.

2See introduction.
3The words "or other authority" are to be omitted. The High Court will take such action as it may think fit.
4Emphasis supplied.
5Taylor, section 949.
6Rosario, I.L.R. 18 Bom. 468-470.
84.36. In a Calcutta case also, it was held that if the indecent or scandalous questions relate to facts in issue or to matters necessary to be known to determine whether or not facts in issue exist, they must be allowed. In that case, during the examination of one of the defendants by the plaintiff, a question was put whether she was made pregnant by a certain person. The question was objected to, but the plaintiff contended that it was relevant, his case being that the witness did not inherit the property by reason of her unchastity during the life time of her husband. The form in which the question was asked did not show what period it referred to. Hence the case was remanded.

"If the plaintiff's case was that she did not inherit the property of her husband by reason of her unchastity during his life time, then the question would be relevant. If, however, it was asked for impeaching her credit as a witness, the Court will have to consider the provisions of sections 146 and 148 to 152."

84.37. In cases of this nature, the questions cannot be prohibited because they relate to facts in issue. All that can be done to mitigate the "scandal" is to exercise such power as is given by the law to the court to hold the proceedings in camera.

84.38. We do not recommend any amendment in the section, since the problems referred to above are concerned with the application of the section rather than with its content.

**SECTION 152**

84.39. Allied to the prohibition in section 151 is that contained in section 152. The court has, under section 152, a duty to forbid two kinds of questions—(a) questions which are insulting or annoying, or (b) questions which, though proper in content, are needlessly offensive. The first group emphasises the improper content of the question. The second group is concerned with the offensive form of the question. In regard to the second group of questions, it is to be noted that even if the content of the question is proper, the form may be objectionable. Propriety of the question, so far as its content is concerned, is governed (apart from questions relevant to the issues) mainly by section 148, vide the words "such questions are proper" and "such questions are improper" in the various clauses of that section. It is not, however, enough that the content is one permissible by the tests laid down in section 148. The form must also avoid "needless offence".

84.40. This section thus reflects the regard of the law for the susceptibilities of the witnesses — and, sometimes, for the susceptibilities of third parties also. It may be noted that in England, on November 6, 1950, the Bar Council approved rules with regard to cross-examination, of which the first Rule is material, and reads—

"(1) In all cases it is the duty of a barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person, and to exercise his own judgement both as to the substance and (as to) the form of the questions put."

No further comments are needed on this section, which needs no change.

---

1Subala v. Indra Kumar, A.I.R. 1923 Cal. 315(2), (Chatterjee & Pearson, JJ.).
2Archbold, Criminal Pleadings, Evidence and Proof (1966), page 530, para. 1389.
CHAPTER 85

CONTRADICTION AS TO MATTERS AFFECTING CREDIT —
SECTION 153

1. INTRODUCTORY

85.1. In order that the inquiry may not travel too far into collateral matters, certain restrictions have been considered desirable. A witness can be cross-examined as to credit; such an examination does introduce collateral materials. What is to happen if the witness denies the damaging imputation introduced in cross-examination? Can an inquiry be held in detail into that imputation? Obviously, this may prolong the trial. Section 153, therefore, prohibits the contradiction of a witness as to matters affecting his credit, except in certain
specified cases. We shall come to the exceptions later. The general rule underlying the section is that a witness cannot be contradicted on collateral matters, but only on matters relevant to the questions at issue.

85.2. The general principle underlying the section can be traced to the leading English case of *A. G. v. Hitchcock*, which lays down that a witness cannot be contradicted on collateral matters.

The defendant in that case was charged with using a cistern for making malt without complying with various statutory requirements. One Spooner gave evidence of the use of the cistern and was asked in cross-examination on behalf of the defendant whether he had not told the cook that the excise officers had offered him twenty pounds to say that the cistern had been used. Spooner denied that he had ever made such a statement, and it was held that the defendant could not ask the cook to narrate the alleged conversation. If Cook had been able to prove that Spooner had actually received a bribe from the excise officers, his testimony would have been admissible because it would have tended to show bias under an exception to the rule prohibiting contradictory evidence on collateral issues.

Pollock C.B. observed in that case —

"The test whether a matter is collateral or not is that: if the answer of a witness is on a matter which you would be allowed on your own part to prove in evidence—if it have such a connection with the issues, that you would be allowed to give it in evidence—then it is a matter on which you may contradict him.";

85.3. The effect of the judgment in *Hitchcock’s case* is aptly stated in the following passage from an American author:

"Independent evidence may be given to prove a self-contradictory statement by a primary witness only if (a) the statement contradicts testimony by the primary witness about a matter directly in issue in the litigation, or (b) the statement contradicts testimony by the primary witness as to ‘those matters which affect the motives, temper and character of the witness……… with reference to his feelings toward one party or the other."

---

3. The sub-quotation is from the Judgment of Pollock C. B. in *A. G. v. Hitchcock*, (1847) 1 Ex. 91.

816
85.4. The rule against contradiction on collateral matters is intended to present side issues from arising. The facts are collateral; therefore the answers are final. The court is free not to believe the answers given by the witness. But in order to persuade it not to believe them, further evidence is not permissible.

If the courts are to be spared the task of considering, on "most imperfect material", issues which have no bearing upon the matters really in contest between the parties, some limitations ought to be recognised. This is what section 153 seeks to achieve.

85.5. The reason of the rule which restricts the right to contradict is, that it is an object of great importance to confine the attention of the court as much as possible to the specific issues. Without some such rule, many collateral questions of fact might be raised in the course of a long trial; and the specific questions to be determined might be lost sight of. At the same time, it is desirable that any evidence should be admitted which may assist in determining the respective value of conflicting testimony.

II. SCOPE AND APPLICATION

85.6. An Australian case may be cited to illustrate the application of the principle enacted in the section. In Paddington v. Bennett, a person claiming to be eye-witness of an accident explained his presence at the spot by stating that he was carrying a message from a bank to J. The opposite party attempted to produce evidence to prove that J had not operated his account with the bank on that day—the suggestion being that the witness was lying when he said that he was carrying a message to J. The evidence was ruled out as inadmissible by the High Court of Australia. It laid down that if a question in cross-examination affects only the credit of the witness and is not relevant to the matters actually in issue, the answers of the witness cannot be contradicted by other evidence, except in certain exceptional cases.

85.7. We have already referred to the usual test for what is not a collateral fact, stated by Pollock C.B. in A.G. v. Hitchcock.

If the answer of a witness is a matter which you would be allowed on your own part to prove in evidence, then it is a matter on which you may contradict him. Thus, collateral facts are those which are relevant to credibility rather than to the main issue.

III. EXCEPTIONS

85.8. To the rule prohibiting the contradiction of the evidence of a witness as to matters affecting credit, there are certain exceptions—apart from the rule permitting contradiction by the previous inconsistent statement of the witness himself. The first important exception is that relating to previous conviction.

It may be noted that one of the important modes of challenging the credibility of a witness is by giving evidence of previous conviction of the witness as an offence. Where a witness, having been asked a question about his previous conviction in order to impeach his credit, denies having been so convicted, the first exception to section 153 permits evidence contradicting the denial made by the witness. Technically, of course, a previous conviction of a witness (unless

1Heydon, Cases and Materials on Evidence (1972), page 434.
3 R.H.C.R. 96.
4Paddington v. Bennett (1940) 63 C.L.R. 533.
5M. G. v. Hitchcock, (1847) 1 Ex. 91, 99.
relevant under some specific provision) is a collateral matter and a discussion thereof might lead the court into a consideration of matters too remote. At the same time, the law recognises that, in practice, the proof of a previous conviction does not take much time and the materials available for such proof are precise enough so as to avoid causing prolonged controversy. Under the Code of Criminal Procedure so far as is material, a previous conviction may, in addition to any other mode provided by any law for the time being in force, be proved—

(a) by an extract certified under the hand of the officer having the custody of the records of the court in which such conviction or acquittal was held, to be a copy of the sentence or order, or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered,

Together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

85.9. A previous conviction need not be of a kind directly reflecting on the veracity of the witness. At the same time, regard must also be had to the words of section 148(2), under which a certain amount of connection between the previous conviction and credibility of the witness is contemplated. As has been pointed out by Cross, little attention would normally be paid to the testimony of a confirmed perjurer, but the veracity of a reckless motorist concerning matters other than his own driving might be considered beyond reproach. Where proof of a previous conviction is permissible as affecting credit, contradiction of the denial of previous conviction is allowed, because of the practical considerations mentioned above.

85.10. There is no particular restriction as to the kind of previous convictions that can be raised. In England, the matter has been covered by statute—section 6, Criminal Procedure Act, 1865,—which applies to civil cases also. The section reads—

"A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction."*

Although there is no direct authority on the point, the statute (section 6, Criminal Procedure Act, 1865) is usually taken to mean what it says, so that a witness may be asked about any conviction, whether it would ordinarily be thought relevant to credibility or not, and the conviction may be proved if it is not admitted.*

It would appear that the position would be substantially the same in India also, having regard to the wide language of the relevant Exception to section 153.

---


*Criminal Procedure Act, 1865, section 6.


*Olifford v. Olifford, (1961) 5 All. E. R. 231, 232; Mard v. Sinfeld, (1881) 49 L. J. Q. B. 695; (deciding that a conviction for embezzlement may be proved against a witness in a commercial case, though going only to credibility).
85.11. The second exception to the rule against contradiction on collateral impartiality.

facts permits the statement of a witness as to the non-existence of factors leading
to a bias to be contradicted. This is apparently on the assumption that the
partiality of a witness is such an important flaw that it must, in all probability,
seriously shake his credit, and in view of its important effect on the persuasive
force of the evidence, contradiction should be allowed even though it is a
collateral fact.

85.12. On a consideration of the various aspects relevant to the subject, we no change.
do not think that the section needs any change.
CHAPTER 86
CROSS-EXAMINATION OF ONE’S OWN WITNESS — SECTION 154

I. INTRODUCTORY

86.1. In order to understand the significance of section 154, it is necessary to revert to the definition of cross-examination. According to section 138, cross-examination means the examination of the witness of an adverse party. An adherence to that definition implies that a party cannot cross-examine his own witness. In fact, the very word “cross” implies the array of the party examining and the witness examined on opposite sides, as it were.

That a party should not be allowed to cross-examine his own witness is a proposition which is founded on two postulates. (1) The party calling knows, at least in broad terms, what the witness is going to say and (2) what the witness is going to say will help the party calling him. Occasions, however, do arise where the first or the second postulate is found to be inapplicable on the facts. The story narrated by the witness at the trial differs substantially from the story which he was expected to narrate. A witness makes a statement in court which is entirely contradictory to what he was expected to depose. Although, nominally, he is a witness “of the party”, virtually he ceases to be so because the version of facts which the party producing or summoning him expects him to present to the court is not presented and something contrary is deposed to. If, in such a situation, the strict rule that a party can put to his witness only those questions that are allowed in examination-in-chief is adhered to, truth may be prevented from coming on the record. Not only would the situation be unfair to the party concerned, but also it is likely to cause injustice in the ultimate. In any case, the party calling the witness may be led to nourishing a feeling of injustice. This is not to say that in every case where a witness gives an unfavourable account, the party calling should be allowed to cross-examine him. There are other considerations to be taken into account. Nevertheless, it cannot be denied that the situation where a witness departs from what he was expected to depose to, is an exceptional one. Exceptional situations may require a relaxation of the ordinary rule, or at least justify a consideration of the question whether relaxation ought not to be allowed.

86.2. To provide for such exceptional cases, section 154 lays down a special rule, providing that the court may, in its discretion, permit the person who calls a witness “to put any questions to him which might be put in cross-examination by the adverse party”. The language employed carefully avoids calling it cross-examination, because that would conflict with the definition in section 138. But the object of avoiding injustice is, in substance, achieved.

86.3. Though the language is restricted as above, the rule in the section is a wide one. It does not, in the first place, require, as a condition precedent, that there must be a formal declaration of a witness as “hostile”—though that is the expression often used in practice. Secondly, application of the section is not confined to cases where a witness deliberately and corruptly “betrays” the cause of the party sponsoring him. The witness may be a perfectly honest one, having no animus against the party calling him. Yet, if there is a possibility of injustice, there is a scope for applying the section. The matter rests in

See note in 34 C. W. N. 114.

820
the discretion of the court, which is not trammelled by any rigid rules with pigeon-holes for particular situations. Truth is paramount, and all ordinary rules of procedure must yield to it if the circumstances so require. That is the supreme guideline which the court bears in mind.

Let us quote a Mysore judgement where the position is dealt with at some length —

"In normal cases where it can fairly be assumed that a party calling a witness represents to the court that he is a trustworthy witness, an occasion for the party calling him to seek permission under section 154 of the Evidence Act can arise only where he unexpectedly gives an answer which is adverse to his case. Even there, it is not enough if the party feels that the witness is hostile to him: it is necessary that the court should come to entertain an opinion that the witness has such hostile animus against the party calling him as to be inspired by a desire to speak the untruth or not to speak the truth.

"Hence, in such cases, an element of surprise of the type mentioned above becomes the starting point for a consideration by the court of the question whether it should exercise its discretion under section 154 and permit the party calling a witness to cross-examine him.

"It is with reference to such cases that Rowland J., observed in Sachidanand Prasad v. Emperor, that permission under section 154 could hardly be refused when any witness makes an unexpected statement adverse to the case of the prosecution. As I read the observation, it means that an attempt on the part of the witness to depart from what is tentatively believed to be true is open to the suspicion that he may be departing from the truth, making it necessary to test his veracity by cross-examination by the party to whose detriment his unexpected departure may operate."

Since it is not possible to catalogue the exceptional circumstances where the above considerations may have to be borne in mind, the section has been couched in a wide and elastic phraseology.

The width of the section will be still better brought out if it is contrasted with the English law."

II. ENGLISH LAW

86.4. There is, in England, a discretion vested in the trial judge to impeach English law. the credit of one's witness to declare a witness hostile. This is derived from section 22 of the Common Law Procedure Act, 1854. An "adverse" witness, in this context, is one who, in the opinion of the trial judge, manifests that he has no desire to speak the truth at the instance of the party calling him. 4

86.5. The Common Law Procedure Act of 1854, section 22, provides:—

"22. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence or by the leave of the Judge, prove that he has made at other times a statement inconsistent with the present testimony; but before such

3Emphasis supplied.
4Para. 86.8, Infra.
5Price v. Manning, (1889) 42 Chancery Division 372.
last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

86.6. Section 22 of the English statute quoted above, uses the expression "in case the witness shall prove adverse". The question was then debated as to what was the meaning of the word "adverse" in the English statute. Did that word mean that the witness himself shall prove hostile to the party calling him, or that the testimony he gives shall be adverse? Upon this question there appear to have been conflicting decisions in England. In some cases it has been held that a witness is adverse when, in the opinion of the Judge, he bears a hostile feeling to the party calling him (as indicated by his attitude and demeanour and mode of answer) and not merely when his testimony contradicts his "proof".

But the contrary view has been taken in several other cases.

86.7. It would not, therefore, be correct to say that in England it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination and impeachment. "The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition; and if he be as true as well as treacherous, he will take care to conceal his true sentiments from the Court." In the language of Lord Denman, "it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose to the truth when brought into Court and in the meantime is persuaded to swear, when he appears, to a completely inconsistent story."

86.8. On a comparison with section 154, it appears that in India, the Legislature has given two indications that any rule upon this point should be of a liberal character. (a) It has placed no fetter on the discretion of the Court to allow cross-examination under the provisions of section 154; and (b) it has relaxed the rule of English law that a party shall not in any case be allowed to impeach his witness's credit by general evidence of his bad character. Under the provisions of section 154, the party calling a witness may, with the permission of the Court, impeach his credit by cross-examination by putting all the questions mentioned in section 146 and may, under the provisions of section 155,

---


2In Coles v. Coles, (1868) 1 R. P. & D. 71, Wilde, K. O., adopting counsel's definition, said: "An adverse witness is one who does not give the evidence which the party calling him wished him to give. A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court." "Proof" here means what he is expected to prove.

3R. v. Little, (1838) 15 Cos. 319 (1838); where the objection was expressly taken that there was nothing in the demeanour of the witness to show that she was hostile; yet the evidence was admitted per Dav. J., in consultation with Cave J. Amstell v. Alexander, (1867) 16 L. T., N. S., 330 (1867); 4Greenough v. Eccles, 5 C. B., N. S., 786, it is laid down that to enable a party to contradict his own witness, the witness must appear not only unfavourable, but actually hostile. There must be some exhibition of animus which this witness does not seem to exhibit. He is, however, in my opinion, adverse to produce as a witness this witness does not seem to exhibit. He is, however, in my opinion, adverse to produce as a witness.


6Woodroffe.

7Greeneough v. Eccles, 5 C. B., N. S., 802.

The meaning of this rule is that a party, after producing a witness, cannot prove him to be of such a general bad character as would render him unworthy of credit.
impeach his credit by the independent testimony of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit. It is, of course, clear that the mere fact that a witness tells two different stories does not necessarily and in all cases show him to be hostile.1 But it is also clear that2 where these conflicting statements involve great discrepancies and contradictions and are the outcome of fraud, dishonesty and treachery on the part of the witness, the party calling him should be permitted to cross-examine him under this section as to the fact and cause of the discrepancies and contradictions, and, if necessary, to impeach his credit under section 155 by substantiating the facts contained in the questions put to him by independent testimony. “If a party, not acting himself a dishonest part, is deceived by his witness — or if a witness professing himself a friend, turns out an enemy, and after promising proof of one kind gives evidence directly contrary — is the party to be restrained from laying the true state of the case before the Court? The common sense of mankind might be expected to answer this proposition in the negative, and to decide that the true state of the case should be made known.”

III. QUESTION OF EFFECT

86.9. So much by way of introduction and comparison. We may now turn to one important question, which seems to have given rise to a fluctuation of views. The question, formulated in very broad terms, is this. When a witness is allowed to be cross-examined (declared to be “hostile” — to use the expression in general use though not accurate), can the party calling him rely on so much of his evidence as is still favourable to that party?

86.10. The recent judgment in Jajir Singh v. The State, (Delhi Administration) lends importance to this question. The observation in that judgement may appear to approve the view taken in Khliruddin Sonar and Others v. Emperor, that when a hostile witness is cross-examined by the party calling him, the result is to discredit his evidence altogether.

In Jajir Singh’s case, two brothers were tried for the murder of one Harnek Singh. Two witnesses gave evidence in support of the prosecution. Swaran Singh departed from the prosecution story and stated that he did not know the name of the assaultants and added that only one of them was present in the court and that was Karam Singh.

86.11. Commenting on the evidence of Swaran Singh, the Supreme Court observed:

“Swaran Singh (P.W. 11) was also examined on behalf of the prosecution but his evidence is of no help to the prosecution because he went back on the story of the prosecution and was permitted to be cross-examined on behalf of the prosecution. It is now well settled that when a witness, who has been called by the prosecution, is permitted to be cross-examined on behalf of the prosecution, the result of that course being adopted is to discredit that witness altogether and not merely to get rid of a part of his testimony. See Khliruddin v. Emperor.”

These observations were obiter, because Swaran Singh’s evidence had been rejected by two successive courts below.

2Woodroffe.
3Ph. & Arn., Ev., S. 555 cited by Woodroffe.

53—131 LAD/ND/77
06.12. In a later decision of the Supreme Court on the subject, the accused, Bhagwan Singh, who was a C.I.D. Police constable, attempted to give a bribe of Rs. 1000/- to Head Constable Jagat Singh for obtaining his favour for certain persons from whom stolen gold coins and gold bangles were recovered by Jagat Singh. The accused Bhagwan Singh was arrested in the process of offering the bribe to Jagat Singh and was convicted under section 165-A, Indian Penal Code.

Jagat Singh, the Head Constable, was declared hostile on the request of the Public Prosecutor during the trial of the case, as he did not support the prosecution case fully in his examination-in-chief.

The main ground of appeal argued before the Supreme Court by the counsel of the accused was that since the prosecution case rested principally upon Jaat Singh's testimony, the whole edifice was destroyed on that witness being declared hostile and the appellant was entitled to an acquittal.

06.13. The Supreme Court rejected this contention of the defence counsel and held that the fact that the Court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as what is described as a hostile witness, did not completely efface his evidence. The evidence remained admissible in the trial and there was no legal bar to basing a conviction upon his testimony if corroborated by other suitable evidence.

06.14. In Sat Pal, the following observations were made by the Supreme Court:

"If, in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."

"It was in the context of such a case, where, as a result of the cross-examination by public Prosecutor, the prosecution witness concerned stood discredited altogether, that this Court in Jaet Singh v. State, with the aforesaid rule of caution — which is not to be treated as a rule of law — in mind, said that the evidence of such a witness is to be rejected en bloc."

06.15. It may be noted that in an earlier case of Narayan Nathu Naik v. Maharashtra State, the court actually used the evidence of the prosecution witnesses who had partly resiled from their previous statements, to the extent they supported the prosecution, for corroborating the other witnesses.

Both logic and common sense seem to justify the view that the fact that a witness is permitted by the Court to be subjected to questions of the nature described in section 154 ought not to preclude the party calling him from relying on the favourable statements. Of course, so much of the evidence as is unfavourable should either be explained or met, or taken as it is. But that is a separate question.

06.16. So far as the rulings of the High Courts are concerned, the position is settled by a series of decisions, of which the Calcutta Full Bench ruling in Profulla Kumar Sarkar is only one example.

---

2See also Sat Paul v. The State, A.I.R. 1976 S. C. 294 (February). (Bhagwati & Sarkaria, J.J.)
3Sat Paul v. The State, A.I.R. 1976 S. C. 294 (Feb.) (Bhagwati and Sarkaria, J.J.)
6Profulla Kumar Sarkar and others v. Emperor, A.I.R. 1931 Cal. 401 (P.B.).
The narrow view originated in the Scottish case of Faulkner v. Brine.¹ The current English view, however, is the opposite.

86.17. Some High Court held: “When a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution under the provisions of section 154 of the Evidence Act, the result of that course being permitted is to discredit that witness altogether and not merely to get rid of a part of his testimony.”

86.18. But the opposite view was established by a Full Bench decision of the Calcutta High Court.² Other High Courts have taken the same view. These included Allahabad,³ Bombay,⁴ Calcutta,⁵ Madhya Pradesh,⁶ Madras,⁷ Mysore,⁸ Lahore,⁹ Orissa,¹⁰ Patna¹¹ and Rajasthan.¹²

86.19. It seems to us that having regard to the fluctuation of views on the subject, it is desirable to restate the position in positive terms in the section, the point being one of a recurring nature and of practical importance. Both logic and common sense require that there should be no bar against a party relying on the evidence of a “hostile” witness. Circumstances of the case may throw doubt on the veracity of the entire evidence. But there should be no general prohibition.

IV. RECOMMENDATION

86.20. In the light of the above discussion, we recommend the addition of the following sub-section in section 154²—

“(2) Nothing in this section shall disentitle the party so permitted to rely on any part of the evidence of such witness.”

²Profuila Kumar, A.I.R. 1931 Cal. 401 (F.B.).
³Babu Ram v. Emperor, A.I.R. 1937 All. 754.
¹³Present section 154 be re-numbered as sub-section (1).
CHAPTER 87

IMPEACHMENT OF CREDIT OF WITNESSES — SECTION 155

I. INTRODUCTORY

87.1. In connection with the assessment of the weight of the evidence of witnesses, we have so far been concerned with the questions that can be put to the witnesses themselves, either on relevant matters or on matters affecting their credit. There is, however, scope for another mode of impeaching the credit of witnesses. In certain cases, one witness may be allowed to testify directly as to the character of another witness or of the prosecutrix. In this sense, the credit of a witness can itself be made the subject-matter of evidence. This is possible under section 155, which deals with impeaching the credit of witnesses by independent evidence.

Section 155 shows that cross-examination is not the only mode of impeaching the credit of a witness, and the credit can also be impeached by giving independent evidence, e.g., testimony of other witnesses. There is no specific provision in any section about the impeachment of credit by contradiction of facts stated by a witness which are relevant to the issue, and this raised some doubt in a Bombay case as to whether the law in the Evidence Act is co-extensive with the law in England. But, under section 5, evidence may always be given of the existence or non-existence of any fact in issue or fact relevant to the issue. So, when the facts stated by a witness are relevant to the issue, independent evidence may always be given to contradict them. Or, when the questions put to a witness in cross-examination for discrediting him relate to facts directly relevant to the matters in issue, his answers may be contradicted.

Such contradictory evidence is really disproving the testimony of the witness on a fact material to the issue by offering counter-evidence, although it is in a sense impeaching his credit in an indirect manner. As observed by Field, "the Evidence Act assumes that where the facts are relevant, evidence may be given to contradict." Of course, section 155 does not say that it is confined to impeachment of one witness by the evidence of another witness. But most cases under the section are of this type where,—to use the phraseology of the Explanatory to section 155,—one witness declares another to be unworthy of credit.

Extrinsic evidence — to use a convenient phrase — is admissible to impeach the credit of the witness. Thus, if witness A has given evidence, witness B can give evidence to show that A is unworthy of credit. Theoretically, this could be an infinite process, but in practice it is not so.

The Act does not contain, at present, any provision for confirming or re-establishing the credit of the witness — a matter which falls outside section 155.

87.2. At this stage, it may be convenient to enumerate the various modes of impeaching the credit of witnesses. The credit of a witness may be impeached —

(a) by cross-examination, (that is, by eliciting, from the witness himself, facts disparaging to him):

---

2Section 155, illustration (a).
3Woodroffe.
---

826
(b) by calling other witnesses to disprove his testimony on material points (the credit of a witness is indirectly impeached by evidence disproving the facts which he has asserted);

(c) by contradiction on matters affecting credit, through other witness;

(d) by independent proof given by other witnesses as to character.

In section 155, we are concerned with (c) and (d). According to that section, the credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him:—

(1) By the evidence of persons who testify that they, from their knowledge of the witness, believe him, to be unworthy of credit;

(2) By proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) By proof of former statements of the witness inconsistent with any part of his evidence which is liable to be contradicted;

(4) When a man is prosecuted for rape or any attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

According to the Explanation, a witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustration (a) to the section presents these facts — A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

In Illustration (b), A is indicated for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

Both the illustrations fall under clause (3) of section 155, as they deal with contradiction of a witness or relevant facts.

87.3. It is desirable to point out that evidence of character under section 155 is concerned with the character of witnesses and the prosecutrix. Sections 52 and 155 deal with different matters. Section 52 prohibits character evidence in regard to the subject-matter of the suit, whereas section 155 prescribes the manner of impeaching the credit of a witness. Sections 138, 140, 145, 146, 148 and 154 provide for impeaching the credit of a witness by cross-examination. In particular, section 146 permits questions injuring the character of a witness to be put to him in cross-examination. Section 155 lays down a different method of discrediting a witness by allowing even independent evidence to be adduced.

Section 155 restricts evidence permissible under section 153.

67.4. The importance of section 155 lies in this, that, by implication, it restricts the evidence, which may be given (otherwise than in the exceptional cases mentioned in section 153) to impeach a witness’s credit, to that specified in the section.¹

II. SECTION 155(1) to 155(4)

67.5. Of the circumstances which can be tendered in evidence to impeach the credit of a witness under section 155, the first is “the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit.” This is direct evidence as to the character of a witness. A question that often arises in connection with such evidence of character of a witness is; what kind of immoral character can be imputed to the witness under this head? To make the matter more concrete, the query is this — is it necessary that the evidence should relate to some trait of character which may directly affect the “veracity, accuracy or credibility” of the witness; or is it enough if the trait tends to show any defect indicating moral turpitude of any kinds? This question arises because of the wide word “credit” used in the clause. Does it refer only to veracity and allied features or has it a wider connotation?

67.6. In England, the scope of evidence that can be tendered under the corresponding rule is narrow. Article 146 of Stephen’s Digest of the Law of Evidence (12th ed., page 168) states the position thus²—

“The credit of any witness may be impeached by the opposite party, by the evidence of persons who aver that they, from their knowledge of the witness, believe him to be unworthy of credit upon his Oath. Such persons may not, upon their examination in chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.”

The words “credit upon his Oath” in the above formulation are universally understood as confined to veracity.

67.7. Although Stephen wrote a hundred years ago, this is substantially the present position, — with one addition. It would appear that now, in England, medical evidence can be given to show certain facts of a medical nature relating to the credibility of a witness. In Toohey v. Commissioner of Metropolitan Police,³ the accused were charged with assaulting a boy of sixteen with intent to rob him. The boy’s case was that the accused had demanded money and cigarettes, taken him up an alley and assaulted him in the course of searching him. The accused’s defence was that they had found the boy in a state of hysteria exacerbated by drink and were helping him home. At the trial, the accused wished to call a police surgeon to testify to the fact that the boy was in an hysterical condition when brought to the police station, that he smelt of drink, and that drink was liable to exacerbate hysteria. They were, however, not allowed to do so. The accused were convicted and the conviction was affirmed by the Court of Criminal Appeal. The conviction was, however, quashed by the House of Lords. The surgeon’s evidence was relevant to the issue, because it assisted in the resolution of the question whether the alleged assault accounted for the hysteria, or whether the hysteria accounted for the allegation of assault. The primary importance of the decision of the House of Lords is that it sanctions the calling of a witness to impugn the re-liability of an opponent’s witness on medical grounds.⁴

⁴Cross, Evidence (1974), page 238.
87.8. According to the theory of English law, evidence intended to impeach credit should relate to general reputation only and should not express the mere opinion of the impeaching witness. It is not sufficient that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is generally said of the person by those among whom he dwells, or by those with whom he is chiefly conversant; for, it is this only which constitutes his general reputation.

In practice, the question is generally shortened thus — "from your knowledge of the witness would you believe him on his oath?"

87.9. As regards the position in the United States, it would appear that in most jurisdictions, at least in a direct attack on the credibility of the witness the evidence used is designed to show the general propensity of the witness who is impeached. "In effect, it is designed to show that the conscience of the witness would not be disturbed if he is testified." "Truth and veracity" are the common tests for impeaching the witness. The Uniform Rules of Evidence limit inquiry to honesty or veracity of the witness. Although, in a few jurisdictions, general moral character is permitted as a means of impeachment, it would appear that the trend now is in the narrower direction, there being a realisation of the dangers of a broader test.

87.10. In California, for example, the sphere of admissibility under this head is somewhat narrow. The California Evidence Code provides, so far as is material, as follows:

"Section 787. Specific instances of conduct—Subject to section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

Section 788. Prior felony conviction—For the purpose of attacking the credibility of a witness it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

(a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.

(b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with section 4852.01) of Title 6 of Part 3 of the Penal Code.

(c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offence.

(d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to procedure substantially equivalent to that referred to in subdivision (b) or (c)."

\(^1\)Woodruff.

\(^2\)R. v. Brown, 1 C.C.R. 70.

\(^3\)Mason Ladd, "Impeachment of Witnesses" (1966-67) 52 Cornell Law Quarterly 239, 241.


\(^5\)Sections 787 and 788, California Evidence Code.

\(^6\)Emphasis supplied.
87.11. It seems to us on a consideration of the merits of the subject that it would be desirable to clarify the scope of clause (1) and that it should be confined to attacks on veracity accuracy on credibility.¹

87.12. This takes us to clause (2) of section 155, which allows proof that a witness has been bribed or has accepted an offer of a bribe or has received other corrupt inducement. As to the words "has accepted the offer of a bribe", it is to be noted that the clause was originally framed "has had the offer of a bribe."

The substitution was probably grounded² upon the ruling in the case of the Attorney-General v. Hitchcock, where it was held that the fact that the witness has accepted a bribe to testify may, if denied, be proved, but a bare admission by the witness that he has been offered a bribe cannot; Pollock, C.B., remarking that it was no disparagement to a man that a bribe is offered to him, though it may be a disparagement to the person who makes the offer.³

No further comments are needed on this clause.

87.13. Under clause (3), the witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. Illustrations (a) and (b) to the section illustrate this clause.⁴

Some comments are called for as to the phrase 'his evidence which is liable to be contradicted', which occurs in this clause. Some obscurity exists as to the exact meaning of the words in question. It was observed by Wilson J. in a Calcutta case⁵ that these words mean (evidence) "which is relevant to the issue". On the other hand, Cunningham⁶ raises the query whether these words do not refer to any part of the evidence which relates to a fact in issue, or relevant fact, or which falls within the exception to section 153. The latter interpretation appears to be correct, for two reasons. First, the wording in section 155(3) is wide, "any part of his evidence which is liable to be contradicted", and, second, the two exceptions to sections 153 lay down, in substance, that where a witness denies a previous conviction, or a fact impeaching has impartiality, he can be contradicted.

87.14. In our opinion it would be useful to insert a clarification adopting the wider view of clause (3).

87.15. Here we may refer to a Supreme Court case⁷ relating to the admissibility of tape recorded evidence in the election petition in respect of a presidential election. The petitioners relied on some tape-recorded statement in order to contradict a witness of the respondent. This was objected to by the counsel for the respondent, on the ground that the tape-recorded conversation was not admissible in evidence for contradicting the evidence of the witness. It was urged by the counsel that under section 155(3) of the Evidence Act, before any former statement can be put in evidence to impeach the credit of a witness, the court must be satisfied that the previous statement is relevant to the matter in issue. Overruling this contention, the Supreme Court held that a previous statement, made by a person and recorded on tape, can be used not only to corroborate

¹Cf. recommendation as to section 146(1).
²Woodroffe.
³Attorney-General v. Hitchcock, (see discussion as to section 153).
⁴See also Anup v. Kedarnath, (1925) 30 C. W. N. 835.
the evidence given by the witness in court, but also to contradict the evidence given before the court, as well as to test the veracity of the witness and also to impeach his impartiality.

87.16. The Supreme Court also held that the interpretation placed by Calcutta High Court in (1890) I.L.R. 17 Cal. 344 was not correct as to the words "which is liable to be contradicted". The court remarked that the evidence may be given that the witness is unworthy of credit and this evidence may be of a general nature and may not be directly relevant to the issue. The evidence may also be regarding the receipt of bribe by the witness so that his statement cannot be acted upon. The previous statement recorded on tape must be considered to be relevant to the issue to impeach the credit of the witness by establishing that he was making contradictory statements.

87.17. A question of procedure may be dealt with, Section 155(3) only lays down that the credit of a witness may be impeached, inter alia, by "proof of former statements inconsistent with any part of the evidence, which is liable to be contradicted", but it does not lay down the manner in which the former statement in writing, when it is sought to be tendered in evidence for contradicting a witness, is to be proved. That is provided in section 145. In other words, section 155 is controlled by section 145 and is not independent of it. As laid down by their Lordships of the Privy Council in Bal Gangadhar Tilak v. Shrinivas Pandit,2 and in Jagrani Kunwar v. Durga Prasad,3 if a party wants to rely on a previous statement, contained in a letter of a person who has gone into the witness-box, in order to contradict him, it is the duty of such person to put that letter to the party or the witness and to give him an opportunity to explain it.

We have dealt with this aspect under section 145, when considering its scope in relation to oral statements. So far as section 155(3) is concerned, it may be useful to provide that it is subject to section 145.

87.18. Section 155(4) provides that when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Such evidence means something more than that it can be proved that she has on specific occasions done acts which may be called immoral. Some meaning must be given to the word 'generally', and it appears that the clause refers to such evidence as that her general reputation was that of a prostitute, or that she had the general reputation of going about and committing immoral acts with a number of men.4

87.19. It may be stated that the Act, as originally drafted, contained the following additional section on the subject of character:— "In trials for rape or attempts to commit rape the fact that the woman on whom the alleged offence was committed is a common prostitute or that her conduct was generally unchaste is relevant". It was, however, thought unnecessary to retain this as a separate section5, and it was accordingly incorporated with the present one. In the case now mentioned, evidence is receivable not so much to shake the credit of the witness, as to show directly that the act in question has not been committed. In trials for rape or attempts to commit that crime, not only is evidence of general

---

1Gopi Chand v. Emperor 1930 Lah. 491, 495.
5Woodroffe.
bad character admissible under the first clause—"to show that the prosecutrix ought not to be believed upon her oath", but also as proof that she is reputed prostitute for it goes for towards raising an inference that she yielded willingly.  

87.20. Evidence of the general immoral character of the prosecutrix is admissible not only to show that she is unworthy of credit, but also on the question of consent. In the American Case of People v. Johnson, the following observations occur—

"It is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than that one whose past reputation was without blemish and whose personal conduct could not truthfully be assaulted".

This does not, of course, mean that the bodily integrity of a woman is regarded as any the less deserving of legal protection because her character is suspicious.

The character is relevant only for deciding the question of fact—probability of consent.

87.21. Apart from general character, the prosecutrix may be cross-examined as to other immoral acts with the prisoner and if she denies these, such immoral acts may be independently proved. This is because they are relevant facts as indicating consent. In England, on the other hand, while the prosecutrix may be cross-examined as to immoral acts as to other men (as shaking her credit) yet if she denies them, witnesses cannot be called to contradict her. This is because the question this time is relevant only to her credit as a witness.

87.22. Section 155, in its opening lines, speaks of the credit of a "witness". But, on the other hand, clause (4) is defective in the sense that while clauses (1), (2) and (3) begin with the words "by evidence" or "by proof", clause (4) does not so begin. It would, in our view, be better to make the matter clearer by putting clause (4) also as a branch of section 155.

87.23. We have disposed of the four clauses of section 155 as it now stands. It remains now to consider one point which does not concern any particular clause of the section, but is relevant to the entire section. This point arises because since section 155 speaks of impeaching the credit of a "witness". Literally, it may become applicable also to the accused who offers himself as a witness. So far as cross-examination of the accused on matters in issue is concerned, the matter will be taken care by the relevant earlier sections, in regard to which we have made suitable recommendations for dealing with the problem of the accused as a witness. The question how far his character can be attacked under section 155, by independent evidence, however, still remains since it falls outside sections 132 and 148. When the credit of an accused-witness is attacked under section 155, the danger arises that not only his credibility as a witness (in the restricted sense) would be attacked, but also there may be a certain amount of mental harassment and a likelihood of prejudice by such cross-examination, if it is allowed without some qualification. We have discussed the relevant aspects under section 148, and stressed the need for special provisions. It seems to us that the best

---

1Woodroffe.
3Emphasis added.
(a) R. v. Riley, (1887) 18 Q.B.D. 481.
5See discussion as to sections 132 and 148, supra.
course would be to create, in section 155 also, a separate provision substantially on the same lines as we have recommended in relation to section 148 as regards the cross-examination of the accused on matters affecting his credit.

III. RECOMMENDATION

87.24. The result of the above discussion is that in regard to section 155, the following amendments are desirable.—

(i) Clause (1) should be restricted to such matters as affect the credibility, accuracy or veracity of the witness.

(ii) Clause (3) should be made subject to section 145, in regard to the procedure for contradiction and the meaning of the expression "liable to be contradicted" should also be clarified in that clause.

(iii) As regards the accused, a separate provision is recommended.

(iv) Clause (4) to be put as a branch.

In the light of the above discussion, we recommend that section 155 should be revised as under:—

155. (1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the permission of the Court, by the party who calls him:

(a) by the evidence of persons who, from their knowledge of the witness, impeach his credibility, accuracy or veracity;

(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement, to give his evidence;

(c) subject to the provisions of section 145, by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted, that is to say, evidence on a fact in issue or a relevant fact or evidence relating to any matter referred to in the First or Second exception to section 153;

(d) where a man is prosecuted for the offence of rape or attempt to commit rape, and the witness is the prosecutrix, by evidence showing that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

155. (2) When an accused person offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, another witness shall not be asked any question tending to show that the accused has committed or.

\[\text{Footnotes:}
\begin{itemize}
  \item[1] Para. 87.11, supra.
  \item[2] Para. 87.17, supra.
  \item[3] Para. 87.14, supra.
  \item[4] Para. 87.24, supra.
\end{itemize}\]
been convicted or been charged with any offence other than that with which he is then charged, or that he is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is relevant to a matter in issue; or

(ii) he has personally or by his legal practitioner asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character; or

(iii) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, provided the leave of the court is obtained for asking the particular question; or

(iv) he has given evidence against any other person charged with the same offence.
CHAPTER 88

CORROBORATIVE EVIDENCE AND RE-ESTABLISHING CREDIT — SECTIONS 156-157 AND PROPOSED SECTION 157A

SECTION 156

88.1. In the Chapters immediately preceding, the discussion was mainly concerned with impeaching the credit of witnesses by various modes. When the credit of a witness is impeached or likely to be impeached, the question arises of corroboration of the witness and re-establishing his credit. When the testimony of a witness is contradicted by his previous inconsistent statements, it may become necessary to give evidence in rebuttal and to counteract the damaging effect of his inconsistent statements. If contradiction is important from the point of view of the adverse party, confirmation of the credit of the witness is equally important from the point of view of the party calling the witness.

88.2. Any good advocate would know where there is need for corroboration of the evidence of a particular witness. In such a case, corroboration is a matter of tactics. But the situation may be one where corroboration is required by a mandatory provision of law. Under section 34, for example, entries in books of account regularly kept in the course of business, are relevant whenever they refer to a matter in which the Court has to inquire, but such statements shall not alone be sufficient to charge a person with liability. The need for corroboration is obvious. In the absence of mandatory legal provisions, there may yet be rules which require corroboration as a matter of prudence. Finally, even where neither law nor prudence necessitates the introduction of corroborative evidence, a party may, as a matter of strategy, consider it desirable that the evidence of a particular witness may be corroborated to increase its persuasive force.

88.3. Corroborative evidence of a fact, then, is that which confirms or supports other evidence of the same fact. As a general rule, evidence does not need the support of corroborative evidence, and the court may act upon the uncorroborated evidence of one witness, even if that means disregarding more than one opposing witness. There are, however, several exceptions to this general rule, where corroboration is required.

88.4. Corroboration of a witness's evidence may be found in the evidence of another witness. Although this is the commonest kind of corroboration, it is not the only kind; and where the law requires corroboration it does not usually specify this, or indeed any other, kind. A document or thing may supply corroboration, and so may the evidence, or the conduct out of court, of the person against whom the corroboration is required such as a confession by him or the telling of lies about the matter, or his similar conduct on other occasions or even his silence when the gist of the evidence is repeated in his presence, where such silence can be construed as an admission.

---

6Ante, page 63.
7Ante, page 168.
The essence of corroboration is that it must confirm, in some material particulars, the evidence standing in need of corroboration.

Section 156.

88.5. The Act deals with two types of corroboration evidence. The questions which can be put to a witness whom it is intended to corroborate as regards any relevant fact, are the subject matter of section 156. The nature of evidence that may be given to corroborate the testimony of a witness is dealt with in section 157.

According to section 156, when a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that the circumstances, if proved would corroborate the testimony of the witness as to the relevant fact which he testifies.

According to the illustration to the section, an accomplice gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed. Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

88.6. Section 156 provides for the admission of evidence given for purposes not of proving a directly relevant fact, but of confirming the truthfulness of a witness. One of the best methods to check this is to ascertain the accuracy of his evidence as to surrounding circumstances though they are not immediately connected with the relevant fact. Provision for this is made in the section which is the reverse of the process of contradiction. Contradiction impeaches the credit, while corroboration confirms it. In fact, corroboration under section 156, or rather, questions tending to corroborate his evidence, is not the only method of confirming the truthfulness of a witness. However, so far as section 156 is concerned, its utility lies in this, that, in order to prepare the ground for corroboration, it is necessary to elicit the surrounding circumstances in the first instance from the witness himself, and it is for this purpose that the section makes a provision.

88.7. There is often no better way of proving the truthfulness of a witness than by ascertaining the accuracy of his evidence as to surrounding circumstances, though they are not so immediately connected with the facts of the case as to be in themselves relevant. While, on the other hand, important corroboration may be given in the case of truthful witness, a valuable field for cross-examination and exposure is afforded in the case of a false witness. In order to prepare the ground for the corroboration of a witness, it is necessary to elicit these surrounding circumstances in the first instance from the witness himself, and for this the section makes a provision.

Recommendation to amend section 156.

88.8. The principle of the section hardly needs any change, but a minor point should be mentioned. The mention of a "relevant fact" in section 156 suggests a query whether the principle should not apply to facts in issue also, since section 5 makes a distinction between the two—apart from the fact that the two expressions are separately defined. It is desirable that opportunity should be taken of adding the expression of "fact in issue" before the words "relevant fact" in section 156.

1Cunningham, Evidence, Commentary on section 156, cited by Woodroffe.
2Field.
3Cunningham, Evidence, section 156, page 316.
SECTION 157

88.9. According to section 157, in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Such statements were admissible before the Act,1 and this section and subsequent decisions2 apply the same principle.

88.10. In effect, section 157 declares evidence of certain facts to be admissible: and if the section had not been inserted, what we have said of section 156 would apply and, the Judge would have had to determine the relevancy of these facts by reference to sections 7 and 11, and he might perhaps have been influenced by the practice in England, which has been against the admission of such evidence3. It is not incumbent on a party to give corroborative evidence of statements challenged by the other party.4 However, where the witnesses for the prosecution were proved to be untruthful in the greater part of their evidence, it would be dangerous to convict on the residue unless it was corroborated5.

88.11. To express the principle underlying section 157 in different terms, prior statements otherwise inadmissible by virtue of the rule against hearsay are let in to lend credibility, particularly to rebut any suggestion of recent fabrication. If the hearsay rule is strictly applied, it would not be permissible to admit prior statements. But when questions of credibility arise, certain aspects assume importance, and a limited exception is made. Even then, the prior statements are not substantive evidence. So far as the aspect of hearsay is concerned, however, it is proper to point out that even though the previous statements was not made before the Court on oath and the declarant was not subject to cross-examination, the previous statement is admissible to rebut the doctrine of recent invention. If it is suggested that the witness has recently invented the story, it is permissible to prove, in rebuttal of the suggestion, that he told the same story at a time more nearly contemporaneous with the evidence to which he is now deposing. Such evidence, however, goes only to corroborate and should not be used as evidence of the truth of the fact stated.

88.12. Of course, the mere fact that a man had, on a previous occasion, made the same assertion as the present does not necessarily add to its truthfulness. One may persistently adhere to falsehood once uttered, if there is a motive for it. However, consistency could be a ground for belief in the veracity of the witness and it had long been the practice in India to treat it as corroborative evidence. This practice is illustrated by a number of judicial decisions before the Act. The previous practice and statutory provisions have been simplified and reproduced in section 157.

---

1See
(a) R. v. Bishonath Pal, (1869) 12 W. R. Cr. 2;
(b) R. v. Bises Nath, (1869) 7 W. R. Cr. 31.

2(a) Mathukumaraswami Pillai v. R., (1912) I.L.R. 35 Mad. 397;


4Markby, Evidence, 109, 110.

5Moulwa Mahomed Ikramull Hug v. Wilkie, (1907) 11 C.W.N. 946.


7Nominal Defendant v. Clements, 104 Commonwealth Law Reports 476, 483, 495.
88.13. The fact that a previous statement is admissible under section 157 as corroborative evidence does not, of course, mean that the provisions of any other section under which it may be relevant are excluded. For example, a statement by a girl, alleging that she was raped, if made immediately after the rape, becomes relevant under section 8, as showing the conduct of the victim of an alleged offence, which conduct is influenced by a fact in issue. The situation is expressly dealt with in section 8, illustration (f). The only refinement which may be mentioned here is that while a statement not in the nature of a complaint is outside section 8, it is within section 157:

"The distinction is of importance: because while a complaint is always relevant, a statement not amounting to a complaint will only be relevant under particular circumstances, for example, if it amounts to a dying declaration or can be used as corroborative evidence." 1,2

88.14. What becomes admissible under section 157 is not substantive evidence. The point became important in one of the earlier Calcutta cases. X was tried for and convicted of an offence, and the depositions of witness given in a previous trial of Y, Z and others, charged with having been engaged in the same offence, were used against X. In the trial of X, the witnesses merely said: "I gave evidence before in this court and that evidence is true." Commenting on this procedure, the High Court had to point out that the proper procedure was to examine the witness a fresh in the trial of X, using the deposition containing their statements in the earlier trial as corroborating the testimony given in the present trial.

88.15. It is of interest to note that section 157 departs from the common law rule. In England, corroboratory evidence must be by independent testimony and so no corroboratory is afforded by mere reiteration by the same witness. The theory is that if it were otherwise a liar could corroborate his lies merely by repeating them. Evidence of his conduct or statements made out of court may be used against him if they amount to admissions, but not to confirm his evidence, for otherwise "every man, if he was in difficulty, would make declarations for himself."

As Hewett L. C. J. observed—"in order that evidence may amount to corroboratio, it must be extraneous to the witness to be corroborated."

88.16. Thus, in England, previous statements are not, at common law, admissible. Even in criminal cases involving sexual offences, a mere complaint is not admissible, though conduct accompanied by complaint would be admissible. Thus, it was held on a charge of sexual attack upon a young girl that her complaint is not corroborative evidence on the charge, but her distressed condition is. This distinction assumes importance in the light of the general rule in England, namely, that on a charge of rape and similar offences, it is the practice to instruct the jury that it is unsafe to base the charge upon an uncorroborated testimony of the victim.

2See also Gangubhai v. R. (1915) I.L.R. 43 Cal. 173.
88.17. The principal object of the prohibition against corroboration by prior statement was to prevent the manufacture of self-serving evidence by a party witness and to prevent interruption by collateral issues and superfluous matters. Technically, then, there being no common law exception in general, a previous statement made by a person, including a self-serving statement by a party witness, would fall within the rule against hearsay. This rule has been changed in regard to Civil Evidence Act,¹ which provides that any statement made by a witness shall, if the leave of the court is obtained, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.

88.18. What we have stated above as to the common law was, of course, subject to certain exceptions meant for special situations even at common law. Chief amongst such exceptions were previous consistent statements admissible as part of the res gestae; also, previous statements sometimes regarded as admissible where it was suggested in cross-examination that the witness has recently been wrotn over and, in certain cases, pre-trial identifications by witness.²

In England, the fact that a witness had made a previous statement similar to a witness’s testimony in court was formerly admissible to confirm his testimony³ later, but such evidence became inadmissible at common law. There were exceptions where-under previous statements were receivable to show that the witness is consistent with himself—but this was only in specified cases,—e.g. where the witness is charged with having recently fabricated the story.⁴ There was also an exception as to sexual offences.

A change was made in the law by the Evidence Act, 1938 which provided that in any civil proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall be admissible as evidence of that fact under certain conditions.⁵ The Civil Evidence Act, 1968 has now extended this to include former oral statements also. Section 3(1) of the Act of 1968 further lays down that where for the purpose of rebutting a suggestion of fabrication a previous consistent statement has been proved, it shall be admissible as evidence of the fact stated.

88.19. Even at common law, an exception is provided in England by the rule that complaints in sexual cases are sometimes admissible to show consistency between the complainant’s conduct and her testimony.⁶ Although the admission of such evidence may well enhance her evidence and make it more credible, nevertheless, in such cases, corroboration of the complainant’s evidence is always required, and evidence of complainant will not be reckoned as such, because it does not come from some independent source.⁷

88.20. It should also be stated that in England, by a recent statutory provision,⁸ a previous statement of a witness, if proved, is to be evidence of the facts stated in certain cases, as already stated. The provision is quoted below—

“Witness’s previous statement, if proved, to be evidence of facts stated.”

---

¹Section 2(1), Civil Evidence Act, 1968.
⁵Lutterell v. Reynell, (1670) 1 Mad. 282, 283
⁸Phipson, Manual of Evidence (1972), page 45
⁹(a) R. v. Christie, (1914) A.C. 545;
⁰Section 3, Civil Evidence Act, 1968 (C. 64).
3. (1) Where in any civil proceedings—

(a) a previous inconsistent or contradictory statement made by a person
called as a witness in those proceedings is proved by virtue of sec-
tions 3, 4 or 5 of the Criminal Procedure Act, 1865; or

(b) a previous statement made by a person called as aforesaid is proved
for the purpose of rebutting a suggestion that his evidence has been
fabricated,

that statement shall, by virtue of this subsection, be admissible as evi-
dence of any fact stated therein of which direct oral evidence by him
would be admissible.

(2) Nothing in this Act shall affect any of the rules of law relating to
the circumstances in which, where a person called as a witness in any
civil proceedings in cross-examination on a document used by him to re-
fresh his memory, that document may be made evidence in those pro-
ceedings; and where a document or any part of a document is received in
evidence in any such proceedings by virtue of any such rule of law, any
statement made in that document or part by the person using the document
to refresh his memory shall by virtue of this sub-section be admissible as
evidence of any fact stated therein of which direct oral evidence by him
would be admissible."

Rationale.

88.21. It was argued at common law that by offering a witness, a party is
held to recommend him as worthy of credence, and warranting his veracity,
corroboration is not permitted, that former statements are no proof that
entirely different statements may not have been made at other times and are
therefore no evidence of constancy: that if the sworn statements are of doubt-
ful credibility those made without the sanction of an oath, or its equivalent,
cannot corroborate them, that a witness having given a contrary account,
although not upon oath, necessarily impeaches either his veracity or his mem-
ory; but his having asserted the same thing does not in general carry his
credibility further than, nor so far as, his oath.  

Section 157 in our Act, however, proceeds upon the principle that consis-
tency is a ground for belief in the witness's veracity.  
Chief Baron Gilbert
was of opinion that the party who called a witness against whom contradictory
statements had been proved might show that the witness had affirmed the
same thing before on other occasions, and that he was therefore "consistent
with himself".

Position
in

88.22. The question of the use of prior statement of a non-party witness
has often arisen in the U. S. A.

Wigmore, in his first edition, approved the "orthodox view".  In the later
ditions, however, he said that "further reflection ....... has shown the persent
writer that the natural and correct solution is the one set forth in the text
above."

---

1Best, Evidence, 11th Ed., pp. 580, etc. cited in Woodroffe.
2Wharton, Evidence, S. 570, cited in Woodroffe.
3Starkie, Evidence, 253, cited in Woodroffe.
4(a) R. v. Malappur, 1 (1874) 11 Bom. H.C.R. 196, 198;
(b) R. v. Repli Birwars, 1884 I.L.R. 10 Cal. 970, 973.
5This is not necessary under the section.
7Wigmore, Evidence (3rd Ed.), 1940, Vol. 3, article 1018, footnote 2 referred to in
Annual Survey of American Law (1963), page 771.
Wigmore's final position as to inconsistent statements was that a witness's prior inconsistent statement ought, on principle, to be admitted, not only to discredit witness's testimony, but also as "affirmative testimonial" evidence, because "by hypothesis the witness is present and subject to cross-examination". There are, however, certain dangers involved if this view is adopted as was noticed in the judgment in an American case discussed below.

88.23. In *Comer v. State*, the defendant was charged with carnal knowledge of his daughter. Called by the prosecution, the daughter denied having sexual relations with her father. She admitted having given the prosecutor a signed statement to the contrary, but she testified that it was not true. There was no evidence of the crime, and her conviction was reversed. Although the Attorney General urged the Supreme Court of Arkansas to overrule its earlier decisions adhering to the orthodox rule that a prior inconsistent statement of a non-party witness is without substantive value, the court declined to do so. The court said that while it appreciated "the abstract logic of Wigmore's argument ...... there are objections to adopting his reasoning in its entirety." Under such a rule, the court thought, "an entire accusation, such as a charge of rape, "could be fabricated merely by first having the prosecutrix emphatically deny the truth of the charge and by then calling another witness to say that the prosecutrix had made a contrary statement on some other occasion." Moreover, said the court, "we are not persuaded that the opportunity to cross-examine months or years later is equally as valuable or equally as effective as the exercise of that privilege when the facts are much fresher in the memory of the witness". Doubtless there are arguments both ways, but "when the arguments are thus closely balanced, we think the advantage of certainty in the law should tip the scales in favour of the rule of *stare decisis*".

88.24. The Model Code of Evidence and the Uniform Rules of Evidence both adopt Wigmore's view. According to the Model Code, "Evidence of a hearsay declaration is admissible if the judge finds that the defendant...... is present and subject to cross-examination". According to the Uniform Rules, "Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1) a statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject-matter, provided the statement would be admissible if made by declarant while testifying as a witness". The Conference Committee commented as follows on this Uniform rule:

"When sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay".

88.25. By statutory provisions in the U.S.A. prior consistent statements are admitted in many jurisdictions. The following is a typical set of provisions extracted from the California Evidence Code:

"S. 1236. Prior consistent statement

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with section 791.

---

3Model Code of Evidence (1942), Rule 503(b).
4Uniforms Rules of Evidence (1963), Rule 631(b).
5Sections 791 and 1236, California Evidence Code.
"S. 791. Prior consistent statement of witness. Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, notice for fabrication, or other improper motive is alleged to have arisen."

88.26. It may now be convenient to refer to a few judicial decisions in India which illustrate the application of section 157 and its wide scope. We first refer to the judgment of the Supreme Court in Ram Ratan. On 8th May, 1959, shortly before 3 p.m., while the grain of Sawanram was being weighed for sale at the shop of Roopram, the three appellants and two others (armed with guns) came up. One of the appellants Ram Ratan fired at Bhimsen, Hansraj fired at Jawanram, and Maniram also fired at Jawanram. Bhimsen died on the spot, and Jawanram and Lakhiram were injured. Thereafter, all the assailants ran away. Roopram had shut up his shop when the incident took place and he came out only when everything was over. Jawanram asked him to send a telegram to the police station and told him the names of the five assailants. Thereafter, Jawanram started for the police station to make a report, but Ramsingh constable met him on the way. Thereupon Jawanram made a complaint then and there. When the complaint was being recorded, Rampratap (Jawanram’s son) also turned up. The three appellants were tried and convicted by the Sessions Court, and then by the High Court. They came in appeal to the Supreme Court.

Contention of the counsel on behalf of the appellants was that the appellants had been implicated on account of enmity. The statement of Roopram was not admissible under sections 6 and 157. The solitary evidence of Jawanram was insufficient for conviction. Statements of Lekhram and Rampratap were not reliable.

88.27. The main question was whether the statements of Jawanram to Roopram were admissible or not under section 157, when deposed to by Roopram. In the opinion of the Supreme Court, there are two things which are essential for section 157 to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place.

In this case, Jawanram had made the statement to Roopram, immediately after the incident to the affect that five persons (including the three appellants) had attacked Bhimsen, Lekhram and himself. This was therefore a prior statement of Jawanram at or about the time when the fact took place. This prior statement can be proved by the person (Roopram) to whom it was made and can be used as corroboration for the evidence of Jawanram. It is not necessary in the admissibility of the statement of Roopram that Jawanram should also say, in his testimony in court, that he told Roopram immediately after the incident, the name of the five assailants. Of course, if Jawanram stated in the court that he had made the statement to Roopram after the incident, that would add to the weight of the evidence of Roopram.

Thus, the evidence of Roopram corroborated the statement of Jawanram in two ways. First, the incident took place in front of his shop, and secondly he proved the statement of Jawanram as to the persons who took part in the incident. Thus, it corroborated the statement of Jawanram under section 157. Therefore the evidence of Jawanram and Roopram was sufficient for conviction. Apart from this, the evidence of Lekhram and Rampratap also added to the weight of the prosecution case. Therefore, there was no force in the appeal.

88.28. In *Radha Kishan,*¹ the facts were as follows:—

In January, 1970, when Moju (victim) was returning home, Radhakishan the (appellant) and Rathoria met him at about 8.00 p.m. Radhakishan told Moju as to why he was flashing the torch light. Moju denied having done so. Then Radhakishan caught hold of Moju and took out his dagger and inflicted certain blows therewith on Moju. After that Moju was dragged up to the field where he was covered with a "chadar" and was left.

Next day Bhaguta arrived at the field. On his query, he (Moju) told him that Radhakishan and Rathoria had beaten him. After some time his (Moju's) brother Madan also reached the spot. Moju informed him that Radhakishan and Rathoria had beaten him.

Rathoria had absconded and Radhakishan had been convicted. This was an appeal by him.

Contention of counsel on behalf of the appellant was:

(i) In the F.I.R., Madan stated that a Pharsi was used. In the trial court, Moju said that a dagger was used.

(ii) The weapon of offence had not been recovered.

(iii) The trial court had relied on the solitary testimony of Moju.

(iv) There was no independent witness of the locality.

88.29. The Court held as follows:

The victim, Moju lost his balance of mind, and it was difficult for him to judge precisely whether the weapon of offence was a knife or a dagger or a pharsi. The discrepancy was of a minor nature. The prosecution had succeeded in proving to the hilt that a sharp edged weapon was used by Radhakishan. Therefore, there was no force in the first contention.

As to the second point, the recovery simply furnished a corroborative piece of evidence, and, where the direct and substantive evidence was available on the record, then want of such recovery would not weaken the case.

A careful perusal of the statement of Moju showed that the specified portions were not mutually inconsistent.

88.30. As to the admissibility of the statement of Madan under section 157, it was not necessary that the witness sought to be corroborated must also say in the court in his testimony that he had made the former statement to some one. In the present case, Moju had said that he had narrated the incident to his brother (Madan); that adds to the weight of the testimony of the person who gave evidence in corroboration.

So far as the question of local witness is concerned, it is every day experience that there is a general reluctance on the part of villagers to appear as witnesses and get themselves involved in a case. Apart from this, it does not injuriously affect the facts of the case.

In the circumstances, the court found no force in the appeal.

88.31. These decisions illustrate the significance and utility of the section, and its wide scope. They do not necessitate any amendment of the section. But we may refer to one point which requires consideration. This arises out of the expression "Legally competent to investigate" used in the section. The term "investigation" is, according to the Code of Criminal Procedure, confined to proceedings taken by the police or by any person other than a Magistrate who is authorised in this behalf. The Supreme Court in H. N. Rishbud's case enumerated the following as steps which would normally fall within the scope of "investigation":

(i) proceeding to the spot;
(ii) ascertainment of facts and circumstances;
(iii) discovery and arrest of suspected offender;
(iv) collection of evidence.

The last mentioned step would include—

(a) examination of persons (and recording their statements, if thought fit); and
(b) search of place; seizure or things; and
(c) formation of opinion as to whether the materials are enough for submitting a charge sheet and filing a report before the Magistrate in either case.

88.32. The precise question that arises is whether a Magistrate, while recording a statement of a witness before trial—i.e. during proceedings under section 159 of the Code of Criminal Procedure, 1898, or under section 164 of that Code or corresponding provision in the present Code—can be said to be an authority "legally competent to investigate the fact" within the meaning of section 157, Evidence Act. That section requires (as a condition precedent to the admissibility of a previous statement) that the previous statement should have been made either before an authority "legally competent to investigate the fact", or at or near the time when the fact to which the statement relates took place.

In spite of the limited definition of the term "investigation" in the Code, the Supreme Court has, in one case, impliedly accorded a very extended meaning to the words "legally competent to investigate" as used in section 157. In that case, a prosecution witness, after his examination-in-chief before the sessions court was over, completely resiled in cross-examination. The point for consideration was whether the statement made before the committing Magistrate could be availed of to corroborate the evidence in examination-in-chief of the witness concerned. The Supreme Court answered the question in the affirmative.

88.33. In a Calcutta case, the High Court held that a statement made by a witness before a Magistrate at a test identification parade can be said to have been made to an authority legally competent to investigate. After a review of the case-law, the High Court expressly held that the proceedings conducted by the Magistrate for the purposes of identification would certainly be proceedings by an authority legally competent to investigate, and any statement made by a witness to such authority can be used to corroborate his testimony in court.

Section 2(b), Code of Criminal Procedure, 1973—Definition of "investigation".
Para. 88.31, supra.
Sarju v. State of West Bengal, (1961) 2 Cr. L. J. 71 (Cal.).
88.34. It is clear that the holding of a test identification parade is a step towards the collection of evidence, and is, as such, a part of the investigation proceedings. But, in view of the limited definition of the term "investigation" in the Code, the holding of such a parade by a Magistrate is not, speaking technically, "investigation" in terms of the definition in the Code. This position, obviously, is anomalous. To cover the statements recorded under section 164 of the Code of Criminal Procedure or under other statutory provision by authorities other than the police (e.g. judicial Magistrates), an amendment of section 157 is desirable in view of the obscurity prevalent on the subject.

88.35. We, therefore, recommend that section 157 should be modified by a suitable amendment to provide for the above matter. In brief—this is not a draft—the amendment should bring within the fold of the section authorities which are under law competent to inquire into a fact or to record statements.

88.35A. The meaning of "corroboration" has been the subject-matter of some controversy. In a Madras case, the majority regarded section 157 as applicable to section 114, illustration (b), so as to be available for corroboration of an accomplice. But it is doubtful if it can legally amount to corroboration within the meaning of illustration (b) to that section. It is possible to hold that the prior statement of an accomplice is admissible, only for the purpose of showing his consistency and as disproving a suggestion that it was recently concocted by him. It would be dangerous to admit it to prove the truth of the evidence also. This is likely to defeat the object of the rule requiring independent evidence by way of corroboration. We may note that we are recommending addition of the test of independent evidence in section 114, illustration (b). The point will then become academic.

It would appear that the "corroborate" is used in two different senses in section 114 and section 157. In the latter section, it is used to show the consistency of the witness, and only indirectly to show veracity. In the former section, stronger and independent corroboration is required.

88.36. It should be noted that section 157 is confined to corroboration by a prior statement of the very witness whom it is sought to corroborate. Witness X cannot be corroborated by the pre-trial statement of a person Y—barring those cases where the statement of Y becomes admissible under a special provision. Barring such special provisions, the use of such extra-judicial statement or out-of-court assertion would be excluded by the rule against hearsay, the maker of the statement not being before the court. This aspect seems to have been overlooked in an Orissa case. In that case, the wife, in defence to a suit for restitution of conjugal rights, pleaded, inter alia, that the husband was impotent and was guilty for cruelty. The following facts are taken from the judgment—

"The trial Court on evidence accepted both the pleas of the wife and dismissed the suit. On the point of impotency the evidence of the wife also gets some corroboration from the report of the doctor which reveals that the husband had a small penis and the erection was negligible. Mr. Patnaik, learned counsel for the appellant mainly contended that the doctor should have been examined in the court and made available for cross-examination. It is admitted by the appellant that he was examined by the doctor in the presence of counsel for both sides. Though opportunities were given to the parties no effect was made by the appellant to summon the doctor as a witness. That being so, the request of the learned counsel to remand the case for examination of the doctor cannot be allowed."

"In any event, the doctor’s report, though itself appears not to be much decisive, lends some support to the story of the wife that the appellant was incapable of performing sexual intercourse with her. That apart, the wife also alleged that she was assaulted by the appellant when she made allegation against the sorcerer who came to cure the husband of his impotency, but attempted to outrage her modesty”.

With due respect, we may state that the report of the doctor was inadmissible, for the reasons, stated above. It was not covered by either by section 157 or by any other provision.

88.36A. In the result, the only change required in section 157 is that already indicated.

SECTION 157A

88.36B. We have dealt with such provisions as exist on the subject of corroboration. We should now refer to one matter in respect of which a comprehensive provision is desirable. We have in mind the need for a provision regarding confirming the credit of a witness by independent evidence. At present, such confirmation can be made (i) by way of producing corroborative evidence under sections 156-157, or (ii) by cross-examining the witness produced to impeach the credibility, or (iii) by substantive evidence on the main issues. There is, however, no comprehensive provision permitting independent evidence to be given for confirming the credit of a witness, though there is a provision for impeaching credit. Curiously, section 158, which is limited to the very narrow situation of a declaration or statement made by a person who is now dead or unavailable as a witness, does permit evidence to be given, inter alia, to confirm the credit of the declarant. But there is no mention in the Act as to confirming the credit of a witness who has actually appeared before the court. Of course, confirmation is indirectly achieved when the witness stands the test of cross-examination, but it appears to us that there should be a right to confirm the credit of any witness who has given evidence in court. Since evidence impeaching the credit of a witness has been made the subject-matter of a specific provision in section 155, it is appropriate that a corresponding provision should be made regarding confirmation. We believe that no elaborate discussion is necessary to justify such a provision on the merits. If, for example, the credit of a prosecution witness is impeached in cross-examination under section 146, or by extrinsic evidence under section 155, fairness requires that there should be some machinery whereby the credit of the witness can be confirmed or—to use an expression often employed by academic writers—for “re-establishing” his credibility.

88.37. This appears to be permissible in England. Phipson has, in his Manual of the Law of Evidence, stated that when the reputation of a witness for veracity of his evidence has been attached, his credit may be re-established either by cross-examination of the impeaching witness or by general evidence that the impeached witness is worthy of credit or by general evidence that the impeaching witness is unworthy of credit, that is, by general “recrimination”.

88.37A. In the U.S.A., according to Rule 20 of the Uniform Rules of Evidence, “Subject to rules 21 and 22, for the purpose of imparting or supporting the credibility of a witness, any party, including the party calling him, may

---

1See para. 88.35, supra.
3Emphasis supplied.
4Rule 20, Uniform Rules of Evidence.
examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of credibility”.

It is unnecessary to multiply legislative precedents, which are referred to here only to illustrate the practical utility of the suggested provision.

88.38. If the above reasoning is accepted, it would be appropriate to insert a new section on the following lines, and we recommend that it should be inserted:

"157A. (1) Where the credit of a witness has been impeached by any party, the adverse party may, notwithstanding anything contained in section 153, in order to re-establish his credit, introduce evidence concerning his accuracy, credibility or veracity or to show who he is and his position in life.

(2) When a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally good moral character."
CREDIT OF DECLARANTS OTHER THAN WITNESSES—SECTION 158

89.1. We have so far been discussing provisions whereunder the credit of witnesses who give evidence in court can be impeached, or, in certain cases, confirmed. It was also necessary for the legislature to make a provision as to the credit of persons who are not witnesses. It may be recalled that two important sections of the Act—sections 32 and 33—provide for the relevancy of certain statements made by certain persons in special circumstances. These statements are made by persons who are now dead, or are not available to give evidence and technically they are not "witnesses", so that the provisions discussed so far as to impeaching credit do not apply to them. When such statements become relevant, the credit of the persons who made the statements should be subject to impeachment or confirmation in the same way as the credit of a witness who appears in court.

It is on this principle that section 158 provides that whenever any statement relevant under section 32 or section 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

The practical utility of this section is demonstrated by judicial decisions. We shall refer to a few of them.

89.2. A Calcutta case\(^1\) illustrates the aspect of confirmation. The deposition of a witness in a criminal case was, after his death, admitted in a subsequent civil suit under section 33. A witness under examination was then asked what information the deceased witness gave him soon after the occurrence. It was held that the question was admissible under this section in order to corroborate the deposition of the deceased witness.

89.3. Two Lahore cases illustrate the aspect of contradiction and also the fact that one has to read into the section certain other propositions.

Section 158, it was held, places a person whose statement has been used as evidence under section 32 in the same category as a witness actually produced in Court, for the purpose of contradicting his statement or corroborating him by a previous statement made by him. Therefore, a statement of A, admitted in evidence under section 32, may be contradicted by the previous statement of A made before the police officer during the investigation\(^2\). For the purpose of such contradiction of A by his statement before the police officer during investigation, A must be treated as a witness actually produced in court, and it must further\(^3\) be assumed that his previous statement made before the police was put to him in cross-examination as required by section 145.

89.4. Of course, the admissibility of a statement under section 158 is subject to any statutory provisions barring the use of particular statements for special reasons. Thus, it is not correct to say that a statement, otherwise falling


under section 162 of the Code of Criminal Procedure, would become admissible merely because it can be brought under section 158, Evidence Act. The provisions of section 162, Criminal Procedure Code, are specific provisions on the admissibility of statements made to the police. They control the general provisions contained in section 158, Evidence Act 1.

This objection does not, however, apply to the First Information Report. In *Amrit Lal v. Emperor*, it was suggested that list of property alleged to have been stolen, which is given to implement and complete the first information report, may be referred to under section 158 and proved under section 159.

The above discussion does not call for any amendment of the section.

---

Chapter 90

Refreshing the Memory of Witness — Section 159

90.1. In order that the knowledge of a witness may be available to the Court in its search for truth, the use of aids to memory is permitted by the law and, in certain cases, the use of previous memoranda is also allowed, in substitution for memory, under certain conditions. A witness may be honest and willing to speak the truth, and may claim personal knowledge of facts, and yet he may have no adequate present recollection of facts. Hence the need for such provision.

90.2. An important aid to exactness would be neglected if, human memory and inaccuracy being what they are, a witness cannot be at liberty to justify his recollection to facts by reference to written memoranda concerning him. In the interests of truth, it would be desirable, as was pointed out by Field J., to recognise the full benefit of the recollection of the witness as to the whole of the facts. Writing is a more reliable means of preserving the truth than simple memory. It is on these assumptions that witnesses are permitted to refresh their memory by referring to certain writings, under specified circumstances.

This procedure is, of course, subject to certain safeguards—in particular, the right to cross-examine the witness on the document so used and the requirement of the production of the document in court for the purpose.

90.3. We begin with section 159. Section 159 deals with refreshing the memory of a witness. The section can be divided into two principal divisions, namely, the portion dealing with witnesses in general and the portion dealing with experts. In regard to witnesses in general, the first three paragraphs along with the proviso are relevant, while experts are dealt with in the fourth paragraph.

90.4. Under the first part of the section, a witness under examination may refresh his memory by reference to three kinds of "writings", namely—

(a) any writing made by the witness himself at the time of the transaction concerning which he is questioned or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory;

(b) such writing made by any other person and read by the witness within the period aforesaid—in this case, the condition is that when he read it, he knew it to be correct;

(c) a copy of such document, with the permission of the court—in this case, the condition is that the court should be satisfied that there is sufficient reason for non-production of the original.

Under the second part, an expert may refresh his memory by reference to professional treatises.

90.5. This is the scheme of section 159. There is also a provision in section 160, for the use of a memorandum, where the witness has no present recollection. The two sections deal with two different situations, though the difference may be rather subtle.

1Cunningham, Evidence, page 377, cited by Woodroffe.
2Hubbo, (1882) I.L.R. 8 Cal. 742, 744, 745.
90.6. Strictly speaking, in the case under section 159, the document is resorted to in order "to revive a faded memory", and the witness swears from the actual recollection of the facts which the document evokes. In the situation in section 160, memory is not revived.

Section 159 deals with the present recollection, while section 160 deals with the past recollection. "In section 159, it is not the memorandum that is the evidence, but the recollection of the witness." On the other hand, in the case of a writing admissible under section 160, the witness has no specific recollection at the time when he gives evidence, but he guarantees as correct the fact recorded in the writing. The witness, after referring to the writing under section 160, swears as to the fact, not because he remembers the fact, but because of his confidence in the correctness of his record.

90.6A. Since the writing referred to under sections 159-160 would usually be an extra judicial statement, an interesting debate seems to have taken place in the U.S.A. on the question whether the situation where a previous statement or memorandum is used as "past recollection recorded" is or is not an exception to the rule against hearsay. Professor Morgan is of the opinion that at least in the situation where the witness has no independent recollection, theoretically, the rule against hearsay is violated—though he does not question the wisdom of the exception. "How can his prior identical unsworn declaration be of equal probative value with his present sworn and examined testimony?" Posing this query, Professor Morgan points out that if the memorandum is received as evidence of the unremembered matter contained in it, it cannot be on the ground of refreshment of recollection. "If accepted at all, it must be as a substitute for present memory. This means, in short, the reception in evidence of an extra judicial statement as probative of the matter asserted in it. If this is not hearsay, it comes perilously close to it."

On the other hand, Judge Lockwood is of the view that the objection on the score of hearsay is without foundation. "The recorded memory of the witness is thus as much a statement of that witness as to what he personally saw or heard as is his present independent recollection of the same fact." Since the person who witnessed the event testifies to the accuracy of the memorandum as made, that memorandum is just as much direct and not hearsay evidence as the language of the witness when he testifies to his independent recollection of what he saw.

So much as regards the theoretical aspects of the section; we now turn to some of the salient features of the section.

90.7. It is a condition precedent to the use of a record under section 159 that it must be contemporaneous. This is also the English law. Some of the cases cited by Cross may be mentioned. In Jones v. Stroud, it was held that a witness could not refresh his memory from a copy made six months after the original was brought into existence; but in Burrough v. Martin, a witness was allowed to refresh his memory with regard to a voyage by reference to the ship's

---

1Goodale, Evidence, page 209, 213, cited by Woodroffe.
3Morgan, "Relation between Hearsay and Preserved Memory" (1927) 40 Harvard Law Review 709, 717, 718.
4Kinsey v. State, (1937) 49 Arizona 201 (Supreme Court of Arizona).
5Cross, Evidence (1974), page 201.
7Burrough v. Martin, (1809) 2 Camp. 112; R. v. Longton, (1876) 2 Q.B.D. 296.
log book, the entries in which were compiled after the events to which they related. In *R. v. Simmonds*, notes made by customs officers at the first convenient opportunity after returning to their office from lengthy interviews were held to comply with the condition of contemporaneity, and the officers were permitted to read them to the court. It was said to be a course constantly adopted by police officers giving evidence of a long interview or series of interviews with suspects; "our courts are not slaves to orality".⁶

Thus, it is not possible to lay down any mathematically precise rule as to how nearly contemporaneous with the fact recorded the memorandum must be.

The writing may have been made either by the witness himself, or by others, provided in the latter case that it was read by him when the facts were fresh in his memory and he knew the statement to be correct.⁷

90.8. Thus, a solicitor may refer to his diary, or an ordinary witness may refer to a newspaper report read by him when the facts were fresh in his mind.⁸ An official shorthand writer may refer to his notes at trial, even though copies of these may be privileged from production to a non-party who has sub-poenaed him.⁹ And a workman's time-book may be used to refresh the memory of the cashier, who read it every fortnight, when paying the wages in accordance therewith.¹⁰ A log-book kept by the mate of the ship and inspected by the captain a week afterwards, may be used to refresh the memory of either.¹¹ So, depositions taken before a Magistrate or Coroner may be referred to at the trial, either by the witness who signed, or by the clerk who wrote them.¹² A person who gives information about records which it was his duty to keep may look at them to refresh his memory as to whether on a certain day they were kept accurately, but in general, if the witness knew the fact only from his document, record etc., the original document, record etc. must be put in the evidence, and properly proved by other means.¹³

90.9. Since the writing used for refreshing the memory is only an aid, technical objection to its admissibility becomes immaterial. It seems to be settled in England that a writing which is not legally admissible for want of stamp or registration can still be used for refreshing the recollection, the assumption being that what is evidence is still *the oral evidence of the witness*, and not the writing. On the same principle, a document rejected by reason of a rule of procedure—for example, Order 13. Rule 2 of the Code of Civil Procedure, 1908—can still be used under section 159.¹⁴

90.10. This is illustrated by an English case.¹⁵ In an action for money lent, an insufficiently stamped promissory-note purporting to be signed by the defendant and expressed to be given for the money lent was put into the hands of the defendant by counsel for the plaintiff, for the purpose of refreshing his memory and obtaining from him an admission of the loan. It was held that the

---

⁵Dyer v. Best, 4 H. & C. 189.
⁶James v. James, ex rel 21st May, 1919, per Roche, J.
⁸Anderson v. Whallay, 3 C. & K. 54; Burrough v. Martin, 2 Camp. 112.
⁹R. v. Williams, 6 Cox, 343; Wood v. Cooper, 1 C. & K. 645.
¹⁰R. v. Mann, 49 J. P. 743.
¹⁴Birchall v. Bullough, (1896) 1 Queen's Bench 325.
plaintiffs were entitled to use the note for that purpose, notwithstanding the provision of the Stamp Act that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever".

It would, therefore, appear that in order to be useful for the purpose of refreshing the memory, a document need not be admissible as independent evidence.

90.11. Refreshing the memory is not mandatory on the part of a witness. If a witness refuses to refresh his memory, he cannot be compelled to do so—although such refusal may sometimes give rise to an adverse inference. In *Haku Mahton*,

it was observed that "the Sessions Judge was not bound to compel the witness to look at the so-called diary in order to refresh his memory".

90.12. The subjects dealt with in sections 159-160 have received detailed attention in the United States. We have already deferred to the discussion in that country as falling under the doctrine of "present recollection revived" (section 159), or the doctrine of "past recollection recorded" (section 160). The latter doctrine comes into play when a witness is unable to sufficiently remember the circumstances of an event, which circumstances are described in a written statement. The former doctrine permits the witness to refer to the writing for the purpose of refreshing his recollection.

90.13. It may be noted that a case of complete loss of memory is outside sections 159-160. English courts have not had to deal with the problem of the amnesiac or near amnesiac witness. But we may refer to a British Cumbrian case—*R. v. Pitt*. The accused was charged with attempt to murder her husband. The accused was suffering from functional amnesia and said in court that she could remember little of what happened. Her counsel then applied for leave to have her hypnotised in court, a hypnotist having given evidence that her memory might be refreshed by an hypnotic trance. The application was granted, the accused giving her evidence after she had emerged from the trance. The decision was partly based on the analogy of refreshment of memory, but reference was also made to the unfairness of not allowing the accused the benefit of the latest medical techniques.

90.14. While the above discussion does not necessitate any changes of substance in the section, certain points of drafting should be mentioned. For the sake of facility of reading, it is, in our view, desirable to re-structure section 159 by dealing, in one sub-section, with witnesses, and in another sub-section, with experts. Incidentally, it has been held that the word "writing" in the section includes also printed matter. It appears to be desirable to replace that word by "document"—an expression which is already used in the section in regard to copies and is wider than "writing". That expression will cover, for example, photographs.

As regards experts, it may be useful to allow reference to periodical literature which may not fall within "treatises".

90.15. We therefore recommend the substitution of the following section in place of section 159—

---

1 *Haku Mahton*, I.L.R. 8 Cal. 793.
2 Para. 90.6, supra.
6 See section 3, "document".
159. (1) A witness may, while under examination, refresh his memory by referring—

(a) to any document made by the witness himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory;

(b) to any such document made by any other person, and read or seen by the witness within the time aforesaid, if, when he read or saw it, he knew it to be correct;

(c) with the permission of the Court, to a copy of such document; provided the Court be satisfied that there is sufficient reason for the non-production of the original.

(2) An expert may refresh his memory by reference to professional treatises or articles published in professional journals.
CHAPTER 91

EVIDENCE WITH REFERENCE TO PAST MEMORANDA—
SECTION 160

91.1. We have, in our discussion of section 159, drawn attention to the two kinds of use of previous memoranda. First, there is the process of refreshing one's memory which is dealt with in section 159, and secondly there is the use of a past memorandum even where there is no present recollection of the facts recorded in the memorandum. The distinction between the two has been already discussed. It is now time to deal in detail with the section relating to the second situation, which reads as follows:—

"160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document."

The illustration takes the familiar case of a book-keeper. A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

91.2. According to Markby1, section 160 deals with a case of the following kinds.

"A, a grocer, sues B for the price of goods sold some time previously, in small quantities, on a great many different occasions in fact, on an ordinary running account. The shopman is called, who says that, though he knows B to be a customer, he has no recollection of the particular transactions, but they are all contained in a book which he holds in his hand. The book is not admissible in evidence, but if the conditions as to the writing and so forth of the entries in the book as stated in section 159 be satisfied, then under section 160 the witness may look at the book, and if he is prepared to state upon oath that the entries are correct, he may read them out of the book."2

91.3. Where a witness has to depose to a large number of transactions and those transactions are referred to or mentioned either in the account books or in other documents, there is nothing wrong in allowing the witness to refer to the account books and the documents while answering the questions put to him in his examination. He cannot be expected to remember every transaction in all its details, and section 160 specifically permits a witness to testify to the facts mentioned in the documents referred to in section 159 although he has no recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Although this section refers to section 159, the situations were quite different, as already pointed out. The memory of a witness under section 160 is not revived at all. Having no specific recollection of the facts, he can only testify to the effect that he recorded correctly the events.

---

1Markby, Evidence, page 111, cited in Field.
Whether document is evidence.

91.4. Considerable discussion seems to have taken place in some of the judicial decisions as to whether the document referred to under section 160 itself becomes evidence. High Courts have discussed the matter inconclusively. There is also a view that the document used in section 160 will not itself become evidence. The point is of not much practical importance for the purpose of the law of evidence, because whatever view is taken, the document must be produced and shown to the opposite party, if he requires it. If the document is to be effectively utilised, witness will have to read out and dictate every word.

Section 159 deals with the case in which the witness really refreshes his memory. "He is sure not only that the facts were correctly recorded, but of the facts themselves, and (is) prepared to swear that they existed and this explains why in section 159, reference to a copy is allowed, but not in section 160." 9

91.5. In Harkhu v. Emperor, a Sub-Inspector of Police was unable to remember the precise nature of the injuries on the persons of the accused when they were brought before him. When asked to consult any memorandum on the point he might have made at the time of his investigation, he refused to do so. It was held that if a witness suffers from a lapse of memory, which can be remedied by reference to any memorandum prepared by him at the time, and the Court invites him to refresh his memory with reference to the writing, the witness is under an obvious obligation to do so, this being part of the duty under which is lies to lay the whole truth before the Court to the best of his ability. A similar view was taken in Mohiuddin Khan v. Emperor where it was held that the Court in such circumstances should require a witness to refresh his memory. On the other hand, there are two earlier cases, both of the Calcutta High Court in both of which it was held that witness was not bound to refresh his memory.

In our view, having regard to the word "may" which is used in section 160, it is not reasonable to read into the section any obligation on the part of the witness to refresh his memory. It is true that a witness takes an oath to tell the whole truth. But it is to be borne in mind that his oath does not require him to enrich his recollection or to improve his information or knowledge or capacity to narrate the past before the court. While a witness ought to be encouraged to assist the court in its search for truth, that does not mean that one can read into section 160 an obligation which is not contained in the express words.

91.6. There is an old general rule 11 inadequately explored in the modern authorities, that, if a party calls for and inspects a document held by the other party he is bound to put it in evidence if required to do so. 12 But, "where a

1A.I.R. 1932 Lahore 7, 8.
4A.I.R. 1938 Rangoon 42, 43.
5Section 161.
6Markby, Evidence, Page 112, cited by Field.
7Harkhu v. Emperor, A.I.R. 1921 All. 86 (Piggott & Walsh, JJ.).
12Warshaw v. Routledes, (1830) 5 Epp. 233; Calvert v. Flower (1836) 7 C. & P. 386; Palmer v. Metcalf and M'Grath. (1858) 1 Sw. & Tr. 159; Stroud v. Stroud. (1963) 3 All. E.R. 859.
document is used to refresh a witness's memory, cross-examining counsel may inspect that document in order to check it, without making it evidence. Moreover, he may cross-examine upon it without making it evidence provided that his cross-examination does not go further than the parts which are used for refreshing the memory of the witness. If, therefore, a witness refreshes his memory concerning a date or an address by referring to a diary, he may be cross-examined about the form or terms of the entries used to refresh his memory without there being any question of the right of the party calling him to insist that the diary should become evidence in the case. On the other hand, if the witness is cross-examined about other parts of the diary the party calling him may insist on its being treated as evidence in the case.

We may note that section 160 uses the expression "document"—an expression which, according to our recommendation, would be substituted in section 159 also.

No further comments are necessary as to section 160.

2Cross, Evidence (1974), page 207.
RIGHTS OF ADVERSE PARTY WITH REFERENCE TO WRITINGS USED AS AIDS TO OR SUBSTITUTES FOR MEMORY

92.1. Under section 161, any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it, such party may, if he pleases, cross-examine the witness thereupon.

The reasons why the opposite party is permitted to inspect a writing under section 161, were thus enumerated in a Calcutta case—

"(i) to secure the full benefit of the witness's recollection as to the whole of the facts;
(ii) to check the use of improper documents;
(iii) to compare his oral testimony with his written statement.

The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness."

92.2. It would appear that, in England, if the adverse party cross-examines a witness upon any other part of the document, he thereby makes it his own evidence. In India, the section is silent on the subject. But, it would appear, on principle, that the right to cross-examine the witness under section 161 would be confined to those points on which he refreshes his memory by consulting the document. The right to cross-examine would be confined to points necessary to explain that part.

92.3. No changes of substance are required in section 161. A verbal point should be mentioned. In this section also, for the word "writing", the word "document" should be substituted, in conformity with section 159, as proposed to be amended, and also in conformity with present section 160. We recommend accordingly.

1Empress v. Ihaboo Mehton (1882) I.L.R. 8 Cal. 739.
CHAPTER 93

PRODUCTION OF DOCUMENTS — SECTION 162

93.1. Documents must be brought before the Court before they can be used for various evidentiary purposes. Certain matters concerning the production of documents are dealt with in section 162. The section comprises four matters.—

(a) The duty of a person who is summoned to produce a document, to bring it into court.

(b) The power of the court to decide objections to its production (in evidence) or admissibility.

(c) The procedure to be followed for the purpose of exercising the power referred to at (b) above; and

(d) The translation of the document.

93.2. As regards the first topic\(^2\), it should be noted that there is a distinction between bringing the document in court and its production in evidence. When a person is summoned to “produce” a document, the expression “production” is also used in the two procedural Codes—that person must bring it into court. This simple and elementary provision really gives rise to the important implication that even if a person has an objection to handing over the document for use in evidence, he must bring it into court. The physical production of the document is obligatory. Whether the objection to its legal production is on the ground that the document has no relevance to the suit or proceeding—an objection usually taken by a party to the protected from disclosure or whether it is on the ground that the document, though relevant, is inadmissible by virtue of a statutory bar, it is not for the person summoned to determine that objection for himself. Only the Court will decide the objection to production in this sense. Production in the physical sense is mandatory on the person called upon to do so by the Court.

93.3. Even as regards physical production in the sense explained above, difficult questions could sometimes arise, where a witness who is summoned to produce a document raises the objection that the document is not in his power. In this context, the crucial words are—“Possession or power”. Where the witness is exclusively in control of the document and some one else claims control over it, no difficulty could arise by reason of the first part of section 162. But difficulty may arise when the witness is in joint possession with somebody else, who is not before the court. In such a case, in deciding whether the witness ought to be compelled to “produce” the document, normally the court will act on what is considered to be just in the circumstances. This aspect came up for consideration in a Bombay case\(^3\). On a review of English cases, it was observed that this matter would depend on whether the defendant, physically speaking, could produce this document and, legally speaking, ought to produce it, there being no other person having interest distinct from the defendant.

93.4. It is obvious\(^4\) that a witness cannot be compelled to produce a document by a summons, unless such document is under his control or possession.

---

\(^1\)Para. 93.1, Supra.


\(^3\)Case law taken from woodroffe.


69 Town, 48 (Amer.) cited in Woodroffe.

859
So a mere clerk in a bank is under no obligation to produce its books when they are under the control of the cashier, nor can the secretary of a railway company, as he was only the employee of the directors, nor are documents filed in a public office so in the "possession" of a clerk there, as to render it necessary, or even allowable, for him to bring them into court without the permission of the head of the office. This is not because of any question of State privilege, but because of the fact that the possession or power is in the head of the office. But one having the actual custody of documents may be compelled to "produce" them even through the document is owned by others—that is to say—he must bring it into court, and then raise the question of privilege regarding its production in evidence—where such privilege exists under section 131.

93.5. Under the first part of section 162 then, the document must be brought into court. The production of the document in evidence will, under the second part, be excused where it has been declared to be privileged from disclosure under the Act—for example, where it is the third party's title-deed, (this is the present law)—or a confidential communication professionally made between a legal adviser and his client, or the like.

93.6. Only the court can decide the validity of the objection. This is, in fact, expressly laid down in the second part of the section. The scheme in this regard, so far as section 162 itself is concerned, creates no problems. A disharmony is, however, introduced by section 123 (affairs of State), the last part whereof gives power to the head of the department to give or withhold permission "as he thinks fit". The decision of the head of the department ought not to overrule the power of the court. We have discussed this aspect while considering section 123.

The amendment which we are recommending in that section will remove the disharmony. The court's exclusive power of adjudicating upon objections to the production of documents will then have no exceptions, after the amendment recommended by us is carried out.

93.7. In order that the power of the Court to adjudicate upon matters of privilege (second part) can be properly exercised some machinery is needed. The third part of section 162, which has two branches, provides as follows—

(i) The court may inspect the document unless it relates to "matters of State".

(ii) The court may take other evidence for enabling it to decide the objection.

Taking up the first branch, we cannot help observing that it introduces a serious anomaly, according to four of us. This aspect has been discussed under section 123, but the important points may be reiterated. Having already emphasised the exclusive power of the court to decide the objection—(b) above—the section should have recognised the power of the court to inspect the document without any exception. But the section creates an exception precisely where the exception may work injustice. We say so because the expression "matters of State" is a vague one, and if the power of inspection is excluded merely because it is claimed that the document relates to matters of State,
then a very important, and almost indispensable, step for the exercise of the power would be taken out of the province of the court. What the section gives with one hand would be taken away with another. If the claim to privilege made on the ground of matters of State or affairs of State cannot be effectively adjudicated by the court, then virtually it comes to this—that the application of the law is left not to the judicial tribunal, but to an executive officer—however high he may be—who is not subject to any check by the tribunal and who is not even called upon—on the literal text of the law—to give reasons for withholding production. This would be a negation of the basic postulate of the rule of law.

93.7A. Fortunately, the construction of the section has not developed upon these lines. We have dealt with the case law in this regard in our consideration of section 123; the case law shows how the courts have felt constrained in the interests of justice to point out the need for leaving the ultimate decision to the court. It is unnecessary to repeat all that we have already stated; and at this state it is enough to repeat the view of four of us that the exception in section 162 for matters of State is unjustified and ought to be removed.

The assumption of the law that it is unnecessary for the judge to have the right of inspecting any document of this character. But, even now, he must necessarily have such right in the case of other privileged documents in order that he may judge as to their admissibility and obligatory production in evidence. Our recommendation, subject to reservation by two of us—Shri Dhavan and Shri Sen-Verma as regards claims to privilege based on security of the State as to the first branch of the third part of section 162 is to remove the exception for documents relating to affairs of State.

93.8. Under the second branch of the third part of the section, the court may also, in order to decide on the validity of the objection take other evidence to enable it to determine on its admissibility. All questions as to the admissibility of evidence are for the judge. Decision of such questions frequently depends on a disputed fact, in which case all the evidence adduced both to prove and disprove that disputed fact must be received by the judge, and however, complicated the facts or conflicting the evidence, such questions must be adjudicated on by him alone. Thus, the judge must equally (for example) decide whether a confession should be excluded by reason of some previous threat or promise and whether a document is protected from disclosure as being a confidential communication or the like. This branch is based on the above mentioned principle.

93.9. The last part of section 162 concerns the translation of documents, and needs no detailed comments.

93.10. In the result, the only change which we recommend in section 162 is the removal of the present exception regarding inspection by the court of documents relating to "matters of State"—a recommendation which is subject to reservation by two of us as already stated.

---

1Cunningham, Evidence 380; cited in woodroffe.
2Woodroffe.
4Woodroffe.
CHAPTER 94

DOCUMENTS PRODUCED AFTER NOTICE AND INSPECTED—
SECTION 163

94.1. A summons to produce a document must be obeyed. Section 162, which we have already discussed, so provides. What happens in regard to the more particular case of a notice to produce a document is dealt with in two sections — sections 163 and 164.

Under section 163, when a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

94.2. This section is intended to prevent the somewhat "undignified squabbling", which frequently takes place in England, as to whether a document which the other party has received notice to produce, should be put in. The reason for this rule is that it would give an unconscious advantage to a party to enable him to try into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties.

In Wharton v. Routledge, Lord Ellenborough said:

"You cannot ask for a book of the opposite party and be determined on the inspection of it whether you will use it or not. If you call for it you make it evidence for the other side, if they think fit to use it."

94.3. In Lawrence v. Van Horne, Radcliffe, J., observed:

"A party who gives notice to produce a paper in evidence must be supposed to know its contents. If he does not, he ought not to be permitted to speculate through the forms of law and obtain from his adversary the inspection of any paper or document he may choose to demand. Such a privilege would be liable to abuse."

94.4. Let us analyse the section. A party is bound to give the opponent's document as evidence if three conditions are fulfilled. The first condition is that the document should be required by that party to be produced in evidence. The second condition is that it should be inspected by the party. The third condition is that the party producing the document should require the party calling for it to put it in evidence. All the three conditions must be satisfied. If only the first of these conditions has been satisfied, the document cannot be treated as evidence of the party called for it. It is clear from the provisions of this section that the party inspecting the document is bound to give it as evidence only if the party producing the same requires it to do so.

---

1Markby on Evidence, page 113, cited by Field.
2Taylor, Evidence, section 181, cited in Woodroffe.
4Lawrence v. Van Horne, 1 Caines 276. See Field.
A person is not obliged to put in evidence the papers called for by him. If the party giving the notice declines to use the papers when produced, this, though a matter of observation, will not make them evidence for the adverse party. For, if notice to produce invests the instrument called for with the attribute of evidence, testimony incapable of proof might be brought into a case by such notice.

Of course, the position is otherwise (as the section says), if the papers are inspected by the party calling for them. Where a party calls for a document from the other party and inspects the same, he takes the risk of making it evidence for both parties.

It rests, however, upon the party who calls for and inspects a paper to adduce evidence of its genuineness, if that be not admitted.\(^1\)

**94.5.** This section does not render proof of the document to be exhibited unnecessary or alter the normal incidence of burden of proof as detailed in other sections of the Act.\(^1\) The documents admitted under this section must not be deemed to be conclusive evidence against the inspecting party, they become evidence for all they are worth.\(^2\)

**94.6.** The section does not expressly provide that it is confined to civil cases, and it would appear that the Calcutta view on the subject is that section 163 applies to criminal trials as well as to civil suits.\(^3\)

**94.7.** The Calcutta view is based principally on the reason that no such limitation is to be found in the wording of the section itself. In both the Calcutta cases, notice to produce certain statements was given to the Crown by the defence, and the statements were produced by the Crown, inspected by the defence and used for cross-examination. It was held that the Crown was entitled to use the whole statements.

It was suggested to us that some of the reasons which justify the imposition of a prohibition, even if they apply, do not apply with the same force in criminal cases. To a large extent, section 163 is based on the consideration that it would give an unconscionable advantage to a party to enable him to try into the affairs of his adversary, without, at the same time, subjecting him to the risk of making whatever he inspects evidence for both the parties. In criminal cases, however, even if this consideration is regarded as applicable, there are other considerations which should be taken as overriding it. We have however not been convinced of the need for a change.

**94.8.** It is for these reasons that we do not recommend any change in section 163.

---

\(^{1}\text{Sayer v. Kitchan, 1 Esp. 210, cited in Woodroffe.}\)

\(^{2}\text{As to notice, see Order 11 R. 15 C.F.C.}\)

\(^{3}\text{Mahomed v. Abdul, (1903) 5 Bom. L.R. 380.}\)

\(^{4}\text{Raja Gopal v. Ramanuja, (1923) N.W.N. 292; 72 I.C. 459 (Mad.).}\)

\(^{5}\text{Ramadhin v. Ram Dayal, 57 I.C. 973 (Oudh).}\)

\(^{6}\text{Government of Bengal v. Santiram Mandal, A.I.R. 1930 Cal. 370.}\)

\(^{7}\text{Emperor v. Makhunlal Dutt, A.I.R. 1940 Cal. 167, 168.}\)
DOCUMENTS NOT PRODUCED AFTER NOTICE — SECTION 164

95.1. The last section discussed was concerned with the document which is produced after notice and is inspected by the party giving notice. Section 164 deals with a situation where a document is not produced, though notice has been given. In the last section, the act was positive and the consequence of the act was also positive.

The document having been called for the inspection, the party calling for the same is bound to use it as evidence, if certain conditions are fulfilled. In section 164, on the other hand, the act of the party is negative, and so also is the consequence. When a party does not produce a document which he has had notice to produce, he cannot afterwards use the documents as evidence without the consent of the other party or the order of the court. This is what the section provides.

The illustration to section 164 takes the case where A sues B on an agreement and gives B notice to produce it (i.e. the document containing the agreement.) At the trial, A calls for the documents and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so. Of course, the illustration assumes that the other party has not consented and that the court has not given permission for use of the document, thus relaxing the section.

95.2. The effect of this section is that where an opponent in possession refuses to produce a document on demand, he is also prohibited from producing it for contradicting the evidence which may have been tendered by the other party by way of permissible secondary evidence, or by way of proof of the fact to which the document relates. This provision may sound harsh; but, it has been explained1 that while, in a sense, it is an appropriate “penalty” for unfair tactics, the original refusal may also be regarded as an admission, in advance, for the purpose of the particular judicial proceedings, of the correctness of the first party’s evidence to this extent.

95.3. There is also the presumption that evidence which could be produced and is not produced would not be favourable to the party who withholds it. The principle was stated in an English case2 in these terms:

"You must either produce a document when it is called for, or never"

95.4. A party thus is not permitted, after declining to produce a paper, to put it in evidence after it has been proved by his opponent by parol. If he is to be allowed to do so, he would be able to hold back the paper, until he saw whether its parol rendering would be favourable or unfavourable to him, and thus to obtain an unjust advantage over his opponent. The same rule is applied when the party calling for the paper has proved a copy, in which case the holder of the paper cannot produce it and object to the reading of it without proof by an attesting witness. Nor can be after refusing to produce, put the

---

1Wigmore, cited in Field.
paper into the hands of his opponent's witness for the cross-examination or produce and prove it as part of his own case.  

He is, in effect, bound by any legal and satisfactory evidence produced on the other side.

95.5. It would appear that the party who does not produce a document in his possession cannot be allowed to prove the contents by secondary evidence also. It was so held in a Madras case. This, with respect, seems to be a correct view. When section 164 speaks of using the document “as evidence”, it includes secondary evidence also. The party refusing can produce neither primary nor secondary evidence. In fact, it is the other party (which gave notice to produce) that becomes entitled to give secondary evidence—the illustration to the section would at least appear to assume this.

It would be of interest to note that this principle was applied, in an early English case, to a chattel, where a party was determined to keep back a chattel.

95.6. It remains now to refer to another provision under which there is a presumption that a document called for and not produced after notice was attested, stamped and executed in the manner required by law.

95.7. The question whether this section applies to criminal proceedings has been the subject matter of some discussion.

95.8. It was suggested to us that it may be better to add the words “to a civil proceeding” after the words “when a party” in section 164 and thereby to limit its scope. We do not, however, consider it necessary to make any such change.

5Section 89.
7See discussion in Sham Das v. Emperor, A.I.R. 1933 Cal. 65, 66, (left-hand); I.L.R. 60 Cal. 341 (Panckridge, J.).
CHAPTER 96

POWER OF THE JUDGE — SECTION 165

96.1. In order to elicit the truth or to get all facts necessary for a proper decision, the law gives certain powers to the court in section 165. If attention is confined to the proof brought forward by the parties, appropriate materials for decision may not be available and the truth may not always come out. Examination of witnesses may not have been conducted scientifically or skillfully, and things may have been left unsaid or obscure unintentionally, or as is sometimes seen intentionally.

96.2. So, whenever the judge finds that the examination has not been conducted in a way as to unfold the truth, or that obscurities in the evidence should be made clear and intelligible, it is not only his right, but also his duty, to probe into matters that he deems important. This the Act empowers the judge to do. He can put his own questions. But this power of interrogation is to be exercised within well-recognised limits by maintaining judicial calm and detachment and without assuming the functions of counsel. The judge may intervene by questions any time he considers necessary, but if extended examination is necessary, it is usually made after the counsel have finished their task.

The power conferred by section 165 is wide, in as much as the judge can put any questions which he considers fit for eliciting the truth. But there are certain limitations given in the section.

96.3. Under the section, the judge may “in order to discover or to obtain proper proof of relevant facts ask any question he pleases, in any form, at any time, of any witness or of the parties about any fact, relevant or irrelevant”. The history of the section shows that it was enacted in that wide form, because, in 1872, it was thought that in many of the lower courts of the country, neither were cases properly prepared, nor were witnesses properly examined, so that it was necessary to vest the judge with an over-all power to get at the truth by asking any questions he liked. But although a great deal of time has since passed, the section has remained on the statute book and we cannot say that even in the present circumstances, the section is not needed.

The powers conferred by the section can, therefore, still be claimed and exercised. “It is obvious that the judge contemplated by the section is not a mere umpire at a contest between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost” He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or wilfully avoided.

96.4. Explaining the object of the section, Stephen in his Introduction to the Evidence Act wrote: “When a man has to inquire into facts of which he report, and facts relevant in the highest degree to facts in issue may often be

1Sarkar, Commentary on section 165.
2Field.
3Stephen, Introduction to the Evidence Act.
extremely important for him to trace the most cursory and apparently futile report, and facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of the Evidence Act. A judge or magistrate in India frequently has to perform duties "which in England would be performed by police officers or attorneys. He has to sift out the truth for himself as well as he can and with little assistance of professional kind. Section 165 is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth."

96.5. The effect of this section is that, in order to get to the bottom of the matter before it, the court will be able to look at and inquire into every fact whatever. A judge may ask any question he pleases about any irrelevant fact, if he does so in order to discover or to obtain proper proof of the relevant facts. It is, therefore, appropriate to say that the object of allowing the judge to ask irrelevant questions under this section is to obtain "indicative evidence" which may lead to the discovery of relevant evidence.

96.6. As regards the nature of the examination, the judge may question the witness either in the manner and with the object followed by the parties, or he may avail himself of the more extended power of interrogation which is given to him under the terms of this section. It has been a matter of juristic dispute whether a judge can, on his own motion, put to the witness questions independently of counsel, so as to bring out points which counsel designedly or undesignedly overlook. On one side, it has been urged, in conformity with the scholastic view, that the judge is confined to the proof adduced by the parties. On the other side, it is insisted that it is absurd for a judge with a witness before him not to do what he can to elicit the truth. So far as concerns the abstract principle, writers on the English common law repeatedly affirm the scholastic view that the judge must form his judgement exclusively on the proof brought forward by the parties. So far as concerns the practice, judges, both in England and in the United States, do not hesitate to interrogate a witness at their own discretion, eliciting any facts they deem important to the case. Best has discussed the matter in these terms—

"Again, the judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any questions in any form and at any stage of the cause, and to certain extent even allow parties or their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure; for, if such be left to the jury, a new trial may be granted, even though the evidence were extracted by questions put from the Bench, but it is a power necessary to prevent justice being defeated by technicality, to secure indicative evidence and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion."

It is this latter object (the securing of indicative evidence) which is the main ground for the enactment of this section.

96.7. At the same time, there is a certain disadvantage to the judge when he examines a witness. One important drawback is that the judge may overlook the demeanour of the witness. This only shows the care to be exercised by the Judge.

1Queen Empress v. Hari Lakshman, I.L.R. 10 Bom. 185.
4Best, Evidence, section 86.
96.8. We generally agree with what Best has said. The section does not seem to need any change in point of substance. But by way of structural improvement, we recommend the following redraft.

REVISED SECTION 165

165. (1) Subject to the provisions of sub-sections (3) and (4), the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing.

(2) Neither the parties nor their agents shall be entitled—

(a) to make any objection to any such question or order, or,

(b) without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

(3) Notwithstanding anything contained in this section, the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

(4) Nothing in this section shall authorise the Judge—

(a) to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; or

(b) to ask any question which it would be improper for any other person to ask under section 148 or 149; or

(c) to dispense with primary evidence of any document, except in the cases herein before excepted.

\(^{1}\)Para 96.6, supra.
JURY AND ASSESSORS — SECTION 166

97.1. Section 166 provides that in a case tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper. Power of jury on assessors.

97.2. The system of trial by jury has been abolished. Provisions for assessors are sometimes made in special laws, but are very rare. Deletion of section 166 recommended.

The section should therefore be deleted. If ever the system is revived, the section could be re-enacted. But since this system is not now in force, we do not think it necessary to retain the section.
CHAPTER 98

IMPROPER ADMISSION OR REJECTION OF EVIDENCE—SECTION 167

98.1. Under section 167, the improper admission or rejection of evidence shall not be a 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.

Section 167 is a verbatim reproduction of section 57 of the Evidence Act of 1855, and the rule has been adopted from the practice of the courts in England.

98.2. It is the duty of the courts to arrive at their decisions upon legal evidence only.1 However, lest it should be argued that a breach of this duty by the judge renders the trial illegal and the judgment liable to be set aside, it becomes necessary to provide that the improper admission of evidence shall not be a ground of itself for (i) a new trial or (ii) a reversal of any decision in the case.

Similarly, since a court is bound to take on record all relevant evidence unless otherwise provided by a specific provision of law—an obligation which can, to some extent, be deduced from section 5—it could have been argued that if admissible evidence has been rejected, the trial is vitiated. Anticipating such an argument, the Legislature has, in section 167, also provided that the improper rejection of evidence shall not be ground of itself for a new trial or a reversal of any decision in the case.

98.3. Stephen Lush, in his Common Law Practice,2 wrote—"Where evidence has been offered by one party at the trial and has been improperly rejected or admitted by the Judge after hearing the objections of the opposite party, a new trial, as a general rule, may be claimed on the ground that in so rejecting or admitting the evidence the Judge did not rule according to the law". But, he also added that courts had not been in the habit of granting new trial where, even if the evidence rejected is admitted, a verdict for the party offering would be clearly against the weight of evidence or—to take the converse case—where, even without the evidence illegally received, there is enough to warrant the verdict.

98.4. Stephen in his Introduction3 to this Act observed (with reference to the sections concerning relevancy), that "important as these sections are for purposes of study, and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts, they are not likely to give rise to litigation or to nice distinctions. The reason is that section 167 of the Evidence Act, which was formerly section 57 of Act II of 1855, renders it practically a matter of little importance whether evidence of a particular fact is admitted or not". Of course, he had in mind those cases where the breach of the rules did not cause substantial miscarriage of justice.

---

3Stephen, Introduction, page 73.
98.5. It may be noted that section 167 applies to civil as well as to criminal cases. The word "decision", though generally used as applicable to civil proceedings, is by no means inappropriate to criminal cases. The words "in any case" in section 167 are wide, and were long ago interpreted to include criminal trials by jury. The position is clear from section 1, which renders the Act applicable to all judicial proceedings, etc. (with certain exceptions), and by section 3, which declares that "Court" includes all Judges and Magistrates. In short, the provision contained in section 167 applies to all judicial proceedings in or before any court, including jury trials.

98.6. The significance of section 167 would be best understood if regard is had to the position regarding appeal. Where an appeal lies on points of law only, two questions relating to evidence may arise, namely, that the judge wrongly admitted or rejected evidence, or that there was no evidence upon which the judge could find as he did. The first question is the one on which section 167 focusses attention. It prohibits reversal of judgement merely on the ground of a wrong admission or rejection of evidence if other evidence on record justifies the decision under appeal, or if inclusion of the evidence improperly rejected would have made no difference.

98.7. This does not, of course, mean that in no case would the improper admission or rejection of evidence affect the decision. To the saving provision in section 167, an important condition precedent has been annexed, namely, "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".

The Privy Council observed, discussing this aspect:

"It was therefore the duty of the High Court in Appeal to apply its mind to the question whether, after discarding the evidence improperly admitted, there was left sufficient ground to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that the evidence was properly admitted, and their Lordships propose therefore to remit the case to the High Court of Madras, with directions to consider this question. If the court is satisfied that there is not sufficient admissible evidence to justify the convictions, they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them".

98.8. In England, under the Rules of the Supreme Court—

"(1) On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding or judgement of the court below.

4Abdul Rahim v. Emperor, A.I.R. 1945 P.C. 82, 84.
5Cockle, Cases and Statutes on Evidence (1963), page 405.
7Order 58, R. 3, Rules of the Supreme Court.

56—131 LAD/ND/77
(2) A new trial shall not be ordered on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court of appeal some substantial wrong or miscarriage has been thereby occasioned.

(3) A new trial shall not be ordered by reason of the ruling of any judge that a document is sufficiently stamped or does not require to be stamped."

No change.

98.9. We have no further comments on the section which needs no change.
CHAPTER 99

DISCRETION OF THE JUDGE

99.1. In this Chapter, we propose to consider in brief the question whether the Judge should be vested with a discretion to exclude evidence which is relevant and technically admissible, where its admission is regarded as necessary in the interests of justice. An examination of this subject has been considered necessary in the light of the query raised whether there is need for such discretion in order to promote the cause of justice by preventing harassment or oppression. The submission to be made after an examination of the position is that such an amendment should not be made.

In order to understand the scope of the present discussion, it will be convenient to discuss the subject under these heads —

(a) Whether the Court in India has any such discretion according to the present law?

(b) What is the English law on the subject?

(c) Whether the vesting of such a discretion in the court in India would be desirable or feasible?

99.2. As to the first question, the correct answer should be in the negative. The courts in India do have jurisdiction — indeed, it is mandatory on their part — to exclude evidence which is irrelevant or inadmissible and to disallow questions which are prohibited by specific legislative provisions. They have no discretion to exclude evidence or to disallow questions permissible by law on the ground that serious prejudice might thereby result to any party or on the ground that embarrassment might be caused to a witness or that the evidence would be unfair. The powers of the Judge are limited to those expressly conferred by the Evidence Act or by the two procedural Codes or any special law. In the absence of a provision conferring such a discretion, courts do not act under any residual or general power to exclude evidence.

Certain sections of the Evidence Act to confer a power or impose an obligation on the Court to regulate the scope of questions in regard to particular matters or in particular forms. By way of example, reference may be made to section 148, whereunder the Court must consider how far the making of imputations on the character of a witness in cross-examination is justified having regard to the considerations mentioned in that section. But, in general, it cannot be said that evidence which is relevant and admissible and not excluded by a specific legal provision, if elicited in the proper form and manner, can still be excluded by the presiding officer on the ground that it would be unfair or oppressive or against public policy. This is true whether the proceeding be civil or criminal.

99.3. As to inherent powers under the Code of Criminal Procedure, there is no authority recognising a power to exclude evidence that is unfair to the accused. Nor is there such power under the Civil Procedure Code.

The question of unfairness to the accused did come up in a case before the Calcutta High Court. In that case, three persons were charged for an offence of murder under section 302, Indian Penal Code. After the close of

---

1Section 482, Cr. P.C. 1973.
prosecution evidence, and before the examination of the accused, the trial judge decided to examine the Defence Counsel as a court witness, since one of the accused had been working in his house on a part-time basis when the offence was committed by him. All the three accused were convicted and sentenced to imprisonment for life.

The matter came up in appeal before the High Court. The High Court observed that "the Advocate's evidence was competent and even compelling. There was no privilege against the court. But the embarrassment to the accused was inevitable, the prejudice inescapable. To plead and to prove, to act as counsel and witness in the same case, even if permissible in any circumstance, was not an easy task. And the trial judge enabled the Advocate to play a dual role and combine the two functions by allowing the defence prayer and permitting the Advocate to address the jury. It is here, we think, that the learned judge misdirected himself. The court had the right to obtain his evidence but it failed in its duty to safeguard the interests of the accused. It mattered little if that course was taken on the prayer of the accused themselves."

The High Court held that the accused did not have a fair trial. It set aside the conviction and directed that the accused be retried in accordance with law.

This case can be explained on the ground that there was a serious defect in procedure. The decision is not relatable to any supposed discretion to exclude evidence on the ground of unfairness.

99.4. In support of the view put forth above as to the present law in India, it may be mentioned that in cases where evidence was obtained by the police by an illegal arrest or search, the Courts have almost universally held that the illegality does not affect the admissibility of the evidence. Not only have they held it to be admissible, but also they have taken such evidence into account in coming to a conclusion on the facts. Had there been a judicial discretion to exclude evidence on the ground of unfairness or prejudice, that aspect would most probably have come up for consideration, at least in some exceptional cases.

Secondly.—taking civil cases—in those judicial decisions where a claim for privilege was made but rejected, one does not come across any discussion or mention of a residual discretion. It is therefore a reasonable view to take that our courts do not possess the existence of a judicial discretion, either in civil or in criminal cases.

99.5. As to the position on the subject in England, Cross & Wilkins, in the Outline of Evidence, state it as follows as regards criminal cases:

"In every criminal case the judge has a discretion to disallow the evidence even if in law relevant, and therefore, admissible if admissibility would operate unfairly against the defendant."

"The use of the discretion for this purpose is apparent in relation to confessions and illegally obtained evidence. The court has a discretion to exclude confessions although they were voluntary within the rules discussed in Article 46, and to reject evidence which is in law none the less admissible although improperly obtained. This discretion is exercised mainly in order to prevent the accused from suffering on account of having been unfairly induced to incriminate himself."

1 Contrast the English position — para 99.6. infra.
2 Cross & Wilkins, Outline (1975), page 248.
"Another basis of the exercise of the discretion is the protection of the accused from undue prejudice. Similar fact evidence is, as we saw in Article 76, liable to be rejected if the judge considers that its prejudicial propensity outweighs its probative value. This is a completely different basis for the exercise of the discretion from that illustrated by the exclusion of confessions; there can be no doubt about the probative value of a confession which complies with the rules governing voluntariness. The discretion to exclude statements made in the presence of the accused is also based on the danger of undue prejudice being caused by evidence of slight probative value.

"We saw on page 229, that, even though cross-examination is legally permissible under section 1(f) of the Criminal Evidence Act, 1898, it may be disallowed in the judge's discretion. This is an extension of the judge's discretionary control of any cross-examination. It is especially important in the case of an accused giving evidence on his own behalf, but there is a general requirement that the cross-examination must be fair to the witness. Fairness to witnesses also accounts for the discretion claimed by the courts to disallow questions on the ground that the answers would involve the disclosure of confidences, although those confidences are not the subject of a legally recognised privilege. This latter exercise of the discretion has only been mentioned in civil cases. In fact, it is possible that it would be held inapplicable in a criminal case on account of the public interest at stake."

99.6. It is in relation to claims to privilege from answering questions in cross-examination that the courts' exclusionary discretion has been invoked in civil cases. The basis on which the discretion has been exercised has been that of balancing the competing interests of disclosure in furtherance of the administration of justice between the parties and non-disclosure in the interest of confidentiality. It seems that the trial judge has a discretion to uphold a witness's claim to be privileged from answering certain questions although no privilege exists as a matter of law, and even though the questions are relevant and necessary for the purpose of the particular proceedings. The only reported cases concern claims to privilege by doctors and priests and journalists; but, in the context of the exclusion of evidence in the public interest, it has been recognised that the public has an interest in the preservation of confidentiality which must be weighed against the private interest of the parties and the importance of the due administration of justice between them.

99.7. There is no English authority suggesting that, in civil cases, the judge has a discretion to disallow improperly obtained admissions, or prejudicial evidence relating to misconduct on other occasions and, in each instance, there is Commonwealth authority to the contrary.

99.8. It may be mentioned that where Cross & Wilkins have referred to the discretion in relation to cross-examination, they have in mind the power of the court to disallow questions which are needlessly offensive or embarrassing in form. This power is similar to that under section 151 of our Act.

5Ibrahim v. R., (1914) A.C. 599, 610.
99.9. As to situations involving an unsuccessful claim of privilege Donovan L.J. made these observations\(^1\) in *A.G. v. Mulholland* "I agree. I add a few words only about the need for some residual discretion in the court of trial in a case where a journalist is asked in the course of the trial for the source of his information. While the journalist has no privilege entitling him as of right to refuse to disclose the source, so, I think, the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all; in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand — I prefer that expression to the term 'necessary'. Both these matters are for the consideration and, if need be, the decision of the judge. And, over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of facts and circumstances which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.

"For these reasons, I think that it would be wrong to hold that a judge is tied hand and foot in such a case as the present and must always order an answer or punish a refusal to give the answer once it is shown that the question is technically admissible. Indeed, I understand the learned Attorney-General to concur in this view namely, that the judge should always keep an ultimate discretion. This would apply not only in the case of journalists, but in other cases where information is given and received under the seal of confidence, for example, information given by a patient to his doctor and arising out of that relationship. In the present case, where the ultimate matter at stake is the safety of the community, I agree that no such consideration as I have mentioned, calling for the exercise of a discretion in favour of the appellants, arises, and, that accordingly, their appeals fail and must be dismissed."

\(^1\) *A. G. v. Mulholland,* (1963) 1 All. E.R. 767.

99.10. The next question is whether it is desirable that the courts in India should be vested with a judicial discretion to exclude evidence and, if so, on what grounds. Notwithstanding the English precedent, it appears to us that to confer such a discretion may lead to a certain amount of vagueness in the administration of the law. This is not to say that in regard to those sections which expressly confer a power on the court to exercise its sound judgment, there should be a modification of any substance by way of narrowing down their scope. They operate on definite matters. The question with which we are concerned is whether there should be recognised a "residual discretion"—to borrow a phrase from the judgment of Donovan L.J. in the English case of *Attorney General v. Mulholland.* The questions permissible in cross-examination are the subject matter of section 148. We are also recommending the insertion of a restrictive provision as to questions relating to the character of a person suing for defamation.\(^2\) Those provisions of the Act which prohibit the putting of indecent or offensive questions will also continue to be in the Act. But, aside, from those provisions, it may not be feasible to vest a general discretion in the court to exclude evidence that may have been obtained by unfair means or may otherwise cause prejudice to a party. Such a provision might lead to undue vagueness and thereby render unpredictable the actual outcome in a large number of cases.

\(^2\)Section 55 as recommended.
99.11. In regard to the view expressed by Donovan L.J. in the English case of Attorney General v. Mulhalland, — 2265 to 2268 — Where he suggested that the court has, even in a civil case, a discretion to exclude a communication of a confidential nature even where the law does not recognise a privilege as such, the vesting of such a discretion in the courts in India might lead to want of uniformity.

99.12. We do not therefore recommend any change. No change.
CHAPTER 100

CONCLUSION

100.1. By way of concluding our discussion of the Act, we would like to say a few words in this Chapter as to certain matters of general interest.

The query may be raised why an Act like the Evidence Act should require discussion at length. The law of evidence is often regarded as relating to matters purely of interest to lawyers, and in that sense, it is described as a technical branch of the law. It is true that the subject of evidence belongs to what is usually described as adjective law as distinguished from substantive law. To put the matter in a different form, it deals with the means permitted by the law for the ascertainment of truth by the judicial process, and not with the end of the law as an instrument of social justice. Nevertheless, the means would appear to be as important as the end. If the means be defective, the end cannot be fully achieved.

100.2. There are, in our opinion, certain other aspects also, which ought to be appropriately emphasised. In a decision of the House of Lords reported in 1918, Lord Parker, while dealing with the status of foreign law, observed—

“Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence.”

When Lord Parker was speaking of “law”, he was not, of course, ruling out the law of evidence; what is more pertinent to be pointed out is that he laid emphasis on “appropriate evidence” and it is the function of the law of evidence to lay down whether a particular evidence should be regarded as appropriate or not.

100.3. An eminent English counsel and Editor of the All England Law Reports has defined the judge’s task as, first to ascertain the facts, second, to ascertain the rule applicable thereto, and third, to apply that rule to those facts.

100.4. Apart from this legal aspect, we may also point out that several branches of the law of evidence deal with questions affecting human values. Rules relating to confessions are an example. The human element becomes relevant in a formulation of the rules of the law of evidence in relation to another topic of the law, namely, questions of privilege. Much of the law of evidentiary privilege is concerned with matters which are protected from disclosure having regard to eminently human considerations—considerations which involve a person’s conjugal rights, his dignity, his reputation for moral integrity, his dealings with those in whom he has placed confidence, and the like.

100.5. In discussion cases relating to character, Foster makes a statement which has subsequently been frequently quoted—

“The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point of issue, is founded on sound sense and common justice. For, no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. And had not those concerned in state prosecutions, out of their zeal for

1Dynamit Aktiengesellschaft v. Rio Tinto Co., (1918) A.C. 292, 302 (H.L.)
3Foster, Crown Law, 246.
the public service, sometimes stepped over this rule in the case of treasons, it would perhaps have been needless to have made an express provision against it in that case, since the common-law grounded on the principles of natural justice hath made the like provision in every other.

100.6. It may also be mentioned that the level of culture of a civilization may impose restrictions on the content of the law of evidence. For example, in criminal trials, involuntary confessions are excluded, not only because they may be false, but also because they are repulsive to the conscience of society.

Then, there is the intellectual appeal of the law of evidence, in so far as it touches on the field of logic and seeks to define what facts are to be considered as of probative value in the eye of the law — "relevant" as the expression goes.

Thus, the legal, moral, and social importance of the law of evidence is much deeper than may appear at the first blush. That explains why the subject cannot be fully disposed of in a brief report.

100.7. Codification of the rules of evidence may not have a long history; but even so, it may be pertinent to point out that some of the rules of evidence are of great antiquity,1 as was noticed by Kenyon C.J. This fact was emphasized by Best,2 with reference to what he regarded as the primary and secondary principles of evidence. A primary principle, according to Best, is one related to a fact to be proved, while a secondary principle is one related to the means of proof.

One of these primary principles is that evidence must be relevant. This principle underlies some of the rules designed to exclude misleading facts from the consideration of the tribunal; and at least one of these rules, that the action of strangers to a litigation ought not to prejudice a party (res inter alias actus alteri nocere non debet) is to be found in a slightly different form in Justinian's Code.3 According to another principle, the burden of proof lies on the party alleging a fact, of which the correlative rule is that he who alleges a matter must prove it, but he who denies it need not disprove it (cui incumbit probare qui dicit non qui negat). This maxim was attributed to Paulus,4 while, as early as the second century A.D., a comparable adage was attributed to the rabbinical teacher Akiba.5

100.8. In India, Brihaspati remarked ages ago that "since people begin to entertain doubts (about a transaction) even in six months (from an occurrence or transaction), the Creator therefore created in the hoary past letters which are recorded on writing material".6

100.9. When success depended on such means as a judgement from God, the oath of the parties, wager of law (compurgation) or of battle and ordeals (ardalsh), rules of evidence were not needed. Society has, however, long since passed these stages.

Essentially, rules of evidence regulate the process of fact-finding in a court of law. This process, whether it is or is not regulated by mandatory rules, is

---


4Corpus Juris Civilis, Dig. xii, 3, 2.

5The Nishnsh, Bekh. 2, 7, see also B.K. 3, 11, D.B. 9, 6 (1933) trs. Danby, 532, 336, 379.

different from the process of such finding in other kinds of human activity. The
difference has been lucidly brought out by two American authors, one of whom
is the Editor of Wigmore:

"The most conspicuous difference between the law's problems in deter-
mining historical facts and those of other disciplines lies in the procedure
of decision. Other disciplines rely primarily on the method of inquiry,
reflection, and report by trained investigators. In other disciplines the
final conclusions as to key facts are drawn by experts, and the conclusions
may be changed — if they are found later after further inquiry and reflection — to be wrong. The law, in contrast, depends in most formal proceedings
upon presentation by the disputants in public hearing before an impartial
tribunal, a tribunal previously uniformed about the matters in dispute. And
findings of facts by the tribunal are usually final so far as the law is
concerned.

"Typical or such formal proceedings is the trial in court. A trial
suffers from immobility. It suffers from shortage and inflexibility of time.
It is dependent largely upon non-expert sources of information and upon
non-expert evaluators of information (the jury). In addition, proof at a
trial is rather strictly governed by procedural rules called rules of evidence."

100.10. The same authors have emphasised the element of contest in these
words:

"A contested law suit is the society's last line of defence in the
indispensable effort to secure the peaceful settlement of social conflicts.
In the overwhelming majority of instances, the general directions of the
law function smoothly with no controversy whatever. When controversies
do arise, the overwhelming majority of them are settled informally or, if
formally, without a contest, as by plea of guilty in a criminal case. In
almost all these situations lawyers are likely to handle evidence in the
same commonsense fashion that anybody else would, unless special calculations are called for by a real possibility of formal litigation."

"When a question has reached the point of contested trial, however,
its whole context is changed. Victory, and not accommodation, is the
objective of the parties. The adversary atmosphere and the delays of
litigations naturally repel evidence, especially testimony and things under
the control of disinterested persons, so that the litigants have available
for use only the partisan and coerced residue after people with ingenuity
have made themselves anonymous. That residue is culled by the parties
with a view not to establishing the whole truth, as to winning the case. And
the evidence which survives this attrition (and the exclusionary rules of
evidence described below) is communicated to the trier of fact in an
emotion-charged setting.

"In judging the law's handling of its task of fact-finding in this setting,
it is necessary always to bear in mind that this is a last-ditch process in
which something more is at stake than the truth only of the specific matter
in contest. There is at stake also that confidence of the public generally
in the impartiality and fairness of public settlement of disputes which is
essential if the ditch is to be held and the settlements accepted peaceably."

1100.11. If one bears these aspects in mind, one immediately perceives the
limitations flowing therefrom.

1Hart and McNaughten, Evidence and Inference in the Law (1938), pages 51, 56;
2Hart and McNaughten, Evidence and Inference in the Law (1938), pages 51, 56;
reproduced in Loisell and others, Evidence Material and Proof (1972), pages 2, 3.
Within these limitations, a well-designed law of evidence always sets before itself certain objectives which it seeks to achieve, namely, limiting the range of inquiry, avoidance of delay, and the ascertainment of truth in the best possible manner.

Let us see how the Act secures the beneficial purposes which it seeks to achieve. The Act, in the first place, seeks to limit the range of evidence by defining the facts to which evidence can relate. One paramount principle controls the giving of evidence. Under section 5, evidence must be confined to facts in issue and relevant facts. This also saves time—an aspect which is not often realised.

100.12. In general, the volume of evidence on relevant facts depends on the importance which the parties attach to proof of the particular facts, and the law does not restrict the volume. However, section 39 lays down the limits of evidence which is to be tendered when the statement forms part of a conversation, documents, books, or series of letters or papers. Only that much portion is admissible as is necessary for the full understanding of the nature and effect of the statement concerned.

100.13. Then, there are rules as to the quality of evidence. Evidence, if oral, must be direct. If it is documentary, the contents of the document must be proved by primary evidence (section 61 to 64), i.e., by production of the original document, except as permitted by section 65. The superiority of documentary evidence over extrinsic evidence is recognised in section 91 and section 92 (the Parole Evidence Rules), which exclude extrinsic evidence in competition with documentary evidence, except under certain circumstances.

100.14. The underlying principle is that documentary proof is always regarded the better type of testimony. The Privy Council has observed—

“It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents.”

Sections 56 to 58 of the Act, which dispense with proof of facts of which the court can take judicial notice or of facts which are admitted, also promote the purpose of avoiding delay.

100.15. We may also note that certain rules of evidence are intended to carry out, in the field of evidence, rules existing in the substantive law. For example, section 92 prevents the parties from substituting a new contract for that recorded in writing, and is, in that sense, ancillary to the substantive law.

In short, rules of evidence are intended ultimately to ensure that truth shall come before the Court in a manner which secures justice and which is in conformity with the general principles of jurisprudence and the content and spirit of the legal system.

100.16. The Act recognises that truth need not be pursued at too high a cost. Wider considerations of public policy may, for example, justify the creation of exceptions to the ordinary rule that a witness must answer every question on a relevant fact.

It is elementary that the trial must be fair. The right to a fair trial is, in particular, promoted by a group of sections seeking to protect the legitimate interests of the accused—sections 24 to 26, 30 and 54—as also by the

1Dinomovi v. Roy, (1879) L.R. 7 Indian Appeals 8 (P.C.).
provisions relating to confrontation of witnesses with their prior contradictory statements.

Finally, procedure is a handmaid of justice, and not an end in itself. On this principle, section 167 forbids a new trial or reversal of a judgement on the sole ground of improper reception or rejection of evidence.

Excellence of the present Act.

100.17. Bearing that these are the principal considerations underlying the Act, we have, in the preceding Chapters, gone through the Act, section by section, and have, wherever necessary, recommended amendments in the light of the experience gained in the working of the Act during the last one hundred years, and also in the light of the changed social conditions as well as conflict of judicial decisions and recent thinking on the subject. These amendments should not, however, be construed as detracting from the high quality of the content of the present Act as a legislative measure. They only show that no legislative measure can be so perfect as to retain its utility for a century without modifications rendered desirable by the passage of time.

In fact, we would like to pay a tribute to the excellence of the Act which, drafted as it was by Stephen — an eminent lawyer and one who is perhaps the most respected name in the field of criminal law — has stood the test of time. If — to borrow a phrase from Gilbert — the law is an embodiment of all that is truly excellent the Act does not fall much short of that ideal.

Role of the Judge.

100.18. We would, at this stage, point out that the Act gives enough indication of the importance which it attaches to the role of the judge in the process of trial. It is no accident that two of the important sections dealing with the role of the judge — sections 165 and 167 — appear at the end of the Act. Their placing, as well as their content, indicates that the principle underlying them should pervade the entire process and that this principle is to be read in each and every of the preceding sections, thus imbuing the trial at every stage. The role of the Judge, as the Act conceives it, is not a static one. That role is dynamic enough to enable the judge to maintain his grip over the proceedings so that vexation is minimised, delay is avoided, the proceedings are conducted with fairness as well as with expedition and justice is done in its procedural aspect. A Judge ought not to forget the heavy burden cast upon him by these two sections in particular, and by the scheme of the Act in general.

Cross-examination.

100.19. In this context, reference may be made to an important feature of trials, — the cross (—) examination of witnesses. Although cross-examination on relevant questions cannot be interfered with by the Judge, yet it must be noted that under section 151 of the Act, the Court has a power to forbid indecent and scandalous questions or inquiries and under section 152, it has a duty to forbid insulting or annoying questions or questions needlessly offensive in form. These two sections give sufficient indication of the legislative attitude as regards the proper sphere of cross-examination. They contemplate that the witness is not to be treated as a mere tool to be played with, or as a toy to be tossed from one counsel to another. He has a dignity of his own, and the fact that he is a witness cannot affect that dignity. The power of the judge to control the course of the trial is particularly expected to be utilised in regard to questions which violate the provisions of these two sections.

We would like to point out that these sections are very rarely invoked, so that injustice often results and the witness leaves the Court with an unfavourable impression about the quality of the machinery of justice. If the
judge uses his powers wisely and efficiently, justice will be done and the trial will be expedited. It will also preserve and improve public confidence in the administration of justice. Unless the question be relevant, it is one of the important functions of the court to see that scandalous matter is not introduced. In this sense, "the trial judge is not a mere automat".1

100.20. Primarily, it is the duty of counsel to avoid scandalous questions. Counsel should not overlook the fact that while they owe a duty to the witness, they have a duty to the Court. If, however, in a particular case, counsel overlook that duty, the Judge should not regard himself as powerless.

In trial Courts, appearing as a witness is sometimes an agonising experience. Witnesses often have a fear of proceedings in courts. The Judge should therefore exercise the powers referred to above widely and effectively, in order that such apprehensions of witnesses may be allayed and citizens can come forward to render aid in the administration of justice without hesitation.

100.21. Even in England, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and do justice according to law: and in the daily pursuit of it the advocate plays an honourable and necessary role.2

No doubt, as Lord Bacon said — "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal." But obviously he did not wish to imply that the Judge should be a silent spectator. In this connection, it will be useful to quote what Burke said3 in the Trial of Warren Hastings:

"A Judge is not placed in the high situation merely as a passive instrument of the parties. He has a duty of his own, independent of them; and that duty is to investigate the truth."

100.22. The following comment4 made as to the judicial function in general is not inapplicable to the field of evidence—

"It should not be supposed that because his (Judge's) jurisdiction is limited, because so much of his work goes unreported, because he is immersed in the detail of fact, the trial judge is clothed with small responsibility in relating law to justice. It is he who makes the law become a living teacher, as he transmits it from the legislature and the appellate court to the citizen who stands before him."

100.23. We would like to conclude this chapter by quoting the following view of Norton as to the function of the law of evidence:

"The law of evidence is, to the administration of the law, what logic is to all sciences. It is applicable to each and every case tried, whether civil or criminal, and on its being founded on sound principles, and practically understood by those who are concerned in the administration of justice — Bench and Bar — depends the right collection of materials on which each particular judgement and decision can alone be rightly founded.

Sultan Begum, A.I.R. 1936 Lah. 183, 185.


"A judgement may be erroneous on a sound collection of facts relevant to the issue, through ignorance or misapplication of the substantive law applicable to the particular case. But no knowledge of the general substantive law can save a judgement from error, if he, whose business it is to collect the facts, has not a practical acquaintance with the law of evidence, which teaches him what facts he ought to gather together, and what to exclude, and why he should gather these and exclude those."

We believe that the importance of the law of evidence and the role of the Judge could not be put in better words. We should also state that rules of evidence, however perfect they may be, cannot guarantee that truth will be known at the end of the trial. They are designed to ensure that the quest for truth is facilitated; that the process will be carried on in a business like manner; that the field of inquiry will be confined to certain facts; that the boundaries of that field will be defined with a reasonable amount of precision; and that certain essential elements of fairness will be constantly kept in mind.

Letter from J. B. Norton, Advocate General to the Government of Madras (19th Feb 1869), Evidence Act, file App. E.
NOTE OF DISSERT OF SHRI SEN VARMA

SHOULD THE WORD "ADMISSIBLE" BE SUBSTITUTED FOR THE WORD "RELEVANT" IN CERTAIN SECTIONS OF THE INDIAN EVIDENCE ACT, 1872?

I am sorry that I am unable to agree with the recommendations of my learned colleagues with regard to a few points mentioned below.

In the first place, I find it difficult to agree with the recommendations that in certain sections of the Indian Evidence Act, 1872, the word "admissible" should be substituted for the word "relevant" and that a definition of the word "admissible" should be given in the Act.

The recommendation is thus stated in Chapter 6.99 of the Report:

"In view of the inaccuracy of the present terminology as discussed above, the better course, in our view, would be to avoid the term "not relevant" in those sections where what is meant is "not admissible". Whilst preserving the word "relevant" in sections 5-16, we should, therefore, substitute the word "admissible" for the word "relevant" wherever the former appears to be more appropriate,—a definition of "admissible" being added, in section 3, as meaning "admissible in evidence".

My disagreement with these recommendations are several. The Indian Evidence Act, 1872, has been now in existence for more than a century. But until now lawyers, courts and judges have not experienced any difficulty in using the word "relevant" in various sections of the Act particularly wherever it occurs in sections 17-55 of the Act. When in practice not the least difficulty has been experienced in this regard and when all concerned know for all practical purposes the meaning of the word "relevant" and have become accustomed to it through long usage, we should, it is submitted, be slow and circumspect in changing the nomenclature on the view that there is some inconsistency, lacuna or inaccuracy in it. We should not forget that life of the law is not always a logical code but it is always grounded in experience. Human life and affairs of human life cannot always be based upon strict logic and logical reasoning and even logic and logical reasoning sometimes vary from time to time, from place to place, from individual to individual, from community to community for various factors and causes which are endless in their variety and formidable in their complexity. Thus even among the masters of logic, Aristotle's logic is different from the logic of John Stuart Mill and John Stuart Mill's logic is different from the present day symbolic logic represented by Bertrand Russell or Johnson. Then, there are differences between all these systems and Indian logic, ancient and modern: and there are differences between ancient Indian logic and modern Indian logic. Here it may suffice to say that we should go slow in changing words and expressions in law unless it is absolutely necessary to do so.

Immanuel Kant in his First Critique — The Critique of Pure Reason, (under the heading "Transcendental Logic, Second Division. Book I: Section I—"Ideas in General") issued a caution and warning in this respect, thus:

"To coin new words is a pretension to legislation in language which is seldom successful: before recourse is taken to so desperate an expedient,
it is advisable to examine the dead and learned languages, with the hope and the probability that we may there meet with some adequate expression of the notion we have in our minds. In this case, even if the original meaning of the word has become somewhat uncertain, from carelessness or want of caution on the part of the authors of it, it is always better to adhere to and confirm its proper meaning — even although it may be doubtful whether it was formerly used in exactly in this sense — than to make our labour vain by want of sufficient care to render ourselves intelligible."

More than one hundred and sixteen years ago John Austin in his Lectures on Jurisprudence while dealing with "Intention" in Lecture XIX observed almost in the same vein — "To discard established terms is seldom possible; and where it is possible, is seldom expedient. A familiar expression, however obscure, is commonly less obscure, as well as more welcome to the taste, than a new and strange one. Instead of rejecting conventional terms because they are ambiguous and obscure we shall commonly find it better to explain their meanings, or (in the language of Old Hobbes), "to snuff them with distinctions and definitions" (page 419 of Volume I of the 5th Edition, revised and edited by Robert Campbell).

The Special Committee on the Transfer of Property (Amendment) Bill, 1927, consisting of Mr. S. R. Das (then Law Member to the Government of India) Sir B. L. Mittra (subsequently Law Member to the Government of India), Sir D. F. Mulla (who also became the Law Member subsequently) and Justice S. N. Sen, in its Report submitted to the Governor General in Council observed in paragraph 10 as follows:—

"10. In the Bills submitted to us the policy which appears to have been followed was that no amendment should be attempted which would merely effect an improvement in wording, but that principles of importance which had been judicially recognised since the passing of the Act should be incorporated. In our opinion, it is a sound course to follow, particularly, in an Act which has been in force for forty-five years and to whose phrasology the general public and the legal profession have become accustomed. Again, it is not safe to alter any wording which has received judicial interpretation, when the interpretation has not led to any inconvenience in practice or miscarriage of justice. We also agree that the Act must be amended to embody new principles. In the amendments which we propose we have also endeavoured to remedy any defect which has led to inconvenience or anomalous results. We have also acted on the principle that it is undesirable to attempt to provide in detail for every possible contingency. No elaboration can be exhaustive and the only result of over-elaboration would be to cramp the action of the courts and to encourage technicalities. Where there has been a conflict of decisions we have endeavoured to set it at rest."

On these pragmatic and practical considerations I think that in spite of the views to the contrary of some recent writers like Cross, Montrose and others, there is hardly any necessity for making any change of terminology as recommended by the majority in the Report. We may mention here that eminent old authorities like Taylor, Stephen and others did not find any difficulty in this respect.
In support of my objection to the recommended change I should also like to refer to the definition of the word "relevant" and to the provisions of section 5 of the Act so far as they are material for our purpose. The word "relevant" has been defined in section 3 as follows:—

"Our fact is *said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts". (Italics mine)

From this it is clear that the word "relevant" in the Indian Evidence Act, has not been used in its natural, ordinary or logical sense throughout. The words "said to be" and the words "in any of the ways referred to the provisions of this Act relating to relevancy of facts", should be carefully marked in this connection; they show that the framers of the Act knew that the word "relevant" has not always been used in the Act in its natural, ordinary or logical sense and that in a few cases the word has been given an extended meaning to deal adequately with the multiplicity and variety of the facts, circumstances and problems which arise in judicial proceedings before the courts of law from day to day, so that even though somebody might not like the use of the word "relevant" in certain provisions of Chapter II of Part I of the Act, still when a fact is connected with another fact in any of the ways referred to in any of the sections 5-55 (both inclusive), then that fact is to be regarded (i.e., said) as relevant to the other fact.

This is exactly in consonance with what has been said in section 5 of the Act. The first paragraph of the section will make this clear.

"5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are *hereinafter declared to be relevant*, and of no others. (Italics mine).

The words in italics above are significant showing that evidence can be given not only of facts in issue as defined in section 3 but also of other facts which are *declared to be relevant* in the various sections of the Act. This clearly shows that even if a fact be not relevant from the standpoint of strict logic and reason still if by any provisions of the Evidence Act relating to relevancy, such a fact is *declared to be relevant*, then evidence can be given of that fact.

In view of the provisions cited above it is difficult to see how the use of the word "admissible" is more appropriate than the use of the word "relevant", in some of the sections of Chapter II of Part-I.

It is well known that the framers of the Indian Evidence Act drew heavily from Taylor's "A Treatise on the Law of Evidence" which even in the year 1872 acquired the status of a standard work on evidence. According to Taylor "relevance" is *the test of admissibility*. He has discussed this aspect of the matter in great detail in pages 211-251 of the 11th Edition (1920) and it eminently stands to reason that a fact which is not at all relevant to a fact in issue may not be admissible in evidence. How can a fact which is irrelevant can be made admissible to prove a fact in issue? Therefore it seems that Taylor was right when he laid down the proposition that relevance is the test of admissibility. At pages 222 et seq Taylor observed—

"316. The rule confining evidence to the points in issue, not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the mode of proving even the
issues themselves. Thus it excludes all evidence of collateral facts, which are incapable of affording any reasonable presumption of the principal matters in dispute, the reason being that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead. Moreover, the adverse party, having had no notice of such evidence, is not prepared to rebut it. The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the Judge so that, while he shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble, light on the question in issue. And here it will generally be found that the circumstances of the parties to the suit, and the position in which they stood when the matter in controversy occurred, are proper subjects of evidence. The change in the law enabling parties to give testimony for themselves, rendered this proof of surrounding circumstances still more important than it was in former times. In accordance with this doctrine it has been properly held, that, in an action for money lent, the poverty of the alleged lender was a very relevant fact, the evidence of which was admissible for the purpose of disproving the loan.

317. The most important class of facts which are excluded on the ground of irrelevancy comprises the acts and declarations either of strangers, or of one of the parties to the action in his dealings with strangers. These are in the technical language of the law denominated res inter alios actae."

Then, Taylor cites cases after cases to show and prove that in every case relevancy is always the test of admissibility of evidence. In the index to the book Taylor clearly mentions in two places that relevance is the test of admissibility. Under the heading — "Admissibility" in the Index is mentioned "relevance as test of" and under the heading "Relevance", relevance is spoken of as essential to admissibility and in both these places he has referred to pages 211-251 of his book. To prove this he has referred to a large number of cases to which it is unnecessary to refer here.

In view of what has been stated above it is difficult to agree with the thesis that there is a distinction and difference between admissibility of evidence and relevance of evidence. At least that does not appear to be the stand taken in the Indian Evidence Act, 1872. One may even agree with the proposition that a fact otherwise relevant may be excluded on practical considerations but it is very difficult to agree with the proposition that a fact not as all relevant may be admissible in evidence. In other words a fact which is relevant to another fact (FACT IN ISSUE) may be excluded on grounds of public policy but it is not possible to agree with the proposition that a fact having no relevance to the fact in issue can be admissible as evidence under the policy of the law. In each of the cases of hearsay, opinion character, etc., if we examine them carefully, we can, in a very limited number of cases, notice some rational, reasonable and fairly strong connecting thread between each of the cases mentioned above and facts in issue to prove which in such special cases hearsay, opinion character, etc. are used in evidence to prove a fact in issue. If on examination, a rational and reasonable connection is, in the opinion of the Judge, found to exist between a collateral fact and a fact in issue, and if the court believes on the proof such collateral fact that the fact in issue exists or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists, then the court is justified in regarding the collateral fact as relevant.
...and in admitting it in evidence. This is substantially the definition of "Proved" as given in section 3 of the Act. In Article 2 of his Digest of the Law of Evidence, Stephen says "that the Judge may exclude evidence of facts which though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case."

This is exactly the reason for the exclusion except in a few exceptional cases, of hearsay evidence, opinion evidence, character evidence, etc. As Taylor says in paragraph 316 of his book (already quoted)—

"............... he (the Judge) shall reject as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all these matters which shed a real, though perhaps an indirect and feeble, light on the question in issue."

Hearsay evidence, opinion evidence and character evidence etc. have been excluded in the Act because each of them merely furnishes a fanciful analogy or a conjectural inference in relation to the facts in issue. But in the few exceptional cases where they are admitted in evidence, they are so admitted because, they shed a "real, though perhaps an indirect and feeble light on the question in issue." In other words, even in such special cases there is some streak of relevancy between the collateral fact and the fact in issue.

Hearsay with a few exceptions is excluded because of practical considerations on which the policy of the law is based, it is regarded as irrelevant. Such practical considerations are allowed to outweigh the principles dealing with logical relevancy. These practical considerations may be taken to be chiefly—a statement made by an absent person cannot be tested by cross-examination of that person; that very few people can be trusted to repeat a statement that they may have heard in any but the very simplest cases; that admission of hearsay would open an easy way to fraud, and would then prolong proceedings by the production of unimportant matters in a way which would cloud the real issue. Moreover, in the case of hearsay evidence, opinion evidence, etc., the statement of the witness who gives such evidence does not represent his direct perception.

It may be pointed out as already stated that the concept of relevance of one fact to another is not a static one. This concept like any other human concept varies from person to person, community to community, place to place and time to time. "In an anarchical state of society", says Holland in his Jurisprudence (Eleventh Edition — 1910) at p. 318, an injured person takes such compensation as he can obtain from a wrong doer, or, if strong enough, gets such satisfaction as may be derived from an act of revenge. A political society, in the first place, puts this rude self-help under stringent regulation and secondly, provides a substitute for it in the shape of judicial process. Self-help is indeed but unsatisfactory means of redress. Here what is relevant in relation to the redress of the wrong done to the injured person is the superior physical strength of the injured man to that of the wrong doer. Not only that, here the injured party being the judge in his own cause whatever he considers to be for his benefit, he regards as relevant for the purpose of deciding the issue. To suppress private revenge and to erect courts of justice and to compel everyone who is wronged to look to the courts for remedial rights is, however, task far beyond the strength of the State in this state of its formation. It is at this stage that the primitive savage, on being asked what was the difference between right and wrong, could say with a sense of pride that it was right when he eloped with his neighbour's wife but it was wrong when his neighbour eloped
with his wife. (See Paul Vinogradoff's Common Sense in Law, pp. 18-19). In a society where this is the standard of right and justice, the relevance of one fact to another (a fact in issue) is bound to be different from the concept of relevance in a more progressive society. We should not forget that the objects of the law of evidence, are, on one hand to limit the field of enquiry by the doctrine that certain classes of facts are already within judicial notice of the courts and by presumptions by which certain propositions are presumed to be sufficiently proved when certain other propositions have been established, on the other hand, to exclude certain kinds or facts as having too remote a connection with or too remote a bearing on the issue, or as incapable of being satisfactorily proved, or as coming from a suspicious quarter. For the last mentioned reason certain classes of person or persons occupying certain relative positions are rendered incapable of being witnesses. In considering the question of relevancy of one fact (a collateral fact or as Bentham called it, an evidentiary fact) to a fact in issue is not always based upon purely logical principles. Thus the disclosure of any communication made by a client to his advocate in the course of and for the purpose of his employment as such advocate may be very pertinent and relevant for deciding any issue in a suit or proceedings but however, relevant such disclosure may be, an advocate is not at any time permitted except with his client's express consent, to make such disclosure. There are many other similar provisions in the Evidence Act under which statements otherwise very relevant and pertinent for the determination of any issue in a suit are excluded from being put into evidence. They are excluded not because they are irrelevant but on grounds of the social policy of the law based upon larger moral and practical considerations.

I do not like to enter into a more elaborate and detailed discussions on this point. What I have already said will tend to show that the concept of relevancy of one fact to another fact is not an invariably absolute or static concept. It is liable to change and variation. What is regarded as relevant may in process of further evolution of our minds and thought, cease to be so and what is rejected as an irrelevant may be regarded as relevant. No definite hard and fast rule can be laid down in this behalf. Then there is nothing sacrosanct about the word 'relevant' or about the word 'admissible'. What we call a relevant fact was called by Bentham, as I have already mentioned, an evidentiary fact. He distinguished an evidentiary fact from a principal fact thus:

"The term evidence, as has already been remarked is a relative term. Like other relative terms, it has no complete signification of itself. To complete the signification of it, to enable it to present to the mind a fixed and complete idea, the object to which it bears a necessary reference must be brought upon the stage. I have to produce evidence. Evidence of what? Evidence of a certain fact or facts. Facts, then, matters of fact, are the subject matter, the necessary subject-matter of evidence: facts in general, of evidence in general. Before we come to speak of evidence in detail, it will be necessary to say something of facts in general, considered as the subject-matter of evidence.

Of facts? Yes; but in what point of view considered? Not in every point of view, but in the particular point of view in which the contemplation of them is pertinent to the design and object of this treatise: not in a physical not in a medical, not in a mathematical point of view; not in a barren, and purely speculative, logical point of view; not in any point of view, but a legal. (Italics mine)."
The facts then, or matters of fact, the species of facts, the individual facts, here under consideration, are those facts, and those only, concerning the existence or non-existence of which, at a certain point of time and place, a persuasion may come to be formed by a judge, for the purpose of grounding a decision thereupon.

Thus, then, the circle within which the class of facts in question is comprised, presents itself as a comparatively narrow one.

In the next view that requires to be given of it, the extent of it will appear boundless. Nor indeed does it admit of any other limits than those which are set to it by the nature of the end or purpose, with a view to which the word of facts is brought thus upon the stage.

Facts, then, considered as the subject matter of legal decision, and for that purpose of evidence may be distinguished in the first place into principal and evidentiary.

What is meant by the words principal fact, and evidentiary fact, has been seen in a former chapter. The question now is, what facts are to be considered principal facts, and evidentiary facts, with reference to a legal purpose.

By principal facts, I mean those facts which on the occasion of each individual suit, are the facts sought, for the purpose of their constituting the immediate basis or ground of the decision: in so much that, when a mass of facts of this description, having been sought, is deemed to have been found, the decision follows of course, whether any other facts be considered found or not.

By evidentiary facts, I mean such facts as are not competent to form the ground of a decision of themselves, nor otherwise than in as far as they serve to produce in the breast of the judge a persuasion concerning the existence of such and such other facts, of the description just given, viz. principal facts.

Here, then it is that the circle expands itself, and seems to break all bounds. Under the term 'principal facts' when the mass comes to be analyzed and divided, facts of a particular description, and that a limited one will be seen to be comprised. But under the description of evidentiary facts, all facts whatsoever—at least all facts that are capable of coming under human cognizance—will be seen to be included. For there is no sort of fact imaginable, to which it may not happen to serve as evidence with relation to some principal fact. It is only by the consideration of the purpose for which the mention of them is introduced, that the view we are called upon to take of them is circumscribed.” (Bentham, Works, Vol. VI. pp. 214-15).

If thus a fact which may be put in evidence and proved for the purpose of proving and establishing a fact in issue, that fact must have some logical and pertinent relationship or connection with the fact to be proved. The idea of that relationship or connection may vary from place to place, community to community or age to age but there must be a pertinent and cogent relationship and that relationship may in a good number of cases, be direct and immediate and in other cases it may not be so direct or immediate or so pertinent but some sort of relationship between the two must be there. Therefore a fact which has no connection to a principal fact or fact in issue cannot be admissible in evidence, even though we may use the word “relevant” in connection therewith. The law by its fiat cannot make a fact admissible for the purpose of proving another fact, that is, a fact in issue unless there is...
some sort of relationship, immediate or mediate, between the two. Therefore, in section 5 of the Evidence Act it has been laid down that evidence may be given in a suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others. And this provision of section 5 is in consonance with the definition of the word "relevant" as given in section 3. I have already quoted that definition but it is worth repeating—"One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."

Then, a fact may be logically relevant but may not be legally relevant and therefore cannot legally admissible in evidence, because its connection with the principal fact, that is, the fact in issue may be too remote or too feeble or because it would complicate the trial with the multiplicity of issues.

It is true that the relevance is essentially a matter of logic; but it is the logic of inference in a specialised form under the influence of law as a practical social study.

Apart from suits, proceedings and disputes before courts of law, even in matters and situations of life in general whenever we take a decision on the basis of facts we draw some inference from the facts which we consider to have been proved and from such inference we come to a conclusion. If we look at the definitions of 'relevant', 'facts in issue', 'evidence', 'proved' and 'disproved', it becomes clear to us that in order that an inference as to the existence or non-existence of one fact may be rationally drawn from the proof of another fact, the connection between the two must be a relevant one. Now what does this relevant connection mean? It means or it ought to mean that the relationship or connection between the two facts must be a logical relationship which in plain language means that it must be a casual connection or relationship. In other words, one fact must be related to the other as if it were either a cause or an effect of the other. Unless there is some casual relationship, we are not justified in calling one fact as being relevant to another fact. In the absence of a relevant connection between one fact and another in this sense, we cannot say that any result can necessarily follow the moment any relationship between the two is established. This is clear from the definition of the expression 'fact in issue'. It has been defined as any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows. The expression 'necessarily follows' in this definition is important as indicating a cause-and-effect relationship between the evidentiary fact and the principal fact. The definitions of 'proved', and 'disproved' also point to the same conclusion. A fact is said to be 'proved'. when after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be "disproved" when after considering matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist. But proof of facts, inferences drawn from such facts and the conclusion as to any right, liability etc. based on such inference are based upon various causes and factors in life. Therefore in order that one fact may be regarded as 'relevant' that is, logically
relevant to another fact, there must be a causal relationship between the two. Now this relationship between one fact and another may vary. The relevancy of one fact to another or causal relationship of one fact or another to an ignorant tribal living in the jungle may be quite different from relevant relationship or causal connection between two facts to a civilised man. Various factors such as our heredity, our nature and our intelligence, our inherent mental structure, our environments, our traditions, our training and education, the level of our understanding, knowledge and culture, our virtues, our sense of dharma, our moral wisdom, all these may influence our concept of relevancy quite differently from an aboriginal who living in the forest, believing in animism may regard a fact as not following necessarily from another proved fact but as the effect of the wrath of some super-natural power etc. In this way instances may be multiplied. Thus the abstract proposition is that by the relevant relationship of one fact to another, what is meant is nothing but a causal relationship between the two and this may be called a logical relationship. Thus, concept of relevance and logical connection between an evidentiary (collateral) fact and a principal fact (fact in issue) is nothing but a causal relationship between the two so that from the proof of the one, a legitimate inference as to the existence or non-existence of the other necessarily follow i.e. follow as an effect from a cause.

There are three important stages in the trial of a case (civil or criminal) before a court. The first stage is the stage of evidence, oral, documentary or material etc. adduced in the case by the parties. In this stage the witness plays a prominent role. Even in the case of documentary and material evidence, the witnesses must formally produce them before the court. In this stage witnesses must testify to facts as perceived by them. But it is never their function to draw any inference from the facts stated by them. Secondly, after considering the matters before it on the basis of the evidence adduced, the court is to draw from such matters inferences regarding the existence or non-existence of fact or facts in issue involved in the trial. In this task the court is expected to be guided by the standard of behaviour of the average prudent man in the circumstances of the case before it. When this stage is over, the fact or facts in issue in the case is or are said to be "proved" or "disproved". Then, comes the third stage which is comparatively easy. From the fact or facts in issue thus proved or disproved, the court is to decide either by the fact in issue itself or the facts in issue themselves or in connection with other facts whether the law on the basis of which the relief is claimed in the case, applies to the case, in other words, whether the existence, non-existence, nature or extent of any right, liability or disability under the law, asserted or denied in the case necessarily follows, that is, follows as an effect or consequence from a cause.

Thus of the three principal stages of trial of a case before a court, the witnesses play a significant role in the first stage by testifying to facts, generally perceived by them with their senses, the second and third stages fall within the exclusive jurisdiction of the court.

From the above it is clear that the relevant relationship of one fact to another is in ultimate analysis a causal or logical relationship. We cannot fully know a fact unless we know the causes thereof. The facts in issue in a case are only truly known to exist when seen as connected with the surrounding body of facts which makes up the four causes (of which the exponent was Aristotle, the founder of Western Logic) giving the reason why the facts in issue exist. "The body of relevant facts exemplifies in its relationship to the
facts in issue every one of these four causes.” According to Aristotle there is a combination of four types of causes or reasons. This is known as Aristotle’s famous doctrine of Four Causes, Material cause, Formal Cause, Efficient Cause and Final Cause. The “material” cause is the general body of surrounding circumstances in which the actual facts in issue are a potential event which may or may not emerge. The “formal” cause is the general type of occurrence of which the actual facts in issue are a particular example. The “efficient” cause is the well-known “causa causans” of the law reports, that event the happening of which sets in motion the forces that produce the events under consideration—as for example—the fall of a tree in a storm causing the death of a man standing under it. The “final” cause is the motive of the agent or the state of things which he wants to realise, be it good or bad. “In a perfectly established case of causal inter-dependence we can reason both from effect to cause and from cause to effect; if one exists the other exists or in the language of Aristotle, their inter-dependence is reciprocal and convertible. So, in evidence we may infer the existence of the facts in issue by seeing them either as effects or as causes of the surrounding body a probative facts” (vide the Appendix to Stephen’s—Digest of the Law of Evidence, pp. 235-236).

Causality plays an important role in the reasoning of substantive law—as for example in the discussion of proximately damages. It is also of great importance in the law of evidence as in the rules of relevancy. The facts in issue are only truly known to exist when connected with the surrounding body of facts which makes up the four causes giving the reason why the fact in issue exists. Thus ‘relevance’ is simply the logic of inference in a specialised form. The above definition indicates just what is asked of proof by evidence. It aims at relating the fact in issue to a wide surrounding field and then showing that there is implicit in that field some general law of behaviour. These laws are extremely various and of widely differing certainty but in every case the principle is the same. The facts in issue are shown to be the conclusion which arises inferentially from the surrounding data; cogency of the inference arises from its revealing the operation in the particular case of some general law of behaviour. By exhibiting the facts in issue inferentially or as reasoned facts we justify our desire to have their existence believed in. Inference is of course, always at work in our thoughts, though with varying degrees of explicitness and elaboration and accordingly the presentation of a case always involves an inference but in varying degrees of prominence. (See pp. 237-238, ibid.).

The law prohibits a witness from giving what is called ‘opinions’. He is only to state facts, because an opinion means any statement which does not represent direct perception; it may vary from mere belief founded on no grounds at all to the fully reasoned conclusion of the scientific experts. The law, therefore, rejects opinions, (excepting opinions of experts) not so much on the ground that they may be erroneous as because it wishes to know what are the premises on which the opinion is founded so that it may judge whether the witness knows those premises to be true and what is the strength of the inference arising from them. With regard to the expert, the law requires the data on which the inference is founded either to be the fruits of his own observation or to have been proved to exist by the direct i.e. (perceptual) testimony of some other witness. In matters of science and art, the expert witness states what inference arises from his data and the court then appraises its cogency. In the case of ordinary i.e. non-scientific facts, the witness only states the facts and
the court draws inference. Such is the theory of the law. It is perhaps fair to add that many logicians experience a difficulty in drawing such a hard and fast line between fact and inference as is done by lawyers.

It may therefore be fairly claimed that the operation of proving a case by evidence is simply specialised example of the process of claiming credit for a conclusion by exhibiting it as the inferential outcome of a set of data. The conclusion is the facts in issue and the data are the facts relevant to the facts in issue or probative facts. (see ibid, pp. 239-40).

It must be remembered, however, that judicial inference, that is, the inference as to the existence or non-existence of principal facts or facts in issue from the probative or evidentiary facts cannot amount to the demonstrative certainty of the mathematician or physical scientist. Dealing with human life and its affairs in complex social and jural relations, the logical inference we seek and draw from the proof of probative facts in law must be the inference of a practical nature in relation to which it would be wrong to accept the certainty of the mathematician or physical scientist. This is why from the same set of proved facts in a case before the court, different judges may draw different inferences and conclusions. The reasons for this are not very far to see. Our passions and our inclinations towards, or our repulsions against, a particular point of view, our arrogance, our prejudices and other irrational and impulsive factors play an important role in this respect as in respect of every other aspect or department of our activities. Man's life is not pure logic and pure reason; man is compromise between passion and reason, between pride and prejudices on the one hand and intellect and knowledge on the other. The faculty of moral wisdom and dharma and the faculty of faith (shraddha), and the faculty of feeling which includes the good and the beautiful (Shivam and Sundaram) are developed in us only a rudimentary form if at all. The defect of logical reasoning is that it has no sure foundation to stand upon because as just now mentioned, different persons may come to different conclusions from the same premises. Not only in the field of enquiry into supreme and extra-phenomenal problems sometimes faced by man such as freedom of the will, immortality of the soul and existence of God, but in the field of mundane problems facing us in our day to day life and activities, arguments and reasoning cannot give us any correct, satisfactory and true solution. In relation to court proceedings also by which we try to solve one very important category of our mundane problems, we find that the decision which a lower court takes on the basis of the proved facts is sometimes strongly dissented from by the court of appeal on the basis of the same proved facts. In the case of Brown v. Allen (344 U.S. 443 at p. 540 (1953), Jackson, J of the U.S. Supreme Court observed—"There is no doubt that if there were a super-Supreme Court, a substantial portion of our reversals of State courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final. Thus, from the same premises and proved facts, varying inferences and conclusions can be and are actually drawn depending upon various factors such as the personal equation i.e. the major inarticulate promises of the persons concerned or in some cases their better knowledge etc. K. N. Llewellyn one of the most-powerful exponents of the Realist School of Jurisprudence in America said in his book "The Bramble Bush"—Never forget that there is an indefinite number of sides to any argument; Never despise an idea no matter how imperfectly or trifly presented or from what source it comes; Never be satisfied with any piece of work, yours or anothers: because it can always be improved: Maintain your ideas with everything you have but without being dazzled by your own brilliance; you might conceivably be wrong; and Always be interested in everything.
He again tells us that the law is not a self-contained set of logical propositions; that rules of law do not explain the result at law; that the stated reasons for a decision regularly mask inarticulate major premises i.e. the personality of the judge, that facts are slippery things, with a nasty habit of changing shape and colour, depending on who is looking at them; that judges are not automatons who announce the law but human beings, possible neurotics; that juries are barely human; that the truth is not in the law books which should nevertheless still be studied, that we do not know yet where the truth is but it is somewhere — in economies or in sociology or in anthropology or psychology or in the murky reaches of Freudian theory. These last words remind one of what Holmes declared in 1886 to the students of Harvard — "If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics and thus by several paths to your final view of life."

Without further elaborating this thesis it may now be said that one fact can never be relevant to another fact unless there is some sort of causal relation (in the Aristotelian sense of the four types of cause) between the two. In this sense it can be safely asserted that a fact can never be admissible in evidence unless it is relevant to the fact in issue.

But from what has been discussed above it is also amply clear that legal relevance for various reasons noted already, sometimes parts company with logical relevance and introduces a set of rules (not strictly logical) based entirely on the practical social policy of the law. A very good example is that the bad character of an accused person is deemed to be irrelevant except in reply (section 54 of the Evidence Act). To a layman, the bad character of an accused person is regarded as highly probative of his present guilt but the law of evidence generally regards such bad character as irrelevant except in few cases. Of course there appears to be very good reasons that the law generally treats the bad character of a person as irrelevant in the trial of a subsequent criminal case against that person. The reason is that even a man of bad character may change. He may be reformed. No person is a born criminal. Modern criminology affirms this. When a person comes into this world, he comes like a pure flower. Thereafter his environments, bad company, training in such company and other facts join together in gradually converting him into a bad character and a criminal but even then a change may come in him, he may be reformed and may become a decent citizen and even a man of saintly character. Therefore, the policy underlying the law that bad character is generally irrelevant appears to be based on sound foundations. Be that as it may, it may be said however that rules not strictly logical in the law of evidence based on the practical social policy of the law and considered necessary for the fair and smooth operation of the judicial process, are not very numerous and form no obstacle. Regarding the subject in this light, hearsay evidence, opinion evidence, evidence as to character etc. are excluded (barring a few exceptions such as those enumerated in sections 32 and 33 etc. and the exceptions relating to opinions of experts and those relating to character in sections 45-55 and a few other minor exceptions) on cogent grounds because in such cases there is no direct perception by the witness of the probative facts to which a party to a suit or legal proceedings has called him as witness to depose.

Upon all these considerations I would respectfully submit that the word "admissible" should not be substituted for the word "relevant" in any of the provisions of the Indian Evidence Act. In order that a fact may be admissible in evidence for the purpose of proving another fact the fact in issue, it must be relevant but from this it does not necessarily follow that every fact which
is relevant shall in very case be admitted in evidence for the purpose of proving
a fact in issue; all probative facts must be relevant facts but all relevant facts
need not be probative facts; again, in a few cases under a set of rules, not
strictly logical, facts not strictly relevant in the sense of logic, may be admissible
in evidence as probative facts on grounds of practical social policy of the law
as evolved out of the exigencies of human affairs and the felt necessities of the
times; in that case such facts become relevant under the rules of the law, though
not under the rules of strict logic. The definitions of the words "Relevant",
"Facts in issue", "Evidence", "Proved" and "Disproved" in section 3, and the
provisions of section 5, of the Indian Evidence Act lend support to this view.
In other words, legal relevance need not always be logical relevance. This being
so relevancy, that is, legal relevancy which means in the present context relevancy
in accordance with the provisions of the Indian Evidence Act, 1872, is always
the test of admissibility.

(S. P. SEN-VARMA) 26-4-77.

NOTE OF DISSENT

SHOULD A NEW SECTION, SAY, SECTION 26-A, BE INSERTED IN THE
INDIAN EVIDENCE ACT, 1872, ENABLING AND REQUIRING INVESTI-
GATING POLICE OFFICERS TO RECORD CONFESSIONAL STATEMENTS
OF ACCUSED PERSON?

The second point on which I have differed from the recommendations of
the majority is with regard to the recording of confessions of an accused by a
police officer. According to the majority view a new section may be inserted
in the Indian Evidence Act after section 26 as section 26-A for the recording
of such confession by a police officer. In support of this view it is stated in
paragraph 11.16 et seq that a suggestion has been made in the 14th Report
of the Law Commission on Reform of Judicial Administration Volume II,
page 748, paragraphs 38 and 39, that as the superior officers of the police are
today recruited from the same social strata as officers of other departments,
a confession made to the officer of the status of the Deputy Superintendent
of Police and above should be acceptable in evidence. This relaxation, was
to be restricted to cases which such officers themselves investigate and should
be introduced as an exceptional measure only in the Presidency Towns or places
of like importance where investigations can be conducted by superior police
officers and where the average persons would be more educated and conscions of
their rights. The recommendation for introducing the change in the Presidency
Towns at the initial stage was made because the magistracy there was directly
under the control of the respective High Courts. In other areas, it was observed,
it should be introduced only after the separation of the judiciary from the exe-
cutive.

In a later report of the Law Commission on the Code of Criminal Procedure
(48th Report of the Law Commission), the question of confessions made to
the police was considered at length and the recommendations in the 48th Report
were more or less on the lines of the recommendation made in the 14th Report.
In the background of these two reports it is recommended by the majority in
paragraphs 11.16—11.18 of the present report that in so far as these recommenda-
tions concern the Evidence a new section, say, Section 26-A in the Evidence Act.

With respect I am strongly opposed to this recommendation. Whatever the
social strata from which superior officers of the police are recruited and whatever
the background and educational attainments which such police officers may
be supposed to have, the attribute of voluntariness which is the hall-mark and
sine qua non of a confessional statement under section 164 of the Code of Criminal Procedure is not likely to be present in an accused person when he is produced before a superior investigating police officer for making a confession under section 164 of the Code of Criminal Procedure, even though the accused person may have a counsel of his choice and such counsel is present when the confessional statement is recorded. It may be stated here in parenthesis that no change has been made in this respect in section 164 of the new Code of Criminal Procedure, 1973.

A police officer investigating a criminal case, however, high his status may be and however equal or superior may be his social stratum to the social strata from which officers of other departments are drawn, cannot be expected to possess and exhibit that attitude of mind and that spirit of detachment and impartiality while recording a confessional statement made by the accused in a case which is being investigated by himself, which a judicial magistrate by his training, occupation, temperament, attitude and independence generated by such occupation and other factors, always brings to bear when recording a confessional statement of an accused person. We should not forget that a man's approach and attitude to the affairs which he is required to deal with in his official career is to a large extent determined by the nature of the duties which he performs by virtue of his official career. An officer of the police develops a peculiar habit of mind which is very different from the habit of mind developed by a magistrate doing judicial work. We should not forget that since ancient times the essential function of the police has been maintenance of law and order which is par excellence an executive function of prime importance and the function of a judicial magistrate even while recording the confessional statement of an accused person, is par excellence a judicial function. The recording of a confession of an accused being essentially a judicial function, only the criminal judiciary (magistracy) may be expected to discharge it properly without fear or favour. These qualities cannot be expected from a police officer, specially when such officer is the investigating police. Being the investigating officer he will have a natural leaning and tendency to prove the guilt of the accused. There is very likely unconscious inclination on the part of an investigating police officer to regard an accused person as the guilty person and he will try in every possible way to involve him in the commission of the offence and to prove his guilt. If by his investigation he cannot prove the guilt of the accused, his efficiency as a police officer will suffer and dwindle and he will come to be regarded by his superior officers as a worthless officer. It is well known that the promotion of police officers not only in this country but in the United Kingdom also, depends to a substantial extent on the success of the investigating police officers in procuring conviction of the accused persons. It is difficult for such police officers to record a confessional statement made by an accused person in an absolutely detached and impartial manner. Human frailty being what it is, a police officer cannot take the risk of sacrificing his own personal interest when recording a confessional statement made by an accused person.

Moreover, the very presence in the law of such a provision as the one recommended, will lure and tempt the investigating police officer to shape and mould before hand the accused person by threat, inducement and promises and by extortion and oppression and by application of other third degree methods, in such a way that when he is produced before the very same investigating officer for making his confessional statement, he will make the confession as if he were making it absolutely voluntarily out of his own free will.
when in fact and reality his moral backbone has already been completely broken and his voluntary will, atrophied and deadened. I am of opinion that the consequences of the introduction of the proposed provision in our statute law will be disastrous on the administration of criminal justice in this country.

The framers of the Indian Evidence Act, 1872, were men of great moral wisdom and circumspection and therefore they were cautious as regards the admissibility of statement made by an accused person before a police officer. The demands of impartial and independent and fair justice will be defeated and thwarted if the views of the majority are accepted.

We may state here that voluntariness on the part of an accused person is the basis of a Magistrate's jurisdiction to record a confession. Before recording a confession it is mandatory upon the Magistrate to ensure by questioning the accused that the statement about to be made by him is spontaneous and voluntary. The judicial magistrate cannot and must not record any confession unless after applying his judicial mind, he is fully satisfied about the voluntariness of the confession. This is imperative and is a matter of substance.

The reason which influenced the Legislature in excluding a confession made to a police officer will appear from the following extract from the first Report of the Indian Law Commissioners —

"The police in the province of Bengal are armed with very extensive powers. They are prohibited from enquiring into cases of a petty nature but the complaints in cases of the more serious offences are usually laid before the police. Darogah (now Sub-Inspector or Inspector) who is authorised to examine the complainant, to issue process of arrest, to summon witnesses, to examine the accused and to forward the cases to the Magistrate or submit a report of his proceedings accordingly as the evidence may in his judgement, warrant the one or the other course. The evidence taken by the Parliamentary Committees on Indian affairs during the sessions of 1852 and 1853, and other papers which have been brought to our notice, abundantly show that the powers of the police are often abused for purposes of extortion and oppression and we have considered whether the powers now exercised by the police might not be gradually abridged. In one material point we propose a change in the duties of the police by the adoption of a rule prohibiting any examination whatever of an accused party by the police, the result of which is to constitute a written document. This, of course, will not prevent a police officer from receiving any information which any one may voluntarily offer to him; but the police will not be permitted to put upon record any statement made by the party accused of an offence."

In 1876, Sir Richard Garth, C.J. in R. v. Huributle, 1876 I.L.R. 1 Calcutta 207, observed —

"A confession made to a police officer under any circumstance, is not admissible in evidence against him and that section 26 is not intended to qualify the plain meaning of section 25; but means that no confession made by a prisoner in custody, to any person other than a police officer shall be admissible, unless made in the immediate presence of a magistrate. It is an enactment to which the court should give the fullest effect, and I see no sufficient reason for reading section 26 so as to qualify the plain meaning of section 25."
In the well known case of *Queen Empress v. Babu Lal* (1884 I.L.R. 6 All. 509)—it was observed

"to repeat a phrase I used on a former occasion, instead of working upto the confession they work down from it, with the result that we frequently find ourselves compelled to reverse convictions simply because, beyond the confession there is no tangible evidence of guilt. Moreover I have said, and I repeat now, it is incredible that the extraordinarily large number of confessions which come before us in the criminal cases disposed of by this court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented. I may claim some knowledge of, and acquaintance with, the ways and conduct of persons accused of crime and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add, that during fourteen years' active practice in the criminal courts in England, I do not remember half-a-dozen instances in which a real confession, once having been made, was retracted. In this country, on the contrary the retraction follows almost invariably as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confessor by other prisoners in havalat, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered. I say it in no harsh sense of disparagement, but it is impossible not to feel that the average Indian police man, with the desire to satisfy his superiors before, and the terms of the Police Acts and Rules behind, him is not likely to be over-nice in the methods he adopts to make a short cut to the elucidation of a difficult case by getting a suspected person to confess. (per Mehlood J.)

Then as late as 1965 in the *Mohan Singh case* (A.I.R. 1965 Punjab 291) Dua, J. observed—

"The police investigating agency in our country has not yet acquired the reputation of being proof against the temptation of attempting to secure confessions by questionable methods."

It is needless to refer to scores of other important decisions on the subject. But it is my duty to bring to the notice of all concerned the views expressed in this behalf by no less a person than the *world-renowned thinker, philosopher* and mathematician, Bertrand Russell in his essay on “Power”. Says Bertrand Russell—

"The gist of the matter is that a police man is promoted for action leading to the conviction of a criminal, that the courts accept confession as evidence of guilt and that, in consequence, it is to the interest of individual officers to forswear arrested persons until they confess. This evil exists in all countries in a greater or lesser degree. In India it is rampant......For the taming of the power of the police, one essential is that a confession shall never in any circumstance be accepted as evidence."

Should we ignore the view of the world-famous savant and philosopher?

Section 164 of the Code of Criminal Procedure should be read together with sections 24, 25, 26 and 29 of the Evidence Act and so read the following result follows:

(1) confession shall not be made to a police officer;
(2) It must be made in the presence of a magistrate;

(3) the Magistrate shall not record it unless he is, upon enquiring, satisfied that it is voluntary;

(4) he shall record it in the manner laid down in section 164 read with section 281 of the Code of Criminal Procedure; and

(5) only so recorded it will be relevant and admissible.


With regards the recommendations of the present Law Commission in its 14th Report, it may be observed that even in England opinions have now been changing regarding statements or confessions made to the police. This is what Sarkar in his Law of Evidence 12th Edition says on p. 270—

"In this connection it may be observed that a section of the thinking people in England is of the opinion that statements or confessions made to the police during the questioning of accused persons should not be made admissible in evidence as under the existing law there. Speaking generally, though the British ‘Bobby’ has a good reputation, his discreditable conduct of the same members of the police force from time to time in their zeal to secure conviction, evokes much public comment. A disclosure in 1963 of the use of third degree methods by the Shefield C.I.D. to extort confession shocked the public. The Home Office tribunal’s finding was that three defenceless victims were subject to “deliberate, unprovoked, brutal and sustained assaults”. In an Address to Yorkshire magistrates in 1963, Lord Shawcross, the eminent lawyer and former Attorney General criticised “kid glove” methods of interrogating suspects. He suggested that the police sometimes found themselves unduly handicapped by Judges’ rules governing the questioning of suspects. Alternatively he suggested that Britain might with advantage adopt something like the procedure under the Indian Evidence Act.

The Guardian (Formerly the Manchester Guardian) in an editorial approving the idea of following of the Indian Model, described its gist as giving the police unlimited powers to question a suspect unhampered by the judges’ Rules observed in the English procedure but prohibiting statements or confessions made by suspects to the police from being heard in evidence at the subsequent trial proceedings; they can be used by the police only as clues which will lead them to further evidence; and to be admissible as evidence, a confession must be made before a magistrate. Mr. Dingle Foot, the Solicitor General at one time told that Labour Lawyers in 1963, that one of the troubles was confusion about powers. Not all confessions on which convictions were obtained were voluntary, he suggested that Britain should follow the procedure in the Indian Evidence Act, 1872, which restricts the use in court of confessions to a police officer”.

Thus even in England a section of thinking people has been suggesting of late that Britain should follow the procedure in the Indian Evidence Act which restricts the use of ‘confessions to a police officer’. We should, therefore, be very cautious in introducing any amendment in the Indian Evidence Act on the lines of the recommendations contained in the reports of the Law Commission. It may be noted here that section 164 of the new Code of Criminal Procedure, 1973, has not made any departure in this respect.
Lastly, in my humble opinion a reliance on social stratum from which a person comes as an indication of his superior moral character appears to be a relic of feudalism under which birth in a particular social stratum was regarded as a sign of superior culture and virtue. Such a view is not at all in consonance with the basic human dignity as referred to in the Preamble to the Constitution of India; such an approach is opposed to the spiritual and moral worth of man. History is full of instances of great men and great leaders and teachers of mankind who were born in so-called lower social strata. These appear to be backdated ideas which are not at all in consonance with basic and fundamental traits of manhood and opposed not only to advanced notions and ideas of the present day but also to the high ideals and heritage, which have come down to us from the Veda Samhitas, the Upanishads and the Shrimad Bhagavad-Gita.

Even now many instances of torture, extortion undue influence having been exercised by the investigating police agency upon suspects, and accused persons are reported not only in the newspapers but also in the Law Reports.

Upon all these considerations I am opposed to the recommendations of the majority in this respect. No new section should be inserted in the Evidence Act for the purpose. That will be a highly retrograde step and will defeat and thwart impartial, independent and fair administration of justice. In final analysis, such a step will be contrary to our cherished ideal of Rule of Law which we seek to make real in our social, economic, political and judicial relations in the shape of justice, social, economic and political.

"If the lamp of justice", said Lord Bryce, "goes out in darkness, how great is the darkness!"

(S. P. SEN-VARMA)
25-4-1977.
NOTE OF DISSENT OF SHRI MITRA

REGARDING RECOMMENDATIONS RELATING TO SECTION 23 AND SECTION 68 OF THE EVIDENCE ACT

I regret my inability to agree with the recommendations of the majority of the Commission regarding proposed amendments relating to: (a) insertion of Explanation 2 to section 23 of the Act, and (b) section 68 of the Act. My dissent is based on questions of principle involved in the proposal to amend the sections noted above, and not merely because I take a different view with regard to the form in which the amendments have been proposed. I am recording my dissenting views after very careful and anxious consideration of the proposed amendments, and had it not been for the fact that in my view questions of principle are involved, I would have been happy to agree with the views of the majority of the Commission.

SECTION 23

Section 23 says that "In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given or under circumstances from which the court can infer that the parties agreed that evidence of it should not be given." This means that if an admission is made either on an express agreement that evidence of such admission should not be given or the circumstances enable the court to draw an inference that the parties agreed together that evidence should not be given, such admission would not be relevant. In other words, where the parties have expressly agreed not to give evidence of any admission or the admission has been made in circumstances which would enable the court to draw an inference to that effect, evidence of such admission would not be given in court. The provision makes it clear that evidence of admission is to be excluded firstly when there is an express agreement and secondly where the court can draw an inference that there is an agreement between the parties to that effect. In all other cases, admission would be relevant. By the proposed Explanation 2, what is sought to be provided is that where an admission is made for the purpose or in course of settlement or compromise of a disputed claim, the parties should be deemed to have agreed that evidence of the admission shall not be given. In other words, whenever there is negotiation for compromise and an admission is made by one or both parties, they should be deemed to have agreed that evidence of admission shall not be given. It means that every case of negotiation for settlement or compromise will be hit by the explanation, provided of course admission is made by one or both parties. In every case of negotiation for settlement or compromise, the parties do make admission of various matters in dispute for the purpose of compromise. The suggested amendment would mean that whether the parties had agreed or not, whether the court can draw an inference or not, as provided in the original section, the parties shall be deemed by the court to have agreed that evidence of the admission shall not be given.

In my view, if the suggested explanation is included in the section, Order XXIII, Rule 3 would become altogether otiose and will be rendered infructuous. This rule says that "Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise—the court shall order such agreement, compromise or satisfaction to be recorded and shall pass the decree in accordance therewith so far as it relates to the suit." I shall refer to the amendment of the rule later. The first matter to be
noticed is that the adjustment between the parties may be with regard to the whole or part of a suit. The second matter to be noticed is that if the proposed Explanation is included, no application can ever be made to the court for the purpose of recording the compromise as required by the rule. It may be said that this rule can be invoked only when there has been a concluded agreement between the parties and in no other case. That is to say, that the rule can be invoked only when there is not only admission regarding the matters in dispute, but the negotiations have ultimately resulted in a concluded agreement in writing signed by the parties. In my view, however, the Rule can be invoked not only in a case of concluded agreement but can be invoked whenever there is a dispute between the parties that the agreement in writing signed by them is not a valid agreement between the parties. It must be noticed that the Rule is invoked only when there is a dispute between the parties as to whether there is an agreement adjusting the claims of the parties to the suit. Indeed, if there is no such dispute there would be no scope for invoking or attracting this Rule. Because, if there is no dispute with regard to the agreement, all that the parties have to do is to file a compromise petition regarding the terms of the agreement.

It is because disputes may and do arise between the parties, as to the validity and binding character of an agreement, that provision has been made by the Rule enabling parties to come to court for adjudication on the question whether there has been a valid binding agreement adjusting the claims between the parties.

If it is provided by law that in every case where the parties negotiate for a settlement of their disputes in the suit, they must be deemed to have agreed that evidence of admission made in the course of negotiations shall not be given, no application can ever be made under Order XXIII, Rule 3 of the Code. When parties negotiate for a settlement they may expressly agree that any admission made by either of them should not be given as evidence, or there may be circumstances which makes clear to the court that that was an agreement between the parties although there was no express stipulation of that effect. If that is so, then s. 23 would cover such cases. But where parties proceed to negotiate for a settlement and there is neither any express stipulation that evidence of admission would not be given, nor are there any circumstances to indicate that there was such an agreement between the parties, if a dispute arises between the parties at a later stage as to whether there has been a valid agreement or not, the parties would be debarred from making an application under Rule 3, even though they have a right to come to the court and seek the court's adjudication on the question as to whether there has been a valid agreement. In my view, inclusion of Explanation 2 would not only render Order XXIII, Rule 3 altogether nugatory, but the parties to the suit who have negotiated a settlement would be deprived of an valuable right to which they are entitled under the provisions of the Civil Procedure Code.

I will now turn to the amendment to the Code of Civil Procedure, and see if the amendment makes any difference to the situation I have mentioned above. The material amendment to Rule 3 of Order XXIII is as follows:—

"After the words 'lawful agreement or compromise' the words 'in writing and signed by the parties' shall be inserted."

Therefore, the Rule after amendment would read as follows:—

"Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise
in writing and signed by the parties or where the defendant satisfies.....shall pass a decree in accordance therewith so far as it relates to the suit.”

As I read it, the amendment noted above makes no difference to the position stated by me in the preceding paragraphs. All that the amendment requires is that the lawful agreement and compromise of the parties to the suit shall be in writing and signed by them. Prior to the amendment the alleged agreement or compromise could possibly have been either verbal, or could have been contained in a series of correspondence between the parties. That would no longer be possible. The agreement must be in writing and signed by the parties after the amendment. This, in my view, leaves the question of relevance of admissions made during the course of negotiations untouched. One example will make it quite clear:—

“A sues B for recovery of Rs. 20,000/- as damages for trespass to A's property. B defends the suit but thereafter enters into negotiations for settlement of the dispute in the suit. After protracted negotiations, in course of which B admits he wrongfully trespassed into A's property and agrees to pay to A Rs. 10,000/- as damages instead of Rs. 20,000/- claimed in the suit. The terms of settlement are drawn up as follows:—

1. B admits that he wrongfully trespassed into A’s property.
2. B would pay to A Rs. 10,000/- as damages for the trespass.
3. Disputes between the parties are settled on the terms mentioned above and neither party has any further claim against the other. Each party to pay its own cost.

After the agreement mentioned above is drawn up, it is signed by both the parties. If after the agreement is signed by the parties there is no further dispute between the parties, all that remains to be done is to file an application in the court and have a decree passed on these terms. But supposing B disputes the agreement and refuses to sign a compromise petition for filing the terms. A then will have to file an application under Order XXIII, Rule 3 in which he should state that B has admitted the wrongful trespass and has agreed to pay Rs. 10,000/- as damages. He would also have to file a copy of the agreement in writing signed by the parties before the court. But if the proposed Explanation 2 becomes law, then B will be rightfully entitled to contend that evidence of the admission of trespass made by him in course of negotiations and subsequently reduced into writing in the terms of settlement cannot be given and the court should take no notice of the admissions made by him and recorded in the terms. If Explanation 2 becomes law, no other alternative course would be available to A whose application for recording the terms of settlement must necessarily fail. In this view of the matter, no application can ever be made under Rule 3, if the proposed Explanation 2 becomes law.

The written agreement or settlement between the parties in all probability may contain admissions and concessions by a party who ultimately agrees to settle the dispute, but such admissions can never be looked into by the court because no evidence of it can be given as the party would be deemed to have agreed not to give the evidence of the same.

For the reasons mentioned above, the proposed Explanation 2 to s. 23 of the Act should not become law.
SECTION 68

I now turn to the proposed amendment of s. 68. The effect of the proposed amendment is that Wills apart, with regard to all other documents which are required by law to be attested, it will no longer be necessary to call an attesting witness in order to prove execution of the document as at present provided by the section. The section says that if the document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. The necessity of calling an attesting witness in the case of a document (other than a Will) to prove the execution of the document is now proposed to be dispensed with. It is to be noticed that the provisions of s. 68 are mandatory in nature and the document in question cannot be used as evidence, until the attesting witness is called for the purpose of proving the execution of the document.

What is now proposed is that with regard to all documents other than Wills, which are required to be attested, it will no longer be necessary to call the attesting witness.

My dissent to the recommendations is based on two grounds. The first is that the recommendation violates a cardinal principle of the law of evidence, namely, that the best evidence shall be produced before the court. In the case of a document required to be attested by law, the best evidence of execution of such a document is the evidence of the attesting witness. He alone is the person who in law can prove the execution of the document. According to the recommendations, he need not be called as a witness, but the document may be proved by the evidence of other witnesses, if necessary. In my opinion, this recommendation will have the direct effect of withholding from the court the best evidence relating to the execution of the document, namely the evidence of the attesting witness. It seems to me that there is no valid reason for providing that although the attesting witness is available, he need not be called by the party who is relying on the document and the execution of the document may be proved through other witness. I am of the opinion that such a provision would invade, as I said earlier, a basic principle of law of evidence, namely, that the best evidence should be produced before the court.

The second ground of objection is that attestation of documents, (the execution of which can be proved through witnesses other than the attesting witness), becomes useless. Attestation of a document is required by law to prove execution of the same. If such execution is allowed to be proved by witnesses other than the attesting witness, there will be no purpose behind the requirement as to attestation of documents. In fact, in my view, attestation of such documents becomes a meaningless formality and there is no reason why this meaningless formality should be allowed to continue. The requirement regarding attestation will be rendered altogether nugatory if proof of execution of the documents by the attesting witness is dispensed with.

To allow attestation of documents to be required by law and at the same time to lay down the attesting witness need not be called and the documents may be proved by any other witness who can prove execution of the same, would, in my view, be an unreasonable and illogical requirement of law. Such a provision would, in my view, be quite out of harmony with the requirement as to execution and attestation of certain documents.

For the reasons mentioned above, I dissent from the recommendation of the majority relating to s. 68 of the Evidence Act.
For the same reasons, I dissent from the recommendations of the majority relating to sections 69, 70, 71 and 72 of the Act, which are consequential upon the amendment proposed to s. 68 of the Act.

(B. C. MITRA)

We would like to place on record our warm appreciation of the valuable assistance we have received from Shri Bakshi, Member-Secretary of the Commission in the preparation of this Report.

P. B. Gajendragadkar .................................. Chairman

P. K. Tripathi .......................................... Member

S. S. Dhavan ........................................... Member

S. P. Sen-Varma ....................................... Member

B. C. Mitra ............................................. Member

P. M. Bakshi .......................................... Member-Secretary

Dated New Delhi
the 9th May, 1977.