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## LAW OF EVIDENCE

The object of every judicial investigation is the enforcement of a right or liability that depends on certain facts. The law of evidence can be called the system of rules whereby the questions of fact in a particular case can be ascertained. It is basically a procedural law but it has shades of substantive law. Law of Evidence is one of the fundamental subjects of law. The Indian Evidence Act, 1872 is largely based on the English law of Evidence. The Act does not claim to be exhaustive. Courts may look at the relevant English Common Law for interpretation as long as it is not inconsistent with the Act.

The Act consolidates, defines and amends the laws of evidence. It is a special law and hence, will not be affected by any other enactment containing provisions on matter of evidence unless and until it is expressly stated in such enactment or it has been repealed or annulled by another statute. Parties cannot contract to exclude the provisions of the Act. Courts cannot exclude relevant evidence made relevant under the Act. Similarly, evidence excluded by the Act will be inadmissible even if essential to ascertain the truth. The term 'evidence' owes its origin to the Latin terms 'evident' or 'evidere' that mean 'to show clearly, to discover, to ascertain or to prove.'

## OBJECT OF THE STUDY OF THE LAW OF EVIDENCE

Evidence refers to anything that is necessary to prove a certain fact. Thus, Evidence is a means of proof. Facts have to be proved before the relevant laws and its provisions can be applied. It is evidence that leads to authentication of facts and in the process, helps in rationalising an opinion of the judicial authorities. Further, the law of evidence helps prevent long drawn inquiries and prevents admission of excess evidence than needed. Law related to evidence and proof is nothing but rules that must be observed in particular situations before certain forums. If the other party in a legal proceeding admits guilt, all is well. The other party can also deny the allegations in the plaint and the existence of certain facts may be called into question. Then the parties or their witnesses have to give evidence in the court of law so that the court may decide whether the facts exist or not. Interpretation of agreed facts is a rarity and in most cases the existence or non existence of facts as to be shown and therefore, the law of evidence plays a very important role.

Illustration: X has entered into a contract with Y to sell his house for an amount of INR 10,000. In case of a breach of contract of contract by either X or Y, a Court of Law cannot decide the rights and liabilities unless the existence of such a contract is proved. may add.

The rules and regulations of evidence are essential. One view says that the court has to arrive at the truth and hear all there is to a case and then arrive at a just conclusion. And accordingly, the law of evidence poses a hindrance with its qualifications and requisites. Other view says that without rules it will take ages to resolve any case and it is too much discretion at the hands of men who will remain unchecked. The Indian Evidence Act, 1872 maintains the right proportion of rules that are not too pedantic or too discretionary. Rules of the law of evidence have to be strong so that the foundation of the administration of justice remains intact and strong. It can also be said that the Act seeks to enact a correct and uniform rule to followed and prevent indiscipline in admitting evidence.

## THE LAW OF EVIDENCE IS THE LEX FORI

Law of evidence is part of the law of procedure. That why it is called the lex fori or the law of the court or forum. It means that Indian courts know and apply only the Indian law of evidence. Thus, the competency of a witness, whether a fact is proved or not is determined by the law of the country where the question arose, where the remedy is sought to be enforced and where the court sits to enforce it. For example, if a legal proceeding is going on in Sri Lanka and evidence is taken in India for the said proceeding whether by commission or by assistance of courts in India, the laws which will be applied during such recording of evidence will Sri Lankan Law of Evidence.

## THE LAW OF EVIDENCE SAME IN CIVIL AND CRIMINAL PROCEEDINGS

A civil case of will and murder will have the same law of evidence. For example, the date of death has to be clarified or confirmed for the will to come into existence and a murder date has to be set for proceeding further with the criminal investigations too. There are, however, certain sections that apply exclusively to civil matters and others that apply exclusively to criminal cases. In civil cases, mere preponderance of evidence may be enough but in criminal cases the prosecution must prove its case beyond reasonable doubt and leave the other alternatives presented very unlikely and highly suspect.

## WHAT IS PROOF? HOW DOES IT DIFFER FROM EVIDENCE?

Anything that can make a person believes that an assertion is true or false. It is distinguishable from evidence such that proof is a broad term comprehending everything that may be adduced at a trial, whereas evidence is a narrow term describing certain types of proof that can be admitted at trial. A case that goes to trial must be strong in its legal submission and satisfy the Court of the claims made by producing evidence. To do this, there are certain documents and objects that are taken into consideration while deciding on a matter of evidence. The Law of Evidence governs this aspect of criminal proceedings. The level of proof in a criminal case is a strict requirement and the party alleging the crime must prove the claim beyond all reasonable doubt. This standard is examined by looking at whether a reasonable man would be convinced by the allegations leveled in the face of evidence to the contrary. This can be done by producing relevant documents, or eye-witnesses to the offending incident or circumstantial evidence that increases the probability of the incident.

## BASIC PRINCIPLES OF EVIDENCE

The Act deals with Relevancy of Facts, Mode of Proof and Production and Effect of Evidence. The following principles are called the basic principles and the exceptions to the above principles; the exact application has been set out very clearly in the Act:

- Evidence must be confined to the matters in issue.
- Hearsay evidence may not be admitted.
- The best evidence must be given in all cases.
- All facts having rational probative value are admissible in evidence, unless excluded by a positive rule of paramount importance.

There two fundamental principles of trial in the all judicial system, firstly, it must ensure that parties to the case are given full opportunity to prove their case, and *secondly* every dispute must come to an end. These two rules which are juxtaposed to each other must be balanced and this is done by the blending of procedural law and rules of evidence.

## HISTORY OF THE LAW OF EVIDENCE

Today we have two basic of evidence upon which rules are formulated. One rule is that only the facts bearing importance to the matter being heard should be looked into by the courts and second that all facts that will help the court to reach a decision are admissible unless otherwise excluded like a client confessing to his legal counsel.

Among others from ancient Hindu Period, Vasistha recognised 3 kinds of evidence:

- Lekhya (Documentary Evidence)
- Sakshi ( Witnesses)
- Bukhti ( Possession)
- Divya (Ordeals)

Though the concept of justice in Islam is that it is a divine disposition, the Mohammedan law givers have dealt with evidence in various forms:

- Oral that may be Direct Hearsay
- Documentary (Less preferred than oral)

Initially at many places and in many beliefs, the parties to litigation would fight each other and it was believed that divine help will come to the rightful party. Trial by battle has been abrogated only in 1817. The trials by ordeal included a person on bed of hot coals or putting ones hand n boiling water. Anyone who suffered injury was held to be impure and guilty. Though it was believed that providence will not let harm come to the innocent, often it was the priests who manipulated the tests so that certain people could go scot-free.

It was believed that if a guilty man touches the corpse it would show a reaction and then the man should be punished. Accordingly refusal to touch a corpse was also admission of guilt by the accused.

The most cruel evidence law existed in Europe with respect to witch hunts and witch craft. The woman suspected of being a witch was tied up and thrown into a pond. If she floated p, she was a witch and was burned alive at stake. If the woman were to sink to the bottom of the pond, she was not a witch. Unfortunately she would be dead by then but nevertheless innocent in the eyes of law. Confessions due to torture are not unknown today either.

## THE MODERN LAW AS IT PREVAILS

The concrete evidence of the 'law of evidence' comes from the times of the Britishers. In 1837, an Act was a passed whereby even a convicted person was allowed to give evidence. Subsequently, parties to litigation could be witnesses for their respective sides. Charles Dickens ridiculed this law and questioned the honesty of such witnesses. After all, who will testify against himself or to his disadvantage? Between 1835 and 1855, there are eleven Acts that touch upon the subject of law of evidence. And these were consolidated.

In 1856, Sir Henry Summer Maine, the then law member of the Governor General's Council was asked to prepare and Indian Evidence Act. His draft was found unsuitable for the Indian conditions. So it fell to Sir James Fitzjames Stephan who became the law member in 1871 to come up with the Indian Evidence Act. His draft bill was approved and came into being as the Indian Evidence Act, 1872 and came into force from 1st September 1872. Before independence, many states had already accepted this law as the law in their respective state. After independence, the Indian evidence Act was held to be the law for all Indian courts

Indian Evidence Act (IEA) makes provisions about rules regarding evidence and applies to all judicial proceedings in or before any court including court martial. However, if the court martial is done under- Army Act, the Naval Discipline Act, the Indian Navy (Discipline) Act, 1934, the Air Force Act, then it will have no application over these laws. It may also be noted that Evidence Act does not apply on affidavits presented to any Court or Officer, nor it applies to any proceedings before an arbitrator.

## CONSTITUTIONAL PERSPECTIVE OF EVIDENCE

Clause (3) of Article 20 of the Indian Constitution, 1950 provides that "No person accused of any offence shall be compelled to be a witness against himself." This principle is espoused on the maxim "nemo teneteur prodre accussare seipsum", which essentially means "NO MAN IS BOUND TO ACCUSE HIMSELF."

The Fundamental Right guaranteed under Article 20(3) is a protective umbrella against testimonial compulsion for people who are accused of an offence and are compelled to be a witness against themselves. The provision borrows from the Fifth Amendment of the American Constitution which lays down that, "No person shall be compelled in any criminal case to be a witness against himself", same as mentioned in the Constitution of India embodying the principles of both English and American Jurisprudence. This libertarian provision can be connected to an essential feature of the Indian Penal Code based on the lines of Common Law that, "an accused is innocent until proven guilty" and the burden is on the prosecution to establish the guilt of the accused; and that the accused has a right to remain silent which is subject to his much broader right, against self-incrimination.

The tendency of Indian legal system manifests skepticism of the police system. This is the reason confessions of an accused is only admissible if recorded by a Magistrate in accordance with an elaborate procedure to ensure that they are made voluntarily. Protection is also accorded by the provisions of The Indian Evidence Act. This protection is available to every person including not only individuals but also companies and incorporated bodies.

This clause gives protection only if the following ingredients are present:

- It is a protection available to a person accused of an offence;
- It is a protection against compulsion to be a witness against oneself; and
- It is a protection against such "Compulsion" as resulting in his giving evidence against himself.

### Person accused of an offence

A person accused of an offence means a "person against whom a formal accusation relating to the commission of an offence has been leveled, which may result in prosecution". Formal accusation in India can be brought by lodging of an F.I.R or a formal complaint, to a competent authority against the particular individual accusing him for the commission of the crime.

It is only on making of such formal accusation that Clause (3) of Article 20 becomes operative covering that person with its protective umbrella against testimonial compulsion. It is imperative to note that, "a person cannot claim the protection if at the time he made the statement, he was not an accused but becomes an accused thereafter." Article 20 (3) does not apply to departmental inquiries into allegations against a government servant, since there is no accusation of any offence within the meaning of Article 20 (3).

Self-incrimination has been extensively discussed in the case of Nandini Satpathy v. P.L Dani. In this case, the appellant, a former Chief Minister of Orissa was directed to appear at Vigilence Police Station, for being examined in connection to a case registered against her under the Prevention of Corruption Act, 1947 and under S. 161/165 and 120-B and 109 of The Indian Penal Code, 1860. Based on this an investigation was started against her and she was interrogated with long list of questions given to her in writing. She denied to answer and claimed protection under Article 20(3). The Supreme Court ruled that the objective of Article 20(3) is to protect the accused from unnecessary police harassment and hence it extends to the stage of police investigation apart from the trial procedure.

Further, this right to silence is not limited to the case for which the person is being examined but also extends to other offences pending against him, which may have the potential of incriminating him in other matters. It was also held that the protection could be used by a suspect as well.

**Protection against compulsion to be a witness**

The protection contained in Article 20(3) is against compulsion "to be a witness" against oneself. In M.P Sharma v. Satish Chandra, the Supreme Court gave a wide interpretation of the expression "to be a witness" which was inclusive of oral, documentary and testimonial evidence. The Court also held that the protection not only covered testimonial compulsion in the Court room but also included compelled testimony previously obtained from him.

**To be a witness-- Furnishing Evidence**

In M.P Sharma's case it was held that, Article 20 (3) was directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in the Court.

**Exception**

It follows that giving thumb impressions, or impression of foot or palm or fingers or specimens of writings or exposing body for the purpose of identification are not covered by the expression 'to be a witness' under Article 20(3).

The Court distinguished 'to be a witness' from 'furnishing evidence', and interpreted the former to mean imparting knowledge in respect of relevant facts by an oral statement or statement in writing made or given in court or otherwise. The latter included production of documents or giving materials which might be relevant at a trial to determine the guilt or innocence of the accused.

**Analysis**

Thus, self-incrimination in context of Article 20(3) only means conveying information based upon personal knowledge of the person giving information. But where an accused is compelled to produce a document in his possession which is not based on the personal knowledge of the accused, in such a case there is no violation of Article 20(3).

**Searches & Seizures**

In V.S Kuttan Pillai v. Ramakrishnan, the Supreme Court held that search of the premises occupied by the accused without the accused being compelled to be a party to such a search would not be violative of the constitutional guarantee enshrined in Article 20(3).

**Section 27 of the Indian Evidence Act, 1872**

S.27 of the Indian Evidence Act, 1872, provides that during investigation when the discovery of evidence by the police is led by some fact that was disclosed by the accused then so much of the information as relates to the facts discovered, may be proved irrespective of the fact whether that information amounts to a confession of not. It was held that the provisions of this section are not prohibited within the scope of Article 20(3) unless compulsion had been used in obtaining the information.

**Compulsion to give evidence "against himself"**

The protection under Article 20(3) is available only against compulsion of the accused to give evidence against himself. Thus, if the accused voluntarily makes an oral statement or voluntarily produces

documentary evidence, incriminatory in nature, Article 20(3) would not be attracted. The term compulsion under Article 20(3) means 'duress'. Thus, compulsion may take many forms. If an accused is beaten, starved, tortured, harassed etc. to extract a confession out of him/her then protection under Article 20(3) can be sought. A case at hand would be Mohd. Dastagir v. State of Madras where the appellant went to the residence of the Deputy Superintendent of Police and handed him an envelope. On opening the envelope, the DSP found cash in it, which meant that the appellant had come to offer bribe to the officer. The DSP refused it and asked the appellant to place the envelope and the notes on the table, and he did as told, after which the cash was seized by the Police..In this case the Supreme Court held that, the accused wasn't compelled to produce the currency notes as no duress was applied on him. Moreover the appellant wasn't even an accused at the time the currency notes were seized from him. Hence in this case the scope of Article 20(3) was not applicable.

### Tape Recording of statements made by the accused

If statements recorded are made by the accused, without any duress, with or without his knowledge are not hit by Article 20(3).

### Scientific tests – involuntary?

The issue of involuntary administration of certain scientific techniques, like narco-analysis tests, polygraph examination, etc. for the purpose of improving investigation efforts in criminal cases has gained a lot of attention. For a long time, there was a debate about whether such tests were violative of Article 20(3) or not and the same issue were brought to the Supreme Court in the case of Selvi v. State of Karnataka.

In this case the Hon'ble Chief Justice, Justice K.G Balakrishnan spoke of behalf of the Apex Court, and drew the following conclusions:

- The right against self-incrimination and personal liberty are non-derogable rights, their enforcement therefore is not suspended even during emergency.
- The right of police to investigate an offence and examine any person do not and cannot override constitutional protection in Article 20(3);
- The protection is available not only at the stage of trial but also at the stage of investigation;
- That the right protects persons who have been formally accused, suspects and even witnesses who apprehend to make any statements which could expose them to criminal charges or further investigation;
- The law confers on 'any person' who is examined during an investigation, an effective choice between speaking and remaining silent. This implies that it is for the person being examined to decide whether the answer to a particular question would be inculpatory or exculpatory;
- Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as criminal proceedings;
- Compulsory narco-analysis test amounts to 'testimonial compulsion' and attracts protection under Article 20(3);
- Conducting DNA profiling is not a testimonial act, and hence protection cannot be granted under Article 20(3);

- That acts such as compulsory obtaining signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration;

- That subjecting a person to polygraph test or narco-analysis test without his consent amounts to forcible interference with a person's mental processes and hence violates the right to privacy for which protection can be sought under Article 20(3);

- That courts cannot permit involuntary administration of narco-tests, unless it is necessary under public interest.

Article 20 (3), invokes protection against self-incrimination and gives an accused the right to remain silent over any issue which tends to incriminate him. This protection by the Indian Constitution is also extended to suspects. Article 20 clause 3, has been carefully drafted to protect the accused from further self-incriminating himself only if any statement of his might result in prosecution. For the benefit of the Courts, the Supreme Court has distinguished between the terms "witness" and "furnish evidence", the former including furnishing statements from one's own knowledge and the latter referring to simply presenting documents required by the court under which protection under Article 20(3) cannot be sought.

In addition it stretches its privileges to a person who is compulsorily being made a witness and also covers searches and seizures wherein, an accused or the person being searched is under no obligation to be a part of the search. If any confession or a mere statement is made based on which some material corroboration is found then that statement cannot be protected under Article 20(3). Under the law, an accused cannot be tortured to make a statement or a confession and no duress can be exercised in order to obtain some information out of him, in such a case the statement would be void and the privileges under Article 20(3) would be applicable. Narco-analysis tests, polygraph analysis etc. which refer to involuntary administration of mental processes, are considered violative of Article 20(3) and can only be done in a few cases as it disrupts the right to privacy.

But with the advancement in medical sciences, the certainty of such scientific tests has increased and the author thinks that they provide an effective tool to furnish evidence which help in speedy disposal of cases. By balancing the harmony between the protective rights and the need for speedy disposal.

## KINDS OF EVIDENCES & WITNESSES

Evidence includes everything that is used to determine or demonstrate the truth of an assertion. Giving or procuring evidence is the process of using those things that are either (a) presumed to be true, or (b) which were proved by evidence, to demonstrate an assertion's truth. Evidence is the currency by which one fulfills the burden of proof.

In law, the production and presentation of evidence depends first on establishing on whom the burden of proof lays. Admissible evidence is that which a court receives and considers for the purposes of deciding a particular case. Two primary burden-of-proof considerations exist in law. The first is on whom the burden rests. In many, especially Western, courts, the burden of proof is placed on the prosecution. The second consideration is the degree of certitude proof must reach, depending on both the quantity and quality of evidence. These degrees are different for criminal and civil cases, the former requiring evidence beyond reasonable, the latter considering only which side has the preponderance of evidence, or whether the proposition is more likely true or false. The decision maker, often a jury, but sometimes a judge, decides whether the burden of proof has been fulfilled. After deciding who will carry the burden of proof, evidence is first gathered and then presented before the court.

**Different Forms of Evidence**

(a) **Oral Evidence**–All those statements which the court permits or expects the witnesses to make in his presence regarding the truth of the facts are called Oral Evidence. Oral Evidence is that evidence which the witness has personally seen or heard. Oral evidence must always be direct or positive. Evidence is direct when it goes straight to establish the main fact in issue.

(b) **Documentary Evidence**– All those documents which are presented in the court for inspection such documents are called documentary evidences. In a case like this it is the documentary evidence that would show the actual attitude of the parties and their consciousness regarding the custom is more important than any oral evidence.

(c) **Primary Evidence**- Primary Evidence is the Top-Most class of evidences. It is that proof which in any possible condition gives the vital hint in a disputed fact and establishes through documentary evidence on the production of an original document for inspection by the court. It means the document itself produced for the inspection of the court. In Lucas v. Williams Privy Council held "Primary Evidence is evidence which the law requires to be given first and secondary evidence is the evidence which may be given in the absence of that better evidence when a proper explanation of its absence has been given."

(d) **Secondary Evidence**–Secondary Evidence is the inferior evidence. It is evidence that occupies a secondary position. It is such evidence that on the presentation of which it is felt that superior evidence yet remains to be produced. It is the evidence which is produced in the absence of the primary evidence therefore it is known as secondary evidence. If in place of primary evidence secondary evidence is admitted without any objection at the proper time then the parties are precluded from raising the question that the document has not been proved by primary evidence but by secondary evidence. But where there is no secondary evidence as contemplated by Section 66 of the Evidence Act then the document cannot be said to have been proved either by primary evidence or by secondary evidence."

(e) **Real Evidence**– Real Evidence means real or material evidence. Real evidence of a fact is brought to the knowledge of the court by inspection of a physical object and not by information derived from a witness or a document. Personal evidence is that which is afforded by human agents, either in way of disclosure or by voluntary sign. For example, Contempt of Court, Conduct of the witness, behavior of the parties, the local inspection by the court. It can also be called as the most satisfactory witness.

(f) **Hearsay Evidence**– Hearsay Evidence is very weak evidence. It is only the reported evidence of a witness which he has not seen either heard. Sometime it implies the saying of something which a person has heard others say. In Lim Yam Yong v. Lam Choon & Co. The Hon'ble Bombay High Court adjudged "Hearsay Evidence which ought to have been rejected as irrelevant does not become admissible as against a party merely because his council fails to take objection when the evidence is tendered." So finally we can assert that Hearsay Evidence is that evidence which the witness has neither personally seen or heard, nor has he perceived through his senses and has come to know about it through some third person. There is no bar to receive hearsay evidence provided it has reasonable nexus and credibility. When a piece of evidence is such that there is no prima facie assurance of its credibility, it would be most dangerous to act upon it. Hearsay evidence being evidence of that type has therefore, to be excluded whether or not the case in which its use comes in for question is governed by the Evidence Act.

(g) **Judicial Evidence**– Evidence received by court of justice in proof or disproof of facts before them is called judicial evidence. The confession made by the accused in the court is also included in judicial evidence. Statements of witnesses and documentary evidence and facts for the examination by the court are also Judicial Evidence.

(h) **Non-Judicial Evidence**– Any confession made by the accused outside the court in the presence of any person or the admission of a party are called Non-Judicial Evidence, if proved in the court in the form of Judicial Evidence.

(i) **Direct Evidence**– Evidence is either direct or indirect. Direct Evidence is that evidence which is very important for the decision of the matter in issue. The main fact when it is presented by witnesses, things and witnesses is direct, evidence whereby main facts may be proved or established that is the evidence of person who had actually seen the crime being committed and has described the offence. The evidence of the witness in Court is direct evidence as opposed to testimony to a fact suggesting guilt. The statement before the police only is called circumstantial evidence of, complicity and not direct evidence in the strict sense.

(j) **Circumstantial Evidence or Indirect Evidence**– There is no difference between circumstantial evidence and indirect evidence. Circumstantial Evidence attempts to prove the facts in issue by providing other facts and affords an instance as to its existence. It is that which relates to a series of other facts than the fact in issue but by experience have been found so associated with the fact in issue in relation of cause and effect that it leads to a satisfactory conclusion.

In Hanumant v. State of Madhya Pradesh, The Hon'ble Supreme Court Observed, "In dealing with circumstantial evidence there is always the danger that suspicion may take the place of legal proof. It is well to remember that in cases where the evidence is of a circumstantial nature the circumstances from which the conclusion of guilt is to be drawn should in the first instance , be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. In other words there can be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

In the case of Ashok Kumar v. State of Madhya Pradesh, the Hon'ble Supreme Court held-

(1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

(2) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused.

(3) The circumstances, taken cumulatively should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

(4) The Circumstantial Evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

**Direct Evidence V. Circumstantial Evidence**

The question that which evidence is superior is going from a long time, on this subjects jurists differ in their views. Some jurists hold that direct evidence is superior evidence. When a particular says that he had seen a particular event happening then undoubtedly his evidence is superior, but even relying on direct evidence at once is also hazardous because a witness can make a completely false statement. In the same manner in the case of circumstantial evidence circumstances are also proved by witnesses. Particularly the manner in which the court draws inferences from circumstances they can be wrong and also and thus circumstances also become false.

In the case of Kallu v. State Of Uttar Pradesh, the accused was tried for the murder of the deceased by shooting him with a country made pistol. A cartridge was found near the bed of the deceased. The accused was arrested at a distance of 14 miles from the village which was the place of occurrence. He produced a pistol from his house which indicated that he could have alone have known of its existence there. The fire-arms expert proved that it was the same pistol from which the shot was fired and deceased was killed. The Hon'ble Supreme Court while convicting the accused held "Circumstantial Evidence has established that the death of the deceased was caused by the accused and no one else."

**Different Kinds of Witnesses**

The witness can be divided mainly into two categories-

(1) Eye Witness

(2) Circumstantial Witness

Witness can be further divided into following kinds-

**(1) Prosecution Witness–** Prosecution is the institution or commencement of criminal proceeding and the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment on behalf of the state or government by indictment or information. A prosecution exists until terminated in the final judgment of the court to write the sentence, discharge or acquittal, a witness which appears on behalf of the prosecution side is known as a Prosecution Witness.

**(2) Defense Witness–** Defense side in a criminal proceeding is opposing or denial of the truth or validity of the prosecutor's complaint, the proceedings by a defendant or accused party or his legal agents for defending himself. A witness summoned on the request of the defending party is known as a Defense Witness.

**(3) Expert Witness–** An 'expert' is not a 'witness' of fact. His evidence is really of an advisory character. The duty of an 'expert witness' is to furnish the judge with the necessary scientific criteria for testing the accuracy of the conclusion so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data furnished which form the basis of his conclusions.

**(4) Eye Witness–** A witness who gives testimony to facts seen by him is called an eye witness, an eye witness is a person who saw the act, fact or transaction to which he testifies. An eye witness must be competent (legally fit) and qualified to testify in court. A witness who was intoxicated or insane at the time the event occurred will be prevented from testifying, regardless of whether he or she was the only eyewitness to the occurrence. Identification of an accused in Court by an 'Eye witness' is a serious matter and the chances of a false identification are very high. Where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs."

"Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution,

then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in and no amount of corroboration can cure that defect."

On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelu Thevar case and, therefore, conviction can be recorded on the basis of the statement of a single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the courts insist on the quality, and, not on the quantity of evidence."

**(5) Hostile Witness**-The witness who makes statements adverse to the party calling and examining him and who may with the permission of the court, be cross examined by that party. Now it is true that in Coles v. Coles, and it may be in other cases, a hostile witness has been described as a witness who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. This is not a very good -definition of a hostile witness and the Indian Evidence Act is most careful in Section 154 not to restrict the right of 'cross-examination' even by committing itself to the word 'hostile'.

This Court in Bhagwan Singh v. State of Haryana [AIR 1976 SC 202] held that merely because the Court gave permission to the Public Prosecutor to cross- examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In State of U.P. v, Ramesh Prasad Misra the Supreme Court held that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defense may be accepted. In Balu Sonba Shinde v. State of Maharashtra 2003 SCC (Crl.) 112 the Supreme Court held that the declaration of a witness to be hostile does not ipso facto reject the evidence. The portion of evidence being advantageous to the parties may be taken advantage of, but the Court should be extremely cautious and circumspect in such acceptance. The testimony of hostile witness has to be tested, weighed and considered in the same manner in which the evidence of any other witness in the case.

Thus we can finally conclude that in order to provide justice Evidence and witnesses are very necessary and they hold a very important place in the Law. With the help of Evidence the judge reaches a verdict. The evidence heard by the court is the most important factor in determining whether the judgment will be in favour of Prosecution side or Defense side.

### 6) Child witness

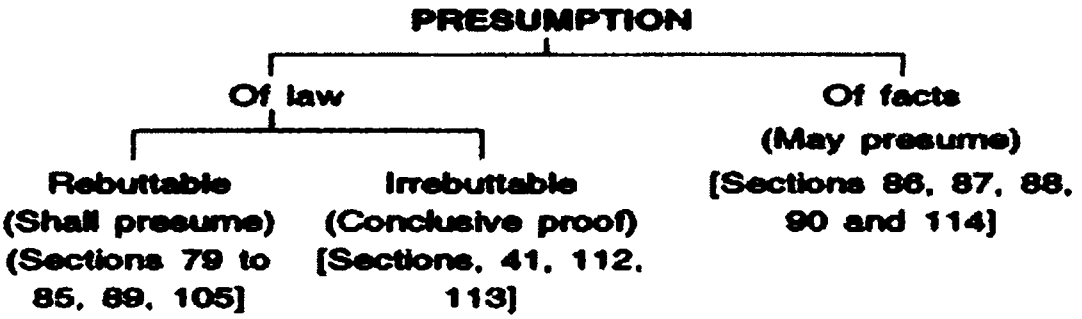
In State v Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967) it was observed that the burden of proving incompetence is on the party opposing the witness. Courts consider 5 factors when determining competency of a child witness. Absence of any of them renders the child incompetent to testify. They are

(1) an understanding of the obligation to speak the truth on the witness stand;
(2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
(3) a memory sufficient to retain an independent recollection of the occurrence;
(4) the capacity to express in words his memory of the occurrence; and
(5) the capacity to understand simply questions about it.

## PRESUMPTIONS OF LAW" AND "PRESUMPTIONS OF FACT

**Presumption**

An idea that is taken to be true on the basis of probability




**Presumptions of Law:**

1. Discretion of Court —

No discretion is vested in the Court at all. The law peremptorily requires a certain inference to be made whenever the facts appear which the law assumes as the basis of the inference.

2. Rules of law —

Presumptions of law are, in reality rules of law and part of the law itself.

3. Presumptions of law must be drawn.

4. Kinds —

There are two kinds of presumptions of law — rebuttable and irrebuttable.

**Presumptions of Fact:**

1. A discretion, more or less extensive as to drawing the inference, is vested in the tribunal.

2. Presumptions of fact are not rules of law.

3. Presumptions of fact may or may not be drawn.

4. There is no such division in the case of presumptions of fact

**Conclusive presumptions** are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong.

**Rebuttable presumptions** are rules defining the nature and the amount of the evidence which is sufficient to establish a prima facie case and to throw the burden of proof upon the other party; and, if no opposing evidence is offered, the Court is bound to come to a conclusion in favour of the presumption.

**Mixed presumptions** or presumptions of law and fact, lie in- between the above two, and consist mainly of certain presumptive inferences which attract the observation of the law.

**'Presumption' and 'Proof':**

"Proof" is that which leads to the conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Proof may be effected by (1) evidence, (2) admissions, or (3) judicial notice. Thus, presumptions are the means, and proof is the end, of judicial inquiry. Presumption is merely an inference. When a rebuttable presumption operates in favour of a party, it is for the opponent to disprove it by adducing evidence to the contrary.

## FEATURES OF THE INDIAN EVIDENCE ACT

The Indian Evidence Act or The Law of Evidence is a subject which cannot be understood without understanding these important features which forms the basis of the Law of Evidence. For a good Lawyer skills and hands on the subject these features are a must on tips. Only then can you jump on to the next level to understand and study the Law of Evidence .These important features are-

1. Court
2. Fact
3. Relevant fact
4. Facts in issue
5. Document
6. Evidence
7. Proved
8. Disproved
9. Not proved
10. Affidavit
11. Motive
12. Circumstantial Evidence
13. May presume
14. Shall presume
15. Conclusive proof

1) **Court**- Court includes all Judges and Magistrates, and all persons except Arbitrators, legally authorized to take evidence. A Court is a governmental institution with the authority to decide legal disputes between the parties. All kinds of persons are free to bring their disputes to the court and seek a fair judgment. The Judiciary is the system who interprets and applies the Law. The place where the court sits is known as a venue. The room where the court proceedings are held is known as a Court room. A Court is constituted by a minimum of three parties-

- The Plaintiff-is a person who complains for an injury caused to him.
- The Defendant-is a person who defenses himself against the complaint made by the plaintiff against the defendant and,
- The Judicial power-which is to examine the truth of the fact and deliver a judgment.
- Besides this Advocates of both the parties.

## 2) FACT-

Section 5 of IEA, provides that evidence may be given on *fact in issue* or on *relevant facts* but no other facts. It means, during trial parties are allowed to prove fact in issue, relevant facts but they are not allowed to prove anything which is neither.

**Facts:** means anything or state of things or relations of thing which can be perceived by senses (see, touch, taste, hear, and smell). Particular 'state of mind' is also a fact. Examples of facts:

The term "fact" means and includes-

Anything, state of things, or relation of things, capable of being perceived by the senses; any mental condition of which any person is conscious.

Example-

- That man heard or saw something, is a fact.
- That a woman has a certain reputation is a fact.
- The jar kept on the table, is a fact.
- That a man holds a certain opinion, has a certain intention, acts in good faith, acts fraudulently, or uses a word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
- That girl has so and so name, is a fact.

## 3) Relevant fact-

A fact is said to be relevant to another when one fact is connected with the other fact in any ways referred to in the provisions of this act in the chapter of relevancy of facts. Relevant fact-The word 'relevant' means that any two facts to which it is applied are in such a way related to each other that, one, either taken by itself or in connection with the other facts, proves or renders probability of the past, present or future existence or non-existence of the other. 'Relevant' means admissible in evidence. Of all the rules in evidence the most important is that the evidence adduced should be confined only to the matters which are in dispute, or which form the subject of investigation. However, it is to be noted here that every facts connected with 'facts in issue' is not relevant, unless the said fact is connected with 'facts in issue' in the same way as described in section 6-55 of IEA. Categories of relevant facts are:

1. Facts forming part of same transactions
2. Certain Statements like admission, confession or dying declarations
3. Earlier judgment pertaining to the said cause of action
4. Opinion of expert of facts disputed
5. Character of parties

## 4) Facts in issue-

Defined under section 3 of IEA, which simply means those facts which can establish right, duty, liabilities or obligations.

The expression "facts in issue" 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.

Explanation.—Whenever, 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.

Thus, in a dispute relating to possession of house, ownership would be fact in issue, since once the ownership is decided, who should have possession can easily be decided just by application of law. In criminal law, ingredients of an offence are 'facts in issue'. Say example, in case of murder, whether death is caused or not, whether death was caused with same intention as required by section 300 IPC or not? Whether accused is entitled for any right of private defense or not? These are 'facts in issue'. Example given in the IEA is:

**Illustrations**

- A is accused of the murder of B. At his trial the following facts may be in issue:—
- That A caused B's death; (*will fix the liability* as required by section 300 IPC)
- That A intended to cause B's death; (*will fix the liability* as required by section 300 IPC)
- That A had received grave and sudden provocation from B; (*will reduce the liability* as provided in section 300 IPC)
- 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. (*will absolve from any liability* since it general exception to any offence and a very good defense)

**5) Document-**

The term "document" means 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. Example-

- Writing is a document;
- Words printed, lithographed or photographed are documents;
- A map or plan is a document;
- An inscription on a metal plate or stone is a document;
- A caricature is a document.

The term document includes all material substances on which thoughts of the people are expressed by writing or in any other way, by a mark or a symbol. For instance, the wooden board on which the bakers, the milk men, indicate by notches, the number of loaves of bread or liters of milk supplied to the customers, are documents.

**6) Evidence-**

The word 'Evidence' has been derived from the Latin word 'evidere' which implies to show distinctly, to make clear to view or sight, to discover clearly, to make plainly certain, to certain, to ascertain, to prove.

According to Sir Blackstone, 'Evidence' signifies that which demonstrates, makes clear or ascertain the truth of the facts or points in issue either on one side or the other.

According to Sir Taylor, Law of Evidence means through argument to prove or disprove any matter of fact. The truth of which is submitted to judicial investigation.

*Section 3* of The Indian Evidence Act, defines evidence in the following words-

*Evidence means and includes-*

(1) All the statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry; such statements are called Oral evidence;

(2) All the documents including electronic records produced for the inspection of the court; such documents are called documentary evidence;

The definition of Evidence given in this Act is very narrow because in this evidence comes before the court by two means only-

(1) The statement of witnesses.

(2) Documents including electronic records.

But in them those things have not been included on which a Judge or a Penal authority depends for this position.

The Hon'ble Supreme Court of India in Sivrajbhan v. Harchandgir held "The word evidence in connection with Law, all valid meanings, includes all except agreement which prove disprove any fact or matter whose truthfulness is presented for Judicial Investigation. At this stage it will be proper to keep in mind that where a party and the other party don't get the opportunity to cross-examine his statements to ascertain the truth then in such a condition this party's statement is not Evidence."

**7) 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. When the Court believes it to exist, it means it is proved beyond reasonable doubt. In the case of criminal proceeding the guilt of the accused is to be proved beyond reasonable doubt. In civil proceedings proving beyond reasonable doubt is not necessary, only balancing of possibilities and probabilities is sufficient. The meaning of proved means positive findings.

**8) 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. Disproved is contrary to proved. It also means negative findings. In disproved the existence of such fact is not proved but its non-existence is proved.

**9) Not Proved-**

A fact is said not to be proved when it is neither proved nor disproved. There is no positive or negative findings. It is a situation where the parties fail to explain precisely, how the matter stands.

**10) Affidavit-**

An affidavit is a written statement made voluntarily by an affiant or deponent under an oath administered by a person who is legally authorized to do so. Affidavits are confined only to those facts which the deponent is able of his own knowledge to prove. An affidavit filed by a party cannot be termed as evidence. Affidavits cannot be used in evidence. It can only be used if the Court permits to be used for sufficient reasons.

### 11) Motive-

A motive in law is the cause that moves the people to commit a certain act. The motive is a very essential factor to be seen behind every act, specially a criminal act committed. It can be explained with the help of an example-

Rekha, who was the owner's daughter, was killed by the tenant dheeraj, who had a evil eye on Rekha. Dheeraj had tried to rape Rekha but Rekha managed to escape and told her mother about the incident on account of which Rekha's father abuseingly told dheeraj to vacate the house immediately. This may be taken as the motive of the Murder. If the prosecution is able to prove the motive, then the Court has to consider it and see whether it is adequate or not. Where there is a direct evidence, the evidence of motive is not of much significance.

### 12) Circumstantial evidence-

It is one of the well established fact in law that the witness may lie but the circumstances never lie. It is not necessary that a direct ocular evidence is needed to prove that a person was behind the crime. The guilt of a person can also be proved by circumstantial evidence. For conviction in the case of circumstantial evidence the following conditions must be accomplished. They are-

The circumstances from which the conclusion of the guilt is to be drawn should be fully established.

- The facts established should be consistent and they should not be explainable on any other hypothesis except that the accused is guilty.
- The nature of the circumstances should be conclusive.
- They should include only the facts which are to be proved.
- There must be a chain of evidence completely showing that in all human probability the act must have been done by the accused.

### 13) May Presume-

The term "may presume" means that the Court has the authority to presume the fact as proved, or to call upon for a confirmatory evidence, as the circumstances require. In such a case the presumption is not a hard and fast presumption, incapable of rebuttal. Such presumptions in law are called as 'juris et de jury'. The Court may presume a fact or regard such fact as proved, unless it is disproved, or it may ask for its proof.

### 14) Shall Presume-

When a Court presumes a certain fact it has no other option except considering the fact as proved unless evidence is given to disprove that fact. The party interested in disproving that fact can produce evidence if he can. In such a case the Court will have the power to allow the opposite party to disprove the fact which is presumed as proved and if the opposite party is successful in disproving the fact then the Court shall not presume the fact. The words "shall presume" indicates that presumption therein is unrebuttable.

### 15) Conclusive Proof-

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.

## EXTENT AND APPLICATION OF EVIDENCE ACT

### SECTION 1

Whole of India- except state of Jammu and Kashmir

Applies to all judicial proceedings in or before any court including court martial, but not to affidavits nor the proceedings before an arbitrator.

Judicial proceedings: Includes any proceeding in the course of which evidence is or may be legally taken on oath.

- Administrative Tribunals- not bound to follow the technical rules of evidence – principles of natural justice
- Commission of inquiry- not bound to follow the technical rules of evidence – principles of natural justice
- Income tax tribunals- certain powers of civil court exercised in certain specified matter- judicial proceedings only for limited purposes- bound to follow the technical rules of evidence for limited purpose.
- Election tribunals- bound to follow the technical rules of evidence –subject to the provisions of the Representation of Peoples act
- Industrial tribunals- deemed to be judicial proceedings - bound to follow the technical rules of evidence
- Departmental proceedings- not bound to follow the technical rules of evidence – principles of natural justice
- Court martial- act applies to court martial proceedings other than the court martial convened under the Army Act, the Naval Discipline Act, or the Indian Navy (Discipline)Act 1934 or the Air Force Act.

  Evidence law applies to all native court martial but not to foreign court martial.
- Affidavits- not bound to follow the technical rules of evidence – principles of natural justice
- Arbitration proceedings- not bound to follow the technical rules of evidence – principles of natural justice

## COMMENCEMENT OF THE ACT

I September 1872

## OF THE RELEVANCY OF FACTS

**Section 5**

**Evidence may be given of facts in issue and relevant facts**

Theory of relevancy of facts

Evidence may be given in any suit or proceeding of the existence of non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

***Frusstra probatur quod probatum non relevant***

It would be frustrating and disgusting to prove facts which are irrelevant.

**Illustrations**

A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:—

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

## SCHEME OF INDIAN EVIDENCE ACT

Three broad categories,

firstly what to prove (5 to 55),

Secondly, Who to prove (100-115),

*Lastly* how to prove (rest of IEA).

## PRINCIPLE OF RES GESTAE

**Principle of Res gestae** in English law all facts which are connected through 'part of the same transaction' they are called as evidence of 'res gestae', however in India such facts are codified from section 6 to section 11.

Res Gestae in IEA are:

1. Facts forming part of same transaction (section 6)
2. Facts which are occasion, cause or effect of facts in issue (Section 7)
3. Facts suggesting Motive, preparation and previous or subsequent conduct (Section 8)
4. Facts necessary to explain or introduce relevant facts (section 9)
5. Things said or done by conspirator in reference to common design (Section 10)
6. When Facts not otherwise relevant become relevant because these facts make other facts in issue or any relevant fact either highly probable or highly improbable (section 11)

**Facts forming part of same transactions (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.

All facts which are connected with the 'facts in issue' due to:

1. Proximity of time
2. Proximity of place
3. Continuity of action
4. Purposes, whether happen at same time and place or different time and different place

Then, they are said be 'part of the same transactions'.

For example

(a) 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 is as to from part of the transaction, is a relevant fact.

(b) 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 goals 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.

(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.

**Facts which are occasion, cause or effect of facts in issue (Section 7):**

These facts are those which provide either occasion or cause or create effect over 'facts in issue'. For example in murder case, 'presence' of accused and victim at the place of occurrence at same time or accused 'having gun', at given time, or 'altercation between' accused and victim are the facts proving occasion, and thus they are relevant in this section. 'Firing' of bullet is cause of death, so 'firing' as such is a relevant fact; 'firing of bullet' may have effect of causing death or serious injuries, here injuries or death is effect of 'firing of bullet', so such injuries are relevant facts.

**Illustrations**

(a) 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.

(b) 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.

(c) 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.

**Facts suggesting Motive, preparation and previous or subsequent conduct (Section 8):**

Facts suggesting motive (say example previous fighting, property dispute, love affair, family dispute, business rivalry etc.) or preparation (say example just before the murder accused purchased a gun or bullets, or took training for shooting, or in case of forgery, he purchase few stamp papers to forged a sale deed etc) or conduct, whether previous or subsequent of the parties are also relevant (examples of previous conducts like, previous attempts, any fights; example of subsequent conduct such as being missing from house after committing murder, suspicious act of hiding himself or certain goods used for the offence etc.)

It is important to note that conducts of parties as well as their agents both are relevant in any suit or proceeding.

**Illustrations**

(a) 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.

(b) A sues B upon a bond for 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, it relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(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 relate that he consulted vakils in reference to making the will, and that he caused drafts or other wills to be prepared of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts, 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 favorable to himself, on 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.

Generally, conduct does not include a bare statement, however, if such statement has affected the conduct of the parties, then not only such conduct but also statement both will be relevant. For example:

(f) 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.

(g) The question is, whether A owes B rupees 10,000.

The fact that, A asked C to lend him money, and that D said to C in A's presence and hearing "Advice you The Orient Tavern to trust A, for he owes B 10,000 rupees" and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

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

(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.

(j) 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 facts 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.

(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 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.

**Facts necessary to explain or introduce relevant facts (section 9):**

When certain fact can explain any fact in issue or any relevant fact, and by such explanation the parties can support or rebut any inference drawn from such facts, then these types facts are called as explanatory facts, and they are thus relevant. Explanatory facts are those facts which can explain a fact which is already taken and inference are drawn from such facts

- A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as a conduct subsequent to and affected by facts in issue. However, the fact that, at the time when he left home he had *sudden and urgent business at the place to which he went* is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant except in so far as they are necessary to show that the business was sudden and urgent.

- introduce a fact which ultimately assert or deny any fact in issue or relevant fact,

A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A – "I am leaving you because B has made me better offer." The statement is a relevant fact as explanatory of C's conduct which is relevant as a fact in issue.

- support or rebut an inference suggested by a fact in issue or relevant fact,

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.

- establish the identity of anything or person whose identity is relevant,

for example fact that some witnesses identified the accused during Test identification Parade (TIP) is relevant under this Section.

- fix the time or place at which any fact in issue or relevant fact happened,

Post mortem report or other scientific reports, fixing the time of murder etc., through some process are relevant. For example, B, the diseased was last seen taking food at 8 PM. His dead body was recovered next very morning at 6 from agriculture field. Undigested food was found in the stomach of the diseased. It will be concluded that death must have happen within 6 hours of his taking of food i.e. his death must have caused somewhere between 8 PM to 2 AM of the early morning.

- show the relation of parties by whom any such fact was transacted

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.

**Things said or done by conspirator in reference to common design (Section 10):**

This is most often used section in cases related to conspiracy. It provides that during existence of a conspiracy, whatever were said or done by the conspirators in furtherance of conspiracy is relevant against all conspirators. Essentials of this section are:

- Proof of an existed conspiracy (reason to believe) between all people whose statement or conduct is proposed to be proved
- Statement or conduct of conspirator must be limited to the one which was in furtherance (direct relationship) with the said conspiracy.

**Illustration**

Reasonable grounds exist for believing that A has joined in a conspiracy to wage war against the Government of India. Then, the facts that, B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D Persuaded persons to join the conspiracy in Bombay. E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

Section 10 has been deliberately enacted in order to make acts and statements of a co-conspirator admissible against the whole body of conspirators, because of the nature of crime; *Badri Rai* v. *State of Bihar,* AIR 1958 SC 953.

The words "common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them. It had nothing to do with carrying the conspiracy into effect; *Mirza Akbar* v. *Emperor,* AIR 1940 PC 176.

If prima facie evidence of existence of a conspiracy is given and accepted, the evidence of acts and statements made by anyone of the conspirators in furtherance of the common object is admissible against all; *Jayendra Saraswati Swamigal* v. *State of Tamil Nadu,* AIR 2005 SC 716.

**When Facts not otherwise relevant become relevant because these facts make other facts in issue or any relevant fact either highly probable or highly improbable (section 11):**

Facts which are not otherwise relevant will become relevant:

- if they are inconsistent with any fact in issue or relevant fact;
    - The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore, is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it *highly improbable*, though not impossible, that he committed it, is relevant.

- 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.
    - The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by B, C or D is relevant as it highly suggests that it must have committed by A

## OTHER RELEVANT FACTS (SECTION 12-16)

- Facts tending to enable Court to determine amount of damages or compensation are relevant under section 12 of IEA. For example, at given time, income of victim's family, number of family members, medical expenditure after accident etc.
- Facts necessary to establish a right or custom in question are relevant in section 13 of IEA. For example, the 'transaction' by which the right or custom in question was created, claimed modified, recognized, asserted or denied, or which was inconsistent with its existence of such right or custom are relevant if the said right or custom itself is disputed. Take a practical example, a demands easement right through property of B. fact that he has enjoyed this for last many years are relevant since it prove the easement.
- Facts showing existence of state of mind or of body or bodily feeling are always relevant under section 14 of IEA. 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. (For example 'A' is tried for a crime. The fact that, he said something indicating an intention to commit that particular crime is relevant. But the fact that, he said something indicating a general disposition to commit crimes of that class, is irrelevant.) However, 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.
- Thus, a Facts showing the existence of any state of mind,

  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.

- such as intention,
- 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.
- A is charged with sending Theartening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.
- A is tried for the murder of B by intentionally shooting him dead. The fact that, A on other occasions shot a 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.
- 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.
- knowledge,
- A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew each and all of the articles of which he was in possession to be stolen. The fact that, at the time of delivery A was possessed of a number of other pieces of counterfeit coin is relevant. The fact that, A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.
- The question is, whether A, the acceptor of a bill of exchange, knew that the name of 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.
- good faith,
- 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 neighbors and by persons dealing with him, is relevant, as showing that A made the representation in good faith.
- 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.
- A is accused of the dishonest misappropriation of property which he had found, 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 the 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, 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.

- negligence, rashness,
- A sues B for damage done by a god 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.
- A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured. Statements made by A as to the state of his health at or near the time in question, are relevant facts.
- 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 defect of that particular carriage, is relevant.

  The fact that, B was habitually negligent about the carriage which he let to hire is relevant.
- ill-will or goodwill
- existence of any state of body or bodily feeling,
- 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 facts.
- The question is, whether A's death was caused by poison. Statement made by A during hiss illness as to his symptoms, are relevant facts.
- Facts bearing on question whether act was accidental or intentional (Section 15) are relevant. For example A is accused of burning down his house in order to obtain money for which it is insured. The fact that, A lived in several houses successively each of which he insured, in 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.

  Similarly, 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 he really did receive. The question is, whether his 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.

  Another example is where 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.
- Existence of course of business are relevant (Section 16) when there is a question as to whether a particular act was done, in which according to the given course of business, the said act naturally would have been done. For example, if the question is, whether a particular letter was dispatched. The facts that, it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant. Similarly, if the question is, whether a particular letter reached to A. The fact that, it was posted in due course, and was not returned through the Dead Letter Office, are relevant, as it will be inferred that letter must be reached to A, otherwise would been return as dead letter.

## ADMISSION

Admission is a voluntary acknowledgment of a fact. Importance is given to that admission that goes against the interests of the person making the admission. For example, when A says to B that he stole money from C, A makes an admission of the fact that A stole money from C. This fact is detrimental to the interests of A. The concept behind this is that nobody would accept or acknowledge a fact that goes against their interest unless it is indeed true. Unless A indeed stole money from C, it is not normal for A to say that he stole money from C. Therefore, an admission becomes an important piece of evidence against a person. On the other hand, anybody can make assertions in favor of themselves. They can be true or false. For example, A can keep on saying that a certain house belongs to himself, but that does not mean it is necessarily true. Therefore, such assertions do not have much evidentiary value.

**Admission as per Indian Evidence Act -**

**Section 17** of Indian Evidence Act defines Admission as thus - An admission is a statement, oral or documentary, or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

As per this definition, any statement, which suggests any inference about any fact in issue or relevant fact, and which is made by persons under certain circumstances, is an admission. These circumstances are mentioned in Section 18 to 20 as follows -

**Section 18** - Admission by party to proceeding or his agent; by suitor in representative character; by party interested in subject-matter; by person from whom interest derived - Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to made them, are admissions.

By suitor in representative character - Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by -

(1) by party interested in subject matter; 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; or

(2) by person from whom interest derived; persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

According to this section, statements made a persons who are directly or indirectly a party to a suit are admissions. Thus, statements of an agent of a party to the suits are also admissions. Statements made by persons who are suing or being sued in a representative character are admissions, only if those statements were made by the party while being in that representative character. Similarly, statements made by persons who have a pecuniary interest in the subject matter of the proceeding and statements made by persons from whom such interest is derived by the parties in suit, are also admissions if they are made while the maker had such an interest. For example, A bought a piece of land from B. Statements made by B at the time when B was the owner of the land are admissions against A.

**Section 19** - Admissions by persons whose position must be proved as against party to suit- Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against the made if they are made whilst the person making them occupies such position or is subject of such liability.

Illustration -

- A undertakes to collect rent for B.
- B sues A for not collecting rent due from C to B.
- A denies that rent was due from C to B.
- A statement by C that he owned B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

**Section 20** - Admission by persons expressly referred to by party to suit - 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.

Illustration -

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.

To be considered an admission, it is not necessary for a statement to give a direct acknowledgment of liability. It is sufficient even if the statement suggests an inference about the liability. For example, A is charged with murder of B by giving poison. The statement by A that he purchased a bottle of poison is admission because it suggests the inference that he might have murdered B using that poison, even though it does not clearly acknowledge the fact that A murdered B. In the case of Chekham Koteshwara Rao vs C Subbarao, AIR 1981, SC held that before the right of a party can be taken to be defeated on the basis of an alleged admission by him, the implication of the statement must be clear and conclusive. There should not be any doubt or ambiguity.Further, it held that it is necessary to read all of his statements together. Thus, stray elements elicited in cross examination cannot be taken as admission.

It is important to note that Indian Evidence Act does not require that an admission be of statements that are against the interests of the maker. All that is necessary is that the statement should suggest some inference as to a fact in issue or relevant to the issue, even if the inference is in the interest of the maker of the statement. Self serving prior statements are also admissions. For example, A person can say to B that he did not steal money from C. This is a self serving statement and is a valid admission. Does this mean that a person can make self serving statements and escape from his liability? The answer is no because such self serving admissions are governed by the provisions of Section 21, which says the following -

**Section 21** - Proof of admissions against persons making them, and by or on their behalf - Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases -

(1) 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.

(2) 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.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(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 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 indicating 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 person did examine it and told him it was genuine. A may prove these facts for the reasons stated in the last preceding illustration.

From the above illustrations it is clear that the general rule is that a person is not allowed to prove his own admissions. Otherwise, as observed in R vs Hardy, 1794, every man, if he were in difficulty, or in view of one, might make declarations to suit his own case and then lodge them in proof of his case. This principle, however, is subject to some important exceptions, which allow a person to prove his own statements. These are as follows -

**Exception 1** - When the statement should have been relevant as dying declaration or as that of a deceased person under Section 32. Section 32 deals with the statement of persons who have died or who otherwise cannot come before the court. The statement of any such person can be proved in any case or proceeding to which it is relevant whether it operates in favor of or against the person making the statement. In circumstances stated in Section 32 such a statement can be proved by the maker himself if he is still alive. In the situation described in Illustration (b), in a case between the shipowner and the insurance company, the contents of the log book maintained by the captain would have been relevant evidence if the captain were dead under Section 32. Therefore, the captain is allowed to prove the contents of the log book even in the case involving him and the shipowners.

**Exception 2** - Statements as to bodily feeling or mind - It enables a person to prove his statements about his state of mind or body if such state of mind or body is a fact in issue or is relevant fact and if the statement was made at the time when such state of mind or body existed and further if the statement is accompanied with his conduct that makes the falsehood of the statements improbable. In Illustration (d), the statements of A that show that he refused to sell them below their value, are self serving admissions. However, it is acceptable because they reflect A's state of mind and were associated with a conduct of refusing to sell that makes their falsehood improbably.

**Exception 3** - The last exception allows a person to prove his own statement when it is otherwise relevant under any of the provisions relating to relevancy. There are many cases in which a statement is relevant not because it is an admission but because it establishes the existence or non-existence of a relevant fact or a fact in issue. In all such cases a party can prove his own statements. These cases are covered by the following sections -

**Section 6** - When a statement is made relevant by the doctrine of res gestae i.e. due to part of the same transaction. For example, immediately after a road accident, if the victim has made a statement to the rescuer about the cause of the accident, he can prove that statement because it is part of the same transaction.

**Section 8** - A statement may be proved by or on behalf of the person make it under Section 8 if it accompanies or explains acts other than statements or if it influences the conduct of a person whose conduct is relevant. For example, where A says to B, "You have not paid my money back", and B walks away in silence, A may prove his own statement because it has influenced the conduct of a person whose conduct is relevant.

**Section 14** - When the statement explains his state of mid or body or bodily feeling when any such thing is relevant or is in issue, it can be proved by himself. For example, where the question is whether a person has been guilty of cruelty towards his wife, he may prove his statements made shortly before or after the alleged cruelty which explain his love and affection for and his feeling towards his wife.

***When oral admissions as to contents of documents are relevant:***

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 document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

**Section 22** lays down that the contents of the documents can be proved by the documents itself and not by oral evidence. The contents of a document capable of being produced must be proved by the instrument and not by parole evidence.

Under the provisions of the Evidence Act the contents of the documents are proved either by primary evidence or by secondary evidence. According to Section 64, the document must be proved by primary evidence, i.e., by producing the document itself. In absence of primary evidence it can be proved by secondary evidence under section 65. Section 22, accordingly, states that oral evidence as to the contents of a document will be relevant only when the secondary evidence of the document can be given under this section. When acceptable materials are avoidable through witnesses, their depositions cannot be rejected merely on the ground that the complaints given by P.W. 4 and P.W. 21 were not marked and muchalka obtained from both parties were not produced. The contents of the documents like certified copy, Xerox or photocopy, attested or duplicate copies can be produced to support oral evidence.

In case the document is registered then except in the case of a will it is not necessary to call an attesting witness, unless the execution has been specifically denied by the person by whom it purports to have been executed. Where the original contract is available to ascertain the quantum of damages there is no question of letting in secondary evidence.

**Section 22A** – When oral admissions as to contents of electronic records are relevant:

Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. Under this section the electronic records are presumed to be genuine unless any question arises in this regard. Oral evidence as to contents of electronic records may be allowed when the genuineness of such records is in question.

**Section 23** – Admissions in civil cases, when relevant

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 together that evidence of it should not be given.Explanations

Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

**Section 31** Admissions not conclusive proof, but may estop:

Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

Section 31 deals with the effect of admission in the matter of conclusiveness. It provides that admissions are not conclusive proof of matter admitted but operate as estoppels. This section gives evidentiary value of admissions containing in Sections 17 to 30 of the Evidence Act. Admissions are not conclusive. "it sometimes happens that persons make statements which serve this purpose or proceed upon ignorance of the true position; and it is not their statements but their relations— with the estate, which should be taken into consideration in determining the issue." An admission, unless it operates as an estoppels, is not conclusive, but is open to rebuttal. A party is not bound by his own admission unless it acted upon the opposite party. The party against whom it is proved is at liberty to show it was mistaken or untrue.

In civil cases the admission must be accepted as a whole or rejected as whole. In criminal cases an admission consists of inculpatory and exculpatory elements. It can be wise to accept inculpatory part of the Statement of the accrued, but if the statement is only evidence the exculpatory part cannot be rejected.

Admissions are of many kinds. They may be considered as being on record actually if they are either in the pleadings or in answer the interrogations or implied from the pleadings by non-traversal.

By admission an existing title can be proved. An admission by a party in respect of joint family property held by him is admissible and binding. An admission is a best evidence binding the opposite party. Where the averments of the applicant in an interlocutory application for bringing the legal representatives on record and accepted by the opposition party, the opposite party would be bound by the averments and cannot resile from them. Where an admission was made by the predecessor in title, he became bound by it.

*Following principles may be drawn from Section 31:*

1. Although the Section 31 is given place in the chapter of relevancy it does not concern with relevancy, rather it concerns with the evidentiary value of admissions.
2. Admissions are substantive piece of evidence but do not confer title.
3. Admissions in civil cases or judicial admissions or admissions in pleadings shall be taken as a whole.
4. Admission or confession should be taken as a whole.

## CONFESSION

The word "confession" appears for the first time in Section 24 of the Indian Evidence Act. This section comes under the heading of Admission so it is clear that the confessions are merely one species of admission. Confession is not defined in the Act. Mr. Justice Stephen in his Digest of the law of Evidence defines confession as "confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime."

In Pakala Narayan Swami v Emperor Lord Atkin observed

" A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not in itself a confession".

In the case of Palvinder Kaur v State of Punjab the Supreme Court approved the Privy Council decision in Pakala Narayan Swami case over two scores.

Firstly, that the definition if confession is that it must either admit the guilt in terms or admit substantially all the facts which constitute the offence. Secondly, that a mixed up statement which even though contains some confessional statement will still lead to acquittal, is no confession. Thus, a statement that contains self-exculpatory matter which if true would negate the matter or offence, cannot amount to confession.

However in the case Nishi Kant Jha v State of Bihar the Supreme Court pointed out that there was nothing wrong or relying on a part of the confessional statement and rejecting the rest, and for this purpose, the Court drew support from English authorities. When there is enough evidence to reject the exculpatory part of the accused person's statements, the Court may rely on the inculpatory part.

**Forms of confession**

A confession may occur in many forms. When it is made to the court itself then it will be called judicial confession and when it is made to anybody outside the court, in that case it will be called extra-judicial confession. It may even consist of conversation to oneself, which may be produced in evidence if overheard by another. For example, in Sahoo v. State of U.P. the accused who was charged with the murder of his daughter-in-law with whom he was always quarreling was seen on the day of the murder going out of the house, saying words to the effect : "I have finished her and with her the daily quarrels." The statement was held to be a confession relevant in evidence, for it is not necessary for the relevancy of a confession that it should be communicated to some other person.

**Judicial confession**- Are those which are made before a magistrate or in court in the due course of legal proceedings. A judicial confession has been defined to mean "plea of guilty on arrangement (made before a court) if made freely by a person in a fit state of mind.

**Extra-judicial confessions**- Are those which are made by the accused elsewhere than before a magistrate or in court. It is not necessary that the statements should have been addressed to any definite individual. It may have taken place in the form of a prayer. It may be a confession to a private person. An extra-judicial confession has been defined to mean " a free and voluntary confession of guilt by a person accused of a crime in the course of conversation with persons other than judge or magistrate seized of the charge against himself. A man after the commission of a crime may write a letter to his relation or friend expressing his sorrow over the matter. This may amount to confession. Extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility. Extra-judicial confession is generally made before private person which includes even judicial officer in his private capacity. It also includes a magistrate not empowered to record confessions under section 164 of the Cr.P.C. or a magistrate so empowered but receiving the confession at a stage when section 164 does not apply.

**Difference between judicial and extra-judicial confession-**

| Judicial confession | Extra-judicial confession |
|---|---|
| 1. Judicial confessions are those which are made to a judicial magistrate under section 164 of Cr.P.C. or before the court during committal proceeding or during trial. | 1. Extra-judicial confession are those which are made to any person other than those authorized by law to take confession. It may be made to any person or to police during investigation of an offence. |
| 2. To prove judicial confession the person to whom judicial confession is made need not be called as witness. | 2. Extra-judicial confession are proved by calling the person as witness before whom the extra-judicial confession is made. |
| 3. Judicial confession can be relied as proof of guilt against the accused person if it appears to the court to be voluntary and true. | 3. Extra-judicial confession alone cannot be relied it needs support of other supporting evidence. |
| 4. A conviction may be based on judicial confession. | 4. It is unsafe to base conviction on extra-judicial confession. |

**Voluntary and non-voluntary confession-** the confession of an accused may be classified into Voluntary and non-voluntary confession. A confession to the police officer is the confession made by the accused while in the custody of a police officer and never relevant and can never be proved under Section 25 and 26. Now as for the extra-judicial confession and confession made by the accused to some magistrate to whom he has been sent by the police for the purpose during the investigation, they are admissible only when they are made voluntarily. If the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the change against the accused person proceeding from a person in authority and sufficient in opinion of the court to give the accused person grounds, which would appear to him reasonable for supporting that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him, it will not be relevant and it cannot be proved against the person making the statement. Section 24 of the Evidence Act lays down the rule for the exclusion of the confession which are made non-voluntarily.

**Section 24 of Indian Evidence Act** - confession caused by inducement, threat or promise, when irrelevant in criminal proceeding- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of 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, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supporting that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceeding against him.

If a confession comes within the four corners of Section 24 is irrelevant and cannot be used against the maker.

**Ingredients of Section 24**

To attract the prohibition enacted in Section 24 the following facts must be established:

- That the statement in question is a confession,
- That such confession has been made by the accused,
- That it has been made to a person in authority,

- That the confession has been obtained by reason of any inducement, threat or promise, proceeding from a person in authority,
- Such inducement, threat or promise must have reference to the charge against the accused, and
- The inducement, threat or promise must in the opinion of the court be sufficient to give the accused ground, which would appear to him reasonable, for supporting that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

**1. Confession made by inducement, threat or promise-** a confession should be free and voluntary. "If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible." The term inducement involves a threat of prosecution if the guilt is not confessed and a promise of forgiveness if it is so done. It is very difficult to lay down any hard and fast rule as to what constitutes inducement. It is for the judge to decide in every case. An inducement may be express or implied, it need not be made to the accused directly from the person in authority. Before a confession can be received as such, it must be shown that it was freely and voluntarily made. This means that the confession must not be obtained by any sort of threat or violence, not by any promise either direct or indirect, expressed or implied, however slight the hope or fear produced thereby, not by the exertion of an influence. The ground on which confessions made by the accused under promises of favour or threats of injury are excluded from evidence is not because any wrong is done to the accused in suing than but because he may be induced by pressure of hope or fear to confess the guilt without regard to their truth in order to obtain relief or avoid the threatened danger. Thus it is clear that if threat or promise from persons in authority is used in getting a confession it will not be taken into evidence. Every threat or inducement may not be sufficient to induce the accused to confess a guilt. The proper question before excluding a confession is whether the inducement held out to the prisoner was calculated to make his confession untrue one. The real enquiry is whether there had been any threat of such a nature that from fear of it the prisoner was likely to have told an untruth. If so, the confession should not be admitted.

In case of an ordinary confession there is no initial burden on the prosecution to prove that the confession sought to be proved is not obtained by inducement, threat, etc. It is the right of the accused to have the confession excluded and equally the duty of the court to exclude it even suo moto. It is idle to expect that an accused should produce definite proof about beating or pressure. But he must point out some evidence or circumstances on which a well-sounded conjecture at least, that there was beating or pressure may reasonably be based.

**2. Inducement must have reference to the charge-** the inducement must have reference to the charge against the accused person that is the charge of offence in the criminal courts and inferencing the mind of the accused with respect to the escape from the charge. The inducement must have reference to escape from the charge. Thus, it is necessary for the confession to be excluded from evidence that the accused should labour under influence that in reference to the charge in question his position would be better or worse according as he confesses or not. Inducements in reference to other offences or matters or offences committed by others will not affect the validity of the confession thus, where a person charged with murder, was made to confess to a Panchayat which threatened his removal from the caste for life, the confession was held to be relevant, for the threat had nothing to do with the charge.

The inducement need not be necessarily expressed. It may be implied from the conduct of the person in authority, from the declaration of the prisoner or the circumstances of the case. Similarly it need not be made to the prisoner directly; it is sufficient to have come to his knowledge provided it appears to have induced to confession.

**3. Threat, inducement and promise from a person in authority**- The threat, inducement and promise on account of which the accused admits the guilt must come from a person who has got some authority over the matter. To be clear the person giving different promises, threatening the accused or inducing him to make the confession must be a person in authority as stated in the Pyare Lal v. State of Rajasthan. If a friend of the accused induces him to make a confession or a relation if he makes him a promise that if he confesses he will get him released or even if he threatens him and the accused on that account admits his guilt this statement will not be excluded by Section 24 as the threat, inducement or promise do not emanate from a person in authority.

If the accused makes the confession thinking that by doing so the authorities would soften the attitude towards him the confession cannot be said to be non-voluntary.

The term "person in authority" within the meaning of Section 24 was held to be one who has authority to interfere in the matter charge against the accused. If this definition is to be accepted that term " a person in authority" would mean only the police who are in charge of the investigation and the magistrate who is to try the case. This view appears to be too restrictive. It appears that a person in authority within the meaning of Section 24 should be one who by virtue of his position wields some kind of influence over the accused.

The question as to whether a person to whom a confession has been made is a person in authority would naturally depend on the circumstances of each case having regard to the status of the accused in relation to the person before whom the confession is made. A house surgeon is a person in authority in relation to nurse of the same hospital.

**4. Sufficiency of the inducement, threat or promise**- before a confession is excluded, inducement, threat or promise would in the opinion of the court be sufficient to give the accused person ground which would appear to the accused reasonable for supposing that by making the confession he would gain an advantage or avoid an evil of the nature contemplated in the section. Consequently the mentality of the accused has to be judged and not the person in authority. That being the case, not only the actual words, but words followed by acts or conduct on the part of the person in authority, which may be taken by the accused person as amounting to an inducement, threat or promise, will have to be taken into account. A perfectly innocent expression, coupled with acts or conduct on the part of the person in authority together with the surrounding circumstances may amount to inducement, threat or promise. It does not turn upon as to what may have been the precise words used but in each case whatever the words used may be it is for the judge to consider whether the words used were such as to convey to the mind of the person addressed an intimation that it will be better for him to confess that he committed the crime or worse for him if he does not. The expression, "whatever you say will be used as evidence against you" will not exclude a confession. On the other hand "you better pay the money than go to jail", "if you tell me where my goods are I will be favourable to you", "I will get you released if you tell me the truth", have been held to be sufficient to give the accused grounds for supposing that by making the confession he would gain an advantage or avoid an evil.

It must be borne in the mind that the advantage gained or the evil avoided must be of temporal nature therefore any inducement having reference to a future state of reward or punishment does not affect the admissibility of confession. A confession will not be excluded which has been obtained by the accused by moral or religious exhortation. The expression "you had better as good boys tell the truth", "kneel down and tell me truth in the presence of the Almighty", do not give out any temporal gain and so the confession derived on these confessions are not excluded by Section 24. Confession obtained on the allegation by the panches that if the accused does not confess he shall be excommunicated will not exclude the confession. It should be borne in the mind that the gain or evil must be in reference to the proceeding against him.

**Evidentiary value of confession**

**Value of judicial confession-** a case where there is no proof of corpus delicti must be distinguished from another where that is proved. In the absence of the corpus delicti a confession alone may not suffice to justify conviction.

A confessional statement made by the accused before a magistrate is a good evidence and accused be convicted on the basis of it. A confession can obviously be used against the maker of it and is in itself sufficient to support his conviction. Rajasthan High Court has also held that the confession of an accused person is substantive evidence and a conviction can be based solely on a confession.

If it is found that the confession was made and was free, voluntary and genuine there would remain nothing to be done by the prosecution to secure conviction. If the court finds that it is true that the accused committed the crime it means that the accused is guilty and the court has to do nothing but to record conviction and sentence him. No question of corroboration arises in this case. Normally speaking it would not be quite safe as a matter of prudence if not of law to base a conviction for murder on the confession of the alleged murder by itself and without more. It would be extremely unsafe to do so when the confession is open to a good deal of criticism and has been taken in the jail without adequate reason and when the story of murder as given in the confession is somewhat hard to believe. This observation was made by the Supreme Court and therefore it cannot be said to be a good law in the case of judicial confession.

Now the settled law is that a conviction can be based on confession only if it is proved to be voluntary and true. If corroboration is needed it is enough that the general trend of the confession is substantiated by some evidence which would tally with the contents of the confession. General corroboration is enough.

**Value of extra-judicial confession-** extra-judicial confessions are not usually considered with favour but that does not mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in the circumstances which support his statement should not be believed.

The evidence of extra-judicial confession is a weak piece of evidence. The extra-judicial confession must be received with great case and caution. It can be relied upon only when it is clear, consistent and convincing. The court has to decide whether the person before whom the admission is said to have been made are trustworthy witnesses. The extra-judicial confession is open to the danger of mistake due to the misapprehension of the witness before whom the confession was made to the misuse of the words and the failure of the party to express his own meaning. This is also open to another sort of danger. There being no record and there being no sanction behind it is very easy for the prosecution to catch hold of any witness who may come and depose that the accused admitted his guilt in his presence on some particular time. Due to those reasons it is very dangerous for the courts to base conviction on the sole basis of extra-judicial confession. Usually and as a matter of caution courts require some material corroboration to an extra-judicial confession statement corroboration which connects the accused person with the crime in question.

Extra-judicial confessions have to received with great caution and care and when the foundation of the conviction is the confession alleged to have been made by the accused there are three things which the prosecution must establish. First, that a confession was made, secondly, that evidence of it can be given that is to say that it was voluntary and thirdly that it is true. Such a confession must be proved by an independent or satisfactory evidence.

In State of Karnataka v. A.B.Nag Raj there was allegation that the deceased girl was killed by her father and step-mother in the National park. The alleged extra-judicial confession was made by accused during detention in forest office. No mention of said confession in report given to police nor any witness present there mentioning about the same confession. This extra-judicial confession cannot be relied on.

Before relying on extra-judicial confession, it must be considered whether the confession was really made. It should also be considered as to why the accused reposed confidence in the witnesses stating about the confession. It was alleged that the accused made confession to a witness who was the widow of one of the conspirators and was helping her husband in making spears and other weapons. It was held that the confession was not reliable.

**Value of retracted confession**- A retracted confession is a statement made by an accused person before the trial begins by which he admits to have committed the offence but which he repudiates at the trial. After the commission of a serious offence some police officer makes investigation into the matter, examines witnesses and the accused. If in his opinion the accused is proved to have committed the offence, he submits a report to a magistrate having jurisdiction in the matter. The court takes evidence and examines the accused. If during the investigation, the accused on being examined by the police officer is willing to admit the guilt the police officer sends the accused to some magistrate for recording his statement. The magistrate after being satisfied that the accused admits in his statement to have committed the offence this recorded statement by the magistrate may be proved at the trial. When the trial begins the accused on being asked as to whether he committed the crime he may say that he did not commit the crime. The question may again be put to him as to whether he made statement before the magistrate during the investigation confessing the guilt. He may deny to have made the statement at all or he may say that he made that statement due to undue influence of the police. In this case the confession made by the accused to the magistrate before the trial begins is called retracted confession.

It is unsafe to base the convict5ion on a retracted confession unless it is corroborated by trustworthy evidence. There is no definite law that a retracted confession cannot be the basis of the conviction but it has been laid down as a rule of practice and prudence not to rely on retracted confession unless corroborated. Courts have convicted persons on retracted confession when they have been of the opinion that the confession when it was made was voluntary or consistent and true but the real rule of law about the retracted confession is " where the retracted confession is the sole evidence it can be of little value specially when made during the competition for a pardon which sometimes occurs where a number of persons are suspected of an offence,". It very often happens that a number of persons are accused of murder or dacoity or of any other offence. The person in charge of the investigation falling on direct and independent evidence chooses some of the accused to admit the guilt on the promise of making him a witness in the case. Instances are not rare when a young man is made to admit some guilt due to pressure or fear.

It is really very strange for an accused to confess before the investigation authority that he has committed the murder. That statement if made without any pressure, fear or hope must be either due to the remorse or godly fear or it is so because the accused is as truthful as Harish Chandra and Yudhisthir. If this is so and if the statement was made because the winess was remorseful or because he made the confession due to fear of god or because he was truthful there is no reason as to why he resiles from that statement when he is put to trial. Due to this suspicion a retracted confession can always be suspected to have been extracted by pressure, undue influence, inducement or threat by some person in authority.

**Proof of judicial confession**- Under section 80 of Evidence Act a confession recorded by the magistrate according to law shall be presumed to be genuine. It is enough if the recorded judicial confession is filed before the court. It is not necessary to examine the magistrate who recorded it to prove the confession. But the identity of the accused has to be proved.

**Proof of extra-judicial confession**- extra-judicial confession may be in writing or oral. In the case of a written confession the writing itself will be the best evidence but if it is not available or is lost the person before whom the confession was made be produced to depose that the accused made the statement before him. When the confession has not been recorded, person or persons before whom the accused made the statement should be produced before the court and they should prove the statement made by the accused.

## Confession to police

### Section 25 – confession to police officer not to be proved.

No confession made to a police officer shall be proved as against a person accused of any offence.

Reasons for exclusion of confession to police- another variety of confessions that are under the evidence act regarded as involuntary are those made to a personnel. Section 25 expressly declares that such confessions shall not be proved.

If confessions to police were allowed to be proved in evidence, the police would torture the accused and thus force him to confess to a crime which he might not have a committed. A confession so obtained would naturally be unreliable. It would not be voluntary. Such a confession will be irrelevant whatever may be its form, direct, express, implied or inferred from conduct. The reasons for which this policy was adopted when the act was passed in 1872 are probably still valid.

In Dagdu v. State of Maharashtra, A.I.R. 1977 S.C. 1579, Supreme Court noted:

The archaic attempt to secure confessions by hook or by crook seems to be the be-all and end-all of the police investigation. The police should remember that confession may not always be a short-cut to solution. Instead of trying to "start" from a confession they should strive to "arrive" at it. Else, when they are busy on their short-route to success, good evidence may disappear due to inattention to real clues. Once a confession is obtained, there is often flagging of zeal for a full and through investigation with a view to establish the case de hors the confession, later, being inadmissible for one reason or other, the case fundles in the court.

In R v. Murugan Ramasay, (1964) 64 C.N.L.R. 265 (P.C.) at 268

Police authority itself, however, carefully controlled, carries a menace to those brought suddenly under its shadow and the law recognises and provides against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying.

### Effect of Police Presence

The mere presence of the policeman should not have this effect. Where the confession is being given to someone else and the policeman is only casually present and overhears it that will not destroy the voluntary nature of the confession. But where that person is a secret agent of the police deputed for the very purpose of receiving a confession, it will suffer from blemish of being a confession to police. In a rather unusual case, the accused left a letter recording his confession near the dead body of his victim with the avowed object that it should be discovered by the police, the supreme court held the confession to be relevant. There was not even the shadow of a policeman when the letter was being written, and planted.

### Exclusion of Confessional Statements Only

This principle of exclusion applies only to statement which amount to a confession. If a statement falls short of a confession, that is, it doesn't admit the guilt in terms or sustainability all the facts which constitute the offence, it will be admissible even if made to a policeman, for example, the statement of an accused to the police that he witnessed the murderer in question. The statement being not a confession was received in evidence against him, as showing his presence on the spot.

### Statements during Investigation and Before Accusation

A confessional statement made by a person to the police even before he is accused of any offence is equally irrelevant. The section clearly says that such a statement cannot be proved against any person accused of any offence. This means that even if the accusation is subsequent to the statement, the statement cannot be proved.

**Confessional FIR**

Only that part of a confessional First Information Report is admissible which does not amount to a confession or which comes under the scope of section 27. The non confessional part of the FIR can be used as evidence against the accused as showing his conduct under section 8.

**Statement not amounting to Confession**

A statement which does not amount to confession is not hit by the bar of section. A statement in the course of investigation was that the design was carried out according to the plan. The statement did not refer to the persons who were involved in the murder, nor did the maker of the statement refer to himself. This was held to be not a confessional statement. Hence, not hit by section 25. The statement of inspector(crimes) that the accused accepted before him that he got the counterfeit currency notes from a stranger but the accused denying to have so stated, was not admissible in evidence.

**Use of confessional statement by accused**

Though the statements to police made by the confessing accused cannot be used in evidence against him, he can himself rely on those statements in his defence. The statement of the accused in FIR that he killed his wife giving her a fatal blow when some tangible proof of her indiscretion was available was not usable against him to establish his guilt. But once his guilt was established through other evidence, he was permitted to rely upon his statement so as to show that he was acting under grave and sudden provocation. There is nothing in Evidence Act which precludes an accused person from relying upon his own confessional statements for his own purposes.

**Special Legislation**

A special legislation may change the system of excluding police confessions. For example, under the Territorists and Disruptive Activities(prevention) Act, 1987, (S15) confessional statements were not excluded from evidence on grounds that the persons making them were in police custody. The court said in another case that section 15 was an important departure from the ordinary law and must receive that interpretation which would achieve the object of that provision was that a confession recorded under S.15 of TADA was a substantive piece of evidence and could be used against a co-accused also.

**Section 26- Confession by accused while in custody of police not to be proved against him.**

No confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person.

Object- The object of section 26 of the Evidence Act is to prevent the abuse of their powers by the police, and hence confessions made by accused persons while in custody of police cannot be proved against them unless made in presence of a magistrate. The custody of a police officer provides easy opportunity of coercion for extorting confession obtained from accused persons through any undue influence being received in evidence against him.

**Confession of an accused in police custody to any one else-**

Section 26 provides that a confession which is made in custody of a police officer cannot be proved against him. Unless it is made before a magistrate.

In Kishore Chand v. State of Himachal Pradesh, the extra judicial confession was made to Pradhan who was accompanied by Police (enquiry) Officer. The only interference which could be drawn from the circumstance of the case, is that the confession was made at the time when the accused was in the custody of police and it could not be proved against the accused. It could not be believed that, when a police officer has seen the accused with deceased at last occasion, he will not take the accused in the custody.

In the case it is evident that the Police Officer has created a scene and to avoid Section 25 and 26, the Police Officer has left the accused in the custody of village head man (pradhan).

The Police Officer in this case has no difficulty to take the accused to the Judicial Magistrate and to take extra-judicial confession under section 164 of Cr.P.C which has got more probable value and it gives an opportunity to make the required warning, that this confession will be used against the accused and after this warning he records the confession. Under section 26, no confession made by an accused to any person while in custody of a police officer shall be proved against him.

**Police Custody**

The word custody is used here in wide sense. A policeman may lay his hand on a person, hand-cuff him or tie his waist with a rope and may take him with him. Again a police officer may not even touch a person but may keep such a control over him that the person so controlled cannot go any way he likes. His movement is in the control of the police officer. A police officer comes to A and asks him to follow to the police station as he is wanted in connection with a dacoity case. A follows him. He is in custody of the police officer.

Thus it is settled that "the custody of a police officer for the purpose of section 26, Evidence Act, is no mere physical custody." A person may be in custody of a police officer though the other may not be physically in possession of the person of the accused making the confession. There must be two things in order to constitute custody. Firstly, there must be some control imposed upon the movement of the confessioner, he may not be at liberty to go any way he likes, secondly, such control must be imposed by some police officer indirectly. The crucial test is whether at the time when a person makes a confession he is a free man or hid movements are controlled by the police by themselves or through some other agency employed by them for the purpose of securing such confession. The word 'custody' in this the following section does not mean formal custody but includes such state of affairs in which the accused can be said to have come into the hands of a police officer, or can be said to have been some sort of surveillance or restriction.

In R. v. Lester, the accused was being taken in a tonga by a police constable. In the absence of constable, the accused confessed to the tanga-driver that he committed the crime. The confession was held to be in police custody as the accused was in the custody of constable and it made no difference of his temporary absence. Where a woman, charged with the murder of her husband, was taken into the custody of the police, a friend of the woman also accompanied her. The policeman left the woman with her friend and went away to procure a fresh horse. The woman confessed her guilt to her friend while the policeman was away. The confession would not be admissible against the accused as the prisoner should be regarded in custody of the police in spite of the fact that he was absent for a short time. But where the accused is not arrested nor is he under supervision and is merely invited to explain certain circumstances, it would be going further that the section warrants to exclude the statement that he makes on the grounds that he is deemed to be in police custody.

Where the accused had consumed poison and so she was removed to the hospital for treatment and from the moment of her admission to the hospital till her discharge from there, the police personnel were neither present in the room wherein the accused was kept for treatment or even in the vicinity of the hospital nor they frequently visited the hospital, it could not be said that the accused's movements were restricted or she was kept in some sort of direct or indirect police surveillance and she was in police custody for the purpose of section 26 of the Evidence Act.

**Section 27- How much of information received from accused may be proved:**

Provided that, 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.

Principle- this section of the act is founded on the principle that if the confession of the accused is supported by the discovery of a fact then it may be presumed to be true and not to have been extracted. It comes into operation only-

- If and when certain facts are deposed to as discovered in consequence of information received from an accused person in police custody, and
- If the information relates distinctly to the fact discovered.

This section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

In Pandu Rang Kallu Patil v. State of Maharashtra, it was held by Supreme Court that section 27 of evidence act was enacted as proviso to. The provisions of sections of Section 25 and 26, which imposed a complete ban on admissibility of any confession made by accused either to police or at any one while in police custody. Nonetheless the ban would be lifted if the statement is distinctly related to discovery of facts. The object of making provision in section 27 was to permit a certain portion of statement made by an accused to Police Officer admissible in evidence whether or not such statement is confessional or non confessional.

Scope- section 24, 25 and 26 of the Evidence Act exclude certain confessions. Section 24 lays down that if a confession appears to have been caused by threat, promise or inducement from some man in authority it will be irrelevant and cannot be proved against the confessioner. Section 25 excludes a confession made to a police officer. Section 26 lays down that if a person while in custody of a policeman, confesses his guilt to any other person not being a Magistrate, his settlement will not be proved against him.

Section 27 lays down that when at any trial, evidence is led to the effect that some fact was discovered in consequence of the information given by the accused of an offence in custody of the police officer, so much of the information as relates to the facts discovered by that information, may be proved irrespective of the facts discovered by that information, may be proved irrespective of the facts whether that information amounts to confession or not.

*Requirements under the Section- the conditions necessary for the application of section 27 are:*

1. The fact must have been discovered in the consequence of the information received from the accused.

2. The person giving the information must be accused of an offence.

3. He must be in custody of a police officer.

4. That portion only of the information which relates distinctly to the fact discovered can be proved. The rest is inadmissible.

5. Before the statement is proved, somebody must depose that articles were discovered in consequence of the information received from the accused. In the example given above, before the statement of the accused could be proved, somebody, such a sub-inspector, must depose that in consequence of the given information given by the accused, some facts were discovered.

6. The fact discovered must be a relevant fact, that is, to say it must relate to the commission of the crime in question.

In Suresh Chandra Bahri v. State of Bihar, it is the discovery and the seizure of articles used in wrapping the dead body and the pieces of Sari belonging to the deceased was made at the instance of one accused. Articles recovered were neither visible nor accessible to the people but were hidden under the ground. No public witness was examined by the prosecution in this behalf. However, the evidence of Investigation Officer did not suffer from any doubt or infirmity. Articles discovered were duly identified by the witness. It was held that in these circumstances, failure of Investigating Officer to record the disclosure of statement was not fatal

In State of Maharashtra v. Bharat Ehagan Lal Raghani, it was held by Supreme Court that, the fact that seized weapons were displayed by police in press conference was not a ground to disbelieve the factum of recovery.

**Section 28- Confession made after removal of impression caused by inducement, threat or promise, relevant:**

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.

**Confession after removal of threat or promise-** under section 24 we have seen that if the opinion of a court a confession seems to have been caused by any inducement, threat or promise having reference to the charge and proceeding from a person in authority, it is irrelevant and cannot be proved even against a person making the confession,

Section 28 provides that if there is inducement, threat or promise given to the accused in order to obtain confession of guilt from him but the confession is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court been fully removed, the confession will be relevant becomes pre and voluntary.

It must be borne in mind that there must be strong and cogent evidence that the influence of the inducement has really ceased. A female servant was suspected of stealing money. Her mistress on Monday told her that she would forgive her if she told the truth. On Tuesday she was taken before a Magistrate and as no one grave any evidence against her she was left off. On Wednesday she was again arrested. The superintendent of Police went with her mistress into Bridewell and told her in presence of her of her mistress that "she was not bound to say anything unless she liked and that if she had anything to say, her mistress would hear her." He did not tell her that of she made a statement it might be given in evidence against her. The prisoner then made a statement it might be given in evidence against herm the prisoner then made a statement confessing the guilt. It was held that this evidence was not admissible in evidence as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement. Had the mistress not been present on the spot it might have been otherwise.

*Impression produced by promise or threat may be removed*

- By lapse of time, or
- By an intervening caution giving by some person of superior authority to the person holding out the inducement, where a prisoner confessed some months after the promise and after the warning his confession was received.

**Section 29-Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.:**

In 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 deception practiced on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to question which he need not have answered, whatever may have been the form of those questions, because he was not warned that he was not bound to make such confession, and that evidence if it might be given against him.

*Confession on promise of secrecy, etc*- section 29 lays down that if a confession is relevant, that is, if it is not excluded from being proved by any other provision on Indian Evidence Act, it cannot be relevant if it was taken from the accused by:

1. Giving him promise of secrecy, or

2. By deceiving him, or

3. When he was drunk, or

4. Because it was made clear in answer to question which he need not have answered, or because no warning was given that he was not bound to say anything and that whatever he will state will be used against him.

Section 24 lays down that a confession which is the outcome of inducement, threat or promise from a person in authority would not be relevant. Section 25 lays down that a confession to a police officer is irrelevant. Section 26 excludes the statement of an accused in a police custody to any person other than a Magistrate. Section 29 lays down that if a confession is not excluded by Sections 24, 25 or 29 it will not be excluded on the ground of promise of secrecy or of deception or of being drunk, or of being made in answer to question or without warning that it will be used against him in evidence.

Section 29 assumes that there is no bar to the admissibility of the confession in question arising from any of the earlier provision, viz, section 24 to 26 and it then proceeds to the invalidate or negative other positive objections or bars that may be raised against the admissibility.

Generally when a man is under intoxication he confesses the guilt. If confessional statement is made by some accused person while he was drunk, it will be admissible if he had not become quite senseless for the very reason that it has not been obtained by inducement or threat now was it made while he was in custody of a police officer.

When a statement is made voluntarily without inducement, threat or promise from a man in authority; and when it is not made to a police officer, it is admissible notwithstanding the fact that the person who took the confessional statement did not warn the accused that he was bound to make the statement and if he did so, it may be used in evidence against him and upon that he may be convicted.

Want of Warning: a voluntary confession is admissible, though it does not appear that the prisoner was warned, and even though it appears on the contrary that he was not so warned.

**Section 30- Consideration of proved confession affecting person making it and others jointly under trial for the same offence-**

When more persons than one are being tried jointly for the same offence and a confession made by one such persons affecting himself and some other such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Principle Underlying: when more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence, should be taken into consideration against all the accused, and not against the person who alone made it. It appears to be very strange that the confession of one person is to be taken into consideration against another. Where the confession of one accused is proved at the trial, the other accused persons have no other opportunity to cross examine him. It is opposed to the principle of jurisprudence to use a statement against a person without giving him the opportunity to cross examine the person making the statement. This section is an exception to the rule that the confession of one person is entirely admissible against the other.

In Kashmira Singh v. State of MP , the accused Kashmira who was an Assistant Food Procurement Inspector, his services along with the another food inspector were terminated on a report of the food officer when they were getting the rice polished in a rice mill. Kashmira was heard twice saying that he would teach a lesson to the food officer. After a few months the son of the food officer was found missing and his body was found in a well. Kashmira, Gurudayal brother of Kashmira, Prithipal son of Gurudayal and one Gurubachan, a rickshaw puller in this case were tried of conspiracy and killing the child. The prosecution story was that Prirthipal led the child, when he was playing near the Gurudwara, for some distance and then the child was taken on the cycle by Kashmira to a house where he was murdered. According to the judgment of the SC Guruibachan was not a rickshaw puller by profession and the rickshaw was hired only for that night for the disposal of the body of the deceased.

*Hence before the confession of one accused may be taken into consideration against others, it has to be shown that:*

1) The person confessing and the others are being tried jointly.

2) They are being tried for the same offence.

3) The confession is affecting the confessioner and the others.

**Admission and confession**

Section 17 to 31 deals with admission generally and include Section 24 to 30 which deal with confession as distinguished from admission.

| Confession | Admission |
|---|---|
| 1. Confession is a statement made by an accused person which is sought to be proved against him in criminal proceeding to establish the commission of an offence by him. | 1. Admission usually relates to civil transaction and comprises all statements amounting to admission defined under section 17 and made by person mentioned under section 18, 19 and 20. |
| 2. Confession if deliberately and voluntarily made may be accepted as conclusive of the matters confessed. | 2. Admissions are not conclusive as to the matters admitted it may operate as an estoppel. |
| 3. Confessions always go against the person making it | 3. Admissions may be used on behalf of the person making it under the exception of section 21 of evidence act. |
| 4.Confessions made by one or two or more accused jointly tried for the same offence can be taken into consideration against the co-accused (section 30) | 4. Admission by one of the several defendants in suit is no evidence against other defendants. |
| 5. confession is statement written or oral which is direct admission of suit. | 5. admission is statement oral or written which gives inference about the liability of person making admission. |

The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement alone, it is confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission as stated in Ram Singh v. State Another test is that if the prosecution relies on the statement as being true it is confession and if the statement is relied on because it is false it is admission. In criminal cases a statement by accused, not amounting to confession but giving rise to inference that the accused might have committed the crime is his admission.

## RELEVANCY OF FACTS

## GROUP III

## STATEMENT BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

Section 32 and the subsequent Section 33 DEAL WITH THE RELEVANCY of statements made by persons who cannot be called as witnesses. Section 60 of the evidence act insists that oral evidence must, in all cases, whatever, be direct. In other words, hearsay evidence is no evidence. Section 32 is an exception to the rule contained in Section 60 that oral evidence must in all cases, whatever be direct.

### Section 32

### Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant:

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

### (1) When it relates to cause of death:

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. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

### (2) Or is made in course of business:

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 acknowledgment 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.

### (3) Or against interest of maker:

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.

### (4) Or gives opinion as to public right or custom, or matters of general interest:

When the statement 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, and when such statement was made before any controversy as to such right, custom or matter had arisen.

### (5) Or relates to existence of relationship:

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.

**(6) Or is made in will or deed relating to family affairs:**

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.

**(7) Or in document relating to transaction mentioned in section 13, clause (a):**

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).

**(8) Or is made by several persons, and expresses feelings relevant to matter in question:**

When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

**Illustrations:**

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by Â; or

The question is, whether A was killed by Â under such circumstances that a suit would lie against Â by A • <˘- Ds widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth,

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day. A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and Â were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banóà in the ordinary course of his business is a relevant fact.

(k) The question is, whether A, who is dead, was the father of S. A statement by A that Â was his son, is a relevant fact.

(I) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and Â were married.

An entry in a memorandum-book by C, the deceased father of. B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues Â for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libelous character. The remarks of a crowd of spectators on these points may be proved.

**Comments:**

**Statement and object:**

Sections 32 and 33 of the Evidence Act are exceptions to the general rule that hearsay evidence is not admissible. Hearsay evidence is not entertained by the courts on the ground that the evidence given by a person who does not have firsthand knowledge about the facts of the case. Because, according to Section 60 of this Act oral evidence must always be direct, that is, the person who has got first-hand knowledge about the facts of the case being entitled only to prove the facts.

For ends of justice the law always demands best evidence to be produced before the court of justice. The best evidence means evidence of the person who has made a statement or has written a document by himself. This is a best evidence of the person who has got firsthand knowledge about facts or original documents. When a witness appears before the court he is required to take oath and is subjected to cross-examination by the opposite party.

A second hand or hearsay evidence means derivative evidence. Hearsay evidence, according to Taylor, "all the evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the varacity and competence to some other person." When the person or document (best evidence) cannot be available in the court, then the "other person" may be allowed by the court, who is not required to take oath or is put to cross-examination, to testify the contents of the documents prepared by the person who is not available for reasoned mentioned in Section 32. Thus, the hearsay evidence, is relevant when: (i) there is necessity and (ii) the special circumstances guaranteeing genuineness and trustworthiness. Section 32 is an exception to the hearsay rule. Unlike English law the Indian law does not make it wholly inadmissible.

**Principle:**

Under section 32 evidence given by a person in a judicial proceeding or before a person authorized by law to take evidence is relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts stated therein. It imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the court to give evidence. As there is no better evidence available the statements made under this section are admitted as principle of necessity." In other words written or verbal statements of relevant facts made by a person:—

(i) Who is dead;

(ii) Who cannot be found;

(iii) Who has become impossible of giving evidence; or

(iv) Whose attendance cannot be procured without unreasonable delay or expense, are relevant under the following circumstances of the case:

1. When it relates to the cause of his death, or

2. When it is made in course of business, or

3. When it is made against the pecuniary or proprietary interest of the maker, or

4. When it gives opinion as to right, custom or matters of general interest, or

5. When it relates to the existence of any relationships, or

6. When it is made in will or deed or other document to family affairs or

7. When it is made in document relating to transaction mentioned in Section 13, Clause (1), or

8. When it is made by several persons, and expresses feelings to the matter in question.

**Necessity of Section 32:**

This section comes into operation when any statement of a person who is either dead or cannot be found, or incapable to give evidence, or whose attendance is not possible without delay or expenses. Before any previous statement of any one of such persons can be admitted under section 32, at least one condition mentioned in clauses 1 to 8 must be fulfilled. In such circumstances the court may admit the statement of other persons "who are in the court to testify the previous statements of one of those above mentioned persons.

When a previous evidence given by a witness is intended to be proved, the facts must be proved strictly. In civil case the party can waive the proof, but in criminal cases strict proof must be given that the witness is incapable of giving evidence. In the present days the dying declaration has assumed much importance. But, the question as to how much weight can be attached to a dying declaration is a question of fact.

Before admitting evidence under section 32 the court must be satisfied the reasons mentioned in clauses (i) to (iv). If the person is dead, then the death must be proved. If the person making a statement survives, then the statement cannot be used as a dying declaration. If a person is not found after making certain statement, the court must be satisfied that all efforts of searching were made and exhausted. Similarly a witness after making statements became physically unfit and totally invalid to depose before the court.

If that happens the court has to be satisfied by producing true evidence as to his permanent incapacity. Sometimes it may happen that the witness is living in a foreign country and his appearance before the court cannot be possible without unreasonable delay or expense. In this circumstances relevant documents must be produced to satisfy the court that his abode in foreign country is permanent. It may also happen that certain original document is in possession of a person who is in abroad, the production of such document cannot be possible without delay or expenses. In such situations Section 32 is also applicable.

**1. Statement of a dying person (Clause 1):**

A statement of a dying person is generally called dying declaration. A dying declaration is a statement made by a person who is at the point of death and every hope of his life in the world is gone; that is, when the declarant is under the expectation of death and there should be no chance of operation of worldly motives. For example, A was assaulted and immediately afterwards died. Before his death A made a statement that "B had assaulted him." The statement of A is admissible as to the cause of his death.

The death, whether it is the result of homicide of suicide is of no matter and the dying declaration may be written or oral or may be partly written and partly oral. In some cases it may be neither written nor oral, but may be consist of some signs or gesture made by the deceased. A dying declaration is, therefore, the last statement of the declarant who as under "settled and hopeless expectation of death." It is admitted in evidence because it is presumed that no person who is immediately going into the presence of his maker, will do so with a lie on his lip." The Supreme Court while admitting the maxim, nemo moriturus proesumitur mentisi (a man will not meet his maker with a lie in his mouth) as the basis of dying declaration, held:

"The general principle on which the 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 mind induced by most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." Thus the following conditions must be fulfilled before accepting a declaration as dying declaration or not:

(a) The person who made the statement must be died.

(b) The statement must relate to the cause of his death or any circumstances of the transaction which resulted in his death.

(c) The proceeding must be one in which the deponent's cause of death was in question.

(d) The proceeding may be civil or criminal.

Dying declaration in English and Indian Laws:

Although the dying declaration under Indian law is founded on English law there are differences between the two legal systems:

1. Under English law the dying declaration in civil cases is not admissible. It is admissible in civil cases in India.

2. In English law the dying declaration is admission in homicide case "where the death of the deceased is the subject of the charge and circumstances of the death, the subject of the dying declaration." Under Indian Law if the cause of death of the deponent comes in question his dying declaration is relevant irrespective of the nature of proceeding. There should be nexus between the circumstances stated by the victim and his/her death.

3. In English law it is necessary that the declarant had been in actual danger of death after receiving injuries and he should have abandoned all hopes of recovery. But, "if the declarant failed to complete his statement and died, the dying declaration is inadmissible." In India the declarant's death must have been ensured. It is immaterial whether the declarant was in actual danger and he had abandoned all hopes of life. If the declarant had been alive, he would have been a competent witness.

If the maker of a dying declaration was present in the court, making a statement stating the facts contained in the declaration, with the difference that the declaration is not a statement on oath and the maker thereof be subjected to cross-examination.

**Statement relating to dying declaration:**

Section 32(1) of the Evidence Act provides that the statement of the deceased may amount to a dying declaration provided the statement either relates to cause of death or exhibits the circumstances of transaction which resulted in his death. The statement of the declarant as to the cause of death or circumstances leading to death would be relevant in a case in which the cause of his death is the point of issue. If the statement is a reliable piece of evidence it can form the basis of a conviction. The varacity, reliability and truthfulness of the dying declaration would be tested only after the evidence was recorded in court and if on proper evaluation of such evidence, the court came to conclusion that the dying declaration was truthful version then there is no question of any further corroboration as the conviction could be based on such dying declaration only. The deceased stated that the accused poured kerosene on her and set her on fire. Statement were recorded by the magistrate after the doctor found her to be in position to give statement. Doctor endorsed the declaration. The conviction of the accused was proper.

"The circumstances of the transaction which resulted in death" are wider in scope in application than the expression "cause of death." The proximity of the statement with the actual occurrence has been found in the leading decision of the Privy Council in Pakala Narayana Swami v. Emperor. Their Lordships held:

"The statement related to the circumstances of transaction which resulted in his death and so it was relevant. They also held that, the statement made by the deceased that he proceeding to the spot where he was killed or as to his reason for the proceeding or that he was going to meet a particular person or that he had been invited by such person to meet him would each of them be circumstances of the transaction and would be so whether the person unknown or was not the person accused. 'Circumstances of the transaction is a phrase no doubt that conveys some limitations.

It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae.' Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in death of the declarant, though as for instance in case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual total date.

It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that the cause of (the declarant) death comes into question."

The Privy Council expressed the opinion that the statement of the accused was partly confession and party an explanation for his innocence. By giving him benefit the Privy Council set aside the conviction of the accused. But the statement made by the victim that "he was proceeding to the spot where he was killed or as to his reason for so proceeding or that he was going to meet a particular person or that he had been invited by such particular person to meet him would each of them be circumstances of transaction." The words statement as 'to any of the circumstances' are by themselves capable of expanding the contours of

the scope of admissibility. When the word 'circumstances' is linked to 'transactions' which resulted in his death the sub-section casts the net in a very wide dimension". The principles laid down by the Privy Council on dying declaration were accepted by the Supreme Court in Khushal Rao v State of Bombay case.

The Supreme Court once again held that a dying declaration, as a piece of evidence, stands as the same footing as any other piece of evidence, it has to be judged and appreciated in the light of surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. As a matter of fact, perfect wording and neatly structured dying declaration may bring about an adverse impression and create a suspicial in the mind of the court since dying declarations need not be drawn with mathematical precion of the declarant should be able to recollect the situation resulting in the available state of affairs. Not that the plurality of dying declarations that adds weight to prosecution case but their qualitative worth. Dying declaration should be such nature as to inspire full confidence. It is not sufficient to convict an accused merely because dying declaration was correctly recorded and it was true version of declarant. The dying declaration must be inspiring confidence when it forms basis of conviction. Once the Court is satisfied that the dying declaration is true and voluntary it is sufficient for conviction.

**Proximity Rule:**

The proximity rule laid down by the Privy Council means the circumstances must have some proximity relating to actual occurrence. But the text of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to confine in a strait- jacket. "They were not too remote in time from the point of death" but "being proximate in point of time and space to the happening the entire statement would have to be read as an organic whole and not torn from the context." The statement of the deceased is admissible only to the extent of briefing the cause of circumstances of the transaction which resulted in death of the deceased. The statement has closed nexus with the actual transaction.

**Corroboration not necessary:**

"There is no absolute rule of law, or even a rule of prudence, that a dying declaration unless corroborated by other evidence, is not fit to be acted upon and made the basis of a conviction." The true and voluntary dying declaration needs no corroboration. It is not essential that the dying declaration should always be corroborated. However, care and caution must be exercised in accepting it as trustworthy evidence. If no infirmity is found the dying declaration can be the sole basis for conviction without any corroboration.1 There is neither rule of law nor prudence that dying declaration cannot be acted upon without corroboration. The rule requiring corroboration is merely a rule of prudence.

**F.I.R. as dying declaration:**

A First Information Report (FIR) when fulfilled all conditions under section 32( 1) it is relevant as dying declaration. Where father of deceased son logged FIR after admitting him in hospital and mentioned about oral dying declaration with necessary details, such dying declaration given to interested person is reliable. In a bride-burning case the statement given by the deceased was initially recorded as complaint and treated as FIR after death of the deceased. But, the FIR as well as the statement given by the injured to the investigating officer is not admissible as dying declaration under section 32 of the Evidence Act. Similarly, a declaration noted down by an Asstt. Sub-Inspector even before FIR was lodged was held not be acceptable.

**Recording of dying declaration by a Magistrate:**

A dying declaration recorded by a Magistrate in a proper manner and in question answer forms as far as practicable and the doctor's certificate that the declarant was conscious and in a fit condition to make the declaration, should be endorsed on the dying declaration. When neither a doctor nor a nurse was available

for giving necessary certificate, the dying declaration is the best evidence available against the accused, the court may rely upon such "defective dying declaration" if there is reliable corroboration. It would be very unsafe and hazardous to sustain the conviction of the accused charged for offences under section 302 read with Section 34. I.P.C. on the basis of dying declaration recorded by a special executive magistrate and police officer separately. It was not sufficient to convict an accused merely because the dying declaration was correctly recorded and it was true version of declarant. The dying declaration must be inspiring confidence when it forms basis of conviction. It is not necessary that dying declaration must be made in presence of magistrate and should be made in the expectation of death. The statement of the deceased was recorded when she was fit and signed the statement in connection with dowry demand case the accused was liable to be convicted under section 304 of I.P.C.

**More then one dying declaration:**

Where there are more than one dying declarations and they are inconsistent then it is not possible to pick out one such declaration wherein accused is implicated and bare the conviction on the sole basis of that dying declaration. There was gap between two declarations, yet they were totally consistent with each other, the dying declaration were held reliable.

Where two dying declarations, one recorded by the doctor and the other recorded by the Magistrate, it will not be safe to rely on either of the dying declaration. In multiple dying declaration lost dying declaration was not in conformity with FIR and declaration made to police as regards motive for offence is concerned. Besides, the manner in which the deceased was set on fire was also different in two declarations. It was held that the conviction cannot be based on dying declaration if there are inconsistence's in three dying declarations the conviction of appellants was held consafe on such evidence.

**Dying declarations in respect of dowry death and bride burning:**

In case of dowry death, suicide or bride burning, if death takes place within short period or within three or four months the statement of the deceased is admissible. In case of bride burning the doctor to whom the deceased was taken for treatment deposed that soon after the deceased was admitted into the hospital she told him that her husband had poured kerosene on her and set fire to her clothes.

The statement was considered as dying declaration. In State of U.P. v Harimohan a housewife was in her in-law's house. A letter written by her to her father two days prior to the incident stating therein that she should be immediately taken to back from the house of her in-laws as otherwise her brother-in law, mother-in law and husband would murder her, was treated as dying declaration. The death by drawing in family well of a housewife and statement made by her to her father as to her suffering at in-laws house was held to be relevant. In case of dowry death the dying declaration must be as quickly as possible in medico-legal register by a doctor and to be signed by him. A true copy of the entry shall be signed and certified by the doctor and forwarded through the investigating officer to the court in order to avoid any subsequent tampering.

Where the dying declaration was made by a married woman, which was taken down by the Naib Tehsildar. The evidence of the doctor was that she was burnt to the extent of 70% and would have remained capable of speaking only for an hour or two after the incident. On the other hand the post-mortem report was that she was burnt about 80%. It was held that a report prepared after death could not supersede the opinion which was formulated by the doctor when the injured was brought to the hospital. Other witnesses also deposed that her husband had sat her on fire. The conviction was uphold.

"Few minutes before her death the deceased made a declaration quietly to her mother naming therein all the three relatives along with the husband who poured kerosene to burn her alive. It was in evidence that the deceased had extensive burn injuries including her mouth, nose and lips.

The Court held that if any credence is to be allowed to the same, then and in that event, the evidence of the mother about the confession stands believed by itself. Significantly, the doctor's evidence as in available on record would also go a long way in the unacceptability of the evidence of the mother as regards confession."

**Oral dying declaration in honour killing:**

It is a case of honour killing of six persons. One of deceased, bother of informant total who were his assailants.

Fact was not mentioned by the informants in FIR as well as in statement recorded under Section 161. Cr. RC. Evidence of informant that after incident he had gone near his injured brother and upon enquiry his brother told him about his assailant was not impossible. His evidence was not impeached in cross-examination. It was held that the dying declaration cannot be disbelieved.

**Evidentiary value of dying declaration:**

In order to assess the evidentiary value of dying declaration under section 32(1) one must not think of that it is "an absolute rule of law" and sole basis of conviction. The general principle on which the dying declaration is admitted that when any person who made such declaration was "at a point of death and when every hope of this world is gone and when even motive to falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth a situation solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by positive oath administered in a court."

In Khushal Rao v State of Bombay the basic principles have been laid down by the Supreme Court in the following words which would be considered as ratio:

1. "That it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

2. That each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

3. That it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence;

4. that a dying declaration stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

5. that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character; and

6. that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, where there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control, that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it, and that the statement had been made at the earlier opportunity and was not the result of turtoring by interested parties."

**Whether dying declaration is evidence:**

The dying declarations are not depositions as the maker does not have any opportunity to take oath, but sometimes they may be considered as relevant where the dying declaration is recorded by the magistrate; it is an evidence and can be admitted without proof under section 80 of this Act. Dying declaration is not depositions unless made in the presence of the accused and recorded by a magistrate.

Where there are "multiple declarations each has to be considered independently on its own merit as to its evidentiary value. One cannot be rejected because of contents of other. But there is no requirement of law that dying declaration must necessarily be made to a magistrate. If evidence of the prosecution has no connection with any circumstance of transaction which resulted in death would not be admissible in evidence as dying declaration of the deceased.

**Statement under sections 161 and 162, Cr. PC:**

The statement of the person who is injured recorded under section 161, Cr. PC is relevant relating to cause of death if he dies subsequently. Section 162(2), Cr. PC in express terms, excludes from its purview statements falling under section 32(1). In this case dying declaration was held to be relevant.

**2. Statements made in course of business (Clause 2):**

The clause 2 of Section 32 is another exception to the general rule of hearsay that derivative proofs are not receivable in evidence. It covers statements, written or oral, of a dead person made or done in the ordinary course of business. According to this clause when a statement made by a person in course of business and in particular:

(i) When it consists of any entry or memorandum made by him in book kept in ordinary course of business; or

(ii) In discharge of professional duty: or

(iii) When it consists of acknowledgement written by him or written by someone and signed by him of the receipt of money, goods, securities or property of any kind; or

(iv) When it consists of a documents used in commerce written or signed by him; or

(v) When it consists of a date of letter or other document usually dated, written or signed by him.

The statement is relevant. Illustrations (b), (c), (d) and (g) speak for themselves.

When the date of birth is in question. An entry in the diary of a deceased surgeon regularly kept in the course of business stating that on particular day he attended a lady who delivered her of a child, it is relevant [Illustration (b)]. The declaration as to date of birth when in question, the school records have more probative force than horoscope.

Similarly, the question is, whether A was in Calcutta on a given day. A statement in the diary of a deceased solicitor, regularly kept in the course of business that, on a given day the solicitor. A attended at a place mentioned, in Calcutta for the purpose of conferring with him upon special business, is relevant fact [Illustration (c)].

The expression "statement made in course of business" has got a significant meaning that it "must be nearly contemporaneous with the performance of duty" the expression 'course of business' is also to be found in Sections 16, 34 and 114. "The rule laid down extended only to statements made during the course, not of any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but of

business of professional employment in which the declarant was ordinarily or habitually engaged." In a proceeding for fixation of fair rent counterfoils made in ordinary course of business are admissible to prove the date of construction of building. The statement of a person who is not available is a statement of that person made in the ordinary course of business in discharging of his professional duty. The business referred to may be of temporary character.

The phrase "is a apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to be proved." In order to admit statement the extrinsive evidence must be given by the party and such evidence must also be weight full to prove the statement made during course of business. Where the entries were signed by the person concerned they were held to be relevant; but where the statement was written, the hand-writing of the declarant and that it was made in course of business, must be proved.

The injury report and post-mortem report prepared by the doctor are relevant and can be used as evidence against the accused after having been proved to be his handwriting. In Panjis or pedigree tables maintained by Panjikars in discharge of profession duty fall under this clause. A statement to which signatures are appended that a document is a copy of the original is admissible when made by the deceased person in a document relating to a relevant fact and also as an admission.

Entry memorandum of account, books, registers etc. is also relevant. Where entries in account book are relevant under section 32(2) and person producing has no personal knowledge, the court may require corroboration. It was held that the books were maintained properly and regularly and that there is reason to doubt their veracity.

### 3. Statement against interest of maker (Clause 3):

Generally no one can say anything against his own interest unless it is true. Clause (3) of Section 32 lays down that statements of a dead person, which is against his pecuniary or proprietary interest and if it is true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages being relevant. It is the same as that of admission. The principle of admissibility is that in the ordinary course of business a person is not likely to make a statement to his own detriment unless it is true.

If the statement of a person, who is dead or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense is neither against his pecuniary or proprietary interest nor if true would expose him to a criminal prosecution or to a suit for damages it will not be relevant. The admissibility of the statement depends on the presumption of what actually the maker had stated against his own interest. The subject of declaration against interest has been given in a leading case.

In order to render a person's statement admissible under clause (3) it must be against his interest which may be pecuniary, proprietary or any other kind. But, the statement must have been made consciously with the knowledge that it was against his interest. In order to determine whether a statement is against interest, the statement itself and not the nature of the transaction is to be looked at. Statement of respondent's predecessor-in-title who is dead against his interest before the settlement officer was admissible and it being recorded in a quasi judicial proceeding can be proved by a certified copy thereof. The statements when admissible against the maker are also admissible against his representative.

### Statement against pecuniary interest:

A statement against pecuniary interest means against the monetary interest of the maker. If a statement made by a person against his pecuniary interest, it may impose upon him the pecuniary liability or it has the effect of charging him with pecuniary liability to another or discharging some other person upon

whom he would otherwise have a claim [Illustration (e)]. "In short, any statement to the effect that his financial position is worse that it would prima facie appear to be bad be not made the statement, will be received as a declaration against his interest." The statement by dead person in a deed that he separated himself from the other coparceners is against interest.

**Statement against proprietary interests:**

A statement by a person against proprietary interest means a declaration while he is in possession of the property, that he has limited interest denying the superior interests of another. When a person in possession of land admits that he is a tenant only he admits he is not the title holder of the land. A statement by the deceased that he had purchased land in the name of another person not merely as a benami transaction but with a view to making him owner. It is admissible.

It was held that the statement of the deceased Manager of a joint Hindu family that he purchased certain property out of the income of the property in the name of his son-in-law is a statement against the proprietary interests of the managers. It must be remembered that in order to make a statement admissible it must be proved that the declarant was in possession at the time of making such declaration.

**Criminal prosecution and suit for damages:**

Any statement which would have exposed the declarant to a criminal prosecution or a suit for damages is relevant. For example, the statement of the deceased that he set fire to rubbish was held to be relevant. Similarly the confession of co-accused in joint trial is relevant. The confession of a deceased co-accused was admissible under section 30 read with Section 32(3) of the Evidence Act.

**4. Statement as to public right or custom (Clause 4):**

Clause (4) of Section 32 deals with the declaration of person who cannot be called before the court to prove any public right, or custom or matters of general interest. The person who was aware of the existence of such right, custom etc. made a statement to this effect and died, such statements are relevant under clause 4. The conditions to be fulfilled include:

(i) The existence of public right, custom or matter of general interests,

(ii) The declaration must come from competent person, and

(iii) The statement is not merely hearsay. Public rights are those rights which affect public at large, such as, right to use public highways, ferries, funeral places, right of bathing in river etc.; general rights are rights affecting a considerable section of the population or community, such as parochial or manorial rights.

It is to be noted that: (i) rights claimed must not be private right, and (ii) the declaration must have been expressed before the controversy as to the existence of that right, custom or matter of interest i.e. ante litem motam (before the dispute arose).

Example of public right:

A statement, in a gift dead, to the effect the mosque was constructed by certain person as a matter of charity, was held to be relevant.

**5. Statement relating to existence of relationship (Clause 5):**

Under clause 5 the statement made by a person who is dead or who cannot be found and etc. will be relevant when it relates to the existence of relationship between persons. Four conditions must be fulfilled,

viz.—(i) the statement, written or verbal, of relevant facts must have been made by a person who is dead, or cannot be found etc. (ii) the statement must relates to the existence of any relationship by blood, marriage or adoption, (iii) the person making the statement must have special means of knowledge as to the relationship in question, and (iv) the statement must have been made before the question in dispute was raised.

The above conditions are sine qua non and the Supreme Court has reiterated in Dalgobinda v Nimaicharan case. The question of inheritance was raised as to whether the plaintiff and defendant were real bothers. Entries made by the Panda (priest) of a temple were admitted that the parties to the suit were not brothers.

The special knowledge is presumed to be knowledge of the declarant who was a member of the family and was intimately connected with it. The statement contained in a pedigree is also governed by this clause. Statements made by deceased members of the family are admissible in evidence to prove pedigree if they are made before there was anything to throw doubt upon them. The Supreme Court observed that when a case of a party is based on a genealogy consisting of links, it is incumbent on the party to prove every link thereof and even if one link found to be missing then in the eye of law the genealogy cannot be said to have been fully proved."

A document executed subsequent to the dispute cannot be relied upon for ascertaining relationship.

### 6. Statement made in will or deed (Clause 6):

When a statement is made by a person who is dead or who cannot be found and etc. (i) relates to the existence of any relationship by blood, marriage, or adoption, (ii) between persons deceased and is made in any will or other deed relating to family affairs of the family to which any of such deceased person belonged and (iii) when the statements made ante litem motam; it is relevant. [Illustrations (h) and (l)].

Although clause 5 and clause 6 are apparently similar there are marked differences between the two; viz.,

(a) Clause 5 deals with the proof of existence of relationship between persons who are alive or dead, whereas clause 6 deals with the persons who are already dead.

(b) Clause 5 admits the evidence of statements, written or verbal, whereas the clause 6 admits only written evidence.

(c) In clause 5 the evidence is the declaration of a person deceased or otherwise inproducible, whereas in the clause 6 the evidence is that of a things viz. wills, family genealogical trees etc.

Under the clause 6 the statement of declaration is expected to come from family member who has good blood relationship, but in some circumstances the statements of persons having special knowledge about relationship are relevant. For examples, birth/death certificates issued by the Birth Registration, Marriage Certificate issued by the priest of a temple etc.

### 7. Statement made in document relating to transaction (Clause 7):

Under this clause a statement contained in any deed, will or other documents which relate to any transaction mentioned under section 13(a) of the Act, is relevant. This clause does not allow introduction of parole evidence. Under this clause only that statement which is contained in any dead or will or in other document relating to any transaction by which a right or custom in question was created, claimed, modified, recognized, asserted or denied, is admissible. The statement must be covered under section 13(a) of the Act and the document must have been related to transaction. A family custom may be proved by recitals contained in family document executed before controversy.

**8. Statements of several persons expressing their feelings (Clause 8):**

Last clause of Section 32 relates to the statement made by a number of persons expressing feelings or impressions on their part is relevant [Illustration (n)]. The statement must have been the common feeling or impression of an aggregate number of persons. In the well known case of "Beauty and the Beast" it has been decided that "there was an action for damages for destroying a picture; the impression produced upon the find by the picture was allowed to be proved on the defence, by witnesses who swore to the exclamations and declarations of other spectators of the picture in their presence, such spectators not being themselves put into witness box."

Fact of the case:

"In that case plaintiff a painter, had painted one Mr. Hope and his wife Mrs. Hope. The former was extremely pain and the other handsome whereupon the plaintiff exhibited it public with the title of "Beauty and the Beast." The defendant Bareford, the brother of Mrs. Hope, cut the picture to pieces and therefore the action was brought to recover damages. The defence was that the picture was libel circulated to bring the defendant into public ridicule, and he was therefore justified in destroying it.

To prove this, witnesses were called who swore to the impression produced by the picture on their own minds, viz, that it was intended to be a representation of the defendant and his wife, and to the statements of recognition by other spectators. The evidence was received. What the witness said as to his own feelings was in the nature of original evidence, that he reported by sanders to have said was in the nature of hearsay. Now the latter is receivable as relevant."

**Section 33**

**Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated:**

Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, 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,—

That the proceeding was between the same parties or their representatives in interest;

That the adverse party in the first proceeding had the right and opportunity to cross-examine;

That the questions in issue were substantially the same in the first as in the second proceeding.

Explanation:

A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

**Comments:**

**Scope:**

Sometimes it may happen that a witness did appear before the court and his depositions were duly recorded in judicial proceeding where the opposite party exercised rights and opportunities to cross-examine him.

However, when he died and could not be found at the later stage of the same proceeding or in any subsequent proceeding between the parties and on the same issues involved therein; the deposition given by the witness in the previous proceeding is relevant under section 33. Section 33 applies in civil suit as well as in criminal cases. It would be applicable inter alia in a case where either the witness who has been examined-in-chief is incapable of giving evidence, or is absent, or his presence cannot be detained without any amount of delay or expense which the court considers unreasonable.

**Principles laid down:**

The section applies to the cases in which evidence given by a witness: (i) in a judicial proceeding, or (ii) before any person who is authorized by law to take evidence, such evidence is relevant in a subsequent proceeding or at the later stage of the same proceeding. The admissibility of such statement and the subject matter do not depend on their intrinsic character but on circumstances on which they are made.

Reasons: (i) when the witness is dead or (ii) he cannot be found or (iii) he is incapable of giving evidence or (iv) he is kept out of the way by the adverse party or (v) his presence cannot be obtained without an amount of delay or expense which the court considers unreasonable.

The evidence deposited by any one of these witnesses mentioned above will be admissible subject to fulfillment of three conditions, viz.,

1. The previous proceeding was between the same parties as in the subsequent one or their representative-in-interest; Proviso l.

2. The adverse party in the previous proceeding had rights and opportunities to cross-examine; Proviso 2.

3. The question in issue were substantially the same in the previous and subsequent proceeding; Proviso 3.

An explanation appended to this section provides that a criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

**Relevance of evidence:**

The principle of admissibility of evidence deposited in the first proceeding depends on fulfillment of the above three conditions. If the conditions are not satisfied the previous deposition would be inadmissible. The application of this section is essentially a matter of discretion of the court.

"Where a statute (eg, the Evidence Act, 1872) makes provision for exceptional cases where it is impossible for the witness to be before the court, the court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved." The precondition is this that Section 299 of Cr. PC and Section 33 of the Evidence Act must be established by the prosecution and it is only then the statements of witnesses recorded under section 299, Cr. PC before arrest of the accused can be utilized in evidence in trial after the arrest of such accused only if the persons are dead or would not be available or any other conditions enumerated in the second part of Section 297(2), Cr. PC is established.

(i) In judicial proceedings. The principle is applicable in judicial proceeding and before any person authorized by law. Judicial proceeding means any proceeding where evidence is taken on oath. The proceeding must be legal proceeding. A statement not recorded in a judicial proceeding is not relevant under section 33 of the Act. Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving a particular fact in later stage of the same judicial proceeding, when the witness cannot be found or is dead.

(ii) Another forum is the proceeding before any person authorized by law to take evidence. For example, evidence examined by a Sub-Registrar under the Registration Act will be admissible in subsequent suit between the same parties, because Sub-Registrar is a person authorized by law to take evidence.

**Representative-in-interest:**

The first proviso to Section 33 provides "that the proceeding was between the same parties or their representative-in-interest." In other words "it covers not only cases of private estate and succession of title, but also cases where both the following conditions exist, viz., (i) the interest of the relevant party to the second proceeding in the subject matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (ii) the interest of both in the answer to be given to the particular question in issue the first proceeding is identical." Whether there was a party to the first proceeding who was representative-in- interest of a party to second proceeding within the above meaning must depend on the circumstances of each case. The rule also applies equally to criminal proceeding. If the witness is dead or cannot be found, the statement recorded would be admissible.

**Right and opportunity to cross-examine:**

According to Proviso II the evidence shall not be admitted unless it was tested by cross-examination by the opposite party at the previous proceeding. The rule is that the adverse party must have right to cross-examine the witness. Simple right is not enough. If the party had right to cross-examine, but he failed to do so, the statement may be proved in subsequent proceeding. The party must have had both the right and the opportunity of cross-examining. Where an accused had no opportunity to cross-examine the prosecution witness, statement of such witness recorded during the course of inquiry is not admissible.

**Identity of issues:**

The questions in issues in the two proceedings should be substantially the same. It is not necessary that all questions in the two proceedings should be the same, but substantially be the same. "It should be borne in mind that the subject matter of suits need not be identical, it is only the question in issue which is to be identical."

Explanation:

According to the explanation a criminal trial or inquiry shall be deemed to be proceeding between the prosecutor and the accused within the meaning of this section. "The effect of the explanation seems to be that a deposition taken in a criminal trial may be used in a civil suit and conversely, provided that the conditions of this section are fulfilled".

## RELEVANCY OF FACTS

## GROUP IV

## STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

### Section 34

**Entries in books of account including those maintained in an electronic form when relevant:**

Entries in books of accounts including those maintained in an electronic form, regularly kept 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.

**Illustration:**

A sues Â for Rs. 1,000, and shows entries in his account-books showing Â to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

**Comments:**

**Scope:**

Sections 32 and 33 provide for relevancy of statements made by a person who is dead or cannot be called before the court. Section 34 on the other hand, provides that entries in books of account including those maintained in an electronic form regularly kept in the course of business, by a person, alive or dead, are relevant, whenever they refer to a matter into which the court has to enquire. This section is an exception to the Section 21 of this Act which provides that a person cannot make evidence for himself. The rules are:

1. When books of account including books in electronic form regularly kept in course of business.

2. Entries kept in such books are relevant only relating to matter in issue.

3. Such entries alone is not sufficient to charge a person with liability.

Where, for example, A sues Â for Rs. 1000, and shows entries in his account books showing Â to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt. Entries in account books regularly kept in the course of business are admissible though they by themselves cannot create any liability.

**Principle:**

As per this section the entries in books of account are relevant, but it is not sufficient to charge any person with liability unless some independent evidence is given. The evidentiary value of such entries of account books depends on corroboration by some other evidence in spite of the entries are regularly kept and mentioned by the writer "who has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth." The original entries alone under sec. 34 would not be sufficient to charge any person with liability.

In other words, the entries supported by corroborative evidence are no doubt relevant, but the corroborative evidence must have minimum probative value. It is that evidence of only corroborative nature. This corroborating evidence may be in any form like receipts, vouchers, bills or even oral evidence of witnesses having personal knowledge of the affairs of the transactions. "The principle is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to temper with undiscovered, to the purposes of a particular case."

**Books of Accounts:**

The term 'book' ordinarily means a collection of sheets of paper bound together in one volume with the intention that such binding shall be permanent record. Unbound sheets of paper are not books of account and cannot be relied upon. But two spiral notebooks and two spiral pads are regarded as books but not loose sheets contained in the two files.

It would not be correct to say that an entry must necessarily be made in the book of accounts at or about time the related transaction takes place so as to enable the book, to pass the test of "regularly kept." Under the Bankers Books Evidence Act 1891 the Bankers books include ledgers, day books, cash books, accounts books and other records used in the ordinary business of the bank whether those books are in written form or are kept an micro film, magnetic tape or any other form mechanical, or electronic data retrieval mechanism.

**Account book regularly kept:**

The books of account regularly kept in the course of business, though relevant, are not alone sufficient to charge any person with liability. It is normal that account-book kept in the regular course of business of tradesman is merely a compilation of all the details of his dealings from day to day and is practically a summary of such transactions written up in bills, vouchers, anamath chits etc. "The words 'regularly kept' are not synonymous with 'correctly kept' in accordance with certain fixed method or form referring to system of book-keeping." The Privy Council has laid down that "the admissibility of books of account regularly kept in the course of business is not restricted to book in which 'entries have been made from day to day or from hour to hour, as transactions have taken place.

The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards made them irrelevant." It is true that no particular form is prescribed for an account book to be maintained, but it should be regular and usual account book. Even the plaintiff's own testimony on oath in support of the entries in his books of account can be treated sufficient corroborative and to faster the defendant with liability.

**Charge a person with liability:**

Where the entries in books of account is regularly kept in course of business though relevant are corroborative evidence and mere production and proof of an entry is not by itself sufficient to charge a person with liability. There must be some independence evidence to prove the transaction. Where the principal amount of claim is disputed Bank has to prove the liability by adducing independent evidence and mere production of book entries will not suffice.

The corroboration is the best effort to prove the transaction by which a person may be charged with liability. Certified copies of statement of account under section 4 of the Bankers' Books Evidence Act corroborated by affidavit of a person are sufficient to charge debtor with liability.

**Evidentiary value of Books of accounts:**

Where accounts books were maintained properly and regularly, its veracity could not be doubted on the ground that the day books supporting ledger entries and that the person who made said entries in ledger books were not produced. The statement of appellant showing that accounts were maintained by his father till 1959 and thereafter by him for every year separately were submitted to the Income Tax Department. The said facts were not challenged in cross-examination. In the said ledger for each year there is entry regarding receipts of rent in question. The statement of appellant was upheld by trial court and appellate court. It was held that books were maintained properly and regularly and it veracity cannot be doubtful.

## Section 35

### Relevancy of entry in public record or an electronic record made in performance of duty:

An entry in any public or other official book, register or record or an electronic 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 or an electronic record is kept, is itself a relevant fact.

### Comments:

### Scope:

This section is based on principle that public records, viz., public or other official book, register or record, maintained in performance of official duties by an officer are admissible. Such public records or documents have got evidentiary value. Following conditions have to be satisfied before any document is made admissible:

1. An entry must be contained in public or official record.

2. It must be made by a public servant.

3. It must be made by public servant in discharging of his official duties.

4. It must be an entry stating a fact in issue or a relevant fact.

Principle:

The principle upon which the entries in a register are received as evidence is that it is public duty of the person who keeps the register for making such entries after satisfying of their truth. The persons who are discharging such public duties have been vested with extraordinary degree of confidence, because the public records are kept only for public benefit. When there is a question of proving such entries, these are generally proved by the production of a certified copy of them. It is not necessary that the person who made the entries have to be called for before the court and have to be examined on oath or to be put in cross-examination. All documents and records are to be presumed to be correct and genuine.

### Entries in public records:

To prove the genuineness of entries made in public records it is necessary that the entries have been prepared by the public servant in discharge of his official duties. For the purpose of the section same standard has to be applied both in civil as well as in criminal proceedings. An entry in a birth register made by the officer-in-charge in performance of his official duty is relevant. But, the evidence of school certificate for proof of a juvenile offenders age was not acceptable, because the register was not prepared in the discharge of a statutory duty. Similarly in case of school leaving certificate Head Master of School stated that he had no personal knowledge as to date of birth, it cannot be allowed. Where the session judge relied upon the entries in the school register for fixing the age of an accused which the High Court reversed, was accepted by the Supreme Court observing that the High Court should not have done so without giving proper consideration to the probative value of the evidence in question. Entries in School Register, School Leaving Certificate have to be proved in same manner as required in civil and criminal cases.

The presumption is that when an entry purports to be made by a public servant,-the court must assume that the public servant did his duty to the best of his ability and based on the entry on material of accuracy of which he was satisfied; but the presumption of truth created by a public record is also rebuttable. Where there is challenge to the validity of record of a village the Supreme Court held that the entries in annual

village papers (Khasra) was rebuttable presumption in favour of the person whose name is borne out by the record. Under section 35 it has been held that ossification test is sure test for ascertaining age. The birth certificate producing on the basis of baptism certificate legally recognized legitimacy.

Record of Rights is admissible under section 35, however, ordinarily records of right not to be treated to have any evidentiary value on question of title in as much as such records are prepared mainly based on possession.

**Evidentiary value of survey record:**

Survey record prepared after decree was passed in suit. Unless the decree is set aside or declared as nullity no one can look into that document purporting to be a partition by ignoring decree.

**Admissibility of electronic records:**

According to Section 92 of the Information Technology Act 2000, the records maintained in electronic form are admissible along with paper based documents.

**Section 36**

**Relevancy of statements in maps charts and plans:**

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.

**Comments:**

The Section 36 mentions two kinds of maps or charts. First includes the published maps or charts generally offered for public sale and the second are those maps or plans made under the authority of Government. Maps or charts of the first kind are relevant only on the ground that they are accessible to the public nevertheless their accuracy may be challenged. The Supreme Court has held that such private maps offered for public sale though not irrelevant do not get the benefit of presumption of accuracy under section 83 of the Act.

The defendant has encroached on land of the plaintiff and the land records are not available for survey. It was held that the court commissioner or the cadastral surveyor cannot decided the encroachment.

Maps or plans in the second category made under the authority of the Government being public document and are relevant under section 83 of the Act. Under this section the court shall presume the maps or plans purporting to be made by the authority of the Central Government or any State Government were so made and accurate. Thus, maps or plans prepared under the authority of the Government are themselves relevant. The general principle from which the second kind of maps referred to in this section are admitted.

**Section 37**

**Relevancy of statement as to fact of public nature, contained in certain Acts or notifications:**

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 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.

**Comments:**

This section needs no explanation. Following facts of public nature are admissible if made:

1. In any Act of Parliament of the United Kingdom; or

2. In any Central Act; or

3. Provincial Act; or

4. State Act; or

5. In Government notification; or

6. In Notification by the Crown Representative appearing in Official Gazette; or

7. In any printed paper purporting to be the London Gazette; or

8. In the Government Gazette of any Dominion, Colony or possession of His Majesty.

**Section 38**

**Relevancy of statements as to any law contained in law-books:**

**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 contained in a book purporting to be a report of such rulings, is relevant.**

**Comments:**

In order to form an opinion the court has to take into consideration: (i) the law contained in a book purporting to be printed or published under the authority of the government of a foreign country, and (ii) the ruling of the courts of such country. Thus, the court shall take judicial notice of law contained in law book, and the ruling of the court of the foreign country. This section is to be read with Section 84 to draw prosecution in favour of genuineness of books which are relevant under this section.

## HOW MUCH OF A STATEMENT IS TO BE PROVED

**Section 39**

**What evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers:**

When any statement of which evidence is given forms part of a longer statement, or of a conversation or of a conversation part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, 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.

**Comments:**

Where there is,— (i) a longer statement, or (ii) a conversation, or (iii) an isolated document, or (iv) a document contained in a book, or (v) a series of letters of papers, the court has discretion to use the relevant

portion of the conversation, document, books or series of letters or papers and requires the production of that portion or pages. In other words, the evidence shall be given of only explanatory or qualifying part of the statement, document, book etc. Same is applicable to electronic record under the section. The statements made in books cannot be relied on unless supported by contemporaneous records.

What evidence is to be given and to be taken is total discretion of the judge. His discretion is always guided by principles of justice, conscience and convenience.

## JUDGEMENTS OF COURTS OF JUSTICE, WHEN RELEVANT

**Section 40**

**Previous judgments relevant to bar a second suit or trial:**

The existence of any judgment, order or decree which by law prevents any Courts 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.

**Comments:**

Section 40 incorporates the principle of res judicata. The plea of res judicate belongs to the province of procedure, but it does not say that the judgment, order or decree is conclusive. It simply says that the existence of such judgment, order or decree is relevant fact. If the decree-holder obtains possession otherwise than by execution of the decree it amounts to satisfaction of decree for possession and if the decree holder is disposed thereafter he gets a fresh cause of action for filing a second suit on the basis of his dispossession. A judgment which has the effect of res judicata is relevant in civil and criminal cases.

The basic objective of incorporating this principle is to prevent multiplicity of suits and interminable disputes between the litigants. Once there has been judgment, order or decree about fact and laws no subsequent proceeding would be started. The doctrine of res judicata rests upon the maxim nemo debet bis vexari pro una et edem cause (No man ought to be tried twice for the same cause of action).

**Res judicata:**

Res judicata means a suit is already adjudicated upon. In other words a thing upon which the court has exercised its judicial mind. Section 11 of the Civil Procedure Code lays down the rule of Res judicata. Section 40 is intended to refer to judgment inter parties and not to the judgment mentioned in Section 41.

It provides that the court should not try a suit in which there is judgment tried by the same court between the same parties and on same cause of action. Res judicata in civil suit provides that facts actually decided in a previous suit by a competent court cannot be again agitated by the same parties. A judgment of the previous suit is conclusive proof in the subsequent suit.

The judgment, order or decree passed in a previous proceedings, if relevant, as provided under sections 40 and 42 or other provisions of the Evidence Act, then in each case the court has to decide to what extent it is binding or conclusive with regard to the matters decided therein. The principle does not apply when they contravene any statutory direction or prohibition. There is something which cannot be overridden or defeated by the previous judgment between the parties.

The doctrine of res judicata applies to law of procedure and its binding force of judgment is also applicable to the parties. A judgment which is relied on by a party in a subsequent suit in support of the plea of res judicatas, becomes relevant and can be read in evidence.

To give effect to the plea of res judicata the court has to be satisfied that the legal rights on which plaintiff sued was finally determined by the judgment and decree therein. In a suit for title, recitals made in judgment between the predecessor of plaintiff and predecessor of defendant regarding rights to the suit property would be admissible for deciding title to the property between plaintiff and the defendant.

**Res Judicata and Estoppel-Distinction:**

The rule of estoppel is not a rule of substantive law. It is a rule of evidence. Res judicata belongs to law of procedure regulated by Section 11 of the C.P.C. Res judicata ousts the jurisdiction of the court, while estoppel shorts the month of a party.

**Application of the principle in Criminal cases:**

The principle of the section applies also in criminal proceedings, but judgment of criminal court is not admissible in the civil court in civil suit for which declaration of the title filed by the plaintiff. Any finding in a criminal proceeding by no stretch of investigation would be binding in a civil proceeding. If a person has been tried for an offence and either convicted or acquitted of it, he cannot be tried again for the same offence. The plea of autre fois convict (who is convicted) or autre fois acquit (who is acquitted) in the previous case has been held to be good defense. Section 403 of Cr. PC has incorporated this principle.

On the other hand. Article 20(2) of the Constitution of India gives guarantee against double jeopardy which provides "no person shall be prosecuted and punished for the same offence more than once."

Thus, the judgment by which acquittal or conviction has been ordered will be relevant to every criminal proceeding; but this section has no application to the cases in which the charge is split into parts and the acquittal is for one part. In K.G. Premshanker v Inspector of Police the Supreme Court has laid down the following principles when judgments of courts of justice are relevant:

1. The previous judgment which is final can be relied upon as provided in Sections 40 to 43 of the Evidence Act;

2. In civil suits between the same parties, principle of res judicata may apply;

3. In a criminal case, Section 300, Cr. PC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; and

4. if the criminal case and the civil proceedings are not for the same cause, judgment at the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41.

**Section 41**

**Relevancy of certain judgments in probate, etc., jurisdiction:**

A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which 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.

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.

**Comments:**

Section 41 deals with,— (i) relevant judgment of a competent court exercising probate, matrimonial, admiralty or insolvency jurisdiction, (ii) the judgment confers upon or take away from any person any legal character or declare any person to be entitled to any such legal character, and (iii) the judgment is conclusive proof of matters mentioned in number (i).

**Principle:**

For the purpose of relevancy judgment is either judgment-in-rem or judgment-in-personam. This section usually deals with judgment-in-rem. As a matter of principle a person is not bound by any transaction to which he is not a party. Therefore, judgment between the parties is binding upon third party, but Section 41 is an exception and the judgment which is in judgment-in-rem is admissible under this section. To attract Section 41 judgment has to be pronounced. Mere pending of two proceedings whether civil or criminal, however, by itself would not attract the provisions of Section 41 of this Act.

**Judgment-in-rem:**

It means a judgment against the whole world. According to Taylor "a judgment-in-rem has been defined to be an adjudication pronounced, as its name indeed denotes upon the status of some particular subject-matter, by a tribunal having competent authority for the purpose. A judgment-in-rem under this section is conclusive in a civil as well as in criminal proceeding. Both the proceedings may run simultaneously.

If the judgment of a civil court is not binding on a criminal court, a judgment of a criminal court is not to be binding in civil court. Such judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matters actually decided." In Section 41 judgments of courts exercising probate, matrimonial, admiralty or insolvency jurisdictions are judgments-in-rem.

**Judgment-in-personam:**

It means a judgment between the parties in contract, tort or crime. Judgment-in-personam binds the parties and their representative- in-interests. This sort of judgment is not relevant in any subsequent proceeding under section 41.

**Bindingness of judgment-in-rem:**

The judgment-in-rem is conclusive proof of matters showing that: (a) it has conferred legal character, or (b) it has declared that person has such legal character or (c) it has declared that such legal character has ceased to exist. The legal character means a legal status. To say that a person is not a partner of a firm is not to declare his status or legal character; it is merely to declare his position with respect to the particular firm.

Under section 41, a judgment-in-rem dealing with legal character of a person can be pronounced by the courts exercising probate, matrimonial, admiralty and insolvency jurisdiction.

**1. Probate jurisdiction:**

Probate jurisdiction means jurisdiction of a court under the Indian Succession Act, 1925 in respect of testamentary and intestate matters. By exercising probate jurisdiction the court can pronounce the genuineness of will of a deceased person and grant letter of probate in favour of a person who may act for the deceased in execution of his will. A judgment by a probate is a judgment-in-rem by which legal character of a person is granted. The court must also satisfy its conscience before it passes an order. A judgment of a court of probate is conclusive proof and is binding on the entire world. The grant of probate is the decree of a court which no other court can set aside except for fraud or want of jurisdiction.

**2. Matrimonial jurisdiction:**

A court having matrimonial jurisdiction can decide matrimonial causes under various Act. By virtue of this jurisdiction the court can decide the legal status of a person whether he is married or she is widow or divorcee. The judgment of a Matrimonial court is judgment-in-rem and is admissible under section 41. A decree of nullity and divorce under Marriage Law has the same effect.

**3. Admiralty jurisdiction:**

Admiralty jurisdiction is exercised by the High Court under the Letters Patent. The finding of a court of admiralty is judgment-in- rem. The admiralty court decides cases arising out of war claims.

**4. Insolvency jurisdiction:**

A court having insolvency jurisdiction exercises its power under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. By exercising insolvency jurisdiction the court can determine legal status of a person whether he is insolvent or he is discharged from insolvency or annulment of his insolvency. The judgment of the court is judgment-in-rem and binding on all.

**Section 42**

**Relevancy and effect of judgments, orders or decrees, other than those mentioned in Section 41:**

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.

Illustration:

A sues Â for trespass on his land. Â alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against Ñ for a trespass on the same land in which Ñ alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

**Comments:**

Under section 42 judgments, orders or decrees other than those mentioned in Section 41 are relevant if they relate to the matters of public nature whether between the same parties or not. For example, customs, tolls on public highway, tolls on ferry etc. This section is also an exception to the general rule that no one should be affected by a judgment to which he is not a party.

**Scope and application:**

Judgments neither inter-parties nor judgment-in-rem is relevant under this section if they relate to matters of public nature under inquiry. According to Section 42 the matters of public nature means matters affecting entire population or at least a large section of the population. "It should be remembered that judgments relating to matters of public nature relevant under section 42 neither work as res judicata nor they are conclusive as judgment-in-rem." They can be used as corroborating evidences. Such evidence may not be between the same parties, but they are related only to the matters of public nature relevant to the inquiry. The judgment of the Privy Council did not bind the plaintiff on the principle of res judicata, it was definitely a relevant circumstance to be taken note of because of what has been stated in Section 42 of the Act.

**Section 43**

**Judgments, etc., other than those mentioned in Sections 40 to 42, when relevant:**

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 provisions of this Act.

**Illustrations:**

(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libelous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C, says that she never was A's wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him, B, is convicted.

A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B, C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.

**Comments:**

**Principle:**

Section 43 provides that if judgment is not relevant under sections 40, 41 or 42 it will not be relevant unless the judgment itself is a fact-in-issue or is a relevant under some other provisions of the Act. This section expressly contemplates cases in which a judgment itself is fact-in-issue or is relevant fact, being admissible except Sections 40,41 and 42. The illustrations appended to the section show that judgments have become relevant under some other provisions (e.g. Sections 6 to 55) of the Act.

The object of enacting Section 43 is of two fold, viz.,—(i) "to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties in another case; and (ii) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts." "The exceptions to this rule are judgments which are relevant under Article 141 or Article 227 of the Constitution as binding precedents or the judgments which are relevant under sections 41 and 42 of the Evidence Act or which are necessary to be taken into consideration when plea of res judicata is raised."

Where the accused was charged for criminal misappropriation findings against him in departmental proceedings would be relevant under section 43 of the Act.

Judgment relevant under other provisions of this Act:

The Income Tax and Wealth Tax assessment orders are not admissible in evidence under sections 40 to 42 but they are definitely admissible in evidence as they contain admission with regard to shares which the parties were having in the property in question.

**Admissibility of judgment:**

A judgment not inter parties is admissible if its existence is a relevant fact. Under this section judgments other than those mentioned in Sections 40, 41 or 42 are of themselves irrelevant, unless the existence of the judgment is relevant under some other provisions of the Act. A judgment setting aside the transfer of a holding is a fact in issue in pre-emption proceedings under section 26, F.B.T. Act and therefore admissible though not inter-parties Relying upon the decision of Bombay High Court in Laxshman Govind v Amrit Gopal it was held the judgment not inter-parties are inadmissible to prove the fact stated therein.

**Effect of judgment of Criminal Court in Civil cases:**

Judgment of a Criminal case cannot be relied on as binding in civil case. Similarly the findings in civil proceeding are not binding on a subsequent prosecution. However, admission made by a party is admissible in subsequent civil proceedings. The judgment in the Criminal Court would not be relevant in the claim petition under the Motor Vehicle Act. "The standard of proof for imposing liability is widely different between the civil and criminal courts and while in a civil suit a defendant can be made liable on probabilities or the action decided on a mere consideration of the burden of proof in the absence of other evidence, no accused can be convicted on such uncertain grounds."

The decision of Civil Court is relevant in Criminal case. But such decision alone is not sufficient for conviction in criminal trial.

## Section 44

### Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved:

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 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.

### Comments:

Section 44 gives an opportunity to the adverse party to raise questions that the judgment obtained under sections 40, 41 and 42 by the first party in the previous suit or proceeding was not in accordance with the principles of the Law of Evidence. It is not necessary for the adverse party to bring a separate suit to have the previous judgment set aside, but he can challenge the judgment in the same suit or proceeding that the judgment was delivered by the court not competent to deliver it or the judgment was obtained by fraud or collusion. This section applies to both Civil and Criminal proceedings. However, Sections 41 to 44 do not suggest that the decisions of the civil court would be binding on the criminal courts.

### Principle:

Section 44 lays down that a party to a suit or other proceeding may show that a judgment, order or decree:

(i) Which is relevant under section 40 that is, which would, as a judgment inter-parties operates as res-judicata;

(ii) Which is relevant under section 41 that is, which is relevant as a judgment-in-rem;

(iii) Which is relevant under section 42 that is, which is evidence as a judgment relating to public matter;

(iv) Which is proved by the adverse party;

It was passed by a court,—(i) which had no jurisdiction to pass it or (ii) it was obtained by fraud or collusion.

The Section 44 "is permissive and not prohibitive." It allows party to avail a judgment by proving fraud or collusion, but it does not destroy his substantive right which exists independently of the Act. Other aspect of this section is that the application of the rule is limited to the cases in which a decree is treated relevant only under sections 40, 41 and 42.

The principle of Section 11 of the Civil Procedure Code will not apply if any one of the grounds mentioned in Section 44 exists. The principle of res judicata does not apply if a previous decree is proved to have obtained by fraud.

### Court without competence:

A judgment delivered by the court was not competent to deliver it. It means the court had no jurisdiction to decide the matter in question and so was not binding. In a case where the question of court's jurisdiction has been directly raised and directly decided in favour of the jurisdiction upto the highest court it would not be open to a party to raise the question against.

The expression "a court not competent to deliver it" means that the court had no jurisdiction to decide the matter in question. "The competency of a court and its jurisdiction are synonymous term. This means the right of court to adjudicate in a given matter."

**Judgment, Order, or decree obtained by fraud:**

When a judgment, order or decree is obtained by practicing fraud upon the court it is not valid. A fraud may be either actual or positive fraud or constructive or legal fraud. According to Sir James Stephen in some cases "it may be mere secrecy."

Under section 44 order sought to be executed was not binding if it was passed by mistake or by fraud. A decree of a superior court can be declared void by an inferior court on the ground of fraud. If a judgment or decree initial by fraud, the same would be a nullify. In such an event Section 44 could be attracted. A certificate of sale of land obtained by fraud is a nullity and it can be challenged collaterally by way of defense without bringing a suit to set it aside. Fraud must be external collateral to adjudication and a "compromise decree cannot be said to be the result of fraud."

**Gross negligence:**

Section 44 is also applied to the cases of gross negligence. The Privy Council has laid down that Section 44 cannot be extended to cases of gross negligence. But in the said case the PC observed that "the court can not treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts." But different High Courts are of views that a suit is maintainable for setting aside a decree on the ground of gross negligence.

**Collusion:**

"Collusion" means "an agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose." The meaning of section is that if collusion is proved between the parties to a previous suit then the judgment in that suit which is relevant under section 40 cannot act as a bar. An ex-party decree obtained by collusion may be set aside under order 9, Rule 1 of the C.P.C.

Opinions of Third Persons, when Relevant The general principle of the law of evidence is that a person who is acquainted with the facts of a case may become a witness. Every witness is a witness of facts. A person who appears before the court is required to state about facts what he knows or experiences. He is to speak about facts only of which he has personal knowledge. He is not required to give his opinion or belief. Because, the opinion or belief of a third person is as a general rule irrelevant and therefore is not admissible.

However, there are cases in which the court has to depend on opinions of third person when it is not in a position to form any correct opinion. Under sections 45 to 51 of the Evidence Act a third person is invited by the court for his opinion on any particular point when the question involved is of such a nature and "is beyond the range of common experience or common knowledge, or when a special study of a subject or special experience therein is necessary," in such cases opinions of an expert is required to enable a court to come to a particular decision.

Thus, Sections 45 to 51 lay down the rule of exceptions when an opinion of a witness who is generally a third person, is relevant provided he is an expert on special matters or has acquired a special experience therein/ There are persons who have got professional skill or specialized knowledge in science, art, technology etc. may be called experts. Section 45 has mentioned who are experts for the purposes of evidence.

## RELEVANCY OF FACTS

## GROUP VI

## OPINIONS OF THIRD PERSONS WHEN RELEVANT

### CRIME & JUSTICE

Crime is as old as mankind and justice as old as civilized society. With the passage of time, the methods of crime and systems of justice have evolved. While yesteryears' systems of justice were rather crude and barbarous, today's legal system looks for "Evidence beyond reasonable doubt".

Today in India and many other democratic nations, the judiciary requires convincing evidence to convict the suspect. Many a times it is difficult to produce eyewitnesses or oral evidence and in a few cases where such evidence is available, it is known to have many limitations and shortcomings. It is on account of lack of substantial evidence that about 90 percent of cases are ending up in acquittal. In India in order to avoid common man losing confidence in criminal justice system, it is imperative to seek ways and means to improve the credibility of the system by adequately making use of the advances and advantages of modern Science & Technology available in the form of Forensic Sciences.

### SCIENCE IN PURSUIT OF TRUTH AND JUSTICE

Most crimes leave behind traces of 'silent evidence'. Yes, traces of materials known as physical evidence, found at the scene of crime act as potent clues that become the most eloquent witnesses. Thanks to the tremendous strides made in technology, today's scientists have a wealth of technological gadgets and tools that can help us turn these clues into powerful witnesses. Today's forensic scientists use the most sophisticated technological equipment to unravel the mysteries from even subatomic particles like dust in air or microbiological materials like DNA.

Anything to everything that is conspicuously absent or present in/on/near the victim/ suspect/ crime scene, surrounding areas, neighborhood etc. and even dust, pollen, bloodstain, bullet, glass, paint, hair, ash, speaker's voice, suspect's image, culprits e-mail, perpetrators mobile SMS etc. serve as 'silent speakers' of truth. These very materials can become valuable pieces of evidence in the hands of forensic scientists who seek truth, the whole truth and nothing but the truth.

### FORENSIC SCIENCE

The word forensic is derived from a Latin word 'forum' which literally means "pertaining to law courts". Similarly the word 'scientia' is a Latin word meaning "knowledge ascertained by observations and experimentation". As everyone knows science is "systematic body of knowledge". As such forensic science simply is "science applied for law enforcement". If medical knowledge is applied for law enforcement it is called Forensic Medicine, if engineering knowledge is applied it is known as Forensic Engineering, if psychology is applied it is known as Forensic Psychology, if accounting knowledge is used it is known as Forensic Accounting, if linguistics knowledge is used it is known as Forensic Linguistics and if archaeology knowledge is used it is known as Forensic Archaeology; thus the common misconception that forensic is something to do with medicine is incorrect.

In short, Forensic Science is the science that deals with analysis of physical evidence collected from all possible sources criminal and victim are associated with.

Forensic scientists are the scientific experts engaged in extensive scientific investigation who perform crucial tasks with their technical expertise, experience and skills using the best scientific techniques to tie the loose ends in order to link the crime with the criminal. Like picking up bits and pieces of flesh from the

crime scene to compare and match DNA, matching skulls with faces, deciphering invisible traces of writings from age old documents, picking up text and images from the obscene e-mails identifying the senders, tracing the last dialed numbers from the mobile telephone tracking the offenders – the list is endless.

As true seekers of truth, these technical sleuths have certainly come a long way from the so-called 'Magnifying Glass Combing Operations' of Sherlock Holmes to the modern day's most powerful 'Scanning Electron Microscope' which can magnify even the tiniest object to 2,00,00 times.

## ADVANCES IN SCIENCE AND TECHNOLOGY

Many developments have taken place during the last 50 years in all walks of life. For example, the nature, extent and ingenuity of crime and criminals have radically changed. Phenomenal developments have taken place in science and technology revolutionizing human life bringing many new comforts and luxuries through several gadgets and machines, thereby improving the quality of life of people, all over the world. But with all these rapid strides in terms of new technologies in Medicine, Biotechnology, Computers, Communications, Space Science, Engineering and so on, many people around the world today feel unsafe and insecure.

Hi-tech Criminals are using latest gadgets and escaping the long arms of law by clever exploitation of legal loop holes and technical trivialities. People have become increasingly selfish. And people are not coming forward to tell the truth. Moreover people are easily getting influenced to tell lies out of fear or favour.

In order to prevent, control and check these negative influences in a free and open society, science has increasingly come to play a vital role in criminal investigation in the form of forensic sciences by making use of physical evidence invariably present in every violation of law.

Let us now understand how forensic science helps resolve criminal and civil disputes. Crime is as old as humankind. In our rapidly changing society, the patterns of crime have also undergone a radical change. Crime today increasingly takes advantage of faster means of transport, faster communication and better opportunities to remain unidentified in a complex social framework and makes use of the latest electronic gadgets and technological innovations that became possible due to phenomenal strides made in the fields of science and technology.

Crime is a complex phenomenon owing its existence to a variety of social, economic, political and individual emotional factors. Rapid urbanization, industrialization, population growth, advancement in science and technology, with their fruits available to the general public, are some criminogenic factors. Police have little control over these. In fact some of these factors are completely beyond the purview of law enforcement authorities or any government agency.

## NEED FOR SCIETIFIC INVESTIGATION

- Social Changes
- Anonymity
- Technical Knowledge
- Wide Field
- Better Evidence
- Tremendous Change In The Commission Of Crime
- Strengthen Evidence Beyond Reasonable Doubt.

## MERITS OF SCIENTIFIC EVIDENCE

- Time tested
- Demonstrable
- Universally accepted
- Without bias
- Repeatable

## FORENSIC EVIDENCE: MULTI-PROFESSIONAL & MULTI-DISCIPLINARY

- medical knowledge — Forensic Medicine
- engineering knowledge — Forensic Engineering
- psychology — Forensic Psychology
- accounting knowledge — Forensic Accounting
- linguistics knowledge — Forensic Linguistics
- archaeology knowledge — Forensic Archaeology

## PRINCIPLES OF FORENSIC SCIENCE

- Law of Individuality.

  Every object, natural or man made has an individuality, which is not duplicated in any other object. It is unique. Neither the nature has duplicated itself, nor can man.

- Law of Progressive change.

  Everything changes with the passage of time.

- Principle of Comparison.

  Only the like can be compared.

- Principle of Analysis.

  Emphasizes the necessity of correct sampling and correct packing for effective use of experts.

- Law of Probability.

  It determines the chances of occurrence of a particular event in a particular way-out of a number of ways in which the event can take place or fails to take place with equal facility.

- Facts do not lie.

  Facts do not lie but man can do.

- Principle of Exchange.(Edmond Locard Principle)

  Whenever two entities come in contact, there is an exchange of traces mutually.

## NATURE OF WORK CARRIED BY FORENSIC SCIENCE LABORATORIES

- Forensic ballistics
- Forensic biology
- Forensic chemistry
- Computer forensic
- Forensic DNA
- Forensic documents
- Forensic engineering
- Forensic narcotics
- Forensic physics
- forensic polygraph
- Forensic serology
- Toxicology
- Voice analysis
- Finger prints
- Track marks
- Tool marks
- Lip prints

Forensic science is multi-professional & multi-disciplinary

## TOOLS AND TECHNIQUES

- Microscopy
- Photography
- Invisible Rays
- Chromatography
- Electrophoresis
- Spectrography
- Laser Microprobe
- Mass Spectrometry
- Spectrophotometry
- Polarography
- Lie Detecter Device
- Neutron Activation Analysis
- X-Rays Diffraction Analysis
- Scanning Electron Microscopy

## Expert Opinion and its Relevancy— Section 45-51

Sec. 45 to Sec.51 under Chapter-II of the Indian Evidence Act provide relevancy of opinion of third persons, which is commonly called in our day to day practice as expert's opinion. These provisions are exceptional in nature to the general rule that evidence is to be given of the facts only which are within the knowledge of a witness. The exception is based on the principle that the court can't form opinion on the matters, which are technically complicated and professionally sophisticated, without assistance of the persons who have acquired special knowledge and skill on those matters. Conditions for admitting an expert opinion are following:-

a) That the dispute can't be resolved without expert opinion and

b) That the witness expressing the opinion is really an expert.

### Who is an expert?

The definition of an expert may be referred from the provision of Sec.45 of Indian Evidence Act that an 'Expert' means a person who has special knowledge, skill or experience in any of the following——

1) foreign law,

2) science

3) art

4) handwriting or

5) finger impression

and such knowledge has been gathered by him—

a) by practice,

b) observation or

c) proper studies.

For example, medical officer, chemical analyst, explosive expert, ballistic expert, fingerprint expert etc.

According to Sec.45, the definition of an expert is confined only to the five subjects or fields as mentioned above. But practically there are some more subjects or fields on which court may seek opinion an expert.

An expert witness is one who has devoted time and study to a special branch of learning and thus he is specially skilled on those points on which he is asked to state his opinion. His evidence on such points is admissible to enable the court to come to a satisfactory conclusion.

### Duty of the expert:-

a) An expert is not a witness of fact.

b)His evidence is of advisory character.

c) An expert deposes and does not decide.

d) An expert witness is to furnish the judge necessary scientific criteria for testing the accuracy of the conclusion so as to enable the judge to form his independent judgment by application of the criteria to the facts proved by the evidence.

**Value of expert opinion:-**

The Expert evidence has two aspects —

a) Data evidence [it can't be rejected if it is inconsistent to oral evidence]

b) Opinion evidence [it is only an inference drawn from the data and it would not get precedence over the direct eye-witness testimony unless the inconsistency between the two is so great as to falsify the oral evidence] —[Arshad v. State of A.P. 1996 CrLJ 2893 (para34) (AP)]

Expert evidence is opinion evidence and it can't take the place of substantive evidence. It is a rule of procedure that expert evidence must be corroborated either by clear direct evidence or by circumstantial evidence.

It is not safe to rely upon this type of evidence without seeking independent and reliable corroboration — [S.Gopal Reddy v. State of A.P. AIR 1996 SC2184 (Para27)]

**Difference between evidence of an expert and evidence of an ordinary witness:-**

| EVIDENCE OF AN EXPERT | EVIDENCE OF AN ORDINARY WITNESS |
|---|---|
| 1. Expert gives his opinion regarding handwriting, finger impression, nature of injury etc. | 1. An ordinary witness states the fact relating to the incident. |
| 2. It is advisory in character. | 2. Witness states the facts. Opinion of a witness is not admissible. |
| 3. Court can't pass an order of conviction on the basis of expert opinion, as because it is not conclusive. | 3. Court may pass an order of conviction on the basis of evidence of ocular witness (eye witness). |
| 4. Expert gives his opinion on the basis of his experience, special knowledge or skill in the field | 4. A witness gives actual facts connected with the incident what he had seen or heard or perceived. |

| SECTION | PROVISION | ILLUSTRATION |
|---|---|---|
| Sec.45:- Relevancy of opinion of experts | If the court has to form an opinion upon-<br>a) Foreign law,<br>b) Science,<br>c) Art,<br>d) Identity of handwriting or<br>e) Finger impression<br>the opinion of the persons who are specially skilled in the above subject or fields are relevant.<br>The expert opinion is only corroborative evidence. It must not be the sole basis for conclusive proof.<br>The expert witness must be subjected to cross-examination in the court. Mere submission of opinion by an expert through any certificate or any other document is not sufficient | 1) Question arises whether A, at the time of committing the offence, was incapable to know the nature of his act or that he was doing what was wrong or contrary to law because of unsoundness of mind. The opinion of the experts upon the points are relevant---<br>a) Whether the symptom exhibited by A commonly show unsoundness of mind and<br>b) Whether such unsoundness of mind usually renders the person incapable to know the nature of his act or to know what he does is wrong or contrary to law.<br>2) The question is whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. Opinion of experts on the question whether the two documents were written by the same person or by different persons, are relevant. |

Considering the provisions of Indian Evidence Act, judicial precedents and our day to day practice it may be submitted that the following kinds of expert opinion may be relevant:-

**1) Foreign law:-**

Foreign law can be proved –

a) by the evidence of a person specially skilled in it and

b) by direct reference to the books printed or published under the authority of the foreign government.

**2) Science or art:-**

The Science or art includes all subjects on which a course of special study or experience is necessary to the formation of an opinion. "Science" or "art" is not limited to higher science or fine art, but it has its original sense of handicraft, trade, profession and skill in work which has been carried beyond the sphere of the common pursuits of life into that of the artistic and scientific action.

The following matters are included in the 'science' and art and the expert opinion of these matters are relevant:-

**Medical opinion:-**

The value of Medical evidence is only corroborative. A doctor acquires special knowledge of medicine and surgery and as such he is an expert. Opinions of a medical officer, physician or surgeon may be admitted in evidence to show—

a) Physical condition of the a person,
b) Age of a person
c) Cause of death of a person
d) Nature and effect of the disease or injuries on body or mind
e) Manner or instrument by which such injuries was caused
f) Time at which the injury or wounds have been caused.
g) Whether the injury or wounds are fatal in nature
h) Cause, symptoms and peculiarities of the disease and whether it is likely to cause death
i) Probable future consequences of an injury etc.

When there is a conflict between the medical evidence and ocular evidence, oral evidence of an eye witness has to get primacy as medical evidence is basically opinionative. Where the direct evidence is not supported by the expert evidence, the evidence is wanting in the most material part of the prosecution case and therefore, it would be difficult to convict the accused on the basis of such evidence. If the evidence of the prosecution witnesses is totally inconsistent with medical evidence, it is the most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained, it is sufficient to discredit the evidence as well as the entire case. [Mani Ram v. State of U.P. 1994 Supp (2) SCC 289,292; 1994 SCC (Cri) 1242]

Where the opinion of one medical witness is contradicted by another and both experts are equally competent to form an opinion, the court will accept the opinion of that expert which supports the direct evidence in the case. [Piara Singh v. State of Punjab AIR 1977 SC 2274]

**3) Handwriting:-**

- Like other expert opinion, the opinion of handwriting expert is advisory in nature. The expert can compare disputed handwriting with the admitted handwriting and give his opinion whether one person is the author of both the handwriting.

- The court shall exercise great care and caution at the time of determining the genuineness of handwriting. A handwriting expert can certify only probability and 100% certainty. On the question of the handwriting of a person, the opinion of a handwriting expert is relevant, but it is not conclusive and handwriting of a person can be proved by other means also.

- **The following are the different modes of proving handwriting:-**
  i) A person who wrote the document can prove it. (Sec.47)
  ii) A person who saw someone writing or signing a document can prove it (Sec.47)
  iii) A person who is acquainted with the handwriting by receiving the documents purported to have been written by the party in reply to his communication or in ordinary course of business, can prove the documents (Sec.47)
  iv) The court can form opinion by comparing disputed handwriting with the admitted handwriting. (Sec.73)
  v) The person against whom the document is tendered can admit the handwriting. (Sec.21)
  vi) The expert can compare disputed handwriting with admitted handwriting and thereby prove or disprove whether the documents were written by the same or different persons. (Sec.45)

**4) Fingerprint expert:-**

Expert opinion on fingerprints has the same value as the opinion of any other expert. The court will not take opinion of fingerprint expert as conclusive proof but must examine his evidence in the light of surrounding circumstances in order to satisfy itself about the guilt of the accused in a criminal case.

**5) Ballistic expert:-**

A ballistic expert may trace a bullet or cartridge to a particular weapon from which it was discharged. Forensic ballistics may also furnish opinion about the distance from which a shot was fired and the time when the weapon was last used.

**6) Evidence of tracking dogs:-**

Trained dogs are used for detection of crime. The trainer of tracking dogs can give evidence about the behavior of the dog. The evidence of the tracker dog is also relevant U/s-45.

In Abdul Razak V. State of Maharashtra (AIR 1970 SC 283) question arises before the Supreme Court whether the evidence of dog tracking is admissible in evidence and if so, whether this evidence will be treated at par with the evidence of scientific experts. In this case, Pune Express was derailed near Miraj Railway Station on 10th Oct.,1966. Sabotage was suspected. The removal of fishplates was found to be the cause of derailment and accident. The police dog was brought into service, taken to the scene of crime. After smelling the articles near the affected joint, the dog ran towards embankment where one fishplate was lying, then the dog smelt it and went to a nearby shanty and pounced upon the accused who was a gang man at Miraj Railway station.

The Supreme Court held that evidence of the trainer of tracking dog is relevant and admissible in evidence, but the evidence can't be treated at par with the evidence of scientific experts analyzing blood or chemicals. The reactions of blood and chemicals can't be equated with the behavior of dog which is an intelligent animal with many thought processes similar to the thought processes of human beings. Whenever thought process is involved there is risk of error and deception. The law is made clear by the Supreme Court by enunciating the principle thatthe evidence of dog tracking is admissible, but not ordinarily of much weight and not at par with the evidence of scientific experts.

Apart from the above fields, there are chemical analyst, explosive experts, mechanical experts, interpreter, patent expert, hair expert etc. whose opinion is admissible in evidence.

**Admissibility of expert opinion:-**

Expert opinion becomes admissible only when the expert is examined as a witness in the court. The report of an expert is not admissible unless the expert gives reasons for forming the opinion and his evidence is tested by cross-examination by the adverse party. But in order to curtail the delay and expenses involved in securing assistance of experts, the law has dispensed with examination of some scientific experts.

For example, Sec.293 Cr.P.C. provides a list of some Govt. Scientific Experts as following:-

a) Any Chemical Examiner / Asstt. Chemical examiner to the Govt.
b) The Chief Controller of explosives
c) The Director of Fingerprint Bureau
d) The Director of Haffkein Institute, Bombay
e) The Director, Dy. Director or Asstt. Director of Central and State Forensic Science Laboratory.
f) The Serologist to the Govt.
g) Any other Govt. Scientific Experts specified by notification of the Central Govt.

The report of any of the above Govt. Scientific Experts is admissible in evidence in any inquiry, trial or other proceeding and the court may, if it thinks fit, summon and examine any of these experts. But his personal appearance in the court for examination as witnesses may be exempted unless the court expressly directs him to appear personally. He may depute any responsible officer to attend the court who is working with him and conversant with the facts of the case and can depose in the court satisfactorily on his behalf.

**Can an Expert suo moto examine and furnish his opinion?**

No, an expert can't initiate examination or analysis and furnish his opinion unless the Investigating Officer has sought his opinion in compliance with the formal procedure. An expert can't do anything suo moto in regard to analysis or examination and formation of his opinion.

**Investigating officer and expert opinion:-**

The investigation officer should seek opinion from experts or specially skilled person to form his own opinion whether the materials collected during the course of investigation is actually establishes the link between the crime, the victim and the criminals. The investigating officer shall seek the assistance of an expert whenever he feels necessary for establishing any fact related to the fact in issue.

**Procedure of forwarding exhibits to experts:-**

When forwarding the exhibits to the experts certain procedure and formalities must be followed by the I.O. to dispatch packed exhibits or physical evidence to experts. It ensures identity and continuity and above all question of integrity of such exhibits. The I.O. shall follow the following procedure for forwarding the exhibits to the experts:-

1) Exhibits are sent to experts through the concerned court. A forwarding report shall be prepared by the I.O. in the prescribed format where available.

2) A certificate from the competent authority concern (C.M.M./C.J.M./A.C.J.M. as the case may be) has to be received in the line that "Certified that the Director, Forensic Science Laboratory, has the authority to examine the exhibits sent to him in connection with the case of State vs. .....(name of the accused) U/s-.....(provision of I.P.C. or any other law) and if necessary, to make them to pieces or remove portions for the purpose of the said examination."

3) The same seal (wax) shall be used by the I.O. on the forwarding report as affixed on the forwarding exhibits.

4) The specimen seal shall be on sealing wax and not in the ink.

5) A copy of label (carbon copy) of each exhibit shall accompany the report.

6) The forwarding report shall be prepared in quadruplicate (two for expert, one for case diary and one for the court's record) and shall be sent to the expert separately in a sealed cover.

7) The exhibit should always be sent to the expert through police messenger.

8) The IO. should make specific question that may establish the links between crime, victim and criminals. The questions should be formulated with some objectivity towards establishing such links between one another.

| SECTION | PROVISION | ILLUSTRATION |
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| Sec.45A:- Opinion of Examiner of Electronic Evidence | In a proceeding when the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner or Electronic Evidence referred to in Sec.79A of I.T.Act, 2000 is a relevant fact.<br>The examiner of electronic record is also treated as an expert. | a) Expert opinion in respect of a particular hardware or software in issue are relevant.<br>b) The copyright of a computer programme of the plaintiff is infringed. The plaintiff shows that there is chain of similarities between his programme and defendant's programme. The defendant replied that the area of the alleged similarity are mere coincidence and generally this path is used by many programmers in such circumstances. Here an appropriately qualified expert can give evidence about the nature of the routine and code in question and how they are derived by the programmers. |
| Sec.46:- Facts bearing upon the opinion of experts | Facts not otherwise relevant, are relevant if they support or are inconsistent with the opinion of experts, when such opinions are relevant. | The question arises whether A died of strychnine poisoning. Experts gives their opinion as to the symptoms of such poisoning and the A's death was caused thereby. The experts may support such opinion by proof that other persons who were admittedly poisoned by strychnine had exhibited similar symptoms to A's.<br>On the contrary, some other experts opine that A had died from ordinary tetanus, they may prove that other persons who admittedly died from the ordinary tetanus had exhibited the same symptoms like A's. |
| Sec.47:- Relevancy of Opinion as to handwriting | This provision recognizes the opinion of non-handwriting expert.<br>Ø When the court has to form an opinion as to handwriting of a person, the opinion of a person who is acquainted with the handwriting of the former person is admissible in evidence.<br>Ø A person can be acquainted with the handwriting of any person in the following cases:- | a) The question is whether a letter is in the handwriting of A, a merchant in London.<br>B is a merchant at Calcutta. B has written letters to A and in response he received some letters from A purporting to be written by A.<br>C is the clerk of B. His duty is to examine and keep all correspondence in files on behalf of B. Accordingly all the letters purporting to be written and sent by A to B has been examined by |

| SECTION | PROVISION | ILLUSTRATION |
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| | a) When he has seen the person whose handwriting is in question, write.<br>b) When in answer to the document written by himself (the person acquainted) or under his authority and addressed to the said person, he has received any document purporting to be written by the said person.<br>c) When in ordinary course of business documents purporting to be written by the said person have been habitually submitted to him (person acquainted). | C and kept by C in the files.<br>Opinion of B or C on the question whether the letter is in the handwriting of A, are relevant. Here it is immaterial that B or C has never seen A write.<br>b) A, a record keeper, has to file papers sent to him in the course of his official duty. He is competent to testify to the handwriting of a person whose papers are so filed. |
| Difference between Sec.45 & Sec.47:- | | |
| Section 45<br>a) Only opinion of handwriting expert is relevant.<br>b) The experts are obviously not acquainted with the handwriting of the maker.<br>c) Expert is not present at the time of writing the document. | Section 47<br>a) Opinion of non-handwriting expert is relevant<br>b) The person who gives his opinion must be acquainted with the hand-writing of the person in question.<br>c) The witness may be present and may see the person write | |
| Sec.47A:- Relevancy of Opinion as to electronic signature | When the court has to form an opinion as to the electronic signature of any person, the opinion of the Certifying authority which has issued the Electronic Signature Certificate, is relevant. | The question arises whether an electronic signature is of A. The certifying authority which has issued the electronic signature opines that A is not the person who has applied or approached for getting an electronic signature. Thus A is not the owner of the electronic signature in question. It belongs to someone else.<br>The opinion of Certifying authority may be accepted by the court. |

| SECTION | PROVISION | ILLUSTRATION |
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| Sec.48:- Relevancy of opinion as to existence of right or custom | When the court has to form an opinion as to the existence of any general custom or right, the opinion of the persons who are in a position to know about its existence, are relevant.<br>Explanation:-<br>The expression 'general custom or right' includes customs or rights common to any considerable class of persons. Private rights are excluded from the operation of this Section. Here the word "general" is equivalent to the term 'public'. | A tribal or family custom excluding a son or brother from inheritance may be proved by general evidence of the members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy. |
| Sec.49:- Relevancy of opinion as to usages, tenets etc. | 1)When the court has to form an opinion as to ----<br>a) Usages of any body of men of family<br>[usages includes any practice, tradition or custom of trade, business, agriculture, family etc.]<br>b) Tenets of any body of men or family<br>[opinion, principle or doctrine held or maintained by a body of men, it applies to religion, politics science etc.]<br>c) Constitution and government of religious or charitable foundation<br>d) Meaning of words or terms used in a particular district or by a particular classes of people<br>2)Opinion of persons who have special means of knowledge as to the above matters, are relevant. | A, the sister of B, claims to inherit the self-acquired property of B under a special custom. General evidence as to existence of such custom by the members of the family who would naturally be cognizant of its existence and exercise without controversy is admissible. |
| | | |

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| Sec.50:- Relevancy of opinion as to relationship | 1)When the court has to form an opinion as to relationship between two persons,<br>2)The opinion of a person on such relationship is relevant on the following conditions:-<br>a) He may be a member of the family of such persons whose relationship is in dispute or he may be an outsider. | i) The question is whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.<br>ii) The question is whether A was the legitimate son of B. The fact that A was always treated as the legitimate son of B by the member of the family, is relevant. |

| SECTION | PROVISION | ILLUSTRATION |
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| Sec.50:- Relevancy of opinion as to relationship | b) He must have special means of knowledge as to such relationship.<br>c) His opinion must be expressed by conduct.<br>The opinion or belief of a person specially competent in this respect as expressed by his conduct in outward behavior, is relevant. Here the word 'conduct' is not necessarily limited to the conduct of the relation of the persons in dispute, but it includes the conduct of the witness who gave his opinion about the existence of such relationship.<br>Proviso:- The proviso to Sec.50 provides that the opinion on relationship can't be sufficient to prove a marriage<br>1) in the proceedings under Indian Divorce Act or<br>2) in the prosecutions for -----<br>a) bigamy (Sec.494 IPC),<br>b) bigamy with concealment of former marriage from the person with whom subsequent marriage is contracted (Sec.495 IPC),<br>c) adultery (Sec.497 IPC) and<br>d) enticing or taking away or detaining a married woman with criminal intent (Sec.498 IPC).<br>In these cases the fact of marriage must be strictly proved in regular way. | i) The question is whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.<br><br>ii) The question is whether A was the legitimate son of B. The fact that A was always treated as the legitimate son of B by the member of the family, is relevant. |
| Sec.51:- Relevancy of grounds of opinion | Whenever the opinion of any living person is relevant, the grounds on which such opinion is based, are also relevant.<br>Opinion is no evidence without assigning reasons for such opinion. The correctness of the opinion can be better estimated if the reasons upon which it is based are known. If the reasons are frivolous or inconclusive the opinion is worth nothing. | i) An expert may give an account of experiments performed by him for the purpose of forming his opinion.<br>ii) An Excise Inspector is an expert on the question whether a certain liquid is illicit liquor or not. Before he gives his opinion as an expert he has to examine it and has also to furnish the data on which his opinion is based. His bald statement that the contents of the bottles are illicit liquor is not sufficient to prove that fact.[Gobardhan v. State AIR 1959 All 53 |

Evidence of an expert is not a substantive piece of evidence. The courts do not consider it conclusive. Without independent and reliable corroboration it may have no value in the eye of law. Once the court accepts an opinion of an expert, it ceases to be the opinion of the expert and becomes the opinion of the court.

## OF RELEVANCY FACTS

## GROUP VII

## ROLE OF CHARACTER IN EVIDENCE Section 52-55

### Character:

As per Webster, "character is a combination of the peculiar qualities impressed by nature or by habit of the person, which distinguish him from others". Character means the collective qualities or characteristics especially mental and moral, that distinguish a person or thing. Character is the estimation of a person by his community. The word 'character' includes both reputation and disposition." Character lies in the man; it is the mark of what he is.

### Reputation:

Webster defines "reputation" to be good name; the credit, honour or character which is derived from a favourable public opinion or esteem, and character by report. Reputation is the common or general estimate of a person with respect to character or other qualities.

Woodroffe states that "Reputation means what is thought of a person by others and is constituted by public opinion. It is the general credit which a man has obtained in that opinion."

Reputation and character are not synonymous terms. Character is what a man or a woman is morally while reputation is what he or she is reputed to be i.e. reputation is the estimate which the community has of the person's character.

### Disposition:

Disposition is a natural tendency, an inclination; a person's temperament. It is the prevailing spirit of mind, resulting from constitution. It is the aptitude or tendency of character.

The word 'disposition' is used to give the meaning a tendency to act, think or feel in a particular way. Character certificate given by the employer or character certificate given by the Heads of the Educational Institutions are the good examples of 'Disposition'. 'Disposition' comprehends or springs and motives of action. It is a permanent, settled and respects the whole frame and texture of the mind.

' The disposition is the prevailing spirit of mind, resulting from constitution. It is the aptitude or tendency of character. Character is often used in the sense of the social estimate formed of a man, his reputation for good or bad.

### The distinction between reputation and disposition is:

i) Reputation means the general credit of the person among the public but disposition means the inherent qualities of a person.

ii) Reputation is what other people think about him while disposition is what he is in reality.

iii) A man may be reputed to be a good man but in reality he may have a bad disposition.

iv) General reputation is a sort of common adjective to all, while disposition of a man may depend upon many traits, some good and some bad.

As character includes both reputation as well as disposition, character means the general credit of the person in the estimation of others plus the nature and inherent qualities of a person. But disposition of a

person can be known only to those persons who are closer to him. A person may have very high reputation but his disposition may be very bad.

"Character is a combination of quality distinguishing a person, the individuality of which is the product of nature, habits and environment." "Is a man honest, is he good—natured, is he of violent temper, is he modest and retiring or imprudent forward — These all constitute traits of character."

Although strictly speaking character is to be distinguished from reputation, yet reputation is more commonly considered as having reference to the dispositions or character of a person. Thus it is said of a person that he bears a good reputation meaning that the person in question has reputation for being a person of good character.

**Admissibility of character evidence in civil suits in Indian law**

In civil action, as a general rule, evidence of character of any person concerned (a party to a suit) is not admissible for the purpose of raising an inference as to his conduct. In other words, that a party did or did not act may not be established in civil actions, by showing that his character is such as to predispose him to one course or to the other. So the exclusion of evidence of a character of a party as a basis of inference as to his conduct is practically absolute in civil cases. In civil cases the evidence of character is generally inadmissible unless the character is of the substance in issue.

Under Section 52 the expression 'the character of any person concerned' is used. Therefore, it may appear to include persons who are called as witnesses, but the content of the section refers, only to the parties of the proceedings.

**Character admissible in civil cases:**

There are certain cases in which character is a fact in issue or a relevant fact e.g. in a suit for libel, if the libel consisted in attributing bad qualities to the plaintiff and the defendant justices the existence of these qualities, the existence of these qualities would be a fact in issue and evidence of character may be led. The character of a female chastity has been received in evidence in action for breach of promise for marriage.

Best states that "To admit character evidence in every case, or to reject it in every case, would be equally fatal to justice; that to draw a line or to define with precision where it ought to be received and where it ought to be rejected, is as embarrassing a problem as any Legislature can be called upon to solve."

In Abdul Shakur and others v. Kotwaleshwar Prasad and others, it has been held that where the contention that certain pronotes had been obtained from the insolvent while he was under the influence of drink, has been found to be baseless, mere general bad character of the insolvent would be quite irrelevant in a civil case to prove want of consideration.

**Admissibility of character evidence in civil suits in British law**

**Defendant Good Character in Civil Cases**

Generally speaking, the good character of a party to civil proceedings, whether defendant or claimant, is not admissible, unlike the normal situation with regard to defendants in criminal cases. As Baron Martin noted in A-G v Radcliff, in most cases, no presumption would arise: '. . . from the good character of the defendant, that he did not commit the breach of contract or of civil duty alleged against him'. Of course, if a party to litigation has his credibility attacked by unwarranted aspersions on his character, he can call evidence of his good character to rebut the allegation.

## Defendant Bad Character in Civil Cases

A defendant's character can be attacked in civil proceedings with a view to undermining his credit, just like that of any other witness. There is no special regime for defendants in civil trials, unlike the situation that governs the accused in criminal proceedings. Thus, for example, a defendant with previous convictions can have them put to him in cross-examination.

Perhaps more significantly, past misconduct can be indicative of present behaviour in civil as well as criminal matters and thus can be used to establish propensity under the common law 'similar fact' doctrine. The legal use of this type of evidence was neglected in civil cases, at least when compared to the extensive jurisprudence on its criminal counterpart. It was only rarely mentioned in judgements, and then often by reference to criminal case law on the topic.

Ironically, however, given the abolition of the similar fact doctrine in criminal trials under s. 99(1) of the CJA 2003, it is only in civil cases that it will be encountered in future. A number of cases, stretching back over a century, are indicative of the doctrine at work. Thus, in Hales v Kerr, evidence from a barber's customers that they, too, had become infected with ring-worm, after having been cut and bandaged by the defendant in the recent past, was admitted to support the plaintiff 's claim to having been negligently infected in a similar fashion.

It suggested that the defendant had an unhygienic system of work.

In Mood Music publishing Company v. De Wolfe Ltd., Lord Denning derived a Two stage test to determine the admissibility of evidence.

The following questions were to be ascertained before admitting the evidence

i) Whether the evidence provided was relevant with the Fact in Issue?

ii) Whether such evidence should be admissible or not?

This test was revisited in case of O'Brien v Chief Constable of the South Wales Police. In practical application of this test the risk of prejudice is likely to be far more acute than in the vast majority of cases where the matter is presided over by a professional judge, who is experienced in 'putting aside irrational prejudice'.

This might be particularly important where the extrinsic evidence is of a scandalous nature; for example, the previous misconduct cited consists of allegations of what would amount to serious crimes if proved.

Additionally, the risk of excessively prolonging and distorting the litigation process will also vary enormously, and needs to be weighed up against the probative value of the evidence and any other case specific factors.

In the light of O'Brien, it might be argued that, despite the term still being in use, there is, in reality, no longer a special doctrine of similar fact evidence in civil cases. Many of the conclusions reached in the case are explicable by other evidential principles, such as simple relevance or as a response to the Civil Procedure Rules. However, this would be an exaggeration, as there is still a residual discretion to reject such evidence simply because it might occasion reasoning or moral prejudice, rather than for any other reason; this is a hallmark of the similar fact doctrine at common law. Nevertheless, this is likely to be exercised only rarely, jury trials, perhaps, apart. In the light of Lord Bingham's observation in O'Brien, that similar fact evidence can be very important, even decisive' in civil cases other litigants may be encouraged to adduce such evidence in future. Against this, the case may also remind the courts that a general exclusionary rule means that evidence of extrinsic defendant misconduct should not be abduced informally.

**Admissibility of character evidence in criminal suits in Indian law**

In criminal proceedings, previous good character is relevant:-

In criminal proceedings, the fact that the person accused is of a good character, is relevant." In criminal enquiries the relevancy of character evidence is different from civil cases.

In criminal cases, the accused is allowed to prove his good character, either in chief or by cross-examination. But so far as concerns proof of the accused's good character by another witness, what must be deposed to is, not particular good acts by him, but his general reputation in the community. Strictly the witness's own opinion of his character is irrelevant, but in particular considerable latitude is allowed and a witness is often asked to say what he knows of the accused's character. The evidence of character is primarily relevant as to credibility i.e. it makes his testimony more worthy of belief.

Good character in criminal cases is a weak evidence. However, in certain cases, good character may become favourable evidence in favour of an accused in doubtful cases and where the prosecution fails to prove the guilt of the accused beyond the reasonable doubts. Good character presumably includes good reputation which a man may be in his own circle as well .as his real disposition as distinct from what his friends and neighbours may think of him.

When the accused in a bribery case pleads and produces evidences of good character, which the Court regards as satisfactory, it must be taken in consideration to decide whether the guilt is proved beyond reasonable doubt Phipson states that "Good character is not a defence, for no one would then be convicted, as everyone starts with a good character. The defendant is, however, entitled to rely on the fact that he is of previous good character as making it less likely that he would have committed the offence. If there is any room of doubt, his good character may be thrown in the scales in his favour."

In Habeeb Mohammad v. State of Hyderabad, [AIR 1954 SC 51] it has been held that in criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person would be suspicious or free from all suspicions when the character of the person by whom they are done is known. Even on the question of punishment, an accused is allowed to prove general good character.

**Bar on the proof of previous bad character in criminal proceedings:**

The general evidence of good character of the accused is always relevant. This is not so with regard to general evidence of bad character. In criminal proceeding the fact that the accused person has a bad character is irrelevant and cannot be proved. The reason is that the prosecution must prove the guilt of accused with the necessary evidence in support of the charge. But the prosecution cannot take the help of bad character of the accused in order to establish its case. lf the prosecution is allowed to prove bad character of the accused, then that would prejudice the mind of the Court. It makes the Court biased against the accused. if evidence of bad character of the accused is permitted t0 be proved the Court may come to the conclusion that he has committed the offence in question. Therefore, this would prejudice the fair trial to which the accused is entitled. However, there are three exceptions to the rule of the irrelevance of bad character in criminal cases.

**The first exception:** The previous bad character is relevant in reply, if the evidence has been given that he has good character. In Indian system of Law, an accused starts with a presumption of innocence; his bad character is not relevant, unless he gives evidence of good character in which case, by way of rebuttal, evidence of bad character may be adduced. The prosecution gets the right to prove the bad character of the accused. In cases of defamation, malicious prosecution etc., the question of reputation is to be considered. In such cases, the bad character of the party may be adduced as evidence.

**The second exception:** The evidence of bad character can be proved in cases in which the bad character is in issue. In case of binding over proceedings for keeping good behaviour under Sections 109, and 110, Cr.P.C. and in proceedings for the offence of dacoity under Sections 400, 401, Indian Penal Code. the bad character of the person involved would be a fact in issue. Under Section 110, Cr.P.C.. a person is to be bound down if he is by habit a robber. a house-breaker or is so desperate and dangerous as to render his being at large hazardous. In an Inquiry under Section 110 Cr.P.C. the very character of the accused is in question and so the evidence to that effect is admissible. The evidence that the accused had committed similar criminal acts previously is admissible upon the issue to decide whether the act was intentional or accidental. If the evidence of bad character is introduced in order to establish a relevant fact which cannot be proved separately the evidence of bad character is admissible.

In Public Prosecutor; APHC v. Bandana Ramayya, [2004 Cr.L.J. 3510 (AP)] it has been held that in a rape case, where the medical evidence clearly points out that there was a forcible intercourse, the bad character of the prosecutrix becomes irrelevant. If the bad character is itself a fact in issue, only then evidence can be placed.

**The third exception:** A previous conviction is not admissible in evidence against the accused, except where he is liable to enhanced punishment under Section 75 of the Indian Penal Code, on account of previous conviction, or unless evidence of good character be given, in which case the fact that the accused had been previously convicted of an offence is admissible as evidence of bad character.

Under Section 75 of the IPC, a person who has been previously convicted by a Court of an offence punishable under Chapter XII or Chapter XVII of the IPC with an imprisonment of three years or more, is liable for enhanced punishment if he had, again committed an offence under those chapters subsequently. may be proved as evidence of bad character

In re: Kamya, it has been held that only after conviction of the accused, the charge for the previous conviction has to be framed for giving enhanced punishment. In such case, the prosecution has to prove the previous conviction of the accused. The trial judge may, at his discretion, proceed or refrain from proceeding, with the trial on the charge of previous conviction.

**Admissibility of character evidence in criminal suits in British law**

A defendant can call evidence to establish his 'good' character. * is may be given during examination-in-chief by the defendant in person, by one of his witnesses, or be elicited from a prosecution witness on his behalf during cross-examination. In British law only Reputation is counted in Character and not Disposition.

In R. v. James Rowtan the accused was tried for committing an indecent assault on a boy of 14 years and at the trial he gave evidence of his good character. 'In order to rebut the evidence of good character the prosecution called a witness and asked "what is the accused's general character for decency and morality?' He said, "I do not know the opinion of my neighbours but in my opinion and the opinion of my brothers who were also his pupils that he is a person capable of the grossest indecency and flagrant immorality. The court said, this is evidence of disposition, not evidence, of reputation and therefore inadmissible.

In R v Redgrave , the defendant was accused of an offence of gross indecency in a public lavatory ( i.e a 'homosexual' offence). At his first trial he was allowed to adduce cards and letters from various girlfriends, to suggest that he was not homosexual and thus was not likely to have committed the offence of which he was accused. (For evidential purposes, if no other, these must be considered analogous to specific creditable incidents.) * is trial produced a hung jury, and a retrial was ordered. The (different) judge presiding at the second trial did not allow evidence of the correspondence to be given and the defendant was convicted. The defendant appealed on the basis that it was wrong for such evidence to have been excluded. Dismissing his appeal, the Court of Appeal upheld the decision in Rowton forbidding the adduction of evidence of specific incidents.

**Defendant's bad character in criminal suits.**

Prior to the advent of the Criminal Justice Act 2003, the adduction of defendant bad character evidence in criminal cases was governed by a complicated mixture of common law principles and statute. Thus, evidence adduced to suggest guilt via propensity was largely ruled by the common law 'similar fact' doctrine. Evidence that was produced to undermine defendant credit was primarily regulated by s. 1(3) of the 1898 Evidence Act (supplemented by common law provisions).

One of the main aims of the 2003 Act was to put all of the rules governing bad character in criminal cases, whether for defendants, witnesses or third parties, and whether going to credit or directly to the issue in a case, into a single statute. However, there were other concerns about the old regime, several of which were explored in the Law Commission report, Evidence of Bad Character in Criminal Proceedings which (in part) prompted the statutory reforms.

Section 101 of the Criminal Justice Act 2003, Defendant's bad character

In criminal proceedings evidence of the defendant's bad character is admissible (1) if, but only if—

(a) all parties to the proceedings agree to the evidence being admissible,

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character.

Under s. 101(1)(a) defendant bad character evidence can be admitted with the agreement of 'all parties to the proceedings'. For practical purposes, in most situations, this will be contingent on the accused person wishing to adduce it, although, presumably, there might be exceptional circumstances in which a co-accused might object to its admission. Nevertheless, a defendant could then have recourse to s. 101(1)(b), which allows him to adduce such evidence in person or via an answer to a question 'asked by him in cross-examination and intended to elicit it'.

Section 101(1)(c), in part, replicates a specialist provision that previously existed at common law. It allows the adduction of a defendant's previous misconduct if it is 'important explanatory evidence'. Guidance on what is meant by this is given in s. 102, which provides that it can be admitted if, without it, the jury or court would find it 'impossible or difficult properly to understand other evidence in the case' and (rather superfluously) its value for understanding the case as a whole is 'substantial'.

R v Beverley , the defendant was accused of participating in a conspiracy to import cocaine. He had two previous convictions. One of these, from more than five years earlier, was for possession of cannabis with intent to supply, and one was from two years previously, for simple possession of cannabis. These were adduced at trial under s. 101(1)(d), as showing a propensity to commit the type of offence with which he was charged. However, on appeal, the conviction was quashed, on the basis that one of the convictions was old, and one was of a different character (simple possession), that they involved a different type of drug, and related to offences of a vastly lesser degree of seriousness, both in size and complexity, to the large-scale conspiracy charged in the instant case.

Although, as these cases suggest, most situations where evidence is adduced under s. 101(1)(d) will require either an 'unusual' offence or one committed in an unusual manner, or, alternatively, several previous offences, in exceptional cases this will not be so.

For example, in R v Isichei , a defendant's single conviction for importing cocaine some six years earlier was admitted under s. 101(1)(d), as it was adduced not to suggest a propensity to commit such offences, but to support the identification of a complainant in an assault occasioning ABH and robbery indictment, who had heard the defendant demanding money for 'coke'.

A defendant's bad character can be adduced under s. 101(1)(e) if it has 'substantial probative value in relation to an important matter in issue between the defendant and a co-defendant'.

In Ibrahim Musone v The Crown, it was held that where two prison inmates were accused of murdering a third prisoner in his cell with a knife, and were running 'cut-throat' defences (blaming each other for the crime), one of the defendants was allowed to adduce evidence of an earlier murder, allegedly perpetrated by his co-accused, to suggest that it was more likely that he (the co-accused) had indicted the fatal wound. This was because the earlier killing was considered to have substantial probative value with regard to an important matter in issue between the two co-defendants (i.e who was more likely to be violently homicidal), and so was admissible under s. 101(1)(e).

Under s. 101(1)(f) evidence of a defendant's bad character can be adduced to 'correct a false impression given by the defendant'. This selectiveness about the adduction of past crimes can be seen in R v Campbell, where the defendant, accused of assaulting his girlfriend, had numerous previous convictions, for a variety of offences, including violence, dishonesty and criminal damage, reaching back over 20 years. However, at trial, only two previous and recent convictions for assaulting former or current girlfriends were admitted, pursuant to s. 101(1)(d), being adduced on the issue of the defendant's propensity to use violence towards women.

Section 101(1)(g) deals with those situations in which the defendant has made an 'attack on another person's character'. Section 101(1)(g) will not invariably be applied where there has, technically, been some kind of 'attack'. R v Nelson . In this case, the defendant, while being questioned by the police on an affray charge, had stated that his neighbour was a liar and a user of class A drugs. As it transpired, the neighbour did not give evidence at the defendant's trial. However, the first instance judge held that there had been an attack on the character of another, which fell within the terms of s. 106(1)(g) of the Act. As a result, the accused man's previous drugs convictions were adduced.

The general rule is that character evidence is inadmissible. Since it is very difficult to assess the character of the person, evidence of character is rendered inadmissible. It is said that it is only God, the angels and the person himself know anything about the character of a man.

**Good character of the accused**

The accused will be regarded as a person of good character if evidence is adducted or elicited to show that he has no previous convictions or no convictions of any relevance or significance. A previous character whether good or bad will be an indicator as to the present conduct of the person. It can affect the way a witness's testimony is viewed, i.e go to credit. In civil cases character evidence is inadmissible unless the character evidence is itself in issue. The evidence is excluded from civil proceedings on grounds of public policy. Due to the following reasons good character evidence is not admissible in civil proceedings.

i) Evidence of unconnected circumstances will prejudice the party

ii) The party would not have an opportunity to defend effectively as he would be unsure about what part of his career would be attacked.

The accused having a good character is entitled to the benefit of the 'Vye direction' consisting where relevant of a propensity limb and credibility limb.

Defendants in criminal cases with good characters are always entitled to the 'second limb' of the Vye direction on propensity.

Defendants in criminal cases with good characters who give evidence are also always entitled to a 'first limb' credibility direction.

Occasionally, 'blemished' defendants without previous convictions who admit to offences, or those with previous convictions that are minor or distant, may be refused or granted good character directions, depending on the circumstances of the case.

**Section 53 A -Evidence of character or previous sexual experience**

Is not relevant. Bars the use of sexual history in determining the consent of the woman. Bars cross examination as the general immoral character of the victim.

**Bad character of the accused**

According to the Indian laws in criminal proceedings the evidence of bad character of the accused is irrelevant and cannot be proved. But the prosecution cannot take the help of bad character of the accused in order to establish it's case. If evidence of bad character of accused is permitted to be proved the court may come to the conclusion that he has committed the offence in question. Therefore this would prejudice the fair trial to which the accused is entitled. However there are three exceptions to this rule

i) When the accused gives evidence of good character then the prosecution has a right to prove the bad character of the accused.

ii) The prosecution has a right to prove the bad character in cases in which the bad character is itself in issue.

iii) A previous conviction is relevant as evidence of bad character of the accused.

Defendant bad character in criminal cases is now almost entirely regulated by Part 11 of the Criminal Justice Act 2003, and s. 101 in particular. Bad character usually consists of convictions, but can extend to other areas of reprehensible conduct in an individual's life.

Evidence of the accused's 'bad character' is inadmissible unless it falls within the scope of one of the gateways to admissibility in section 101 (1) (a-g) of the Act. Whenever the prosecution (but not a co-defendant) attempts to adduce such evidence under s. 101(1)

a trial judge has a discretion to refuse to admit it, whether from the Act itself or as a result of s. 78 of the Police and Criminal Evidence Act 1984, even if one of the gateways is, prima facie, satisfi ed. The similar fact doctrine developed at common law survives in civil cases, despite being abolished in criminal trials. Such evidence appears to require less probative force that was formerly the case in criminal hearings to be admitted in civil forums. However, the court can have regard to a wider range of policy factors than was the case in criminal trials when deciding whether to exclude such evidence.

# PART II

# ON PROOF

## CHAPTER III

## FACTS WHICH NEED NOT BE PROVED

Generally, if a fact is alleged by any party to a suit or criminal case, that party has to provide proof of the truthfulness of that fact to the court. However, Indian Evidence Act allows the court to accept certain kinds of facts without any necessity to be proven by any party. These kinds of facts are specified in Section 56, 57, 58, and 114.

The provisions in these sections are as follows -

**Section 56 - Facts judicially noticeable need not be proved** - No fact of which the Court will take judicial notice need be proved. This means that if the court is bound to take notice of a particular fact, the parties do not have the burden of proving that fact. It is part of the judicial function to know that fact. For example, the court is bound to know the various laws and customs of the country. A party does not need to provide any proof when stating any law. Facts for which a court will take judicial notice are specified in **Section 57**. These include Laws in force in India, Public Acts of Parliament, Local, and person acts declared by it to be judicially noticed, Articles of War for Indian armed forces, the rule of the road, land, or sea, that vehicles in India must keep to the left of a road etc, the territories under the dominion of Govt. of India. In all these case, the court may resort appropriate books or documents of reference for its aid. Also, the matters enumerated in this section are not exhaustive. The section merely provides that the court must take judicial notices of the facts enumerated in this section. It does not prohibit the court from takings judicial notice of any other facts. To understand this point, we need to look at the meaning of judicial notice -

**Meaning of "Taking Judicial Notice"** - It means recognition of something as existing or as being true without having any proof. Judicial notice is based upon reasons of convenience and expediency. Certain things are so commonly known that any ordinary person is aware of it and it is a waste of time to seek any proof for such things. For example, it is a commonly known fact that certain parts of MP, Bihar, and AP are naxalite affected or that J&K is a terror striken area. A court does not need to spend time in looking for its proof. Thus, judicial notice is the cognizance taken by the court itself of certain matter which are so notorious or clearly established that the evidence of their existence is unnecessary. For example, in the case of Managing Committee of Raja Sidheshwar High School vs State of Bihar, AIR 1993, the court took judicial notice of the fact that education in the state was virtually crumbled. In another case, court took judicial notice of the fact that several blind persons have acquired great academic distinction. If the court is called upon by a person to take judicial notice of a fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so. The basic requirement for taking judicial notice is that the fact has to be of a class that is so generally as to give rise to the presumption that all persons are aware of it. However, a judge cannot bring his personal knowledge into judicial notice if that knowledge is not public knowledge. Just because a judge knows something does not make it a thing of common knowledge.

J Chandrachud observed that a court does not operate in ivory tower. It can take cognizance of facts that are happening all around it. Shutting judicial eye to the existence of such facts and matters is in a sense an insult to common sense and would reduce the judicial process to a meaningless and wasteful trial. No court therefore need to insist upon a formal proof of notorious facts such as date of polls, passing away of an eminent person, or events that have rocked the nation.

**Section 58 - Facts admitted need not be proved** - No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, 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. Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

This basically means that if a fact has been admitted by a party, the other party need not provide proof of that fact. For example, admissions made in written statements, or things said before and accepted to be said in the trial need not be proved. in averments made in a petition that have not been controverted by the respondent carry the weight of a fact admitted. However, an admission may not necessarily constitute conclusive evidence of the fact admitted. Therefore, this section allows the court to ask for some other proof of the admitted fact. This is a discretionary power of the court.

**Section 114 - Court may presume existence of certain facts** - 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. For example, a person may be presumed to be dead if his whereabouts are not known for seven years.

Such facts need not be proven.

# CHAPTER IV

# OF ORAL EVIDENCE

## ORAL EVIDENCE AND DOCUMENTARY EVIDENCE

### ORAL EVIDENCE

The facts judicially noticeable and facts admitted are need not to be proved. Oral and documentary evidence are not only media of proof. This chapter deals with the oral evidence only. It enacts two broad rules regard to oral evidence: firstly, that all facts except contents of documents may be proved by oral evidence, and secondly, that oral evidence in all cases must be direct and not hearsay.

The meaning of expression "oral evidence" is given along with the definition of the term "evidence" in Section 3 of Indian evidence act as-: "Evidence" 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.

(2) All documents including records produced for the inspection of the Court such documents are called documentary evidence.

**Section 59** of the Indian evidence act reads as-: All facts, except the contents of documents, or electronic records, may be proved by oral evidence.

*Principle:* this section lays down that all facts may be proved by oral evidence, except the contents of a document. The section is rather loosely worded as it makes an unqualified statement as regards the exclusion of oral evidence to prove the contents of a document. The true position is that oral evidence can be led as evidence relating to documents under section 65.

In general the evidence of a witness is given orally, and this means oral evidence. The expression oral evidence therefore includes the statement of witness before the court which the court either permits or requires them to make. The statement may be made by any method by which the witness is capable of making it. A witness who cannot speak may communicate of facts to the court by signs or by writings and in either case it will be regarded as oral evidence. Thus where a women was unable to speak because her throat was cut and she suggested the name of her assailant by the signs of her hand that was held to be a verbal statement relevant as a dying declaration.

Where oral evidence is credible and cogent, medical evidence is to contrary is inconsequential. Only when medical evidence totally improbable oral evidence, adverse inference can be drawn. Evidentiary value of the oral testimony of an eye-witness cannot be diluted by reason of non-production of any document in support of a claim contrary to the oral testimony.

**Difference between 'Relevancy' & 'Admissibility'-:** there are following three differences between the relevancy and Admissibility -:

1) The first deals with the probative value of specific facts,

2) The second including artificial rules which do not profess to define probative value but yet aim at increasing or safeguarding it, and

3) The third covering all those rules which rest on extrinsic policies irrespective of probative values.

**Evidentiary value**-: Oral evidence is a much less satisfactory medium of proof than documentary proof. But justice can never be administered in the most important cases without resorting to it. In all civilized systems of jurisprudence there is a presumption against perjury. The correct rule is to judge the oral evidence with reference to the conduct of the parties, and the presumptions and probabilities legitimately arising in the case. Another test is to see whether the evidence is consistent with the common experience of mankind, with the usual course of nature and of human conduct, and with well-known principles of human action.

**Falus in uno falus omnibus-:** The maxim means false in one particular, false in all. This principle is a somewhat dangerous maxim. There is always a fringe of embroidery to a story, however true in the main and so where the falsehood in merely an embroidery, that would not be enough to discredit the whole of the witness's evidence; where , on the other hand the falsehood relates to a major or material point that is enough to discredit the witness.

**Appreciation-:** oral evidence should be approached with caution. The court must shift the evidence, separate the grain from the chaff and accept what it finds to be true and reject the rest. The credibility of the witness should be decided on the following important points:

(a) Whether the witness have the means of gaining correct information,

(b) Whether they have any interest in concealing the truth,

(c) Whether they agree in their testimony.

Though a chance witness is not necessarily being a false witness, it proverbially rash to rely upon such evidence. The real tests for accepting or rejecting evidence are; how consistent is the story in itself, how does it stands of cross-examination and how far does it fit it with the rest of the evidence and circumstances of the case. Non-consideration of oral evidence by the lower appellate court, it is a non observance of the mandatory provision of Order 41, Rule 31 which brings in the sessions infirmity in the judgment. The judgment in such a cases stands vitiated and is not binding on the high court in the second appeal. When a girl states that a particular person used to conduct himself as her father, she says so from his personal knowledge and it is not hearsay.

**Electronic records-:**

The section was amended by the Information Technology Act, 2000 so as to include within the meaning of the term "document", electronic records also. Hence, every other fact, except contents of an electronic record or of any document, can be proved by oral evidence.

*S.60 deals with Oral evidence must be direct* - Oral evidence must, in all cases, whatever, be direct; that is to say—

- If it refers to a fact which could be seen, it must be the evidence of a witness who says he seen it;
- If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
- If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
- If it refers to an opinion or to the grounds in which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds -

Provided that the opinion of 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.

Provided also that, 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.

*Principle-:* this section enacts the general English rule that hearsay is no evidence. It embodies the second important rule about oral evidence, viz., that it must in all cases be direct and not hearsay. The section sets out the scope of the expression 'direct evidence'. It is true that hearsay evidence is excluded by this section. However, this is subject to well- recognized exceptions (e.g., sections 17 to 39).

Stephen – "the word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else."

**Hearsay evidence and its exclusion-:** the term hearsay is ambiguous and misleading as it is used in more than one scene. Stephen says "sometimes it means whatever a person is heard to say; sometimes it means whatever a person declared on information given by someone else; sometimes it is treated as nearly synonymous with irrelevant" , (Stephen's evidence, introduction, p.4). In its more generally accepted since the term hearsay is used to indicate that evidence which does not derive its value from the credit given to the witness himself, but which rests also on the veracity and competence of some other person. It is thus used in contradiction to 'direct evidence'. It is derivative evidence.

**Reasons for exclusion of hearsay-:**

(a) The irresponsibility of the original declerant;

(b) The deprecation of truth in the process of repetition; and

(c) The opportunities for fraud its admission would open; to which are sometimes added these grounds, viz.,

(d) The tendency of such evidence to protract legal inquires, and

(e) To encourage the substitution of weaker for stronger proof.

Hearsay evidence is the statement of a witness not based on his personal knowledge but on what he heard from others. If the evidence is that of a fact the happening of which could be heard, for example, the noise of an explosion, the evidence must be that of a person who personally heard the happening of the fact. the evidence of a reporter that after filing the F.I.R at the instance of his companion, who told by the people there, by naming the accused, that he assaulted the deceased and escaped, was held to be irrelevant, being not an eye witness account. thus all the cases the evidence has to be that of a person who himself witnessed the happening of the fact of which he gives evidence in whatever way the fact was capable of being witnessed. Such a witness is called an eye-witness or a witness of fact and the principle is known as that of direct oral evidence or of the exclusion of hearsay evidence. A post mortem report was produced by the record clerk of the hospital. The doctor who conducted the post mortem was not produced. The court ruled that in such circumstances the report was not provable. Only the original report stand not a copy of it is admissible.

R v. Gibson

The accused person was prosecuted for causing hurt by throwing a stone at prosecutor. So soon he was hit by the stone a woman who saw a man throwing the stone drew his attention towards a house and said: "the person who threw the stone went in there." Very soon thereafter he was caught and arrested in that house.

But the above statement was held to be not relevant. The prosecutor himself had not seen any person throwing a stone at him and thereafter entering a particular house and, therefore, the statement was not hearsay.

**Exceptions to hearsay**

- Res Gestae [s.6]
- Admissions and Confessions
- Statement relevant under section.32
- Statements in Public Documents.
- Evidence in Former Proceedings
- Statements of Experts in Treatises[s.60,proviso]

**Difference between Direct Evidence and Hearsay Evidence**

| Direct evidence | Hearsay evidence |
|---|---|
| 1. Direct evidence is that which the witness is giving on the basis of his own perception | 1. Hearsay evidence is that which has been derived by other person. |
| 2. Direct evidence is best oral evidence of the fact to be proved. | 2. Hearsay evidence is secondary one and it is admitted in exceptional cases. |
| 3. The liability of veracity of direct evidence is on person who is giving its evidence. | 3. In case of hearsay evidence the person giving evidence does not take the responsibility of its veracity. |
| 4. The person giving direct evidence is available for cross examination for testing its veracity. | 4. The person giving hearsay evidence is not author of original evidence. It is derived from original author. |
| 5. The source of direct evidence is the person who is present in court and giving evidence. | 5. In case of hearsay evidence the person giving hearsay evidence is not original source of evidence given by him. |

## DOCUMENTARY EVIDENCE

**MEANING—**: the expression "documentary evidence" as it is defined in section 3, means: All documents including records produced for the inspection of the Court] such documents are called documentary evidence.

The expression "document" is defined in section 3 as follows:

"Document"- means any matter expressed or described upon any substance by means of letter, figures or makes, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

S.3 defines the term 'evidence' as meaning and including oral and documentary evidence. All evidence comes to the tribunal either as the statement of a witness or as the statement of a document, i.e., oral or documentary evidence. The present chapter deals with the documentary evidence, i.e., the mode of proof of contents of documents old documents either by primary or secondary evidence, the types of documents, viz., public and private documents of the presumptions as to the documents. Father we are going to deal with the 3 main aspects —:

a) How documents are to be proved the manner of,

b) What are the presumptions about the various kinds of documents, and

c) When is oral evidence excluded by documentary evidence.

It has been said that the word "document" as used in the law of evidence "should not be construed restrictively. Etymologically the word means something which shows or teaches and is evidential or informative in its character. Where the statement of parties containing the terms of a compromise were recorded by a court and duly signed, it was to be held to be a document. with regard to recorded tape, it was said that there is "no reason in principle why the recording in recording in some permanent or semi-permanent manner of human voice(or other sounds) which are relevant to the issue to the determined, provided that it furnishes information, cannot be a document". In reception to the reception into evidence of models, maps, diagrams and photos, it is to observed in WIGMORE "that for evidentiary purposes they are nothing except so far as they have a human being's credit to support them. Then they become media of communication as a superior substitute for words."

R.M.Malkani v. State of Maharashtra

The accused, which an appealed to the Supreme Court against his conviction, was the coroner of Bombay. A doctor, who was running a nursing home, operated upon a patient who afterwards died. It, being a post-operation death, becomes the subject of post-mortem and inquest. The coroner persuaded the doctor to pay him a sum of money if he wanted the report to be favorable to him. The payment was arranged to be made through another doctor and the final meeting for this purpose was to be settled by telephone call from the house of another the doctor. The police commissioner was called with the tape-recording mechanism. This was connected to the doctor's telephone and thus the most incriminating conversation was recorded in the presence of the police officer.

The Bombay High Court held that the testimony of the two doctors required corroboration and that the tape amply corroborated it. The decision was upheld by the Supreme Court.

N.Sri Rama Reddy v. V.V. Giri & Pratap Singh v. State of Punjab

The court accepted conversation of dialogue recorded on tape-recording machine as admissible evidence.

**S.61 – Proof of contents of documents—:** The contents of document may be proved either by primary or secondary evidence. Law of best evidence requires the best evidence must be given in proof of the facts in issue or the other relevant facts. Primary evidence is the best evidence. The best evidence rule is to produce the original and secondary evidence is not admissible unless the original is proved to be lost, etc, as required under section 65. Contents may be proved, i.e., in other words, there are no degrees of secondary evidence.

In India the rule is the same as in England. The section means that there no other method allowed by law for providing the contents of a document except by the primary or the secondary evidence. Where admissions were made in a written statement by the plaintiff's predecessors-in-interest which was filed in several judicial proceedings regarding the rights in the suit property, a certified copy of the written statement was held to be admissible in proof of the settled rights to the property. Where the document carried adhesive stamps which belonged to a period prior to six months from the date of purchase, the court said that such document could not be attached in evidence. it would have been admissible if it was not creative of any rights in favour of any party and merely recorded something. An unregistered family settlement deed was held to admissible strictly for collateral purposes only.

The subject of documentary evidence can be divided into three parts:

1. How the contents of a document are to be proved? {61-66}

2. How the document is to be proved to be genuine? {67-90}

3. How far and in what cases the oral evidence is executed by documentary evidence? {91-109}

## PRIMARY AND SECONDARY EVIDENCE {SECCTION 62-66}

### Primary evidence

Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1. - Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2. - 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 expression "primary evidence" of a document is defined in section 62. The following four are included in the expression "primary evidence":

1.The original document itself produced for the inspection of the court.

2.Where a document is executed in several parts, each part is primary evidence of the document.

3.Where a document is executed in counterparts, each counterpart in primary evidence against the party signing it.

4.Where a number of documents are all made by one uniform process, for example, by printing, lithography or photography, each is primary evidence of the contents of the document.

*Priciple—:* this section defines primary evidence as the document itself produced for the inspection of the court. Primary evidence is evidence which the law requires to be given first. The general rule requiring primary evidence to be given of the litigated documents is based on the best evidence rule. An original document is the first permanent record of a transaction. It is first-hand evidence and presumptively the most reliable. Besides, documents are often interlined or altered. Therefore it is desirable to have the original to see if alterations are part of the document or are made subsequently.

There is probably no rule of evidence that is better known than this that secondary evidence of the contents of written document is, in general, not relevant. "The contents of every written paper are, according to the ordinary well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. Where the writer of a letter was not examined as a witness and no opportunity was given to the opposite party to cross-examine him, the letter was held by the Supreme Court to be not reliable evidence. The truth of the contents of a document can, however, is also proved by any other evidence and not necessarily by the evidence of author of the document.

One specimen of a newspaper of a newspaper is not a copy of another specimen of the same newspaper of the same date. They are all originals, each being primary evidence of the contents rest under Explanation 2 to section 62.

## SECONDARY EVIDENCE

Section 63. Secondary evidence means and includes.....

1. Certified copies given under the provisions hereinafter contained;

2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies;

3. Copies made from or compared with the original;

4. Counterparts of documents as against the parties who did not execute them;

5. Oral accounts of the contents of a document given by some person who has himself seen it.

The most remarkable among the types of secondary evidence by the section is the oral or parol evidence of the contents of a document. Thus, it follows the oral evidence of the contents of a document can be given. There are two conditions of a relevancy of such evidence. Firstly, party offering oral evidence must be entitled to give secondary evidence of such document. The circumstances in which secondary evidence can be given are listed in section 65 should exist so as to enable, the party to give secondary evidence of a document in question. The second condition is that the oral account of the contents of a document must be that of a person who has himself seen it. Once these conditions are satisfied, the party can give oral evidence of the contents of the document even if he has attested copy in his possession.

"The rule is, that if you cannot produce the original, you may give parol evidence of its contents if indeed the party giving such parol evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact to go to the jury, from which they might sometime presume that the evidence kept back would be adverse to the party without holding it. But the law makes no distinction between one class of the secondary evidence and another."

The evidence embodied in a letter was held to be not reliable when the author of the letter was not produced and the opposite party had no opportunity of cross-examining him. Even where a person against whom an item of news appears in the press has not denied it, it would not constitute evidence against him. Facts contained in the report would have to be proved.

Call records of cellular phones are stored in huge servers, which cannot be easily moved and produced in courts. Hence, secondary evidence of such records should be allowable under sections 63 and 65. Whatever or not the requirements of section 65b (4) are satisfied. The nature of evidence to show that there has been no improper use of a computer and that it was functioning properly would vary from case to case. It would be very rarely necessary to call an expert. In normal cases it would be possible to discharge the burden of proving proper functioning by calling a witness who is familiar with the operation of the type of computer in question.

**Difference between Primary Evidence and Secondary Evidence**

| Primary evidence | Secondary evidence |
|---|---|
| 1. Primary evidence is original document. Which is presented to the court for its inspection. | 1. Secondary evidence is the document which is not original document but those documents which are mentioned in section 68. |
| 2. Primary evidence is the best evidence in all circumstances. | 2. Secondary evidence is not best evidence but is evidence of secondary nature and is admitted in exceptional circumstances mentioned in section 63. |
| 3. Giving primary evidence is general rule. | 3. Giving secondary evidence is exception to the general rule. |
| 4. No notice is required before giving primary evidence | 4. Notice is required to be given before giving secondary evidence. |
| 5. The value of primary evidence is highest. | 5. The value of secondary evidence is not as that of primary evidence. |

**Proof of documents by primary evidence**

S.64 of the evidence act deals with this and it reads as -: Documents must be proved by primary evidence except in the cases hereinafter mentioned.

This section embodies one of the underlying principles which is that a document must be proved by its primary evidence. The meaning of the expression "primary evidence" has been explained in sec.62. But lest technical considerations should defeat substantial justice, the following section, namely, sec 65, embodies situations which would sanctify secondary evidence.

It has been held in several decisions that objections, if any, as to the mode of proving a document should be at trial stage itself. If no objections taken at the stage, subsequently at the stage of appeal, it would be too late and would not be allowed. Where, however, a copy of the insurance policy and not the original document was produced before the tribunal, the other party making no objection then, an objection before the appellate court was allowed so as to exclude the evidence.

**Cases in which secondary evidence relating to documents may be given**

S. 65 deal with these kinds of cases and reads as-: Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the meaning of Section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) When the originals consist 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 collections.

In cases (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

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.

Where the document is inadmissible in evidence, the acquiescence of the other party at the time of marking of the document could be no bar to raising an objection in the appellant forum for the first time. But, if the objection relates to the mode of proof it cannot be allowed to be raised for the first time at the appellate stage. Circumstances for admission of secondary evidence must be made out. Without taking steps for production of original or laying foundation for secondary evidence, production of certified copies by itself was not allowable in evidence.

Evidence related to electronic record. A prayer was made for pr producing it by means of video-conferencing. The court said that there was no bar on examination of a witness through video-conferencing.

Section 67 deals with the Proof of signature and handwriting of person alleged to have signed or written document produced - If a document is alleged to be signed or 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 hand writing.

The party, who produces a document which he alleges is executed, signed or written by a certain person, has to prove that fact. This section merely requires proof of signature and handwriting of the person alleged to have signed or written the document produced.

As to the way in which the handwriting of a person can be proved has been already been seen in connection with opinion as to handwriting. Such a proof is not necessary where the document has been produced by the part against whom its production was demanded, because by producing it he virtually admits the execution by him. Except in the cases of a secure digital signature, if the digital signature of any subscribe is alleged to have been fixed to an electronic record the fact that such digital signature is the digital signature of the subscriber must be proved.

Proof of execution of document required y law to be attested. Section 68 deals with these kind of cases and lay down that, if a document required by law to be attested, it shall not be used as evidence until on attesting witness at least 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 and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act,1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specially denied.

The document has to be roved by examining the attesting witnesses. The validity of the document could not be denied by the person who had no right succeed or had any other right to property. The denial in this case was by the son of the executants through his second wife. He had no right of succession and therefore, was not allowed to register his denial to the validity of the document. Thus, an examination of attesting witness is necessary only when the execution of the document has been specifically denied. If not so denied, the evidence furnished by the registration certificate under S.63 of the registration act coupled with the presumption under illustration (e) to S.114 of the Evidence act would be more than sufficient.

Whereas in the cases of proof of will and Where all that the executor of a pronote said that he was very old, infirm and could not understand the nature of the document, but offered no evidence in support of his allegation, the Allahabad High Court held that this did not amount to a specific denial of execution. There was no necessarily of calling an attesting witness. Where, in the case of a "will" the only attesting witness surviving and summoned was able to prove nothing, the will was held to be not proved. Similarly, where the legal heir of the executants of a denied execution and the opposite party did not produce the attesting witness for the fear that he may not favour the, the requirements of the section were held to be not satisfied. The legal requirement is complied with when one attesting witness is produced. Neither it is necessary to produce the other witness even if available, nor is there any obligation to explain why the other witness has not been produced. What is to be done if no attesting witness is available? Section 69 provides the answer.....

S.69 deals with the Proof where no attesting witness found any lays down that "If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, 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 document is in the hand writing of that person."

If no attesting witness is available or if the document is executed in the United Kingdom, two things should be proved-:

a) It should be proved that the signature of the person executing the document is in his handwriting, and

b) That the signature of at least one attesting witness is in his handwriting.

Where all the attesting witnesses of a will were dead the court allowed the will to be proved in the manner of any other document. Where the part to an attested document has admitted that he executed the document that is sufficient proof of the execution even if the document is required by law to be attested. This is laid down in section 70.

Section 70 deal with the admission of execution by party to attested document and say that The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

If the attesting witness denies or does not remember the execution of the document, its execution should be proved by other evidence. Where the attestor was an illiterate person and he attested by putting the thumb impression and though it was a conveyance by his predecessor-in-interest, he was not bound by the document unless it could be shown that the document was read out to him and he understood it. The

Calcutta and the Allahabad high court have held that the word 'admission' relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. In other words, it has no relation to any admission of execution made before an attesting witness without reference to any suit or proceeding.

Now the question here is that what if attesting witness denies the execution. Section 71 deals with the same and says that if the attesting witness denies or does not recollect the execution of the document its execution may be proved by other evidence.

If a document not requires by the law to be attested has in fact been attested, its execution may be proved as if it were not an attested document. In a case before Madras High Court, the question related to the validity of a will alleged to have been made and signed by a lady before her death. Of the attesting witnesses only one was alive and he denied having attested any such will. There were two other witnesses only one was alive and he denied having attested any such will. There were two witnesses only. One of them was the registrar who did remember the woman executrix. The other witness was able to identify the signature of her head father who was one of the attesting witnesses. In these circumstances the court held that the execution the execution of the will could not be said to have been duly proved. Section 63 of the succession act, 1925 requires a will to be attested by the two or more witnesses. A combined reading of sec.68 of the Evidence Act and S.63 of the succession Act would, therefore, suggested that at least one attesting witness should be examined and he should speak not only of the testator's signature but also that the other the other witnesses signed the will in his presence. Where this is not done, the will cannot be said to have been proved.

A 'will' which have not been proved in accordance with the requirements of S.68 cannot be used even for some relationship or for the existence or absence of some other rights in the property.

Where the attesting witness of a will was not produced for the fear that he might go against the claimant's interest, the Allahabad High Court held that it could not be said that the witness had denied knowledge so as to attract provisions of section 71.The section is attracted when the attesting witness, who is available, denies attestation. Other evidence then becomes permissible. The scribe testified as to the scribing of the 'will' by him and attestation by two witnesses. This statement was held to be coming under S.71. A subsequent "will" executed by the testator made specific mention of the execution of "will" in question. The execution of the will by the other evidence was taken to be proved.

In the case of a will the burden lies upon its propounder to prove its genuineness, the deceased testator being no longer available to speak to its genuineness. Accordingly when the evidence produced by him was contradicting his claim and there was also inconsistency in the opinion of the handwriting expert, the will was held to be not proved.

Section 72 deals with the proof of the document not required by law to be attested. Where no attestation is necessary the section declares in simple terms that where a document, though not required by law to be attested, is nevertheless attested, it may be proved as if it was not attested.

Comparison of signature, writing or seal with others admitted or proved

S.73 deals with the comparison of signature, writing or seal with others admitted or proved and says that -: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 s 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.

When the court has to satisfy itself whether the signature or whether the signature or seal on a document is genuinely that of a person whose signature or seal it purports to be, the court may compare the same with another signature or seal which is admitted or proved to be that of the person concerned. This principle is laid down in S.73. In so doing the court does not act as an expert. Modes of proving handwriting have already been considered before. Comparison by the court of the handwriting with a proved or admitted handwriting is one of those methods which are recognized by this section. It is necessary that the writing to be used as a standard should be properly proved to the satisfaction of the judge to be the handwriting of the person concerned.

An application for appointment of an expert for verification of signature should be rejected where the application is disputing his signature. An application for this purpose can be made at any stage of the trial.

This section enables the court to require the person concerned to write any words or figures to enable the court to compare them with words or figures in question. The principle of the section also applies to finger impressions. Ordinarily the court should in such cases take the help of an expert. In a grant of loan against pledge of ornaments, the question was whether the slip acknowledgement receipt of articles was under the signature of the pledge. The court itself decided the question by comparing the handwriting with an admitted handwriting. It was held on appeal that expert should have been obtained as a matter of prudence or cogent reasons given why that was not considered necessary.

Rejection by the court of the evidence of a handwriting expert on the ground that the expert had no qualifications was held to be not proper. Once becomes an expert in this field by training, experience and constant observation and not by any formal qualification. It is not a developed science and there are no regular courses of study. The expert here was retired personnel from forensic science laboratory. The circumstantial evidence supported the expert opinion was also based upon cogent reasons.

## PUBLIC & PRIVATE DOCUMENTS

S.74 deals with the public documents which read as -:

The following documents are Public documents-

1. Documents forming the acts or records of the acts

a) Of the sovereign authority,

b) Of Official bodies and Tribunals, and

c) Of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country.

2. Public records kept in any State of private documents.

Two kinds of public documents:

1. Documents forming the acts or records of the act of the sovereign authority, namely, the parliament and the legislative assemblies, or of the official bodies and tribunals, and of public officers, legislative, judicial and executive, of any pert of India or of the commonwealth, or of a foreign country, are public documents.

2. Private documents which are registered in the public offices also become public documents

A private document, such as, for example, an application for a licence, which is filed in government office and is produced there from does not become a public document so as to dispense with the necessity of proof by primary evidence. A post-mortem report is not public document so as to amount to proof of identity of the deed without producing the doctor in evidence.

A private waqf deed which is recorded in the office of the sub-registrar is a public document. This should be compared with a decision of the Gauhati high court where it was held that a private sale deed registered under the Indian Registration Act is not a public document and, therefore, a certified copy is not admissible in evidence under S. 77 of the evidence act. Explaining the meaning of public records the court said-:

"Public records are those records which a government unit is required by law to keep or which it is necessary to keep in discharge of duties imposed by law."The court overruled its own earlier decision and followed the Privy Council decision in Gopal Das v. Thakurji, where their Lordships held that the d original receipt executed by any individual and registered under the Indian Registration Act is not "a public record of public document", within the meaning of S.74(2) As the original gas to be returned to the party under S.61(2) Of the Registration Act.

Entries made by a police officer in the site inspection map and site memo have been held to be public document. A record of consideration of employees for promotion purposes was submitted before the Supreme Court by a public sector undertaking. The record was 13-19 years old. It was held that the record was sufficiently old to rule out the objection that it was a manufactured one and not the original. An order sanctioning prosecution of an officer has been held to be a public document. Section 75 of the Act deals with the Private Documents and lay down that all other documents are private.

**Difference between Public Document and Private Document**

| Public document | Private Document |
|---|---|
| 1. Public document is prepared by public servants in discharge of his public duties. | 1. Private document are those documents which are prepared by a person for his private interest under his private right. |
| 2. Public documents are available for inspection to the public in public office during appointed time after payment of fixed fee. | 2. Public documents are kept in custody of the person to whom it belongs and is not available for general inspection to the public. |
| 3. The secondary copy of public document is to be admitted in judicial proceedings. | 3. Before proving one of conditions laid down under section 65 the secondary evidence of original document is not to be admitted in judicial proceedings. |
| 4. As general rule the public document is proved by secondary evidence. | 4. As general rule the private document is to be proved by original i.e. by primary evidence. |
| 5. The court is bound to presume the genuineness of public document from their duly certified secondary copy. | 5. No presumption is made about genuineness of original document from secondary evidence of private document except in some exceptional circumstances. |

## PROOF OF PUBLIC DOCUMENTS

The rule relating to proof of public documents is that they can be proved by producing certified copies. It means that public documents are always provable by secondary evidence. This first provision which deals with this is section 76 which says about the Certified copies of public documents-: 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 written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officers with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation - Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Where in a process for acquisition of land, it became necessary to determine the value of land by the comparable sales method, evidence of registered sales was allowed by producing certificate copies. Examination of the parties to the agreements was not considered to be necessary.

The provision which deals with the Proof of documents by production of certified copies is section 77 of the act which reads as-: Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

A will was executed in the state of Goa with the intervention of Notary Public. The court said that it became a Public document. It could be proved by production of a certified copy. Such will carried with it a ring or halo of its authenticity and reliability and it presumed t be true until disapproved.

Next provision deals with the Proof of the other official documents it is provided under S.78. This reads as:-

**The following public documents may be proved as follows –**

(1). Acts, orders or notifications of the General Government in any of its departments, or of the Crown Representative or of any State Government or any department of any State Government.

By the records of the departments, certified by the heads of those departments respectively, or

By any document purporting to be printed by order of any such Government or as the case may be, of the Crown Representative;

(2) The proceedings of the Legislatures -

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting The Orient Tavern be printed by order of the Government concerned;

(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

By copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer;

(4) The Acts of the Executive or the proceedings of the Legislature of a foreign country -

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;

(5) The proceedings of a municipal body in a State, -

By a copy of such proceedings certified by the legal keeper thereof of by a printed book purporting to be published by the authority of such body,

(6) Public documents of any other class in a foreign country, -

by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a notary public, or of an Indian consul or diplomatic agent, 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.

The Allahabad High Court had held that a mere cyclostyled covering letter accompanied by a similar copy of the rules is not relevant. It was covering letter accompanied by a similar copy of the rules in not relevant. It was necessary that the letter should have been certified by the head of the department as required by section 78. A newspaper is not one of the documents referred to in S. 78 by which an allegation of a fact can be proved.

## PRESUMPTIONS AS TO THE DOCUMENTS

### Meaning of Presumption.....

Presumption is an inference of fact drawn from other known or proved facts. It is a rule which treats an unknown fact as proved on proof or admission of certain other facts. It means a rule of law that courts shall draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disapproved.

### Kinds of Presumptions.....

**There are two kinds of presumptions:**

1) May presume: presumptions of fact are permissive in the sense that the court has discretion to draw or not to draw them. They are also rebuttable as their evidentiary value may be negatived by contrary proof. Thus these presumptions afford a provisional proof. That a person found in possession of stolen property soon after the theft is either the thief or has received the goods knowing them to be stolen is a presumption is a presumption of this type.

2) Shall presume: they are always obligatory; and a judge cannot refuse to draw the presumption. Such presumptions are either (1) rebuttable, or (2) irrebuttable. Rebuttable presumptions of law are indicated by the expression 'shall presume'. They hold good unless and until there is contrary evidence, e.g., the court shall presume the genuineness of every Government publication. (section-84)

### Difference between Rebuttable and Irrebuttable Presumption

| Rebuttable Presumption | Irrebuttable Presumption |
|---|---|
| 1. It means a presumption which can be overthrown by contrary evidence. | 1. It is drawn so conclusively that contrary evidence is not allowed. It is juris et de jure, i.e., incapable of rebuttal. |
| 2. The court regard such facts as proved unless and until it is disproved. The court, here, dispenses with the necessity of formal proof. (section 4) | 2. The court shall on proof of one fact regard the other as proved and shall not allow evidence to disprove it. (section 4) |
| 3. Examples- A person not heard of 7 years is dead, or that a bill of exchange has been given for value. | 3. Examples- A child under a certain age is inapplicable of committing any crime (section 82, IPC) section 41and section 113. |

This chapter deals with the presumptions about the genuineness of the documents. These presumptions start from S.79 to S. 90 of the act. These are the various presumptions deals with the various documents and as to their genuineness .....

**The first provision as to the genuineness of the documents is section 79 which says about Presumption as to genuineness of certified copies and reads as-:**

The Court shall presume to be genuine 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 Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorized there to by the Central Government:

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 document purports to be signed or certified, held, when he signed, the official character which he claims in such paper.

When a certified copy of a document is produced before the court as evidence of the original in circumstances in which secondary evidence is admissible the law presumes that the copy is a genuine reproduction of the original. This presumption is raised by section 79. The effect of the presumption is that if anybody alleges that the certified copy is not genuine, the burden of proving that fact lies on him, for the court presumes genuineness.

For this presumption arise, it is necessary that the copy should haven certified by an officer of the Central or State Govt. or by an officer in the State of J&K who is duly authorized by the Central Government. Secondly, the document should be subsequently in the form, if any, prescribed by law and should also purport to be executed in that manner.

**The provision which deals with the Presumption as to documents produced as records of evidence is S. 80 which reads as-:**

Whenever any document is produced before any Court, purporting to be a 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 authorized by law to take such evidence or to be statement or confession by any prisoner or accused person taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume –

that the document is genuine; that any statements as to the circumstances under which it is taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

It is necessary for this presumption to arise that a person should have recorded his evidence before a court of law before any officer authorized by law to take such evidence, or that a person accused of any officer authorized by law to take such evidence, or that a person accused of any crime has recorded his confession in accordance with the law, and a copy of the statement has been signs by the judge, magistrate or other officer before whom the statement was recorded.

**Section 81 says about the presumption as to gazettes, newspapers, private Acts of parliament and other documents. And reads as-:**

The Court shall presume the genuineness of every document purporting to be the London Gazette, or any official Gazette or the Government Gazette of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of private Act of Parliament of the United Kingdom printed

by the Queen's Printer and of 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.

Every document which purports to be a newspaper or journal. In spite of this presumption, it has been held by the Supreme Court that newspaper reports do not constitute admissible evidence of their truth. The presumption, of genuineness attached under s.81 to a newspaper reports cannot be treated as a proof of the facts reported therein. A newspaper report cannot be the basis of filing a writ petition. The statement of a fact contained in newspaper is merely a hearsay and therefore inadmissible in evidence.

**There is the new amendment added in this section in the form of S.81A. This reads as-:**

The court shall presume the genuineness of every electronic record purporting to be the Official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody.

This section mainly says that the Court has to presume the genuineness of any electronic record purporting to be the official Gazette or purporting to be the electronic record directed by law to be kept in accordance with the form required by the law and is produced from proper custody.

**S.82 is the next provision which deal with the presumption as to documents admissible in England without proof of seal or signatures and reads as-:**

When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine and that the person signing it held at the time when he signed it, the judicial or official character which he claims; and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

Where a document is produced before court of law which according to the laws of England or Ireland would be admissible without proof of seal, or stamp or signature authenticating it, the court shall presume that such seal, stamp or signature is genuine and also that the person signing the document held at the time of signing it, the judicial or official character which he claims.

**S.83 deals with the Presumption as to maps or plans made by authority of government. This reads as-:**

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. Maps or plans purporting to be made with the authority of the central or any State Government are presumed to be accurate. Maps or plans made for the purpose of any cause must, of course, be proved to be accurate. Where the site plan and inventory prepared on behalf of a former ruler was not produced in its original State, the Supreme Court did not allow any objections to be raised about the matter in the Supreme Court.

**S.84 which deals with the presumption as to collections of laws and reports of decisions which reads as-:**

The Court shall presume the genuineness of every book purporting to be printed and published under the authority of the Government of any country, and to contain any of the laws of that country; and of every book purporting to contain reports of decisions of the Courts of such country. This section says that the

court presumes the genuineness of every book purported to be printed or published under the authority of the government of any country, and which contains any of the laws of that country. The same presumption is raised in reference to books published by the State which contains report of decided cases.

**S.85 deals with the Presumption as to power of attorney which reads as-:**

The Court shall presume that every document purporting to be a Power of Attorney, and to have been executed before, authenticated by, notary public, or any Court, judge, Magistrate, Indian Consul, or Vice Consul, or representative of the Central Government, was so executed and authenticated. The Delhi High Court acted on this presumption and held that the power of attorney executed on behalf of a bank and attested by notary public created the presumption that the power was validly delegated and the executants were duly authorized to do so. The presumption created by the section applies with equal force in reference to documents authenticated by notaries functioning in other countries. The Supreme Court accepted a document which was authenticated before a notary public of California, U.S.A. [97] Following this; the Allahabad High Court raised the presumption as to a signature authenticated by a notary public in Pakistan.

**There are three new provisions added in this section i.e.85A., 85B, 85C respectively.....**

**S.85A deals with the presumption as to electronic agreements which read as-:**

The court shall presume that every electronic record purporting to be an agreement containing the digital signatures of the parties was so concluded by affixing the digital signature of the parties.

**S.85B deals with the presumption as to electronic records and digital signature and reads as-**

1) In every proceeding involving a secure electronic record, the court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status relates.

2) In any proceedings, involving secure digital signature, the court shall presume unless the contrary is proved that-:

a) the secure digital signature was affixed by the subscriber with the intention of signing or approving the electronic record;

b) except in the case of a s\secure electronic record or a secure digital signature, nothing in this section shall create any presumption relating to authenticity and integrity of the electronic record or any digital signature.

**S.85C deals with the presumption as to Digital Signature Certificates which read**

The court shall presume, unless contrary is proved, that the information listed in Digital Signature Certificate is correct, except for information specified as subscriber information which has not been verified, if the certificate was accepted by the subscriber.

**S.86 deals with the presumptions as to certified copies of a foreign judicial record which reads as-:**

The Court may presume that any document purporting to be 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 (10 of 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.

This section says that the court is given the judicial discretion to presume that certified copies of foreign records are genuine. The first eight presumptions noted above are compulsory presumptions in the sense that the judge is bound to raise the presumption in question. But the presumption as to foreign judicial records and the two presumptions that follow are in the discretion of the court in the sense that the court may or may not draw the presumption.

**S.87 deals with the Presumption as to Books, Maps and Charts which reads as -:**

The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Often the books, charts, maps, etc. are produced before the court in proof of a fact-in-issue or a relevant fact and which appears from the book, etc. the Court may presume that any such book, map, and etc. was written by the person whose name is shown as that of the author and was published at the place where it says it was published.

**S.88 deals with the Presumption as to Telegraphic Messages which reads as-:**

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 massage purports to be sent, but the Court shall not make any presumption as to the person by whom such massage was delivered for transmission.

The court may treat telegraphic message received, as if they were the originals sent, with the exception that a presumption is not to be made as to the person, by whom they were delivered for transmission and, unless the non-production of the originals is accounted for, secondary evidence of their contents is inadmissible. A telegram is a primary evidence of the fact that the same was delivered to the addressee on the date indicated therein.

**S.88A. deals with the Presumptions as to electronic messages which read as-:**

The court may presume that an electronic message forward by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the court shall not make any presumption as to the person by whom such message was sent.

Explanation- for the purposes of this section, the expressions "addressee" and "originator" shall have the same meanings respectively assigned to them in clauses (b) and (Za) of sub-section (1) of section 2 of the Information Technology Act, 2000.

The section provides that the court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee corresponds with the message as fed into his computer for transmission. The court is not authorized to make any presumption as to the person by whom such matter was sent.

The Explanation to the section talks about the meaning of the terms "addressee" and "originator". It says that these will have the same meaning as is assigned to them in S. 2(1) (b) and (3) of the Information Technology Act, 2000. Section 2(1) (z) says that an addressee means a person who is intended by the originator to receive the electronic record but does not include any intermediary. Section 2(1)(z) says that an originator means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary.

**S.89 deals with the Presumption as to due execution etc., of documents not produced which reads as:-**

**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.**

Where a document has been called for but not produced before the court, the court shall presume that the document in question was duly signed, stamped and attested. The presumption is that the document is that the document was in all respects in accordance with the law. The presumption is compulsory and is not in the discretion of the court.

**S.90 deals with the Presumption as to documents thirty years old and reads as:-**

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 hand writing of any particular person, is in that person's hand writing, and in the case of 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 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.

A document which is thirty years old is presumed to be genuine. It is presumed to be genuine in all respects. But the presumption is in the discretion of the court. The court may, but is not bound, to presume that a thirty-year old document is genuine. This presumption. This presumption is provided for inS.90.

The document should be thirty years old. "What is the meaning of its being thirty years old? Parties are not called upon to prove that the deed has been in existence for thirty years before the time of it production, the court is, unless it is impeached, to receive that as proof of the instrument." The date on the face of the instrument is prima facie evidence of its age. Where there was an action on a bill of exchange, and no evidence being offered of its age except the date which appeared on its face, that was to be a prima facie evidence of its date. But evidence can be given of the fact that the date appearing on the instrument is wrong. In such a case thirty years would be computed from the date which is proved to be the date of the execution of the document. Even where a document was not thirty years old when filed in the court but becomes so by the time that it is considered by the court as part of the evidence, the presumption will apply.

The second condition for the presumption to apply is that the instrument should be produced from proper custody. The meaning of proper custody is given in the explanation. According to the explanation, proper custody means: -

a) The place where the document in question would naturally be;
b) Was under the care of a person with whom it would naturally be;
c) Any custody which is proved to have had legitimate origin; or
d) Under the circumstances of the case the custody from which the instrument is produced is probable.

S.90 nowhere provides that authenticity of the recitals contained in the document is proved, this by itself does not lead to the presumption the recitals contained in the document are also correct. It is open to the parties to raise a plea to the contrary within the limits permitted under sections 91 and 92. It has been held that when a thirty years old copy of document is produced, the genuineness of the original cannot be presumed.

The ruling of the Privy Council and also that in Seethayya v. Subramaniya were approved by the Supreme Court in Lakhi Baruah v. Padma Kanta Kalita . The court held that a certified copy of the registered sale deed was not entitled to the benefit of the presumption. A gift cum-will document which was produced from proper custody and was also thirty rears old was presumed to be genuine.

**S.90A deals with the presumption as to electronic records five years old and reads as:-**

Where any electronic record, purporting or proved to be five years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the digital signature which purports to be the digital signature of any particular person was so affixed by him or any person authorized by him in this behalf.

Explanation- Electronic records 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 naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.

## OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

**S.91 deals with the Evidence of terms of contracts, grant and other dispositions of property reduced to form of document which reads as:–**

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 of its contents in cases in which secondary evidence is admissible under the provisions herein before contained.

Exception 1 - When a public officer is required by law to be appointed in writing, and when it is shown that any particular person had 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.

Explanation 1 - 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.

Explanation 2 - Where there are more originals than one, one original only need be proved.

Explanation 3 - 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.

Where the fact to be proved is embodied in a document, the document is the best evidence of the fact. Such fact should, therefore, be proved by the document itself, that is, by the primary or secondary evidence of the document. According to the High court of Delhi, it did not permit oral evidence of the contents of a partition deed which deed was inadmissible being not registered.

Once it is shown that the original document is not admissible in evidence because of insufficiency of stamps, secondary evidence by way of oral statement or Xerox copy cannot be allowed. Allowing the party to confront the witnesses with Xerox copy of such evidence was held to be not permissible. The section forbids the proof of the contents of a writing otherwise than by the writing itself. The section embodies the best evidence rule, thus declaring a doctrine of substantive law. Even a third party, who is seeking to prove a written contract, can prove it only by producing the writing. In this respect S.91 and 92 supplement each other. They are both based on the "best evidence rule" though they differ in some material particulars also.

The Supreme Court held in Taburi Sahai v. Jhunjhunwala , that a deed of the adoption of child is not a contract within the meaning of section 91 and, therefore, the fact of adoption can be proved by any evidence apart from the deed. So is true of a will. Further the principle of exclusion of all other evidence applies only to the terms happens to be mentioned in a contract, the same can be proved by any other evidence than by producing the document. Where both oral as well as documentary evidence are admissible on their own merits and have been admitted, the court may go by the evidence which seems to be more reliable. There is nothing in the act requiring that the documentary evidence should prevail over the oral evidence.

**S.92 deals with the Exclusion of evidence or oral agreement and reads as-:**

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 term:

Proviso (1) - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want for due execution, want of capacity in any contracting party, want or failure of consideration, or a mistake in fact or law.

Proviso (2) - The existence of any separate oral agreements to matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether; r not his proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3) - 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.

Proviso (4) - 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, 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.

Proviso (5) - Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6) - Any fact may be proved which shows in what manner the language of a document is related to existing facts.

The principle laid down that when the terms of any such document have been proved by the primary or secondary evidence of the document, no evidence of any oral agreement or statement shall be admitted, as between the parties to the document or their representatives, for the purposes of contradicting, varying, adding to, or subtracting from the terms of the document. In other words, no oral evidence can be given to qualify the terms of the document and their representatives-in-interest from giving oral evidence concerning the contents of the document. Other parties left free to give such evidence.

The amount which appeared due on a promissory note was not allowed to be contradicted by showing that the promise had only agreed it need not be paid. The court followed Bai Hira Devi v. Official Assignee where it was held that "in the case of a conveyance, it would not be open to either of the parties to the document to prove that, if the consideration was mentioned as Rs. 10,000, in fact the consideration was less or more." It was pointed out by the Madras High Court in its decision in K.S. Narasimhachari v. Indo Comml. Bank that the consideration is a term of the contract that while the parties can give evidence under proviso (1) Of the section to show that the document was invalid because there was no consideration or there was failure of consideration or difference in the kind of consideration than that mentioned in the document, it will not be competent for him to prove a variation of the consideration recited in the document.

## EXCEPTIONS

1) Validity of document {proviso-1} the first proviso to S.92 says that evidence can be given of any fact which would invalidate the document in question or which would entitle a party to any decree or order relating to the document. The validity of a document may be questioned, for example, on ground that it was obtained by fraud, intimidation or illegality, or that the document was not duly executed, or that one of the parties was incompetent to contract, or that there was a mistake of fact or of law or that there was no consideration or consideration had failed.

2) Matters on which document is silent {proviso-2} evidence can be given of an oral agreement on a matter on which the document is silent. Such evidence is allowed subject to two conditions; firstly, the oral

agreement should not be inconsistent with the terms stated in the document. The terms which are expressly stated in the document cannot be allowed to be contracted by any oral agreement. Such evidence is allowed to be proved only on matters on which the document is silent. Secondly, in permitting the evidence of oral agreement the court is to have regard of the degree of formality of the document. If the document is extremely formal, evidence of an oral agreement shall not be allowed even on matters on which the document is silent. A written agreement, for example, is silent as to the time of payment of the price. If there is any oral agreement as to the time of payment of the same may be proved.

3) Condition precedent {proviso-3} the third proviso provides that the existence of any separate oral agreement constituting condition precedent to the attaching of any obligation under the document may be proved. Where the parties to a promissory note payable on demand, orally agreed that payment would not be demanded for five years, the Supreme Court allowed the oral agreement to be proved.

If the party liable under a document has already stated making payments under it, he cannot afterwards set up the defence of an oral condition precedent to liability. In a mortgagor's suit for rejection it was held that oral evidence could be admitted to show that the document was not intended to be acted upon, that it was a sham document and that it was executed only as a collateral security. Facts, however, showed no evidence to that effect.

4) Recession or modification {proviso -4} to rescind a document means to set it aside and to modify means to drop some of it as cancelled or to modify some of its terms; such oral agreement may be proved. This is, however, subject to one qualification stated in the proviso itself, namely, where the contract is one is required by law to be in writing, or where it has been registered according to the law relating to registration of documents, then proof cannot be given of any oral agreement by which it was agreed either to resigned the document or to modify its terms.

5) Usages and customs {proviso-5} the proviso, therefore, provide that the existence of any usage or a custom by which incidents are attached to a particular type of contract can be proved. But this is subject to the condition that the usage or custom of which proof is offered should not be against the express terms of the document. The usage should not be repugnant to or inconsistent with the document, for otherwise it would nullify the document. Where goods sold are to be carried by the railways, but the contract does not mention as to who is to arrange for wagons, evidence may be offered that by the custom of the trade seller had to arrange for wagons.

6) Relation of language of facts {proviso-6} every contract intended to apply to certain facts. The facts upon which the document is to operate are sometimes set out in the contract itself and sometimes not. Where, for example, a person transfers the whole of his property, but doesn't describe or state where his property is. In such cases the property to which the document relates can be proved by oral evidence. Similarly, where a written contract says that it subject to the "usual clause", the usage prevalent in a particular trade may be proved by oral evidence. Oral evidence is also receivable to throw light upon the nature of a document. The section does not fetter the power of the court to arrive at the true meaning of a document as disclosed by all the relevant surrounding circumstances.

In Abdullah Ahmed v. Animendra Kissen, the Supreme Court cited the following passage from Halsbury:

"The evidence of the conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the facts done under it is a guide to the intention of the parties in such a case and [particularly when acts are done shortly after the date of the instrument."

**EXCEPTION -1 Appointment of a Public Officer**

Where the appointment of a public officer is required by law to be made by writing and the question is whether an appointment was made, if it is shown that a particular person has acted as such officer that will be sufficient proof of the fact of appointment and the writing by which he was appointed need not be proved.

**EXCEPTION -2 Wills**

Wills admitted to probate in India may be proved by the probate. The document containing the will need not be produced. "Probate" is copy of the will certified under the seal of the court and, therefore, is a sufficient proof of the content of the will.

**AMBIGUOUS DOCUMENTS**

A document is ambiguous when either its language does not show the clear sense of the document or its application to facts create doubts, how far oral evidence can be allowed to clarify the language or to remove the defect? These sections can be placed in two groups depending upon their type of defect shown by the document.

**Ambiguities are of two kinds:**

1) Patent ambiguity, and

2) Latent ambiguity.

**PATENT DEFECTS {S.93-S.94}**

**Meaning of Patent defects.....**

Patent ambiguity deals with S.93 & 94. A patent ambiguity means a defect which is apparent on the face of the document. The document is apparently defective. Any person reading the document with ordinary intelligence would at once observe the defect. In such cases the principle is that oral evidence is not allowed to remove the defect. The reason for the rule is that the document being clearly or apparently defective, this fact must be or could have been known to the parties and if they did not care to remove it then it is too late to remove it when a dispute has arisen.

**S.93 deals with the Exclusion of evidence to explain or amend ambiguous document and reads as:-**

When language used in a document is, on its face, ambiguous of defective, evidence may not be given of facts which would show its meaning or supply its defect.

If the document had mentioned no price at all, oral evidence of the price would have been allowed under S.92 as to a matter of the fact on which the document is silent but not when the document mentions price of ambiguous nature. No extrinsic evidence can be given to remove patent defect. Where a lease deed left blanks at the place where the date of commencement should have been mentioned, but in another part it said that the first installment of rent would be paid on a certain date, the Allahabad High Court held that the date of the payment of the first installment could reasonably be fixed as the date of commencement. A contract for the sale of a part of the land of 5 acres, described the part to be sold as "one acre of a front land." It was held that what constituted the "front land" for this purpose was ascertainable. There was no confusion about the language used and, therefore, S.93 was not attracted.

**S.94 deals with the Exclusion of evidence against application of document of existing facts and reads as -:**

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.

This section applies when the execution of the document has been admitted and no vitiating fact has been proved against it. Where the document in question was a record of the proceeding of the Board and contained an admission under signature of the parties, it was held that an admission could be explained by the maker of it and, therefore, oral evidence of explanatory nature was admissible.

**LATENT DEFECTS {S.95 – S.97}**

**Meaning of latent defects.....**

Latent defect means a defect which is not apparent on the face of the record. The document makes a plain reading. There is nothing apparently wrong with its language. But when an attempt is made to apply it to the facts stated in it, it comes out that it does not accurately apply to those facts. Thus the defect is not in language used in the document, but in the application of the language to the facts stated in it, such a hidden defect is known as a latent defect.

**S.95 deals with the Evidence as to document unmeaning in reference to existing facts and reads as-:**

When language used in a document is plain in it, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

When the language of a document is plain but in its application to the existing facts it is meaningless, evidence can be given to show how it was intended to apply to those facts. Where for example, a house is agreed to sell by a written deed. The house is described to be located at a particular place or in particular city. It turns out that the seller has no house at that place or in that city, but has a house in a nearby place and that has also been in the occupation of the buyer. Evidence can be given to show that such e house was meant to be sold.

**S.96 deals with the Evidence as to application of languages which can apply to one only of several persons and reads as-:**

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 be given of facts which show of those persons or things it was intended to apply to.

Where a promissory note mentioned a date according to the local calendar and also according to the international calendar, but the two date turned out to be different, it was held that evidence could be offered to show which date was meant.

**S.97 deals with the Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies and reads as-:**

When the language used 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.

The principle of the section is that where the language of a document applies to one set of facts and partly to another, but does not apply accurately to either, evidence can be given to show to which facts the document was meant to apply.

**Difference between Patent Ambiguity and Latent Ambiguity**

| Patent Ambiguity | Latent Ambiguity |
|---|---|
| 1. Patent ambiguity is there where the language of document is so uncertain and effective thus no meaning can be given to the document. | 1. Latent ambiguity is such where the language of documents certain and meaningful but the language of document is not applied to the present circumstances. |
| 2. The patent ambiguity is personal and it is related to the person who executes the document. | 2. Latent ambiguity is objective in nature and it is related to subject matter and object of document. |
| 3. No oral evidence is allowed to remove patent ambiguity. | 3. Oral evidence is permitted to remove latent ambiguity. |
| 4. Patent ambiguity is based on rule that patent ambiguity makes the document useless. | 4. The rule of giving oral evidence in case of latent ambiguity is based on principle that latent ambiguity does not make the document useless. |
| 5. Patent ambiguity is on face of document and is evident from inspection of document itself. | 5. Latent ambiguity is not evident from prima facie inspection of document but becomes apparent when the language of document is applied to existing circumstances. |

**S.98 deals with the Evidence as to meaning of illegible character, etc. and reads as-:**

Evidence may be given to show the meaning of illegible or not commonly intelligible character, of foreign, obsolete, technical, local or provincial expressions, of abbreviations and of words used in a peculiar sense.

This section permits evidence to be given of the meaning of words or marks of illegible character or words which are not commonly of intelligible character, foreign words, obsolete words, technical, local and provincial expressions, abbreviations words used in a peculiar sense. An artist agrees to sell "all his models". Evidence can be given to show whether he, meant to sell all his models or modeling tools. Oral evidence is admissible for the purpose of explaining artistic words and symbols used in a document.

**S.99 deals with who may give evidence of agreement varying terms of document and reads as-:**

Person who is not parties to document or their representatives in interest may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document.

The parties to a document or their representative-in-interest cannot give evidence of a contemporary agreement varying the terms of the document. This disability is quite clearly contained in S.92. But this provision is modified by S. 99 in this extent that evidence of such an oral agreement can be given by a third party if he is affected by it.

**S.100 deals with saving of provisions of India Succession Act relating to Wills and reads as-:**

Nothing in this Chapter contained shall be taken to affect any of the provisions of the Succession Act (X of 1965) as to the construction to Wills.

## BURDEN OF PROOF

Chapter VII, S.101 to S.114 of Indian Evidence Act deals with the provisions of "burden of Proof".

The word 'burden of proof' has not been defined in Evidence Act .It is a fundamental principle of criminal jurisprudence that guilt of accused is to be proved by the prosecution, and an accused should be presumed to be innocent.

The expression burden of proof is explained in S.101 of Indian Evidence Act as, " 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 question is which out of two parties has to prove a fact. The answer to this question decides the question as to burden of proof.

### Meaning of 'Burden of Proof' –

In short The burden of proof means the obligation to prove a fact. Every party has to establish fact which go in his favour or against his opponent and this is the burden of proof. Evidence Act lays down some principle of burden of proof of general nature .

### Principle of Burden of Proof :

### Theoretically the basis is divided into two parts -

A) Concept of onus probandi

B) Factum probans

Thus together how to prove facts and who shall prove or who shall prove and to what extend ? Burden of proof is constant. Onus shifts. It consists and means that what is to be proved is fixed . e.g . burden is constant and who shall prove that is to be decided .

This liabilities and responsibilities to prove the fact is known as onus (burden) which shifts from shoulder of one party to the shoulder of another party. Burden of proof is always constant because it has reference to ingredients and concepts while onus shifted from shoulder to shoulder.

The rule of burden of proof in civil and criminal cases is of different nature. In civil proceedings the party who alleges certain things must prove his case , but proving beyond doubt is not necessary. In criminal cases however the guilt of the accused is to be proved beyond reasonable doubts otherwise the accused gets benefits of doubt .Cardinal (Important) rules as to burden of proof - Section 101, 102 and S.103 of the Indian Evidence Act, Provides three types of cardinal rules as burden of proof .

### S.101 of Indian Evidence Act explained Burden of Proof as under -

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence to facts which he asserts, must prove that those facts exist.

When a person is bound to prove the istence of any fact, it is said that the burden of proof lies on that person.

### Illustration

(a) 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.

(b) 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.

Supreme Court in Jarnail Sen vs State of Punjab A I R 1996 SC 755 that in Criminal Case, the burden of proving of the guilt of the accused beyond all reasonable doubt always lies upon prosecution, and therefore if it is fails to adduce the satisfactory evidence to discharge the burden, it cannot fall back upon evidence adduced by the accused person in support of their defence to rest its solely thereupon.

**S.102.On whom burden of proof lies :**

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) A sues B for land of which B is in possession, and which, as 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.

(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.

This section tries to locate the party on home burden of lies. the burden of proof lies upon the party whose case would fail. if no evidence is given on either side.

Case law in a Triro vs Dev raj A I R 1993 J&K 14 . in thus case when there was a delay in filing the suit, the defendant had taken a plea of limitation period. the plaintiff was in position to know the cause of delay the burden of proving that the case was within prescribed limit was on the plaintiff.

**S.103.Burden of proof as to particular fact**

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 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.

The principle of section 103 is that whenever a party wishes is the court to believe and act upon the existence of the fact, burden lies upon him to prove that fact .If party wishes ti the Court to believe that his opponent has admitted a fact burden lies upon him to prove that the fact of admission.

**Particular Cases with reference of burden of proof**

This principles are called rule of Convenience of burden of proof which are covered under section 104 to S. 113 and section 113 A and 114 A.

**S.104.Burden of proving fact to be proved to make evidence admissible**

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 wishes to give such evidence.

**Illustrations**

A wishes to prove a dying declaration by B .A must prove B's death.

B wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Section 104 provide, the proof of fact on which evidence become admissible. where the admissibility depends upon the proof of burden of another fact the party who wants to prove it will have to prove the fact on which admissibility depends.

**S.105.Burden of proving that case of accused comes within exceptions**

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

**Illustrations**

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.

(b) A, accused of murder, alleges, that by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on A.

(c) Section 325 of the Indian Penal Code, (45 of 1860), provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments. A is charged with voluntarily causing grievous hurt under section 325. The burden of proving the circumstances bringing the case under section 335 lies on A.

Section 105 thus provides that, if the accused claims that each case comes within any of the recognized exception the burden of proving that lies on him.

**S.106.Burden of proving fact specially within knowledge**

When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

**Illustrations**

(a) 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.

(b) A is charged with traveling on a railway without a ticket. The burden of proving that he had ticket is on him

Case -

Eshwarai vs Karnataka 1994 SC. in this case held that where a man and woman were found hiding under the bed in a bedroom of the person who was lying dead of injuries the of proof lies upon them to explain their presence and also the circumstances in which the deceased met his death.

**S.107.Burden of proving death of person known to have been alive within thirty years.**

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.

**S.108.Burden of proving that person is alive who has not been heard of for seven years.**

Provided 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.

**S.109.Burden of proof as to relationship in the case of partners, landlord and tenant, principal and agent**

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 those relationships respectively, is on the person who affirms it.

**S.110.Burden of proof as to ownership**

When the question is, whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner

**S.111.Proof of good faith in transactions where one party is in relation of active confidence.**

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.

**Illustrations**

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father

**Presumption as to Burden of Proof**

S111A (Amendment 1984). Presumption as to certain offenses.- (1) Where a person is accused of having committed any offense specified in sub-section (2), in-

(a) any area declared to be disturbed area under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or

(b) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace, and it is shown that such person had been at a place in such area at a time when firearms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offense.

**(2) The offenses referred to in sub-section (1) are the following, namely -**

(a) an offense under section 121, section 121-A, section 122 or Section 123 of the Indian Penal Code (45 of 1860);

(b) criminal conspiracy or attempt to commit, or abatement of, an offence under section 122 or section 123 of the Indian Penal Code (45 of 1860).

## S.112.Birth during marriage, conclusive proof of legitimacy

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

Case Smt. Dukhtar vs Mohd.Farooq Air 1987 SC.1049.

## S.113.Proof of cession of territory

A notification in the Official Gazette that any portion of British territory has1before the commencement of Part III of the Government of India Act,1935, (26 Geo. 5 Ch. 2) been caddied 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.

## S.113A.Presumption as to abatement of suicide by a married women

113A (Amendment 1983). Presumption as to abetment of suicide by a married woman.- When the question is whether the commission of suicide by a women had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

### Explanation

For the purposes of this section, "cruelty" shall have the same meaning as in section 498-A of the Indian Penal Code (45 of 1860).

State of U.P v. Harimohan (2000) 8 SCC 598.

A housewife was murdered in her in-laws' house. A letter written by her father two day's prior to the incident stated therein that she should be immediately taken back from the house of her in-laws or otherwise her brother-in-law, mother-in-law and husband would murder her. The defence plea was that the letter was written much earlier. It was held that even if it was so it will not make any difference as admittedly, it was proved to have been written by the deceased before her death. there Cruiser watches under section

Almgir Sani v State of Assam (2002) 10 SCC 277. The accused was charged under Section 302 and 304B IPC. He was acquitted of the offence under Section 302. The presumption under Section 113B was not automatically rebutted

## S113B.Presumption as to dowry death

S.113B. Presumption as to dowry death.- When the question is whether a person has committed the dowry death of a women and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.

### Explanation

For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860

## S. 114.Court may presume existence of certain facts

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.

### Illustration

The Court may presume -

(a) That a man who is in possession of stolen goods 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 particular;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(d) 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;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business had been followed in particular cases;

(g) That evidence which could be and is not produced would, if produced be unfavorable 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 unfavorable to him;

(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 (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, 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 young and ignorant person, completely under A's influence;

As to illustration (d)—It is proved that a river ran in a 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.

Amendment 2013 w.e.f.2013

**S.114A.Presumption as to absence of consent in certain prosecutions for rape.**

114A. In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation — In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code.

Case law

Nawab Khan vs State 1990 cr l j. 1179, it was held by the court the moment the prospectutrix with whom sexual intercourse is committed, disposes before the court that she did not give the consent to sexual intercourse. then the court shall presume that there was no consent. in such a case if the accused claimed that there was consent then he has to prove that the prosecutrix consented to the sexual intercourse.

The general rule with regard to burden of proving the fact is that he who asserts must Prove. the rule is in accordance with the principle that the burden of proof is upon the party for substantially asserts the affirmative of the issue but not on the party for denies. The reason behind this rule is that who drags another Into The court Must Bear the burden of proving the fact which he asserts .further it is very difficult to establish a negative when compared to an affirmative the expression, burden of proof has to distinct meanings one the legal burden .i.e .burden of establishing the case and second evidential burden for example burden of leading evidence .

# ESTOPPEL

The doctrine of Estoppels is based on the principal of equity. S.115, S.116 and S.117 of Indian evidence Act Deals with the provision doctrine Estoppel. It would be most inequitable and unjust if one person is allowed to speak contrary to his earlier statement. As it would cause loss and injury to the person who has acted on such statement.

## Object-

To Prevent commission of fraud against another.

## Meaning of Estoppel -

" Estopped means stopped, which means a person is not allowed or permitted to speak contrary to his earlier statement. "

## Definition of Estoppel :

S.115 of the Indian evidence Act defined Estoppel as follows, " When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

## Illustration

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title

## Conditions for Application of Doctrine of Estoppel -

For application the doctrine following conditions have to be satisfied-

1) There must be a representation made by one person to another person.
2) The representation must have been made as to fact and not as to law.
3) The representation must be as to an existing fact.
4) The representation must be intended to cause a belief in another.
5) The person to whom the representation is made must have acted upon that belief and must have suffered a loss.

## Provisions in Indian Evidence Act as to Estoppel-

### A) S.116.Estoppel of tenant and of license of person in possession

No tenant of immovable property of 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 not person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person has a title to such possession at the time when such license was given.

S.116 prevents and disables the tenant from denying the title of the landlord at the beginning. No tenant in possession shall be permitted to challenge or question the title of landlord at the time of commencement of

Tenancy. And no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title at the time when the licence was given. Thus no licencee shall be permitted to question or challenge the grant or licence at the time of granting the licence.

In Kuldeep Singh vs Shrimati Balwant Kaur ,AIR 1991 P & H. 291, when the tenant become wealthy of the property portion of which was let out to him, under the sale deed registered prior to one registered in favour of other. denied by him of relationship of tenant and landlord between him and subsequent vendor. It was held that tenancy right is not extinguished.

**B) S.117 Estoppel of acceptor of bill of exchange, bailee or licensee**

No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority of 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.

**Explanation (1)**

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.

**Explanation (2)**

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

**Case law -**

1) Rajesh Wadhwa vs Dr.(Mrs) Sushma Goyal AIR 1989 Delhi 144.

In this case the lease deed executed by land lady's father on behalf of landlady. Eviction petition by father under power of attorney of landlady. The tenant was estopped from taking plea that the land lady's father was not duly constituted attorney to file the eviction petition.

2) Ambika Prasad Mohanty Vs Orissa Engineering College and others AIR1989 Orissa 173.

In this case the plea was against cancellation of admission of student admitted in private Engineering College after the selection. The cancellation of his admission was on the ground that he had secured minimum marks in qualifying examination as prescribed in college prospectus. The university regulation does not prescribe any minimum marks for eligibility for admission to the engineering college estopped from cancelling the admission.

The principle of estoppel is a rule which prevents a person from taking up in consistent position from what he has pleaded or asserted earlier. The principle bailor.toppel is based on equity and good conscience the object of this principle is to prevent for and to manifest good faith amongst the parties. Only parties and no stranger can take advantage of it. Estoppel is only a rule of law. It does not give rise to a cause of action.

# COMPETENCY AND COMPELLABILITY OF WITNESSES

## WITNESS

As per Bentham, witnesses are the eyes and ears of justice. Often oral evidence is needed to clarify or help determine the rights and liabilities of the parties in a legal proceeding. Witnesses can be the people or experts with valuable input for the case. It is through witnesses and documents that evidence is placed before the court. Even the genesis of documents can be proved by the witnesses. Thus, the law has to be very clear with regards to certain issues like who is a competent witness? How many witnesses are needed to prove a fact? Can a witness be compelled to answer every question posed? How can the credibility of the witnesses be tested? Whether a witness can refer to notes to refresh his memory and what are the judges standing with respect to the witnesses.

In India, it is a common problem that many do not come forward as witnesses whether due to unreasonable delay in police or court proceedings or fear of persecution can not be determined that easily. In some countries like the USA, Canada and China, 'Protection of Witnesses' Acts have been enacted to offer protection and equity to a person who is a witness.

The Jessica Lal Murder case and Nitish Kataria murder case served to bring the up the issues regarding witnesses, their protection and conduct to the forefront. There are a lot cases, national and international, that an interested student can pursue for the sake of learning the practical application of law relating to witnesses, investigations and how it affects the outcome of a case.

## WHO IS A WITNESS?

A witness is a person who gives evidence or testimony before any tribunal.

Section 118 of the IEA generically lays down who may testify: All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question 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.

Explanation to Section 118 states 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.

Prima facie, the section says that every one is competent to be a witness as long as they can understand and respond to the questions posed and the Court is expected to pay special attention to the capability of the witnesses. This section is not concerned with the admissibility of the testimony of the witnesses or their credibility; it deals with competency of parties to be witnesses.

The plain and simple test of competency is whether a witness can understand the questions being posed to him and answer accordingly in a rational manner. Competency of witness to testify is actually a prerequisite to him being administered an oath.

In Rameshwar vs. State of Rajasthan AIR 1952 SC 54, it was held that an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not to his competency.

## CHILD WITNESS

In Suresh vs. State of Uttar Pradesh AIR 1981 SC 1122, it was decided that a child as young as 5 years can depose evidence if he understands the questions and answers in a relevant and rational manner. The age is of no consequence, it is the mental faculties and understanding that matter in such cases. Their evidence, however, has to be scrutinized and caution has to be exercised as per each individual case. The court has to

satisfy itself that the evidence of a child is reliable and untainted. Any sign of tutoring will render the evidence questionable as decided in Changan dam vs. State of Gujrat 1994 CrLJ 66 SC. If the court is satisfied, it may convict a person without looking for collaboration of the child's witness. It has been stated many a times that support of a child's evidence should be a rule of prudence and is very desirable.

A child witness is a privileged witness and he may not have to take an oath. In M Sugal vs. The King 1945 48 BLR 138, it was decided that a girl of about ten years of age could give evidence of a murder in which she was an eye-witness as she could understand the questions and answer them frankly even though she was not able to understand the nature of oath. The same principle has been applied in India too through Queen vs. Sewa Bhogta 1874 14 Beng and Prakash Singh vs. State of MP AIR 1993 SC 65.

A VOIRE DIRE test (Here, the Court puts certain preliminary questions that are unconnected to the case just in order to know the competency of the child witness) of a child witness is not essential but desirable. A judge may ask a few questions and get them on record so as to demonstrate and check the competency of the child witness. It can be presumed that this is a duty imposed on all the judges by the Section 118 of the IEA, 1872. The judge can ask questions also to find out whether the child has a rough idea of the difference between truth and falsehood.

In Suresh vs. State of UP case, it was held that a child who is not administered oath due to his young years and is not required to give coherent or straight answers as a privileged witness can give evidence but this evidence should not be relied upon totally and completely.

In the 90's a trend emerged where the Courts started recording their opinions that child witnesses had understood their duty of telling the truth to lend credibility to any evidence collected thereof. The Supreme Court has also commended this practice.

## LUNATIC

A Lunatic can depose during the period of lunacy. During the lucid interval, the person is able to understand and give rational answers. The Court has to check whether the witness possesses the required capability and intelligence to understand the questions being put to him and answer them in a rational manner. In R vs. Hill 1851 20 LJMC 222, a patient at a lunatic asylum gave evidence at a trial for manslaughter as it was proved that only with respect to his delusions, he was a lunatic and otherwise, he was a person capable of giving rational answers.

## PEOPLE OF EXTREME OLD AGE

Generally, the Courts put questions to determine the coherency as well as clarity of thought of aged witness. If found to be fit, there is no bar for the elderly to be witnesses.

## DUMB WITNESS

Section 119 of the IEA states that 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. Evidence so given shall be deemed to be oral evidence. It is said open court because a commissioner may define the movements or gestures as he understood them and probably not as the witness intended it. Plus, no description can be 100 % accurate. If the witness is literate, he may choose to write down the answers too.

This Section applies to those people too who can speak but do not want to. For example, a person may have vowed not to speak on a particular day (s) or to observe silence can give evidence through the means of writing, signs and gestures.

A person competent to give rational answers is not barred to testify on account of tensions with wife or being mentally upset as per the Section. Even an accomplice or an accused can be competent witnesses as discussed at the end of this chapter in Section 133. In Ugar Ahir vs. State of Bihar AIR 1965 SC, it was held that the maxim 'falsus in uno, falsus in omnibus' is not a rule of law or practice but places a duty on the courts to carefully separate the grin from the chaff.

A person who has a personal interest in conviction of an accused or is related to one of the parties is not ineligible to be a witness though his testimony/evidence should be scrutinized carefully to prevent any miscarriage of justice. The Supreme Court has even held that a woman not meeting the standards of morality of the society is no reason to discard her as a witness or not consider her evidence. The importance of rational and close evaluation of evidence in each of such scenarios is stressed time and again by the Supreme Court.

In conclusion it can be stated that the court can exercise discretion with respect to children, lunatics, elderly people, deaf or blind witnesses. The court can check for a level of understanding in these witnesses and then decide to refrain from taking evidence from them.

**Section 120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.—**

In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Under section 120 the husband and wife may give evidence against each other. In civil proceeding the parties to the suit are competent witnesses. Rule is also applicable in criminal proceeding as well.

In maintenance proceeding under section 125 of the Criminal Procedure Code the wife is competent witness. Both husband and wife is competent witnesses to give evidence in order to prove non-access against each other." The question whether evidence given by husband, as a power of attorney is useful of deciding issues in suit or not has to be decided by the court at time of disposal of case, but not at stage or recording evidence.

**Section 121 Judges and Magistrates:**

No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any question 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.

**Illustrations:**

(a) A, on his trial before the Court of Sessions, says that a deposition was improperly taken by B, the Magistrate. Â cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) "Sections 121 to 132 provide exception to the general rule that a witness is bound to tell the whole truth and to produce any document in his possession or power relevant to the matter in issue." There are cases in which the witness is a "privileged" with respect to certain matters and he cannot be made bound to answer questions while giving evidence.

Under this section a judge or a magistrate is a competent witness. A judge or a magistrate cannot be compelled to answer questions except: (i) upon the special order of the court to which he is subordinate or (ii) as to his conduct in court as such judge or magistrate in relation to a case tried by him.

A is accused before the Court of Sessions of having given false evidence before B, a Magistrate. Â cannot be asked what A said, except upon the special order of the superior Court.

(c) A is accused before the Court of Sessions of attempting to murder a police officer whilst on his trial before Â, a Sessions Judge. Â may be examined as to what occurred.

This section makes it clear that privilege granted to the judge or magistrate cannot be extended to the other kinds of witnesses. So long he or she is acting or has acted as a judge or a magistrate no question is permitted to be asked as to his or her conduct or judicial function. But the superior court by virtue of the section has right to question as to his or her conduct. The Supreme Court has extended the privilege to arbitrators also. According to the Supreme Court in no case an arbitrator can be summoned to explain how he came at his award.

The privilege given by this section is the privilege of the witness, i.e., the judge or magistrate of whom the question is asked. If he waives such privilege or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege. A session judge while trying a case cannot compel a committing magistrate, except under the special orders of the court to which he is subordinate.

## PRIVILEGED COMMUNICATIONS

The Indian Evidence Act mentions three kinds of communications as privileged from disclosure:

1. Matrimonial communications;

2. Official communications;

3. Professional communications.

### 1. Matrimonial Communications:

A person cannot be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married; nor will such communication be permitted to be disclosed except in the following three cases, viz.,:—

(i) If the person who made it, or his or her representative in interest, consents; or

(ii) In suits between married persons; or

(iii) In proceedings in which one married person is prosecuted for any crime committed against the other. (S. 122)

### 2. Official communications:

The provisions of the Act relating to official communications are contained in Ss. 123 and 124 of the Act, and can be discussed under the following two heads, viz.:

(a) Evidence as to affairs of State (S. 123)

(b) Disclosure of communications made in official confidence (S. 124)

### (a) Evidence as to affairs of State (S. 123):

S. 123 lays down that no one can 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 may give or withhold such permission as he thinks fit.

Under this section, the question whether the production of the document in question would be injurious to public interest is to be determined, not by the judge, but by the head of the department having custody of the document. (Beatson v. Skene, 1860 L.J. Ex. 430)

Commenting on this privilege, the Privy Council has remarked that the privilege regarding production of State papers is a narrow one, which must be exercised most sparingly. The principle and foundation of the rule is concern for public interest, and the rule cannot be applied any further than the attainment of the object requires. (Henry Greer v. State, 1931 PC. 254)

The Act does not lay down as to what documents are to be regarded as unpublished official records relating to affairs of State or communications made to an officer in his official capacity. It is not every official record or register or every official communication which can be regarded as privileged.

The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on ground of public interest, must as a class be withheld from production.

The following are examples of unpublished records of State, viz.—

(a) Document exchanged between two States;

(b) Document exchanged between the State and its own subjects;

(c) Document exchanged between Heads of Department of another State;

(d) Document exchanged between Heads of Department or between Ministers.

(b) Disclosure of communications made in official confidence (S. 124):

Under S. 124, no public officer can be compelled to disclose communications made to him in official confidence, if he considers that the public interest would suffer by the disclosure.

The question that arises under this section is whether the commu-nication in question was made to the public officer in his official capacity. This is a condition precedent which must be satisfied before the privilege can be claimed, and this question is primarily to be decided by the Court before which the privilege is claimed.

Courts have adopted a basic principle for deciding whether a particular document is a communication made in official confidence to a public officer or not, namely, whether the document produced was under a process of law or not. If the former is the case, it would be difficult to say that the document produced under the process of law is a communication made in official confidence.

If, on the other hand, a document is produced in a confidential departmental enquiry, not under the process of law, but for gathering of information by the department for guiding them in future action, if any, which they have to take, it would be a case of communication made in official confidence.(Killi Suryanarayana, 1954 Mad. 278)

**Professional communication**

It has been observed that a sound system of the administration of justice should possess three ingredients, namely a well planned body of law based on wise concepts of social justice, a judicial hierarchy comprised of the Bench and the Bar, learned in the law and inspired by high principles of professional conduct and existence of suitable generation to ensure fair trial.A "privileged professional communication" is a protection awarded to a communication between the legal adviser and the client. It is out of regards to the interest of justice, which cannot go on without the aid of men skilled in jurisprudence in the practice of Courts, and in those matters affecting rights and obligations, which form the subject matter of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived all professional assistance, a man would not venture to consult any skilled person, or would only dare to tell his counsel half his case. The following discussion compares the laws dealing with

**Privileged communications in India and England.**

**Indian law:**

In India, Sections 126 to 129 of the Indian Evidence Act, 1872 deal with privileged that is attached to professional communication between a legal adviser and the client. Section 126 and 128 mention circumstances under which the legal adviser can give evidence of such professional communication. Section 127 provides that interpreters, clerks or servants of legal adviser are restrained similarly. Section 129 says when a legal adviser can be compelled to disclose the confidential communication which has taken place between him and his client.

Section 126 states that no barrister, attorney, pleader or Vakil shall at any time be permitted to

1. disclose

# any communication made to him by or on behalf of his client or

# any advice given by him to his client in the course and for the purpose of his employment;

2. to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his employment.

There are certain exceptions to this rule. This Section does not protect from disclosure:

1. any communication made in furtherance of any illegal purpose;

2. any fact observed in the course of employment showing that any crime or fraud has been committed since the commencement of the employment.

The protection afforded under this Section cannot be availed of against an order to produce documents under Section 91 of the Code of Criminal Procedure. The document must be produced, and then, under Section 162 of this Act, it will be for the Court, after inspection of the documents, if it deems fit, to consider and decide any objection regarding their production or admissibility.

Under Section 126, it is not that every communication made by a person to his legal adviser is protected from disclosure but only those communications made confidentially with a view to obtain professional advice are privileged. It should also be remembered that the privileged extends only after the creation of pleader-client relationship and not prior to that. Also, communication must be made with the lawyer in his capacity as a professional adviser and not as a friend.

Considering the exception to this rule, existence of an illegal purpose will prevent any privilege attaching to any communication. Thus, communications made with a view to carry out a fraud are not privileged.

The scope of Sections 126, 127 and 128 is different from that of Section 129. The former Sections prevent a legal adviser from disclosing professional communication. Section 129 applies where a client is interrogated, whether he is a party to a suit or not. Section 129 states that no person shall be compelled to disclose in the Court any communication between him and his legal adviser unless he offers himself as witness. Thus, Section 129 makes a person immune from compulsory process. This immunity may extend to third parties, such as consultant who are recruited to help with the preparation of the case for trial. However, once the material has got out, it should not be kept out of Court on account of its confidential nature any more than would any other confidential matter. Also, if a party becomes a witness of his own accord he shall, if the Court requires, be made to disclose everything necessary to the true comprehension of his testimony.

In a recent case, an unsigned and undated letter which was allegedly written by the advocate-accused to his client-terrorist to remain absconding was held to be professional communication and not ' abetment' and thus could not be used against the advocate. But in another case, the Gujarat High Court held that disclosure was allowed where the client desired to obtain decree for money on basis of forged promissory note.

The rule is established for the protection of the client, not of the lawyer, and is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectuated, of serving full and unreserved intercourse between the two.

**English law:**

In England, the main category of privilege afforded to a communication is legal professional privilege. Further there are two types of legal professional privilege:

1. Legal advice priviledge:

It protects communication between a lawyer in his professional capacity and his client provided they are confidential and are for the purpose of seeking or giving legal advice. This type of legal priviledge is similar to that under Section 126 of the Indian Evidence Act.

2. Litigation privilege:

the second type of legal professional privilege arises only after litigation or other adversarial proceeding are commenced or contemplated. It is wider than legal advice privilege and protects all documents produced for sole and dominant purpose of the litigation, including all communication between

- a lawyer and his client
- a lawyer and his non professional agents
- a lawyer and a third party.

This type of privilege has similar protection under Section 127 and 129 of the Indian Evidence Act.

The above privileges have an exception similar to that under Indian law but the only difference is that under the Indian law, any communication made in furtherance of an illegal purpose is not privileged. Under the English law, the purpose must be criminal and not merely illegal.

In England, the Court of Appeal recently decided a landmark case on legal advice privilege. The decision given in "Three Rivers District Council and others v. Governor & Company of the Bank of England" is likely to have a profound impact on the way in which such privilege is handled due to which companies may need to reconsider the organisation of their internal systems.

The facts of the case were as follows:

He question of legal advice priviledge arose in the context of the ongoing litigation between liquidators of the BCCI and the Bank of England. In 1991, following the collapse of the BCCI, the government set up a Bingham Inquiry to investigate the Bank of England's supervision of BCCI and to consider whether the action taken by UK authorities were appropriate and timely. The Bingham inquiry Unit (BIU), an internal body at the Bank of England which consisted of three Bank officials, was set up to deal with all communications between the Bank of England and the Bingham Inquiry. The Bank of England was advised during the inquiry by the Bank's solicitors.

The liquidators of BCCI subsequently brought proceedings against the bank of England for misfeasance in public office relating to events emerging from the collapse of the BCCI. In these proceedings, the liquidators sought disclosure of certain documents prepared by the Bank employees and ex employees that came into existence at the time of the Bingham Inquiry, which were classified by the Court of Appeal as follows:

(i) documents prepared by the Bank's employees that were sent over to the bank's solicitors;

(ii) documents prepared by the Bank's employees with a dominant purpose of the Bank obtaining legal advice which were not sent over to the bank's solicitors;

(iii) documents prepared by the Bank's employees without the dominant purpose of the Bank obtaining legal advice but were sent over to the bank's solicitors;

(iv) documents under the above three points prepared by the bank's ex employees.

The Bank refused to disclose these documents on the ground that they were covered by the legal advice privilege. The claim for privilege was upheld at first instance. However, the Court of Appeal reversed the decision and decided that the documents were not covered by the privilege.

The decision of the Court of Appeal accepted the basic principle of law that documents passing directly between the lawyer, acting in his professional capacity, and the client are protected by the legal advice privilege, where the dominant purpose of those communication is to obtain legal advice. The Court of Appeal has discussed some important essentials of the legal advice priviledge: -

1. Who is he client?

2. What constitutes legal advice priviledge?

3. Whether evidential material obtained from the employees prior to the communication is excluded from priviledge?

1. Who is the client?

The Court took a narrow view of who actually constitutes the client as opposed to an employee of the client. While the Court accepted that a corporation could only act through its employees, it held that this in itself was not sufficient to protect al communication by an employee to the employer's lawyer. But the Court gave no guidelines as to when an employee may be deemed to be a client and when it may not.

2. What constitutes legal advice priviledge?

This question was left open but the Court suggested that obtaining information for employees and ex employees in the context of an investigation might be for the dominant purpose for enabling evidence to be presented to the investigation rather than to obtain legal advice, and so again fall outside the privilege. Thus, legal advice had to be distinguished from other forms of assistance a lawyer might provide.

3. Whether evidential material obtained from the employees prior to the communication is excluded from priviledge?

The Court appeared to treat preparatory documents as no more than the raw material on which the client can thereafter seek legal advice. The apparent consequence of the Court's decision is that all the following communication may not be protected by legal advice privilege:

(i) Communication and documents prepared by the client's employees, if not deemed to be the client, with the dominant purpose of obtaining legal advice, but not sent to the client's lawyers;

(ii) communication and documents prepared by the client's employees, if not deemed to be the client, with the dominant purpose of obtaining legal advice, which are intended to be sent to and are in fact sent to the client's lawyers;

(iii) communication and documents prepared by or obtained from independent third parties such as expert non legal advisers, i.e. brokers, economist or accountant ( and including ex employees) with a dominant purpose of obtaining legal advice, and then sent to the client but not sent to the lawyer; and

(iv) Communication and documents prepared by independent third parties (including those referred to in the third point) with a dominant purpose of obtaining legal advice for a client and passed by the third party to the client's legal adviser.

Practically, to implement these rules, it has to be seen whether the investigation or the regulatory proceedings are adversarial or non-adversarial. If adversarial, the wider litigation privilege would apply. If non-adversarial, only legal advice privilege would be applied. The Court of Appeal did, however, note that the scope of the legal advice is not clear cut as might be expected.

**Comparative Analogies:**

The effect of such a case in India will change the outlook toward legal advice privilege.

(i) The companies will have to establish well in advance who constitutes the client. When the company is the client it cannot be assumed that all the employees are treated as clients for the purpose of legal advice privilege. This has to be defined early in the process so that those handling the investigation know the scope of the protection from disclosure.

(ii) It will be appropriate to consider internal processes for the gathering of information and creation of preparatory documents for those investigations. The documents produced either by the employees, ex-employees or independent third parties, whether communicated to the lawyer or not, may not be protected and may have to be disclosed in subsequent litigation.

(iii) Safeguards have to be placed by ensuring that in-house and external lawyers prepare all the notes and documents in the context of the inquiry. But it has to be shown that dominant purpose of preparing the material was to obtain legal advice.

(iv) In general, the companies have to be cautious in producing documents or passing relevant information internally without the approval of the lawyer.

A lawyer is under a moral obligation to respect the confidence reposed in him and not to disclose communications which have been made to him in professional confidence i.e. in the course and for the purpose of his employment, by or on behalf of his client, or to State the contents or conditions of documents with which he has become acquainted in the course of his professional employment, without consent of his client. If such communications were not protected, no man would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights, and no man could safely come into a Court, either to obtain redress, or to defend himself.

The rigid enforcement of this rule occasionally operates to the exclusion of truth; but if any law reformer feels inclined to condemn the rule on this ground, he will do well to reflect on the eloquent language of the late Knight Bruce, LJ, who observed,

"Truth, like all other good things, may be loved unwisely, - may be pursued too keenly, - may cost too much. And surely the meanness and the mischief of prying into the man's confidential consultation with his legal advisers, the general evil of infusing reverse and dissimulation, uneasiness, suspicion and fear, into those communication which must take place, and which, unless in the condition of perfect security, must take place uselessly or worse, are too great a price to pay for the truth itself."

**Section 130 Production of title-deeds of witness not a party:**

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 pledge or mortgagee, or 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.

Principle:

Section 130 protects the witness who is not a party to a suit or proceeding. The section provides that a witness who is not a party to a suit cannot be compelled to produce:

(i) His title deed of any property,

(ii) Any deed or document by virtue of which he is pledgee or mortgagee of any property, and

(iii) Any document, the production of which might tend to criminate him.

But, such witness may be compelled to produce the document if he has agreed with the person seeking its production. "The reason for the rule is protection from the mischief and inconvenience that might result from compulsory disclosure of title."

**Section 131 Production of documents or electronic records which another person, having possession, could refuse to produce:**

No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production.

Under section 131 where a person in mediate possession of documents or electronic records cannot be compelled to produce such documents or electronic records which any other person would be entitled to refuse to produce the same. If the last mentioned person consents it can be produced before the court.

**Section 132 Witness not excused from answering on ground that answer will criminate:**

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

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

Under section 132 a witness is not excused from answering any question relevant to the matter in issue. This section abolishes the privileges of witness who is at the same time deprived of claiming the excuse. "It deals with the self- incriminating statements in the form of question." He is said to be compelled to give evidence on matter in issue. He cannot refuse answer except at the cost of adverse party.

Principle:

According to this section where a witness is questioned relevant to the matter in issue in any civil suit or criminal proceeding he can be compelled to answer all questions and cannot be excused from answering any question on the ground that the answer might expose him to civil or criminal proceeding or may tend to his prejudice.

The proviso, on the other hand, protects witness that if a witness is compelled to give answer, he shall not be liable for arrest or prosecution nor the answer can be proved against him in any criminal proceeding. However if the answer is false, the witness may be prosecuted for giving false evidence. The protection of the proviso to Section 132 can be applied to a private witness who has been compelled to answer any question during the investigation. A witness is absolutely protected from criminal prosecution on the basis of the evidence as an approver.

Nature of answer:

The answer must relate to compulsion. The protection is granted to the cases in which a witness is compelled to answer. In case of voluntary answer there is no protection. "If the witness is made to understand that he must answer all the questions without exception, it would amount to compulsion."

## ACCOMPLICE WITNESS

In the basic sense Accomplice Witness mean a witness to a crime who, either as principal, Accomplice, or Accessory, was connected with the crime by unlawful act or omission on his or her part, transpiring either before, at time of, or after commission of the offense, and whether or not he or she was present and participated in the crime . The word 'accomplice' has not been defined by the Indian Evidence Act, 1872. An accomplice is one of the guilty associates or partners in the commission of a crime or who in some way or the other is connected with the commission of crime or who admits that he has a conscious hand in the commission of crime .

To the lay man, accomplice evidence might seem untrustworthy as accomplices are usually always interested and infamous witnesses but their evidence is admitted owing to necessity as it is often impossible without having recourse to such evidence to bring the principal offenders to justice. Thus accomplice evidence might seem unreliable but it is often a very useful and even invaluable tool in crime detection, crime solving and delivering justice and consequently a very important part of the Law of Evidence.

**Section 133 of the Indian Evidence Act, 1872 deals with the Accomplice Witness.** It says 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.

Usually most of the crimes are committed at secluded places where there will not be any eye – witness to testify regard to these offences, and it would not be possible for the police to get sufficient evidence to prove the guilt of the accused. In such cases what police does is that it picks up one of the suspects arrested who is usually least guilty and offers to him an assurance that if he is inclined to divulge all information relating to the commission of the crime and give evidence against his own colleagues, he will be pardoned. So any such person who is picked up or who is taken by the police for the purpose of giving evidence against his own colleagues is known as an accomplice or an approver.

An accomplice is a competent witness provided he is not a co accused under trial in the same case. But such competency which has been conferred on him by a process of law does not divest him of the character of an accused. An accomplice by accepting a pardon under Section 306 CrPC(Code of Criminal procedure,1973) becomes a competent witness and may as any other witnesses be examined on oath.

An accomplice is one concerned with another or others in the commission of a crime or one who knowingly or voluntarily cooperates with and helps others in the commission of crime. It was held in R.K Dalmia v. Delhi Administration that "an accomplice is a person who participates in the commission of the actual crime charged against an accused.

### Categories of Accomplice:

1. Principal offender of First Degree and Second Degree: The principal offender of first degree is a person who actually commits the crime. The principal offender of the second degree is a person who either abets or aids the commission of the crime.

2. Accessories before the fact: They are the person who abet, incite, procure, or counsel for the commission of a crime and they do not themselves participate in the commission of the crime.

3. Accessories after the fact: They are the persons who receive or comfort or protect persons who have committed the crime knowing that they have committed the crime. If they help the accused in escaping from punishments or help him from not being arrested, such person are known as harbourers. These persons can be accomplices because all of them are the participants in the commission of the crime in some way or the other. Therefore anyone of them can be an accomplice.

**Competency of Accomplice as Witness:**

An accomplice is a competent witness provided he is not a co accused under trial in the same case. But such competency which has been conferred on him by a process of law does not divest him of the character of an accused. An accomplice by accepting a pardon under Section 306 CrPC becomes a competent witness and may as any other witnesses be examined on oath; the prosecution must be withdrawn and the accused formally discharged under Section 321 CrPC before he can become a competent witness. Even if there is an omission to record discharge an accused becomes a competent witness on withdrawal of prosecution. Under Article 20(3) of the Constitution of India, 1950 no accused shall be compelled to be a witness against himself. But as an accomplice accepts a pardon of his free will on condition of a true disclosure, in his own interest and is not compelled to give self-incriminating evidence the law in Sections 306 and 308, Code of Criminal Procedure is not affected. So a pardoned accused is bound to make a full disclosure and on his failure to do so he may be tried of the offence originally charged and his statement may be used against him under Section 308.

**When Accomplice becomes a competent witness:**

Section 118 of the Indian Evidence Act says about competency of witness. Competency is a condition precedent for examining a person as witness and the sole test of competency laid down is that the witness should not be prevented from understanding the questions posed to him or from giving rational answers expected out of him by his age, his mental and physical state or disease. At the same time Section 133 describes about competency of accomplices. In case of accomplice witnesses, he should not be a co-accused under trial in the same case and may be examined on oath.

**Some propositions have been made by Courts in this regard:**

First, courts have opined that such competency, which has been conferred on him by a process of law, does not divest him of the character of an accused and he remains a participes criminis and this remains the genesis of the major problem surrounding the credibility of such evidence.

Secondly, an accomplice by accepting a pardon under Section 306 CrPC becomes a competent witness and may as any other witness be examined on oath, the prosecution must be withdrawn and the accused formally discharged under Section 321 of the Criminal Code before he would be a competent witness18 but even if there is omission to record discharge, an accused is vested with competency as soon as the prosecution is withdrawn.

Thirdly, Article 20(3) of the Indian Constitution says that no accused shall be compelled to be a witness against himself. But as a co-accused accepts a pardon of his free will on condition of a true disclosure, in his own interest, and is not compelled to give self-incriminating evidence, the law in Section 306 and 308 of CrPC is not affected and a pardoned accused is bound to make a full disclosure and on his failure to do so he may be tried of the offence originally charged and his statement may be used against him under Section 308. This suggests that a participes criminis continues to be the same and if so then despite the fact that his involvement has been pardoned by a judicial act can be used for self-incrimination and to expect a "true and full disclosure" is unreal.

In order to be an accomplice a person must participate in the commission of the same crime as the accused and this he may do in various ways. In India all accessories before the fact if the participate in the preparation for the crime are accomplices but if their participation is limited to the knowledge that crime is to be committed they are not accomplices. However opinion is divided as to whether accessories after the fact are accomplices or not. In some cases it has been held that in India there is no such thing as an accessory after the fact whereas in some cases accessories after the fact have been held to be accomplices.

Three conditions must unite to render one an accessory after the fact:

- The felony must be complete
- The accessory must have knowledge that the principal committed the felony
- The accessory must harbour or assist the principal felon.

**Importance of Section 114 and 133:**

These are the two provisions dealing with the same subject. Section 114 of the Indian Evidence Act says that the court may presume that an accomplice is unworthy of any credit unless corroborated in material particulars.

Section 133 of the Indian Evidence Act says that an accomplice shall be a competent witness as against the accused person and a conviction the accused based on the testimony of an accomplice is valid even though it is not corroborated in material particulars.

**Necessity of Corroboration:**

Reading Section 133 of the Evidence Act along with Section 114(b) it is clear that the most important issue with respect to accomplice evidence is that of corroboration. The general rule regarding corroboration that has emerged is not a rule of law but merely a rule of practice which has acquired the force of rule of law in both India and England. The rule states that: A conviction based on the uncorroborated testimony of an accomplice is not illegal but according to prudence it is not safe to rely upon uncorroborated evidence of an accomplice and thus judges and juries must exercise extreme caution and care while considering uncorroborated accomplice evidence.

An approver on his own admission is a criminal and a man of the very lowest character who has thrown to the wolves his erstwhile associates and friends in order to save his own skin. His evidence, therefore must be received with the greatest caution if not suspicion. Accomplice evidence is held untrustworthy and therefore should be corroborated for the following reasons:

- An accomplice is likely to swear falsely in order to shift the guilt from himself.
- An accomplice is a participator in crime and thus an immoral person.
- An accomplice gives his evidence under a promise of pardon or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the prosecution.

Like the Supreme Court has laid down what is known as theory of "double test" in the case of Sarwan Singh v. State of Punjab . In this case Sarwan Singh who was the third accused, was tried along with two others, i.e. Gurdayal Singh and Harbans Singh, under Section 302 for the murder of one Gurdev Singh who was the brother of the first accused, Harbans Singh. The case was that Sarwan Singh along with Gurdayal Singh and Banta Singh, who became an approver later on , caused the death of Gurdev Singh and all the accused were convicted on the basis of the evidence of Banta Singh. So the evidence of Accomplice is subject to corroboration.

Nature of Corroboration:

Generally speaking corroboration is of two kinds. Firstly the court has to satisfy itself that the statement of the approver is credible in itself and there is evidence other than the statement of the approver that the approver himself had taken part in the crime. Secondly the court seeks corroboration of the approver's

evidence with respect to the part of other accused persons in the crime and this evidence has to be of such a nature as to connect the other accused with the crime. The corroboration need not be direct evidence of the commission of the offence by the accused. If it is merely circumstantial evidence of his connection with the crime it will be sufficient. The corroboration need not consist of evidence which, standing alone would be sufficient to justify the conviction of the accused. If that were the law it would be unnecessary to examine an approver. All that seems to be required is that the corroboration should be sufficient to afford some sort of independent evidence to show that the approver is speaking the truth with regard to the accused person whom he seeks to implicate.

**Detectives, Decoys and Trap Witness:**

Detectives, decoys and trap witness cannot be put on a par with the accomplice. These are the persons who act for the advancement of public justice and their aim is to bring the culprits to book. Although they pretend to collaborate with the culprits in the commission of crime they do not share the element of Mens rea. These persons therefore cannot be considered as accomplices and their evidence requires no corroboration.

Where a servant of the accused was a mute spectator to the crime being committed by the accused, he cannot be regarded as an accomplice witness as he cannot set to have participated in crime with the requisite mens rea.

**Honest Trap Witness:**

In C.R. Mehta v. State of Maharashtra, the accused acting in consort offered a sum of Rs. 3 Lacs to the Home Minister of State Government for cancellation of a detention order. The Minister giving an impression that he would consider the offer filed a complaint with Anti – Corruption Bureau and a trap was laid. While handing over the bribe money to the Minister the accused along with his three other co – accused were arrested. It was held that the complainant Minister cannot be equated with position of an accomplice and as a witness the quality of his evidence as also his general integrity being of high order conviction of the accused can be based even on his uncorroborated evidence.

**Application of the Concept of Accomplice witness in various cases:**

Janendra nath Ghose v. State of West Bengal the accused was tried for the offence of murder and the jury found him guilty on the evidence of the approver corroborated in material particulars. It was contended that there was a misdirection because the jury were not told of the double test in relation to the approver's evidence laid down in Sarwan Singh case.

Raghubir Singh v. State of Haryana – In this case it was observed:

"To condemn roundly every public official or man of the people as an accomplice or quasi – accomplice for participating in a raid is to harm the public cause. May be a judicial officer should hesitate to get involved in police traps when the police provides inducements and instruments to commit crimes, because that would suffer the image of the independence of the judiciary." In the present case the Magistrate was not a full – blooded judicial officer, no de novo temptation or bribe money was offered by the police and no ground to discredit the veracity of the Magistrate had been elicited.

Lachi Ram v. State of Punjab – the accused was charged with murder and was convicted on the evidence of an approver corroborated in material particulars. On the question whether proper tests were applied in applied in appreciating the approver's evidence the Supreme Court held:

"It was held by this Court in Sarwan Singh case that an approver's evidence to be accepted must satisfy two tests".

The first case to be applied is that his evidence must show that he is a reliable witness, and that is a test which is common to all witness. The fact that High Court did not accept the evidence of the approver on one part of the story does not mean that the high Court held that the approver was an unreliable or untruthful witness. The test obviously means that the Court should find that there is nothing inherent or improbable in the evidence given by the approver and there is no finding that the approver has given false evidence.

The second case which thereafter still remains to be applied in the case of an approver and which is not always necessary when judging the evidence of the witness, is that his evidence must receive sufficient corroboration. In the present case the evidence of the approver was reliable and was corroborated on material particulars by good prosecution witnesswho have been belived by the lower courts."

**Section 134 : Number of witnesses:**

No particular number of witnesses shall in any case be required for the proof of any fact.

As per section 134 no particular number of witnesses shall be required to prove the facts of any case. Even testimony of a single witness is sufficient if the court considers it worthy even without corroboration. It depends upon the nature and circumstances of a case. Material evidence and number of witnesses have to be taken note of by the courts to ascertain truth of allegation made.

The Supreme Court describes the testimony of sole witness is dependable. Where there is only a solitary eye-witness it is reliable. It is the quality not the quantity of evidence required by the court to pronounce its judgment. Numerical superiority is not the test of credibility of a party's evidence. When the testimony of eye-witness examined is cogent, confident and rediable, non-examination of his brother, sister or few others who had gathered near the house of deceased after the incident is of no significance and does not affect credibility of testimony of the said witness.

In order to sustain an order of conviction on the basis of testimony of a solitary witness, such evidence must be clear, cogent and convincing and should be of an unimpeachable character. The prosecution examined three injured witnesses but not two others in the same category. The court held this could not lead to the inference adverse to the prosecution because there is no compulsion as the number of witnesses.

**Single witness:**

It is the general rule of English Law that witnesses are weighted and not counted (Ponderantur tests non-nemerantur). The court can and may act the testimony of a single witness even though it is uncorroborated. The credibility of witness may be given weightages than that of testimony of a number of other witnesses. The conviction can be based on the testimony of single witness if found wholly reliable. Offences under the Narcotic Drugs and Psychotropic Substance Act, 1985 may be punished on the basis of seizing authority. The evidence has to be weighed and not to be counted and the court is concerned with the quality and not the quantity of evidence. There is no legal impediment in convicting a person on sole testimony of a solitary witness, provided he is wholly reliable

The Courts in this country have by harmoniously reading Section 114(b) and Section 133 together laid down the guiding principle with respect to accomplice evidence which clearly lays down the law without any ambiguity. This principle which the courts have evolved is that though a conviction based upon the uncorroborated testimony of an accomplice is not illegal or unlawful but the rule of prudence says that it is unsafe to act upon the evidence of an accomplice unless it is corroborated with respect to material aspects so as to implicate the accused. This guiding principle though very clear is often faced with difficulties with respect to its implementation. While implementing this principle different judges might have different levels of corroboration for accomplice evidence and thus with no hard and fast rules relating to the extent and nature of corroboration an element of subjectiveness creeps in which can result in injustice.

Accomplice witness can be a competent witness by fulfilling certain condition. One necessary condition for being Accomplice Witness is that he must be involved in the crime. So, the Accomplice Evidence can be taken as a strong evidence when it is subject to corroboration.

- How the evidence is presented and
- How witnesses lay their testimony in the court
- The powers of the judges in such matters.

**Section 135** talks about Order of production and examination of witnesses. It reads that the order in which witness 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.

The order in which the witnesses are to be presented for examination is to be decided by the party leading the evidence and the court is very slow in interfering with the order. However, the court has the discretion to do so as long as it is fairly exercised.

**Section 136** says that it is up to the Judge to decide as to admissibility of evidence. The Section reads as follows.

When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the 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.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, 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: X is accused of receiving stolen property knowing it to have been stolen. It is to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

It is proposed to prove a fact (X) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (T, U and V) which must be shown to exist before the fact (X) can be regarded as the cause or effect of the fact in issue. The Court may either permit X to be proved before T, U or V is proved, or may require proof of T, U and V before permitting proof of X.

Keeping Section 5 of the Act, a Judge may ask the party proposing to give evidence of any fact in what manner the alleged fact will be relevent if proved. A party seeking to put a document in evidence must show the section or provisions under which the document is admissible.

**Section 137** says that examination in-chief is the examination of a witness by the party who calls him and the examination of a witness by the adverse party shall be called his cross-examination. The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Examination in Chief is the first examination after the witness has been sworn or affirmed. It is the prerogative of the party by who the witness has been called to examine him in chief so as to get all the material facts within his knowledge to prove such a party's case.

Cross- Examination is a powerful tool to test the veracity of a witness and the accuracy or completeness of what he has stated. Cross- examination can at times take form of intensive questioning with the expected answers hinted to in such questions itself.

The examination and cross – examination has to be related to relevant facts but the cross –examination need not be confined to the facts to which the witness testified on his examination –in-Chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination ; and , if new matter is, by permission of the Court, introduced in-re-examination, the adverse party may further cross-examine upon that matter.

In civil cases, the advocate or counsel narrates the facts of the case and this is known as the opening of the peading. In criminal cases, one of the officers of the ourt reads out the summary of charge levelled against the accused as well as his plea.

**Three basic stages can be laid down in the examination of witnesses:**

**EXAMINATION IN CHIEF:**

Where the advocate for the party calling the witness introduces the witness and examines him, whether for the plaintiff or the defendant. It is a vivavoce examination. Here the questions are to the witness and he answers them and the answers are dult recorded. No leading questions ahould be posed here. It is preferable that the questions move in a chronological order so that the information presented can be lonked to the case better. Only relevant questions can be asked. Here the questions are asked for the sake of an answer,generally one that supports and proves the case for the party who called the witness.

**CROSS EXAMINATION:**

The cross-examination is also called examination exadverso. It can be used to impeach the credibility of the witness as well as expose the inaccuracies of the evidence of the particular witness.

If the defense fails to challenge the relevant facts that have been stated by the prosecution witness in the examination-in-chief, the court may take it as acceptance of the truth of such facts as was decided in Ganesh Jadhav V State of Assam 1995 1 CR LJ 111.

**RE-EXAMINATION:**

If the counsel thinks it is necessary, he may with the permission of the court re-examine his own witness. RE-examination cannot be claimed as a matter of right and its purpose is only to explain the new points or matter that may have been raised in the cross-examination and not to prove any other fact.

An order of re-examintaion can be made by the court on an application by a party or by court's own motion. If the prosecution does not examine its witness and offers him to be cross-examined, it is tantamount to abandoning one's own witness anf therefore, a witness cannot be thrown open to cross examination unless he is first examined-in-chief.

Each question should call for a fact and not for opinions or conclusions on law.

**Section 138** lays down the order of examinations of witnesses or turns in simple terms. It says that witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross –examined, then (if

the party calling him so desires) re-examined.Now sometimes a person is called to the court to produce a document. Section 139 says that such a person does not become a witness by the mere fact that he produces it and cannot be cross examined unless and until he is called as a witness. This principle was reteriated in Bijoy Bharati V Fakrul Hussain 1976 3 SCC 642.

Further **Section 140** says that witnesses to character may be cross-examined and re-examined.

This is an important basic concept of the law of evidence. We have to know about Leading questions. **Section 141** says that any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

Illustration: The purpose of examination-in-chief is that the witness can tell the relevent facts in his own words and put them across himself. A leading question is where a person does not have this freedom. For instance, if a witness is asked, "Do you live at XYZ place, City M?", he will answer in a mere yes or no and thus, it is said that leading questions put the answer in the mouths of the witnesses.

A leading question can put in the examination-in-chief or the re-examination with the permission of the Court. They cannot asked if objected to by the adverse party, in an examination-in-chief, or in a re-examination, except with the permission of the Court as per **Section 142.** The Courts permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved. A leading question may be asked in cross examination as per **Section 143.**

**Section 144** says that any witness may be asked, whilst 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, or if he is about to make any 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 which entitle the party who called the witness to give secondary evidence of it.

In simple terms, a witness can give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration: The question is, whether X assaulted Y. M deposes that he heard X say to N-"Y wrote a letter accusing me of theft, and I will be revenged on him". This statement is relevant, as showing X's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

**Section 145** allows the cross- examination of a witness with respect to previous statements made by him in writing or reduced into writing or reduced into writing, and relevant to matters in question, 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 of its which are to be used for the purpose of contradicting him.

The general rule is that the contents of a writing cannot be used unless the writing is itsel produced. This section is an exception to this rule. The prpose is two-fold, one that the credit of the witness can be impeached as well as that the statement cannot be used as a positive evidence of the facts contained inwriting. This Section mandates that if any contradiction in the evidence of a witness in his previous statement is intended to be used, the attention of the witness must be called to that particular part of his previous statement and has to proved in an appropriate manner.

This Section applies only to contradictions. But if there are omissions in the previous statements that are not contradictions but throw some doubt on the veracity of what was omitted, the uncertainty may be capable of removal by questions in re-examination as was decided in Laxman V State 1974 3 SCC 704.

**Section 146** says that a witness during cross-examination, may, in addition to the questions herein before 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 t expose him to a penalty or forfeiture.

Such questions can be asked even if the answer might tend to directly or indirectly incriminate the witness or expose him to a penalty or forfeiture.

**Section 147** talks about when a witness is to be compelled to answer. The section reads that if any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto. The purpose of the section is that a witness should answer such a question even if it injures his character. But if the witness answers the question in positive admitting the allegation contained in the question, the answer cannot be used for the purpose of subjecting him to an arrest or use it as evidence in any suit or proceeding.

It is up to the court to decide when the question will be asked and when the witness is compelled to answer as per **Section 148.** If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the Witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it.

In exercising its discretion, the Court shall have regard to the following considerations:

1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Courts as to the credibility of the witness or the matter to which 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.

The discretion of the court in such matters is something that has been utilised a lot in the past years. The Supreme Court has said that in certain cases, the court should not sit as a slient spectator. For example, if a defense laywer keeps asking a rape victim to go into the details of the incident continuosly, the court must stop such questions especially if they are not relevent and do not lead to any concrete evidence.

**Section 149** affords a bit of protection to the witness when it says that no question referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustration: A pleader is informed by a person in Court that an important. Witness is a dakait. The information being questioned by the pleader, gives satisfactory reason for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

Illustration:A witness of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

**Section 150** lays down the procedure of Court in case of question being asked without reasonable grounds. It says that if the Court is of opinion that any such question was asked without reasonable grounds. It 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 Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue exited as per **Section 151.**

In State of Uttar Pradesh V Raghubir Singh 1997 3 SCC 775, the Supreme Court considered it indecent and improper that scandalous questions where allowed to be put a woman whose child had been kidnapped and killed when the paternity of the child was nowhere an issue or a question.

The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form as per **Section 152**

**Section 153** lays down the rule of exclusion of evidence to contradict answers to questions testing veracity. It reads that when a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Though an answer given by a witness in response to a question intended to shake his credit cannot be contradicted by means of evidence, the witness can be charged and proscuted for giving false evidence under Section 193 of the Indian Penal Code if the answer is found to be false.

Exception 1 to the section says that if a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2 to the section says that if a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

Illustration: A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it. Evidence is offered to show that he was dismissed for dishonesty. The evidence is not admissible.

Illustration: X affirms that on a certain day he saw Y at Delhi. X is asked whether he himself was not on that day at Bombay. He denies it. Evidence is offered to show that X was on that day at Bombay. The evidence is admissible, not as contradicting X on a fact which affects his credit, but as contradicting the alleged fact that Y was seen on the day in question in Lahore.

In Sri Rama Reddy V V V Giri 1970 2 SCC 340, it was decided that evidence of a prior statement can be allowed provided it is relevant to the matte in issue. It was further clarified that such evidence could be used to support of contradict the evidence given in court.

## HOSTILE WITNESS

The terms 'hostile' or 'adverse' witnesses are unknown to IEA. Under the common law, a hostile witness is one who is not desirous of telling the truth at the instance of the party that called him. In Bakshi V State AIR 1979 SC 569, it was decided that when a prosecuation witness turns hostile by stating something that is destructive to the prosecution case, the prosecution is entitled to pray that the witness may be treated as hostile. Further in Samir Das V State Of Tripura 1999 CR LJ 953 GAU, it was decided that unless some material is shown that the witness has resiled from what he stated during investigation, the prosecution cannot be permitted to cross-examine the witness by treating him as hostile. Now, we will discuss the provisions of law involved.

**Section 154** says 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.

A witness who lets down the party calling him is called a hostile witness. The Supreme Court said that reliance can be placed on the hostile witness in reference to the accused about whom his testimony was truthful and natural. Thus, a hostile witness's testimony may not be wholly believed or wholly rejected. It must be scrutinised and the parts consistent with the defense or prosecution may be taken into consideration.

In Rangilal V State 1991 CRI LJ 916 ALL, it was decided that the evidence of a hostile witness cannot be discarded and it can be used to corroborate other reliable evidence if such reliable evidence exists on record.

In Sat Pal V Delhi Administration 1976 1 SCC 727, it was decided that evening a criminal prosecution, when a witness lets down the party calling him as a witness, his evidence cannot be as a matter of law be treated as wiped off completely from the record. It is for the court to decide whether the witness stands discredited or part of his testimony may be true. As a rule of prudence, it has been suggested that the judge should discard the evidence in toto.

Even **Section 155** can be followed to impeach the credit as the section reads, 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 90[accepted] the offer of a bride, or has received any other corrupt inducement to give his evidence;

3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

In simple terms 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.

Illustrations: X sues Y for the price of goods sold and delivered to Y. M says that he delivered the goods to Y. Evidence is offered to show that, on a previous occasion, he said that he had delivered goods to Y. The evidence is admissible.

X is indicated for the murder of Y. M says that Y, when dying, declared that X had given Y the wound of which he died. Evidence is offered to show that, on a previous occasion, M said that the wound was not given by X or in his presence. The evidence is admissible.

**Section 156** renders the questions tending to corroborate evidence of relevant fact admissible. The section reads that 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 believes that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration: X 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.

**Section 157** says that 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 component to investigate the fact, may be proved.

**Section 158** of the act reads that whenever any statement, relevant under section 32 or 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.

**Section 159** allows a witness to refresh his memory. It says that a witness may, while under examination, refresh his memory by referring to any writing made by 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.

The witness can refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

The Court should be satisfied that there is sufficient reason for the non – production of the original.

An expert may refresh his memory by reference to professional treatises.

In State Of Ap V Cheealapati Ganeshwara Rao AIR 1963 SC 1850, it was decided that an approver can rely on the account books maintained by him.

**Section 160** says that a witness may also testify to facts mentioned in any such document as is mentioned is 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.

Illustration: A book- keeper may testify to facts recorded by him in books regularly kept in the course of business, if he know that the books were correctly kept, although he has forgotten the particular transactions entered.

**Section 161** allows the right of adverse party as to writing used to refresh memory. It says that 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.

**Section 162** of IEA says that 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 on by the Court. The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code (45 of 1860).

**Section 163** lays down that 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.

**Section 164** says that when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration: X sues Y on an agreement and gives Y notice to produce it. In court X calls for the document and Y refuses to produce it. X gives secondary evidence of its contents. Y seeks to produce documents itself to contradict the secondary evidence given by X, or in order to show that the agreement is not stamped. He cannot do so.

**Section 165** affords to the judge the right to put questions or order production. It says that 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 of irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer give in reply to any such question. This is allowed so long as the judgement must be based upon facts declared by this Act to be relevant, and duly proved.

This section does not authorize any Judge 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; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted.

**Section 166** has lost its significance as its subject matter, jury system, is no longer in existence.

## IMPROPER ADMISSION & REJECTION OF EVIDENCE

S. 167 of Indian evidence Act lays down that the improper admission or rejection of evidence is not a ground for reversal of judgement or for new trial of the case , if the Court considers independently of the evidence improperly admitted, there was evidence enough to justify the decision, or that if the rejected evidence had been admitted it ought not have varied the decision.

When therefore, an appeal is grounded on the improper exclusion or admission of evidence, the appellant must be prepared to show , not only that there has been an improper admission or exclusion but that a mockery of justice has been thereby caused.

**S.167- No new trial for improper admission or rejection of evidence -**

The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions 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.

**Scope- This section applies to civil and criminal cases .**

**Effect of improper admission or rejection in Civil cases -**

The improper admission or rejection of evidence is not ipso facto ground for new trial , where there is ample evidence to justify decision irrespective of the admission or the rejection of the evidence.

But it should be borne in mind that the reception of inadmissible evidence is less injurious than the rejection of admissible evidence because in the former case in arriving at a decision the evidence wrongly admitted can well be excluded from consideration whereas in the latter case the evidence wrongly admitted can well be excluded from consideration whereas in the latter case the evidence rejected can only be brought on record by having recourse to further proceeding.

**In criminal cases -**

This section applies to criminal cases also. It is only when the high Court feels doubt that if one fact were not there whether the opinion or decision of a certain authority would have been the same , that the high Court interferes but where it is patently clear that there would have been other decision, in that event the extraneous circumstances above would not vitiate the order.

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