LAW of EVIDENCE

[LEADING CASES, MATERIALS & Q.A.]

Dr. ASHOK K. JAIN
LL.M; Ph.D (Delhi)

Ascent Publications
21/29, Shakti Nagar, Delhi-110007

FIRST EDITION, 1998
REPRINT *2001/2003/2005/2006/2009*
SECOND EDITION, 2008 (WITH SUPPLEMENT2008)
THIRD ENLARGED EDITION, 2010
FOURTH EDITION **2012**

Price : Rs. 150.00

PUBLISHED BY ASCENT PUBLICATIONS, **21/29,** SHAKTI NAGAR, DELHI.
PRINTED AT GL S. OFFSET, DELHI.

CONTENTS

4. STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES: DYING DECLARATION

9. Estoppel

10. Witnesses

11. Examination of Witnesses

REFERENCES

1. *Avtar Singh:* The Law of Evidence (Central Law Agency)
2. *Batuk Lai:* The Law of Evidence (Central Law Agency)
3. *Ratanlal & Dhirajlal:* The Indian Evidence Act, 1872 (Wadhwa & Co.)
4. *Vepa P. Sarathi:* Elements of the Law of Evidence (Eastern Book Company)
5. *Monir:* The Law of Evidence (Short Edition)
6. *Sarkar* on Evidence
7. *A.N. Saha:* Law of Evidence
8. *Phiphson & Elliot:* Law of Evidence
9. *Wigmore* on Evidence
10. *N.H. Jhabvala:* The Indian Evidence Act (C. Jamnadas &Co.)

Other Sources

1. The Landmark Judgments of 1997-1998 - *Ashok K. Jain.*
2. *Supreme Court Yearly Digests - SCYD* (1995-2009) - *Shailendra Malik* (Ed.) (Eastern Book Co.).
3. *Cases and Materials on Law of Evidence* - Faculty of Law, Delhi University, Delhi.
4. *Question Papers Referred* - Delhi and Other Indian Universities; Competitive Exams like IAS.

TABLE OF CASES

A

B

C

D

E

F

G

H

I

J

K

L

H

N

0

P

Q

R

1 Introduction

Substantive and Procedural Laws[1]

Laws may be divided into substantive and procedural laws. The laws by which rights, duties and liabilities are defined are called *substantive* laws e.g. I.P.C. (which defines several offences and also lays down the punishment for such offences). The laws which prescribe the mode by which the application of the substantive law is regulated are called *procedural* laws e.g. Cr.P.C. The procedural laws can be further divided into two *parts: firstly*, there are rules dealing with various procedures to be followed in a court of law. *Secondly*, there are rules dealing with the mode of the proof of the existence or otherwise of rights, duties and liabilities e.g. Evidence Act

The object of every judicial investigation is enforcement of some right or liability which invariably depends upon certain facts. Law of evidence is a system of rules for ascertaining the controverted questions of facts in judicial inquiries. The substantive law merely defines what facts go to constitute a right or liability. The law of evidence inquires into these facts; it is a procedural law which provides, *inter alia*, how a fact is to be proved.

The law of evidence bears the same relation to a judicial investigation as logical to the reasoning. However, there are limitations on the free process of reasoning in the form of certain rules or principles. The law

1. How substantive law is different from procedural law? Explain briefly while taking the example of the Indian Evidence Act, 1872. *[D.U.-2007]*

of evidence is a system of rules which a court has to follow. The law of evidence is basically procedural and does not affect" substantive right of parties. However, it has here and there overtones of substantive law. For example, the law of estoppel can defeat a man's right. It shuts his mouth. It would not permit him to speak of his rights.

Role of law of Evidence in Civil/Criminal proceedings

The rules of law of evidence for civil and criminal cases are, in general, the *same* e.g. the method of proving that a particular person is dead in respect of civil case (person executing the will died or not on a particular date) or criminal case (a person charged with murder). But, there are certain sections of Evidence Act which apply only to the civil cases (e.g. Ss.115 -117 dealing with estoppel) and some only to the criminal cases (e.g. Ss. 24-30 dealing with confessions).

The method of proving (i.e. burden of proof is on the prosecution /plaintiff) is same in both, but there is a marked difference as to the effect of evidence (or weight of evidence) in civil and criminal cases. There are marked variations in standards of proof in civil and criminal cases (discussed later).

Criticism of Law of Evidence

A crucial question is: Does this elaborately framed code of law of evidence give any assistance to the judge, whether and how far he ought to believe what the witness say? The answer is a judge cannot absolutely rely on the rules of evidence.

No rule of evidence can guide the judge on the fundamental question of whether evidence as to a relevant fact should be believed or not; and if believed what inference to be drawn from it as to the main fact. Again, the rules of evidence are not rules of logic - they throw no light at all on a further question of equal importance to the one first stated.

Rules of evidence are artificial. The best guide of judge on a question is his own common sense and experience of human nature. A person ignorant of those rules may give a much better answer than a judge.

Owing to the difficulty and abstruseness of the doctrines propounded, the courts are less eager to entertain and the lawyers are diffident to urge,

the questions of law of evidence which requires closer and critical study of the provisions of Evidence Act. It is suggested that the rules of evidence should not be pedantic nor should discretion be too wide.

Law of Evidence in India

The word 'evidence' is derived from the Latin word *evident* or *evidere*, which means "to show clearly, to discover clearly, to ascertain, to prove". Historically described as child of the jury system, the system associating with the judge "twelve men" in the administration of justice.

The object of rules of evidence is to help the courts to ascertain the truth, to prevent protracted inquiries, and to avoid confusion in the minds of judges, which may result from the admission of evidence in excess. Thus, the Indian Evidence Act, 1872 was passed with the main object of preventing indiscipline in the admission of evidence by enacting a correct and uniform rule of practice.

There are three main *principles* which underlie the law of evidence:-

(i) Evidence must be confined to the *matters in issue.*

(ii) *Hearsay* evidence must not be admitted.

(iii) The *best* evidence must be given in all cases.

The Indian Evidence Act, 1872 is mainly based on the English law of evidence. It was drafted by Sir James Stephen.- The Act is not exhaustive i.e. it does not purport to contain all the rules of evidence. For the interpretation of the sections of the Act, the courts can look to the relevant English common law. However, the courts cannot import any principle of English law which is inconsistent with what is laid down by the Act.

Scheme of the Indian "Evidence Act, 1872

The Indian Evidence Act is divided into three main Parts:

(I) Relevancy of Facts (Chapter I containing Sees. 1-4 deals with preliminary points; Chapter II deals with 'what facts may and may not be proved' - Sees. 5-55).

2. Who drafted the Indian Evidence Act, 1872? *[D. U. -2007]*

(II) Mode of Proof (Chapters III to VI deals with 'how are the relevant facts to be proved', etc. - Sees. 56-100).

(III) Production and Effect of Evidence (Chapters VII to XI deals with 'by whom and in what manner must the evidence be produced' - Sees. 101-167).

The provisions of the Indian Evidence Act are intended to separate the grain from the chaff, and secure for the consideration of the court the best evidence. Till 2000, nineteen amendments have been made in the Act.

Application of the Indian Evidence Act, 1872

The Act applies to all judicial proceedings in or before any court, including courts-martial (except under the Army Act, Naval Discipline Act and Air Force Act), but not to affidavits presented to any court or officer, nor to proceedings before any arbitrator. It shall come into force on 1st September 1872 (Sec. 1).

The Act applies to *judicial* inquiries only and *not* an administrative inquiry. An enquiry is judicial if the object of it is to determine a jural relation between the parties. A judicial proceeding is one in the course of which evidence is or may be legally taken on oath [Sec. 2 (i), Cr.P.C.]. An execution proceeding is a judicial proceeding, but a contempt proceeding is not. Proceedings under the Income Tax are *not* judicial proceedings under this Act, but proceedings before Industrial Tribunal has been held to be judicial proceeding.

For the purposes of the Evidence Act, an inquiry is *judicial* if it is under an obligation to take evidence from both sides, to hear both sides and then to formulate a judgment by the use of discretion. Such an inquiry is different from a fact-finding inquiry in which only discovered facts have to be recorded and there is to be no use of discretion i.e. an administrative e inquiry.

The Act does not apply to 'affidavits' because the deponent's assertion of facts on the basis of his personal knowledge does not constitute 'evidence'. An affidavit is, however, used as a mode of proof. It can become evidence only by consent of the party or if specifically authorized by any provision of law viz. Order 19, C.P.C.; Sees. 295-297, Cr.P.C.

Further, *arbitrators* have to follow the principles of natural justice but they are not bound by the law of evidence *(Munic. Corpn. Delhi vjagan Nath Ashok Kumar* AIR 1987 SC 2316). Still further, the Evidence Act has no application to enquiries conducted by the *tribunals*, even though they may be judicial in character; such tribunals follow rules of natural justice.

Lexfory - Law of evidence is the *lex fori* i.e. law of the forum (or court) in which a case is tried ('law of the place of the action'). Whether a witness is competent or not; whether certain evidence proves a fact or not; that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced and where the court sits to enforce it.

Where evidence is taken in one country in aid of a suit or action (proceeding) in another country, either on ordinary commission or with the assistance of the local courts, the law applicable to the recording of evidence, would be the law prevailing in the country where the proceeding is going on *[Praful B. Desai* (2003) 4 SCC 60].

Repeal of Enactments

Sec. 2 (1) repealed all rules of evidence which were *not* contained in any Statute, Act or Regulation in force in any part of British India. Before passing of the Indian Evidence Act, the rules of evidence were governed by the rules of English Common Law, Hindu and Mohammedan Laws, and the rules of Equity, Justice and Good Conscience. Sec. 2 (1) repealed all those rules of evidence.

The Repealing Act, 1938, has *repealed* Sec. 2 and Schedule.

The Act a *Complete Code*

The Indian Evidence Act, 1872 is mainly *based* on the English law of evidence. The Act consolidates, defines and amends the law of evidence. The Act, however, is *not* exhaustive, i.e. it does not purport to contain all the rules of evidence. For the interpretation of the sections of the Act, the courts can look to the relevant English common law. However, the courts cannot import any principle of English law which is inconsistent with what is laid down by the Act.

The law of evidence is contained in the Evidence Act and in *other* Acts and Statutes which make specific provisions on matter of evidence viz. Order XXVI, C.P.C.; Sees. 291-292, Cr.P.C; Sees. 59 and 123, T.P. Act. It may be noted that the Evidence Act deals with the particular subject of evidence and is a 'special' law. Hence, no rule about the relevancy of evidence contained in the Evidence Act is affected by any provision in the Cr.P.C. or any other enactment unless it is so specifically stated in the Code or it has been repealed or annulled by another statute.

Evidence excluded by the Evidence Act is inadmissible even if it seems essential for ascertainment of truth. Further, parties cannot contract themselves out of the provisions of the Act. Likewise, a court cannot on the ground of public policy, exclude evidence relevant under this Act.

DEFINITIONS: INTERPRETATION CLAUSE

In this Act the following words and expressions are used in the following sense unless a contrary intention appears from the context: "Court"; "Fact"; "Relevant"; "Facts in Issue"; "Document"; "Evidence"; "Proved"; "Disproved"; "Not Proved"; "India" (Sec. 3).

Court

"Court" includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence. This definition is not exhaustive.

It may be noted that in a trial by jury, the Court includes jury. A Court does not include an arbitrator though he is legally authorized to take evidence.

Fact[3]

"Fact" means and includes -

(1) any thing, state of things, or relation of things, capable of being perceived by senses [i.e. *external* facts; illustrations (a), (b) and (c)],

3 What is a fact? How is it different from 'fact in issue'? Give two illustrations of each. *[D.U.-2009]*

(2) any mental condition of which any person is conscious *[internal* facts; illustrations (d) and (e)].

Illustrations

(a) That there are certain things arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something is a fact.

(c) That a man said certain words is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation is a fact.

Law has not merely to deal with things physically but also with things which are so hidden as to be beyond physical observation, such as, a state or condition of a person's mind. Thus, intention, fraud, good faith, negligence, etc. are facts.[4] It has been said that "a state of man's mind is as much a fact as the state of his digestion". The state of person's health is a fact. The psychological facts can only be proved by circumstantial evidence.

The facts may be *positive* or *negative*. The existence of a certain state of things is a positive fact; the non-existence of it is a negative fact.

The fact sought to be proved *{factum probandum)* is called "principal facts", the facts which lead to establish it are called 'evidentiary facts' *(factum probans).*

Facts in Issue[5]

"Facts in issue" means and includes - (1) any act from which either by itself or in connection with other facts, the existence, non-existence,

4. Give an example of 'fact' which is not capable of being perceived by the senses. *[LCI 1-2006]*

5. Write a short note on 'Facts in issue'. *[LC.1-94/95; L.C.II-94/95]*
Distinguish between 'fact in issue' and 'relevant facts.' *[D.U.-2007]*

nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows, (2) any fact asserted or denied in answer to an issue of fact recorded under the Civil Procedure Code.

Facts which are in *dispute* are facts in issue. Evidence becomes necessary only in reference to facts which are in controversy or dispute between the parties. Further, the fact should be such that the question of right/liability should depend upon it. The following *illustration* makes clear the point:-

"A is accused of the murder of B". At his trial the following facts may be in issue - that A caused B's death; that A intended to cause B's death; that A had received grave and sudden provocation from B; that A at the time of doing that act which caused B's death, was, by reason of unsoundness of mind incapable of knowing its nature.

Thus, every fact which a plaintiff must prove in order to get adjudication in his favour, or which a defendant may prove to defeat the suit, becomes a fact in issue. Facts in issue will depend upon the provisions of the substantive law applicable to the offence. If, for example, the action is for the tort of negligence, such of the ingredients of liability for negligence which are in dispute shall be the facts in issue. If the plaintiff alleges that the defendant was under duty of care towards him and the defendant denies the fact, this fact will be a fact in issue between the parties. Thus, facts in issue depend upon the ingredients of the offence and the state of the parties' pleadings. A fact in issue is called the 'principal' fact; or *factum probandum.*

In criminal matters, the allegations in the charge-sheet constitute the facts in issue. In civil matters, the process of ascertaining facts in issue is known as framing issues. The 'issue of fact' under C.P.C. is equal to the 'fact in issue' of the Evidence Act.

Whatever be the facts in issue, there existence has to be proved to the satisfaction of the court before the court can be called upon to pronounce a judgment on the basis of those facts.

Relevant Facts[6]

"One fact is said to be *relevant* to another when the one is connected with the other in any of the ways referred to in the provisions of chis Act relating to the relevancy of facts", viz.

(I) facts logically connected with facts in issue (Ss. 6-16),

(II) admissions and confessions (Ss.17-31),

(III) statements by non-witnesses (Ss. 32-33),

(IV) statements under special circumstances (Ss. 34-38),

(IV) judgment in other cases (Ss. 40-44),

(V) opinions of third persons (Ss. 45-51),

(VII) evidence as to character (Ss. 52-55).

It is to be noted that the section does not define the term "relevant". Rather, it simply indicates when one fact becomes relevant to another. Normally, facts relevant to an issue ate those facts which are necessary for proof or disproof of a fact in issue. Thus, relevant facts (or evidentiary facts) or *factum probans* are those which are capable of affording a reasonable presumption as to either the facts in issue or the principal matters in dispute. The word 'relevant' has been held to be 'admissible' *(Lakbmi* v *Haider,* 3 CWN 268). Relevant facts are not themselves in issue, but are foundations of inferences regarding them.

For example, "when A is accused of the murder of B", the 'relevant facts' are - A had a motive and opportunity to kill B, he had made preparations by buying a knife, etc., or after the murder he was seen running with blood-stained knife in hand.

Relevancy implies relationship and such relationship with the facts in issue as convinces or has a tendency to convince the judge as to the existence or otherwise of the facts in issue. The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one taken by itself or in connection with other facts proves or renders probable the existence or non-existence of the other. It may be noted that circumstantial evidence

6. Write a short note on 'Relevant facts' **[LC./-95; *L.C.II-94/95***

is evidence that *relates* to facts, other than those in issue, which by human experience, have been found to be so associated with the fact in issue that the latter may be reasonably inferred there from.

Evidence[7]

"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 *{oral/ocular* evidence).

(2) all documents produced for the inspection of the court *(documentary* evidence); (a document is evidence only when it is produced for the inspection of the court." A writing obtained by the court for the accused for comparison is *not* evidence as it is not a document produced for the inspection of the court).

This is not a real definition of the term "evidence", but is rather a statement of what the term "evidence" includes. The word 'evidence' implies the state of being evident i.e. plain, apparent or notorious; but it is applied to that which tends to render evidence or generate proof of a fact. The term 'evidence' means anything by which the alleged matter or fact is either established or disproved. Anything (exclusive of mere argument) that makes the thing in question evident to the court is evidence.

For example, where the question is whether an explosion took place before a fire occurred. The noise of the explosion and its flash are evidence of it. Persons who saw the flash or heard the noise can give evidence of the fact of the explosion. If the happening of a fact is recorded on anything apart from human memory, that record is also an evidence of the happening.

The definition as given here includes only two kinds of evidence, i.e., statements of witnesses and documents. But this does not mean that there cannot be any other kind of evidence. For example, when the judge inspects the scene of occurrence and draws a chart of it that is also evidence though it is neither an oral statement of a witness nor a document produced by the parties. But in a way it is a document.

7. Write a short note on'Definition of Evidence'. [LC./-94/95]

The definition of 'evidence' given in the Evidence Act is incomplete and defective. It *excludes* the statements and admissions of the parties, their conduct and demeanour (outward behaviour) before the court, circumstances coming under the direct cognizance of the court, facts of which the court can take 'judicial notice' of and the fact which the court must or may presume. The confession of an accused person is not evidence in the ordinary sense of the term, as defined in this section (as not taken on oath and not subject to cross-examination) though it has to be given due consideration in deciding the case. Similarly, the confession of a co-accused has to be regarded as amounting to evidence in a general way, because 'whatever is considered by the court is evidence'; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense *{Haricharan Kurmi* v *State of Bihar,* AIR 1964 SC 1184).

Similarly, statements of parties when examined otherwise than as witnesses, material objects other than documents, etc. are not evidence according to the definition given in Sec. 3, but these are matters which the court may legitimately consider. The definition given in Sec. 3 is, however, exhaustive in the sense that every kind of evidence can ultimately be reduced either to the category of oral or documentary evidence.

Difference between 'evidence' and 'proof- The word 'evidence' includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter or fact, the truth of which is submitted to judicial investigation. 'Proof is the establishment of fact in issue by proper legal means to the satisfaction of the court. It is the *result* of evidence, while evidence is only the *medium* of proof.

Appreciation of Evidence

Whatever be the kind of evidence, namely, whether facts are reported to the court through the mouth of a witness or by means of a document, in either case the court has to examine the reliability quotient of the evidence produced. This is called "appreciation of evidence". Evidence is required to be appreciated to find out what part of it represents the true and correct state of things. It is the function of separating the grain from the chaff *[Ganesh K. Gulve* v *State of Maharashtra* AIR 2002 SC 3068]. Evidence is to be tested by its inherent consistency and inherent

probability of the prosecution story *[Ramakant Rai* v *Madan Rai* AIR 2004 SC *77]*.

When a party to the suit does not give evidence and does not offer himself for cross-examination, a presumption would arise that the case set up by him is not correct [I *Idhyadhar*v *Mamkrao* AIR 1999 SC 1441].

Different Kinds of Evidence

There are different types of evidence:

(1) *Direct evidence* - It is the testimony of the witnesses as to the principal fact to be proved e.g. the evidence of a person who says that he saw the commission of the act which constitutes the alleged crime. It also includes the production of an original document.

It means any fact which without the intervention of any other fact proves the existence of a fact in issue. The fact of a marriage, for example, between certain persons may be proved by producing the wedding photographs. Direct evidence is generally of a superior cogency; its greatest advantage is that there is only one source of error, namely, fallibility of testimony.

(2) *Circumstantial evidence** - It is the testimony of a witness to other relevant facts from which the fact in issue may be inferred. In cases based on circumstantial evidence, such evidence should be so strong as to point unmistakably to the guilt of the accused. 'Circumstantial evidence' includes all the relevant facts. It is *not* secondary evidence; it is merely direct evidence applied indirectly.

In *State of U.P.* v *Ravindra Prakash Mittal* (AIR 1992 SC 2045) the court laid down:

i) The circumstances from which the conclusion is drawn should be fully established.

(ii) The circumstances should be conclusive in nature.

(iii) All the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence of the accused.

8. Discuss: Value and proof of Circumstantial evidence'. *[DU.-2010]*

(iv) The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused.

In the absence of direct evidence, a person can be convicted on the basis of circumstantial evidence alone if the conditions mentioned above are satisfied *(Umedbhai* v *State of Gujarat* AIR 1978 SC 424). In appreciating a case based on circumstantial evidence, one circumstance by itself may not unerringly point to the guilt of the accused. It is the cumulative result of all the circumstances which could matter *(Gade Lakshmi Mangraju* v *State ofA.P.* AIR 2001 SC 2677). Thus, there must be a chain of evidence so 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 *(Hanumant Govind Nargundkar* v *State ofM.P.* AIR 1952 SC 343).

Sometimes the facts happen suddenly and do not leave behind much direct evidence. In such cases the main event will have to be reconstructed before the court with the help of the surrounding circumstances such as the cause or the effects of the event. Circumstances sometimes speak as forcefully as does the direct evidence. For example, there is a quite little village touched by a road which ends there. Occasionally a driver who belongs to the village comes there with his lorry for night rests. The night, on which the truck came, a man of the village was found lying dead by the road-side. The position of his body and the nature of injuries leave on doubt that he was dragged by a vehicle for a little distance and then one wheel ran over him. There was no dust storm, rain or mist to obstruct visibility. From these circumstances certain facts may reasonably be inferred and many others can be safely presumed as a matter of probability. The facts tell the story beyond a shadow of doubt that it is the work of the village lorry and that it must have been negligently handled.

Where the circumstantial evidence only showed that the accused and deceased were seen together the previous night, it was held to be not sufficient *(Prem Thakur* v *State of Punjab* AIR 1983 SC 446). The Kerala High Court has observed that, in a murder case, just because the doctor conducting the autopsy is not in a position to give a definite opinion regarding the cause of death, the court does not become helpless. It can still convict the accused on the basis of other circumstantial evidence

(State v *Mani,* 1992 Cr LJ 1682). In *Laxman Naik* v *State ofOrissa* (AIR 1995 SC 1387), the conviction and sentence of death sustained on the basis of circumstantial evidence showing an unbroken and complete chain of events leading to the rape and murder of a seven year-old daughter of the brother of the accused.

Unlike direct evidence, the circumstantial evidence suffers from fallibility of inference. The weight of evidence varies according to the number of independent facts supported.

(3) *Real/personal evidence* - It refers to any matter which the court perceives itself e.g. that a man standing before a judge has got a scar on his face, objects like murder weapon, bloodstained clothes, photographs, etc. 'Personal' evidence is that which is afforded by human agency.

(4) *Hearsay evidence* -It is also called derivative or second-hand evidence. It is the testimony of a witness as to statements made *out* of court which are offered as evidence of their own truth. Thus, A's evidence that A *heard* that a murder had taken place is 'hearsay' evidence.

(5) *Primary evidence* - It means the best or original evidence.

(6) *Secondary evidence* - It is an indirect evidence.[9]

(7) *Positive/negative evidence* - The former tends to prove the existence of a fact, while the latter non-existence of a fact. Negative evidence is ordinarily no good evidence.

(8) *Oral evidence.*

(9) *Documentary evidence.* Under Sec. 3, Evidence Act, evidence can be both oral and documentary and 'electronic records' can be produced as evidence.

(10) *Conclusive evidence* - Where the connection between the principal and evidentiary fact is a necessary conclusion.

9. What is the difference between primary evidence and secondary evidence? *[D.U.-2007]*

Evidence Recorded through Video-Conferencing

LEADING CASE: STATE OF MAHARASHTRA v PRAFUL B. DESAI (DR.) [(2003) 4 SCC 601]

Fans and Issue - In this case, the complainant's wife was suffering from terminal cancer. It is the case of prosecution that the complainant's wife examined by Dr. Greenberg (U.S.A.) who opined that she was inoperable and should be treated only with medication. Thereafter, the complainant and his wife consulted the respondent who is consulting surgeon for the last 40 years. In spite of being made aware of Dr. Greenberg's opinion, the respondent suggested surgery to remove the uterus. The Maharashtra Medical Council in an inquiry held the respondent guilty. The prosecution made an application to examine Dr. Greenberg through videoconferencing. The trial court allowed it; the respondent challenged that order in the High Court. The High Court held that as per Sec. 273, Cr.P.C, the evidence must be recorded in the presence of the accused.

In this case, question for consideration was whether in a criminal trial, evidence can be recorded by "video conferencing."

Observations - The Supreme Court rejected the view taken by the High Court and held that the High Court has failed to read Sec. 273, Cr.P.C. properly. Sec. 273 provides for dispensation from personal presence. In such cases, evidence can be recorded in the presence of the pleader which is deemed to be presence of the accused. Thus, Sec. 273 contemplates constructive presence. This indicates that actual physical presence is not must.

As to the question whether evidence can be recorded by video-conferencing, the US Supreme Court in *Maryland* v *Santra Ann Craig [497* US 836 ^1990)] has held that recording of evidence by video-conferencing was not a violation of 6th Amendment (Confrontation Clause).

This court also observed that court must endeavour to find out the truth. There would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for

unjustified failure to produce available evidence *[Nageshwar Krishna Ghobe* v *State of Maharashtra* (1973) 4 SCC 23]. Justice Bhagwati in the case of *National Textile Workers' Union* v *P.R. Ramakrishnan* (1983) 1 SCC 228 held that, Law cannot stand still, it must change with the changing social concepts and values. If the law fails to respond to the need of changing society, then it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth.

In *State* v *S.J. Choudhary* (1996) 4 SCC 567, it was held that the Evidence Act was an ongoing Act and the word "handwriting" in Sec. 45 of that Act was construed to include "typewriting". On the same principle, courts have interpreted, over a period of time, various terms and phrases. Examples: "Telegraph" to include "Telephone"; "Banker's books" to include "Microfilm"; "To take note" to include "Use of Tape recorder"; "Documents" to include "Computer databases".

In *BasavarajR. Patil v State ofKarnataka* (2000) 8 SCC 740, the question was whether an accused needs to be physically present in court to answer the questions put to him by court whilst recording his statement under Sec. 313, Cr.P.C. It was held that the section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in facilities for legal aid in the country. It was not necessary that in all cases the accused must answer by personally remaining present in court.

In the present case, the court observed:

> *(l)* Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. Except for touching, one can see, hear and observe as if the party is in the same room. This is not virtual reality, it is actual reality. Thus, in video-conferencing both parties are in the presence of each other. It is clear that so long as the accused

and/or his pleader are present when evidence is recorded by video-conferencing that evidence is being, recorded in the "presence" of the accused.

(ii) Normally, when a commission is issued by the court for the examination of a witness, the recordings would have to be at the place where the witness is. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a judicial officer) would be required to record the evidence and to ensure attendance. However, new advancement of science and technology permit official of the court, in the city where a videoconferencing is to take place, to record the evidence. Thus, where a witness is willing to give evidence, an official of the court can be deputed to record evidence on commission by way of video-conferencing.

(iii) The evidence will be recorded in the studio/court where the video-conferencing takes place. The judicial officer shall ensure that the respondent and his counsel are present when the evidence of Dr. Greenberg is recorded and that they are able to observe the demeanour and hear the deposition of Dr. Greenberg. The officer shall also ensure that the respondent has full opportunity to cross-examine Dr. Greenberg.

(iv) It must be clarified that adopting such a procedure may be possible if the witness is out of India and not willing to give evidence.

Decision - Held that under Sec. 3, Evidence Act, evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video conferencing.

Comments - Examination of witnesses through video-conferencing has been approved in *Bodala Murali Krishna* v *Smt. S. Bodala Prathima* (AIR 2007 A.P. 43). In *Amitabb Bagchi v Ena Bagchi* (AIR 2005 Cal 11), the court said that there was no bar on examination of a witness through video-conferencing. It was a case for claim of *pendente lite* maintenance. The husband was permanently living in America. His statement was allowed to be recorded by the electronic evidence.]

Document[10]

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.

Illustrations - (i) A writing, (ii) words printed, lithographed or photographed, (iii) a map or plan, (iv) an inscription on a metal plate or stone, and (v) a caricature - are all documents.

This definition of the word 'document' is similar to the one contained in the Indian Penal Code. Stephen defines a 'document' as "any substance having any matters expressed or described upon it by marks capable of being read". Thus, letters imprinted on trees as evidence that they have been passed by the Forest Ranger are documents.

In *R.* v *Daye,* the term 'document' was defined as "any writing or printing capable of being made evidence, no matter on what material it may be inscribed". Thus, the wooden scores on which bakers or milkman indicate by notches the number of loaves of bread or quarts of milk supplied to their customers are also documents - as much as more advanced computerised methods of keeping accounts. A musical composition is also a document.

10. Explain the term 'Document' *[LC.I-95/96*

India

"India" means the territory of India excluding the State of Jammu and Kashmir.

Proved

See under the Questions section.

FURTHER QUESTIONS

Q.1. (a) Explain the terms 'Proved', 'Disproved', and 'Not proved'. *[D.U.-2007/2011]*

(b) Write a short note on 'Standard/Degree of proof in respect of civil/criminal proceedings'. *[L.C.I -94/95*

A.l. (a) Proved, Disproved, Not Proved (Sec. 3)

"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 does exists.

A fact is said to be *"'disproved'"* when, after considering the matters before it, the court either believed 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.

A fact is said to be *"not proved"* when it is neither proved nor disproved."' It means neither the fact is proved with certainty nor the fact is believed to exist. In other words, the man of ordinary prudence neither believes that the fact exists nor he believes that the fact does not exist.

These provisions of the Act deal with the degree or standard of proof. These are the only provisions that deal with the matter.

Evidence of fact and proof of a fact are not synonymous terms. Proof is the effect of evidence. 'Proof considered as the establishment of material facts in issue in each particular case by proper and legal

means to the satisfaction of the court is effected by: (i) evidence or statements of witnesses, admissions or confessions of the parties, production of documents; (ii) presumptions; (iii) judicial notice; and (iv) inspection.

It may be noted that the word "matters" (and not the term *evidence)* is used in the definition of the term 'proved' and 'disproved'. For instance, a fact may be orally admitted in Court; such an admission would not come within the definition of term 'evidence', yet it is a matter which the court, before whom the admission was made, would have to take into consideration, in order to determine whether the particular fact was proved or not proved. It is because of the use of this wider term that a court can attach due weight to the demeanour of a witness, i.e., the matter in which he gives evidence in the court. In *State of Maharashtra* v *McL Yakub* (AIR 1980 SC 1111), it was pointed that the word 'proved' does not draw any distinction between direct or circumstantial evidence.

Proof does not mean proof of rigid mathematical demonstration (absolute certainty or accuracy of statements), because that is impossible; it must mean such evidence (such degree of probability) as would induce a reasonable man to come to the conclusion *[Hawkins v Povells Tillary Coal Co. Ltd.* (1911) 1 K.B. 988j-2005 SCC (Cri.) 225]. Suspicion cannot take the place of proof, nor moral belief of the judge in the guilt of the accused. The sea of suspicion has no shore and the court that embarks upon it is without rudder and compass.

In *M. Narsingha Rao* v *State of A ndhra Pradesh* (AIR 2001 SC 318), the Supreme Court held that a fact is said to be "proved," when after considering the matter before it the court, either believe it to exist or considers its existence so probable that a prudent man ought, under circumstances of particular case, to act upon supposition that it exists. This is the definition of the word 'proved' in the Evidence Act. What is required is production of such materials on which the court reasonably acts to reach the supposition that the fact exist. Proof of facts depends upon degree of possibility of having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him.

In *Babuda* v *State of Rajasthan* (AIR 1992 SC 2091), it was held the accused not to be convicted of theft where there was nothing to show his presence in the house from where the articles supposed to have been

stolen from removed, the only evidence being recovery one and half months at later from the person to whom the articles were allegedly sold, conviction not to be based upon suspicion.

The extent to which a particular evidence aids in proving the fact in controversy is called as the 'probative force'. What and how much proof is necessary to convince the judge of the existence of a fact in issue? The answer depends upon many circumstances as different standards of proof are demanded in civil and criminal cases. In *civil* cases, a matter is taken to be proved when the balance of probability suggests it, but in *criminal* cases the court requires a proof beyond reasonable doubt. Graver the offence, stricter should be the degree of proof *[Asbish Batham* v *State ofM.P.* (2002) 7 SCC 317; *Mausam Singha Roy* v *State ofW.B.* (2003) 12 SCC 377]. A reasonable doubt is not an imaginary, trivial or a mere possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case *[State of M.P.* v *Dharkole* AIR 2005 SC 44].

(b) Standard/Degree of Proof **in** respect of **Civil and Criminal** proceedings

The Evidence Act makes no distinction between the degree of proof or probability requisite for criminal as distinguished from civil cases. However, as remarked by Best in his book on Evidence, "There is marked difference as to the *effect,* i.e. probative force of evidence, in civil and criminal proceedings. In civil cases, mere preponderance of probability is sufficient; whereas, in criminal cases, issues must be proved beyond any reasonable doubt". The rule is based upon the maxim of English law laid down by Holroyd J. that "It is better that ten guilty men should escape, rather than one innocent should suffer".

In civil cases, the rule of evidence may be relaxed by consent of parties or by court's order e.g. proof of affidavit. It is not so in criminal cases. With regard to *proof* "in 'criminal' cases, the following general rules have to be observed:

(i) The accused is always presumed to be innocent until the prosecution proves him to be guilty. While in civil cases, all that is necessary to insist upon is that the proof adduced in support of a fact is such that should make a prudent man to act upon the supposition that it exists.

(ii) The evidence must be such as to exclude every reasonable doubt of the guilt of the accused.

(iii) In case of any reasonable doubt as to the guilt of the accused, the benefit of doubt should always be given to the accused.

(iv) There must always be clear proof of *corpus delicti*, i.e., the fact of commission of the crime.

(v) The hypothesis of delinquency should be consistent with all the facts proved.

As regards the standard of proof in civil and criminal cases, Denning J. observed in *Bater* v *B.,* "It is true that by our law, there is a higher standard of proof in criminal cases than in civil cases; but this is subject to the qualification that there is no absolute standard in either case. In *criminal* cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also, in *civil* cases, there may be degrees of probability". The general rule in civil actions (except matrimonial causes) is that an uncontested case may be established by a minimum of proof, and a contested case by a balance of probabilities.

The same evidence which may be sufficient to regard a fact as proved in a civil suit may be considered insufficient for a conviction in a criminal action *[Razik Ram* v *Jaswant Singh* (1975) 4 SCC 769].

Q.2. Whether the following can be characterized as 'documents':-

(i) Writings on the walls of Red Fort.

(ii) The words 'owned by LC.-I' written on the fans hanging in the classroom of a school.

(iii) Inscriptions on the bricks embedded in the walls and plastered from outside.

(iv) Inscription on a stone. [LC./-94/96]

A.2. Document

According to Sec. 3, '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.

Illustrations - A writing; words printed, lithographed or photographed; a map/plan; an inscription on a metal plate or stone; and, a caricature -are all documents.

Speaking generally, it means anything or matter which contains a permanent record of a relevant fact or a fact in issue. Thus, a paper on which a contract is written is a document, so is a wall or chattel or stone on which something is inscribed. 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 of its character. Of course, much depends upon the context in which the word 'document' is used.

Thus, in the *case in question,* (i), (ii), (iii) and (iv) are 'documents'.

2
Relevancy and Admissibility of Facts

0f What Fact May Evidence be given (Sec. 5)

"Evidence may be given of the existence or non-existence of *every fact in issue* and of *relevant facts,* 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 law for the time being in force relating to Civil Procedure.

Illustration - 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 a club; A's causing B's death by such beating; A's intention to cause B's death.

According to Sir James Stephens, the most universal rule of evidence is that the evidence adduced should be alike directed and confined to the matters which are in dispute. Anything not directly connected is irrelevant. Thus, evidence of all collateral facts, which are incapable of affording any reasonable presumption as to the principal matters in dispute, are excluded to save public time.

Logical and Legal Relevancy

In order to prove the existence or non-existence of the facts in issue, certain other facts may be given in evidence, called relevant or evidentiary facts *(See* Chapter 1). Such facts may have such a direct or indirect connection with the fact in issue, that they render the latter probable or improbable.

A fact is said to be *logically* relevant to another when it bears such a casual relation with the other as to render probable the existence or non-existence of the latter. All facts which are logically relevant are not legally relevant. One fact is said to be *legally* relevant to another only when the one is connected with the other in any of the ways referred to in Sees. 6-55 of the Act. Whatever is legally relevant is logically relevant. However, only legally relevant facts are considered as relevant facts. A confession made to a police officer may appear to be logically relevant, but it is not legally relevant, for Sec. 25 declares that it cannot be used as evidence against the person making it.

The question of relevancy is a question of law to be decided by the Judge. If irrelevant evidence is so mixed up with relevant evidence that it cannot be separated, the whole of the evidence should be rejected. The question of relevancy is a question of law and can be raised at any stage of the proceeding. The *Explanation* to Sec. 5 lays down that if some provision in Civil Procedure Code disentitles the person to give evidence of a fact, he will not be entitled as of right to adduce that evidence in the court.

Relevancy and Admissibility[1]

Relevant means that which is logical probative. Admissibility is not based on logic but on law and strict rules. The terms 'relevancy' and 'admissibility' are not co-extensive or interchangeable terms. All admissible evidence is usually relevant, but all relevant evidence is not admissible. All facts which are allowed by the provisions of the Evidence Act to be proved are relevant; but, however relevant a fact may be, unless it is allowed to be proved by the provisions of the Act, it is not admissible. Relevancy (Sees. 6-55) means, "what facts may be proved before a court". The admissibility (Sec. 56 onwards) is the means and the method of proving the relevant facts. Relevancy is the *genus* of which admissibility is a *species.*

1. Distinguish between relevancy and admissibility. [LC./-96; *LC.II-93]*

Discuss: Concept of relevancy under the Indian Evidence Act. ***[D.U.-2007]***

Give one example of: (i) facts though relevant are not admissible under the Evidence Act; (ii) facts though admissible are not relevant under the Evidence **Act.** *[L.C.II-2006]*

"All that is relevant may not be admissible but all that is admissible has to be relevant." Elaborate. Mention exceptions to it, if any. *[D.U-2010]*

Very often, public consideration of fairness and the practical necessity for reaching speedy decisions necessarily cause the rejection of much of the relevant evidence. Thus, privileged communications (during marriage; with a legal adviser; official communications) are protected from the disclosure. .

Though where the relevancy of a fact is established, there is presumption of its admissibility and it is for the other side to show that the fact is not admissible. It may be noted that if admissibility is considered synonymous with the receivability in evidence, then every admissible fact is not necessarily relevant. Thus, the previous statements to contradict a witness and the facts to impeach the credit of a witness, are receivable in evidence but they are not relevant.

The court is to decide the question of admissibility of an evidence (Sec. 136). Admissibility is a quality standing between relevancy (or probative value) on the one hand and proof (or weight of evidence) on the other hand. A fact may be relevant but the proof of it may be such as is not allowed in the case of the 'hearsay' rule (e.g. statements made out of the court; witness asserts and the accused said 'so and so'). Thus, oral statements which are hearsay may be relevant, but are not admissible.

In Ram Bihari Yadav v *State of Bihar* AIR 1998 SC 1850, the Supreme Court explained the point of difference between relevancy of evidence and its admissibility. The court said that frequently the expression 'relevancy' and 'admissibility' are used as being synonymous with each other but their legal implications are different, because facts which are relevant may not be admissible. For example, the communication made by spouse during marriage, the communication between an advocate and his client may be very much relevant but as a matter of policy they are not admissible. On the other hand, there are facts which, though admissible, are not relevant. Their admissibility is grounded on other considerations, and not the consideration of relevancy. Evidence in terms elicited from a witness in cross-examination as to his character to find out his credibility is admissible although it may have nothing to do with the facts of the case. .

It is a fundamental rule of the law of evidence that evidence must be relevant in order to be admissible. But the converse is not true, because much relevant evidence may be inadmissible under the specific

rules of evidence affecting admissibility. Evidence may be produced to show that a witness was biased or suffered from some mental condition which rendered his evidence unworthy of belief; or showed that a confession was admissible because it was made without oppression, or that a secondary evidence of the contents of a document might be adduced because the original was lost. These are facts which go to the admissibility of evidence.

Hearsay evidence is excluded, even if it is relevant, because it may be repeated version and may suffer from exaggeration or undertoning with no chance to cross-examine the original narrator. Evidence of character of an affected person may be materially relevant but is excluded from admission because of the unnecessary prejudice to the mind of the judge and the chance of denial of fair trial Admissibility has nothing to do with relevancy or probative value. Admissibility is a matter of legal policy. It is a question of law to be determined by *lex fori* .

Evidence obtained by Undesirable Methods - Whether Admissible

The relevant evidence remains relevant, even if it was obtained by improper or unlawful means. "The test to be applied in considering whether evidence is *admissible* is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how it was obtainedj *[Magraj Patodia* v *R.K. Birla* (1970) 2 SCC 889]. The House of Lord! would sanction the exclusion of such evidence only where the accused had been lured into incriminating himself by deception after the commission of an offence *[R.* v *Sang* (1979) 2 All ER 1222].

/The Supreme Court noted the only exception to this rule, which is that where after the alleged offence, improper methods have been used to obtain evidence for it and the judge is of the view that the prejudicial effect of such evidence would be out of proportion to its evidentiary value, the judge may exclude *it^Pushpadevi* v*M.L. Wadhawan* AIR 1987 SC 1748). The impact on the fairness of the proceedings is the crucial determining factor.

In *R.* v *Christou* (1992) 4 All ER 559, the police operated for about 3 months by establishing a shop of jewellers and putting up the shady image of being interested in buying 'stolen property'. The object was to

recover stolen goods and to obtain evidence against those involved in theft and handling. All the transactions in the shop were filmed and conversations recorded. The evidence so collected was admitted at the trial. The court reasoned, "the trick was not applied to the appellants (accused persons): they voluntarily applied themselves to the trick. It is not every trick producing evidence against an accused which results in unfairness".

Relevancy of Facts forming Part of Same Transaction (Sec. 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".

The principle of the section is that whenever a "transaction" such as a contract or a crime, is a fact in issue, then evidence can be given of every fact which forms part of the same transaction. Transaction refers to a series of acts so connected together as are capable of being called by a single name e.g. a contract, a crime, etc. Roughly a transaction may be described as any physical act, or series of connected physical acts, together with the words accompanying such act or acts.

A 'transaction' may consist of a single incident stretching over a few minutes, or it may be spread over a variety of facts, occupying a much longer time, and occurring on different occasions or at different places. Where the transaction consists of different acts, in order that the chain of such acts may constitute the same transaction, they must be connected together by proximity of time, proximity or unity of place, continuity of action, or community of purpose or design. A transaction can be truly understood only when all its integral parts are known and not in isolation from each other.

Illustrations to Sec. 6

(a) A is accused of B's murder by beating him. Whatever was said or done by A or B or by the by-standers at the beating or so shortly before or after it as to form part of the transaction, is a *relevant* fact.[2] .

2. **A** question based on the same facts, *[L.C.I-94]*

(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 gaols are broken open. The occurrence of these facts is *relevant,* as forming part of the general transaction, though A may not have been present at all of them.

(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.[3]

(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._/

Res Gestae[4]

.Facts forming part of a transaction are described by English and American writers as being part of *res gestae,* i.e., things done in the course of a transaction. The illustrations (a) to (d) above, are all instances of *res gestae.*

The term *res gestae* is equivalent to the 'facts' mentioned in Sec. 6. However, it is also used in the following senses - as equivalent to fact in issue, as equivalent to details of facts in issue, and fact in issue and surrounding circumstances. Taylor defines this expression as including everything that may be fairly considered as an incident of the event under consideration. Thus, *res gestae* are those circumstances which are the instinctive (automatic) and undersigned incidents of a particular act. *[They are the acts talking for themselves not what people say when talking about the acts.*

Circumstantial facts are admitted as forming part of *res gestae,* i.e., as being part of the original proof of what has taken place. Statements may also accompany physical happenings. An injured person, for example, is naturally bound to cry. If the transaction e.g. an accident, happened in a public place, a number of by-standers will make mutual conversation

3. A question based on the same facts. [LC./.-95]
4. Write a short note on Res *gestae. [C.LC-91/93/2006,* LC.H-94]

about the incident. The question is to what extent such statements can be regarded as parts of the transaction. Some important *guidelines* in this regard are:-

(i) Spontaneous and simultaneous utterance is a part of the transaction, e.g. what a person states during an occurrence in respect of the occurrence itself.

(ii) Statement must be contemporaneous with the fact, i.e., statement made either "during or immediately before or after its occurrence", and of such a nature that the event speak for themselves (and not what the people say when talking about the event). The words must be at least *de recenti.*

(iii) If the statement is made after the act is over and its maker has had the time for reflection and deliberation (fabrication); and/or it is a mere narration of past events, then it is not relevant. The statement should be an exclamation "forced out of a witness by the emotion generated by an event" (G. *Vijayavardhan Rao* v *State ofA.P.* AIR 1996 SC 2971).

(iv) The statement must be a statement of fact and not an opinionj

'The following *illustrations/cases* will help clear the point:-

(i) A, while running in street, crying that B has stabbed him, is a relevant fact. Similarly, the statement of a raped woman 'crying for help', is a relevant fact.

(u) Statements made during the investigations of a crime are *not* relevant facts.

(iii) A, when reached the murder spot, heard people present there as saying that someone murdered someone. It was not stated that the persons who made above statements were present at the time of murder. It is not a relevant fact. However, if a witness after witnessing the incident goes to the police station and files a FIR, the making of the report is part of the transaction and amounts to res gestae.

(iv) In *Agassiz* v *London Tramways Co.* (1872) 21 WR 199, there was a tram collision and an action was brought against the tramway Co. in respect of injury to a passenger. A remark by another

passenger to the effect that the driver ought to be reported and the conductor's reply, "He has already been reported for he has been off the line 5 or 6 times to-day" were rejected, the transaction being over, and as the remarks referred not to the *res*, but to the past acts of the driver.

(v) In another case, A was tried for the murder of B by shooting him with a gun. The facts that the person, who was at that time in the same room with B, saw a man with a gun in his hand pass by a window of that room and thereupon exclaimed "There is the butcher" ('A was known by that name') were held to be relevant.[5]

(vi) Where shortly after a murder, the person suspected of it explained away the absence of the deceased by saying that he had left the village, the court held the statement to be a part of the transaction and thus relevant *[Basanti* v *State ofH.P.* (1987) 3 SCC 227].

(vii) A man was prosecuted for the murder of his wife. His defence was that the shot went off accidentally. There was evidence to the effect that the deceased telephoned to say: "Get me the police please". Before the operator could connect the police, the caller, who spoke in distress, gave her address and the call suddenly ended. Thereafter the police came to the house and found the body of a dead woman. Her call and the words she spoke were held to be *relevant* as a part of the transaction which brought about her death[6] *[Ratten* v *The Queen* (1971) 3 WLR 930].

However, where the raped girl made a statement to her mother after the rape when the culprit had gone away and the girl came home from the scene of occurrence, held that it is not admissible under Sec. 6. \

5. A question based on the same facts. [C.LC.-92]

6. In a trial for dowry murder of B; the fact that on the alleged murder night the police had received a distress telephonic call from B in which before abrupt disconnection she could only say: "Please help me, I fear immediate harm to myself. Is the fact relevant? *[C.LC.-95\[D.U.-2007]*

Criticism of res gestae doctrine

The doctrine of *res gestae* is applicable to 'hearsay' evidence also, which is not considered a good piece of evidence. In *R.* v *Foster* (1834) 6 C & C, the witness had seen only a speeding vehicle, but not the accident. The injured person explained him the nature of the accident. He was allowed to give evidence of what the deceased said, although it was only a derived knowledge, it being a part of *res gestae.?* Similarly, collateral facts are *res inter alios actae* (i.e. transactions between others, for example, statements made behind the accused's back and to be used as evidence against him), and included in *res gestae.* As a matter of fact the famous English judge Mr. Justice Blackstone is said to have told an advocate struggling to introduce an irrelevant fact as relevant evidence, to try to bring it under *res gestae,* because the phrase can take in 'anything' if the judge is so inclined.

According to Professor Stone, "no evidential problem is so shrouded in doubt and confusion". The rule is not only useless but also harmful. It is *useless* because every part of it is covered by some other rule, for example, declarations as to the state or mind or health. It is *harmful* because it caused confusion about the limitations of other rules.

The precise limits of *res gestae* are not themselves not easy to define. Facts differ so greatly that no fixed principle can be laid down as to the matters that will form parts of a transaction. Because of its confusing nature, the phrase *res gestae* has not been included in Indian Evidence Act. And it is left to the judges to find the necessary connection and treat a fact as relevant.

LEADING CASE: SUKHAR v STATE OF UP.
[(1999) 9 SCC 507]

Facts and Issue - This case *inter alia* revolved round the scope of Sec. 6 of the Evidence Act. The victim was shot at by the accused and he raised an alarm. When a witness rushed to the spot, the victim told him that it was the accused who shot at him. The victim survived and so the accused was charged with an

7. A question based on the same facts. [C.LC.-92]

offence under Sec. 307, IPC. However, during the pendency of the trial, the victim died, because of some other cause. The question arose whether the witness could give evidence of what the victim told him?

Observations and Decision - The Supreme Court observed that Sec. 6 of the Evidence Act is an exception to the general rule that the hearsay evidence is not admissible. But for bringing such hearsay evidence within the provisions of Sec. 6, what is required to be established is that it must be almost contemporaneous with the fact in issue and there should not be an interval which would allow fabrication, so that it forms part of the same transaction as the fact in issue.

"This principle of law embodied in Sec. 6 of the Evidence Act is usually known as the rule of *res gestae* recognized in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" it becomes relevant by itself. The rationale in making certain statement of fact admissible under Sec. 6 is on account of the spontaneity and immediacy of such statement or fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae" [Gentala Rao* v *State ofAndhra Pradesh* AIR 1996 SC 2791].

The Supreme Court also referred to the ratio of *Rattan Singh* v *State cfHimachal Pradesh* (AIR 1997 SC 768). In this case, the act of the assailant intruding into the courtyard at dead of night, the victim's identification of the assailant, her statement that the appellant was standing with a gun and that he fired at her were so intertwined with each other by proximity of time and space, that they formed part of the same transaction and therefore held relevant under Sec. 6.

In the present case, the court held that the evidence of the witness is admissible as *res gestae.]*

In *Vasa Chandrasekbar Rao* v *Ponna Satyanarayana* (2000) 6 SCC 286, the accused murdered his wife and daughter. The statement by the father of deceased wife (witness) that father of accused told him on telephone that his son has killed the deceased would be in the nature of hearsay. In the absence of evidence that the information given by the father of accused to the witness that the accused had killed the deceased was either at the commission or immediately thereafter so as to form part of the same transaction such utterances cannot be considered as relevant under Sec. 6. To be relevant so, there must have been reasonable certainty that the speaker made the statement under stress of excitement in respect of the transaction.

Res gestae has come to be a rule of exception to the hearsay evidence. A fact or a statement of fact or opinion, which is so closely associated in time, place and circumstances with some act or event, which is in issue, that it can be said to form a part of the same transaction as the act or event in issue, is itself admissible in evidence. The justification given for the reception of such evidence is that the light that it sheds upon the act or event in issue is such that in its absence, the transaction in question may not be fully or truly understood and may even appear to be meaningless, inexplicable or unintelligible *[Kapoor Singh Rana* v *State of Delhi* 1 (2006) CCR 558 (DB)].

Facts which are the Occasion, Cause or Effect of Facts in Issue (Sec. 7)

According to Sec. 7, the following facts are relevant-

(j) facts which are the occasion, cause or effect (immediate or otherwise) of facts in issue or relevant facts,

(ii) facts which constitute the state of things under which they happened, or

(lii) facts which afforded an opportunity for their occurrence or transaction. \

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.

Sec. 7 could be explained as follows:

Occasion - Evidence can always be given of the set of circumstances which constituted the occasion for the happening of the principal fact *See* illustration (a). The fact that the deceased girl was alone in her cottage it the time of murder is relevant as it constituted the occasion for the murder.)

Cause - "Cause" often explains why a particular act was done. It helps the court to connect a person with the act. The act in question must have seen done by the person who had the cause for it e.g. the fact that accused was in love with deceased's wife The word "cause" is broader than the word "motive". Where, for example, soon after an election the winning candidate is murdered, the election and somebody's defeat at it is the cause of the murder and beyond the cause there may be no motive in it.)

Effects - Every act leaves behind certain effects which not only record the happening of the act, but also throw light upon the nature of the act.^ One of the important facts which connects a person with the act in question is the footprints on the scene of the crime and the finger impressions[9])[see illustration (b)]. Similarly, where a person is poisoned the symptoms produced by the poison are relevant, being the effects of the

8. A question based on the same facts. *[D.U.-2007]*
9. The question is whether A caused the death of B by rash and negligent driving. Whether tyre-marks produced on the spots are relevant fact?

[L.C.I-94/95/961

facts in issue. Possession of stolen articles by a person, immediately after theft, is also an effect. Unexplained scratches on the face or the person of the accused are also the effects of the facts in issue.[10]

Opportunity - Often a person has to carve out for himself an opportunity * to do the act. in question. This may involve a break from the normal routine of his life. Evidence of opportunity thus becomes important as it shows that the act must have been done by the person who had the opportunity to do it. For example, the fact that accused left his fellow workers at about the time of the murder under the pretence of going to a Smith's shop was relevant as this gave the accused his opportunity. Illustration (c) also gives an instance of opportunity.

State of things - The fact which constitute the state of things under which or in the background of which the principal facts happened are relevant e.g. the state of relations between the parties, the state of the health of the deceased and his habits For example, where the accused was prosecuted for shooting down his wife and he took the defence of accident, the fact that the accused was unhappy with his wife and was carrying an affair with another woman was held to be relevant as it constituted the state of things in which the principal fact, namely, the shooting down, happened:,

Mere advantage not enough ~ The mere fact, however, of a party being so , situated that an advantage would accrue to him from the commission of a crime, amounts to nothing or next to nothing, as a proof of his having committed it.

I Motive, Preparation and Previous or Subsequent Conduct (Sec. 8)

According to Sec. 8, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. Further, the conduct (previous or subsequent) of a party or his agent or an accused is relevant which influences or is influenced by a fact in issue or relevant fact.

10. State the provision of law and give reasons as to relevancy of the following fact: In a murder trial, the postmortem report revealed that the digested food indicated that the murder must have taken place three to four hours after lunch

[D.U.-2007]

lustrations

(a) *A is tried for the murder o/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[11] *{Motive).*

(b) A sues B upon a bond for the payment of money. B denies the making of the bond. The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant *(Motive).*

(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[12] *{Preparation).*

(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 of other wills to be prepared of which he did not approve, are relevant *{Preparation).*

(e) *A is accused of a crime* - The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of witness or suborned persons to give false evidence respecting it, are relevant *{Conduct).*

(h) *The question is whether A committed a crime* - The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter are relevant *(Conduct). @ A is accused of a crime* - The facts that, after the commission of the alleged crime, he absconded or was in possession of property

11. A question based on the same facts. *[D.U.-2007]*
12. A question based on the same facts. *[D.U.-2011][C* L.C-92/94]

or proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant *(Conduct).*

Sec. 8 could be explained as follows: I

Motive

Motive is moving power which impels one to do an act. It is the inducement for doing the act. Evidence of motive is always relevant, for men do not act wholly without motive. The evidence of motive assumes special importance when the whole case is built upon circumstantial evidence *(Tarseem Kumar* v *Delhi Admn.* AIR 1994 SC 2585)(f Thus, on the murder of an old widow possessed of wealth, the fact that the accused was to inherit her fortunes on her death was held to be relevant as it showed that the accused had a motive to dispose her of.)

Where certain lands were inherited by the deceased along with his brother but the accused got them transferred into their names and criminal and revenue cases were pending between them at the time when the deceased was killed, it was held, that these facts constituted a sufficient evidence of motive *(Awadhesb* v *State of U.P.* AIR 1995 SC 375).

It may be noted that evidence of motive is not sufficient by itself to lead to conviction nor absence of it to discredit other evidence. When there is clear evidence that a person has committed an offence, the motive becomes irrelevant. A murder case based on the direct evidence does not become weak just because of the want of a motive.

In *State of U.P.* v *Babu Ram* (AIR 2000 SC 1735), the Supreme Court said: "It cannot be laid down that the motive may not be very important in cases depending upon direct evidence, whereas motive is very much material only in the case which depends upon circumstantial evidence. There is no legal warrant to making such a hiatus. Motive is relevant factor in all criminal cases whether based on testimony of eye witness or circumstantial evidence. The question in this regard is, whether prosecution must fail because it failed to prove the motive, or it would weaken the prosecution to any perceptible limit. No doubt, if the prosecution proves the existence of motive, it will be well and good for it. Particularly, in a case depending on circumstantial evidence such motive

ould then be counted as one of the circumstances. However, it cannot be forgotten that it is generally difficult area for any prosecution to bring m record that what was in the respondent's mind. Even if the investigation ifficers would have succeeded in knowing it through interrogation that cannot be put in evidence by them due to the ban imposed by law."

In the present case, the accused himself said about the motive i.e. ejection of his demand for property by the deceased. It was also confirmed by the sister of the accused.

Reparation

Once an offence has been committed, the evidence of preparation becomes most important for the crime must have been committed by the man who was preparing for it. Thus, for example, the sharpening of a knife before an affray in which the knife was used is relevant as an act of preparation. For the same reason, it is relevant to show that the accused hired a revolver a few days before the murder.

Conduct

The conduct of a man is particularly important to the law of evidence, for his guilt or the state of mind is often reflected by his conduct. Guilty mind begets guilty conduct A Under Sec. 8, the conduct of the following parties is relevant - parties to a suit/ proceeding or of their agent (plaintiff and defendant in a civil suit, and accused in a criminal proceeding), any person an offence against whom is the subject of any proceeding (injured person).

The conduct must be in reference to the facts in issue or relevant facts; further, the conduct must be such as influences or is influenced by the facts in issue or relevant facts. The evidence of the conduct is relevant whether it is previous to the happening of the facts or subsequent to them. Some of the *instances* of guilty conduct are: the defendant turned pale, when arrested; a defendant charged with wife's murder, failed to shed tears; the defendant's offer to marry the girl who charged him with rape; bribing; concealing one's identity; feigning insanity; absconding; or,
silence.

to a question asked or it would have been made even if a question was not asked, the latter being a complaint. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first (e.g. 'what is the matter', 'why are you crying'). The essential difference between a statement and a complaint is that the latter is made with a view to redress or punishment and must be made to some one in authority (the police, parent or some other person to whom the complainant was justly entitled to look *for assistance and protection).*

Explanation 2

"It provides that when the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is also relevant."

Such statements are admitted because without their help the conduct may be unintelligible. Thus, if a man accused of a crime is silent or flies, or guilty of a false or evasive response, his conduct is coupled with the statement, in the nature of an admission, and therefore, evidence against himself.

Illustration (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.

Illustration (g): The question is, whether A owes B Rs. 10,000. The facts that A asked C to lend him money, and D said to C in A's presence and hearing - "I advise you not to trust A, for he owes B Rs. 10,000", and that A went away without making any answer, are relevant facts.[16])

Queen-Empress v *Abdullah* (1885) 7 All 385 (F.B.) - The accused was prosecuted for the murder of a young girl, a prostitute. She was attacked while asleep in her home. It was already morning and there was sufficient light to enable her to identify her assailant, who cut her throat with a razor. She was taken to a police station and thence to a hospital where

15. **A** question based on the same facts. *[DU.-2011][LC.I~94][C.LC-2006*
16. A question based on the same facts. *[D.U -2007/2010]*

attempts were made to know from her the name of the accused. But she was unable to speak, her throat being cut. She answered by signs of her hand. When the name Abdullah (accused) was mentioned she made an affirmative sign. She died on the third day.

A reference was made to the Full Bench over the question whether the signs of the hand she made in response to the questions put to her were relevant under Sec. 8 as the conduct of an injured person. The *majority* held that Sec. 8 was not applicable, as to attract Sec. 8 the conduct must be influenced directly by the facts in issue/relevant facts and not by the interposition of words spoken by third persons. The signs of the hand were not influenced by the facts, but by the questions asked. But for the questions, there was nothing in them to connect anybody with the injury. Left to themselves those signs would indicate nothing. The evidence was, however, relevant under Sec. 32 as a 'dying declaration'.

Mahmood J., did not agree and regarded the conduct to be relevant under Sec. 8. Explanation 1 of Sec. 8 points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such a case those actions and statements may be proved as a whole. In illustration (f) to Sec. 8, although A's conduct is undoubtedly 'influenced' by the fact in issue, it is only influenced through the intervention of third person, C. The word 'conduct' does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact. In the present case, the deceased would not have acted as she did if it had not been for the action of those who questioned her. There is no difference in principle between the act of A in running away when told that police were coming, and the act of deceased in moving her hand in answer to the questions. Both are the cases of 'conduct' within the meaning of Sec. 8.

Facts Necessary to Explain or Introduce Relevant Facts (Sec. 9)

Sec. 9 declares the following kinds of facts to be relevant:-

(i) facts necessary to explain or introduce a fact in issue or relevant fact,

(ii) facts which support or rebut an inference suggested by a fact in issue or relevant fact,

(iii) facts which establish the identity of anything or person,

(iv) facts which fix time or place at which any fact in issue or relevant fact happened, and

(v) facts which show the relation of parties.

Sec. 9 could be explained as follows:

Introductory or explanatory facts

(Evidence is always allowed of facts which are necessary to *introduce* the main fact or some relevant fact. For example, where the question is whether a given document is a "will made by a certain person", evidence may be given of the state of his property and of family at the date of the alleged will as it may be necessary to introduce the circumstances in which the will became necessary *{Illustration (a)]*. Similarly, in a suit for libel, evidence can be given of the state of parties' relations at the time of the alleged libel as this may be necessary to introduce the circumstances that led to the libel. If they had any dispute, that too may be cited though not the details of it *[Illustration (b)]*.

Evidence of *explanatory* facts is allowed for the same reason. The explanatory evidence is not relevant in itself i.e. if considered separately and alone from other evidence it would not amount to anything. Where, for example, a person is tried for leading certain people to a riot by marching at the head of them. The cries of the mob may be given in evidence being explanatory of the nature of the transaction[17] *{Illustration*

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[18] *[Illustration (e)]*.

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

17. State the provision of law and give reasons as to relevancy of the following fact: In a case of homicide against X, prosecution produces a statement of Y -"I heard the cries, and saw the dead body." *[D.U.-2009]*

18. A question based on the same facts. *[D.U.-2007/2010]*

B has made me a better offer'. This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue[19] *[Illustration (d)]*. Similarly, a statement made by a partner on leaving his firm is relevant being explanatory of his conduct in leaving the firm.

Facts which support or rebut inferences

Evidence can be given of facts which support or rebut an inference suggested by a fact in issue or relevant fact. For example, a person is accused of a crime. The fact of his absconding soon after the commission of the crime is a 'conduct', which is relevant because it suggests the inference that he is guilty. Any fact which either supports this inference or rebuts or contradicts it will also become relevant. For example, if after absconding, he was arrested in a railway train travelling without ticket or in shabby dress, this will be relevant as fact supporting the inference of his guilt. It will be equally relevant for him to show that he left home because he had urgent and sudden business to attend (the details of such business are not relevant) *[Illustration (c)]*.

Where it was alleged that X murdered Y, after a long chase, the fact that X had undergone a heart surgery operation and was quite weak before alleged murder is a fact which rebut the inference of X's guilt.[20] Where the accused was all the time with the complainant till the FIR was lodged, thereafter he felt that he was himself being suspected. He then kept out of the way and evaded arrest. It .was held that the evidence of his conduct previous to FIR was relevant to contradict the inference suggested by the subsequent evading. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime *{Matnt* v *State of U.R).*

^Identity of a *person/thing ('Identification Parade')*

Where the court has to know the identity of any thing or any person, any fact which establishes such identity is relevant. Personal characteristics such as age, height, complexion, voice, handwriting, manner, dress,

19. A question based on the same facts. *[D.U.-2011\[C.L.C.-2006*

20. In his trial for murder of B by stabbing after a long chase, A adduced evidence that a week before the alleged murder A had undergone heart surgery. Is the fact relevant? *[CLC-93]*

distinctive marks, blood group, occupation, family relationship, education, travel, religion, knowledge of particular people, places or fact and other details of personal history are relevant facts. Various methods like finger/ thumb-impressions, foot-marks, comparison of writing, 'identification parade' by police are used in this regard.[1]

"Identification parades" are held at the instance of the investigating officer for the purpose of enabling the witnesses to identify either the properties which are the subject matter of alleged offence or the accused persons. The idea is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once. The purpose is to test and strengthen the trustworthiness of evidence. The whole idea is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source Significantly, there is no provision for TI (Test identification) parade in the Criminal Procedure Code and the Evidence Act.

It is desirable that a TI parade should be conducted as soon as after the arrest of the accused *[Abdul Waheed Khan* v *State o/A.P.* (2002) 7 SCC 175]. Where the evidence against an accused person is evidence of identification alone, the Magistrate must hold the parade of the accused. Whenever the accused person disputes the ability of the prosecution witnesses to identify him, the court should direct parade to be held. TI parade should be taken by a Magistrate and the police should not be present at that time. However, it could also be done by the police and any citizen. Identification through a 'photograph' can take the place of a formal TI parade *(Laxmi Raj Shetty* v *State of T.N.* AIR 1998 SC 1274). A delay of 47 days in holding TI parade would not erase the evidentiary value of it *[Anil Kumar* v *State of U.P.* (2003) 3 SCC 569].

The holding of TI parade is *not* compulsory; even where the accused demands it the prosecution is not bound to do so *(Surendra Narain* v *State*

21. State the provision of law and give reasons as to relevancy of the following fact: In case of an identity of a skeleton recovered from a pond, 'the production of super imposed photograph of deceased over the skeleton' by the prosecution. *[D.U.-2009]*

Of U.P. AIR 1998 SC 3031). However, if the prosecution fails to hold it on the plea that the witnesses already knew the accused well and it transpires in the course of trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case *(Jadunatb Singh* v *State of U.P.* AIR 1971 SC 363). When the eyewitness knew the accused and clearly identified in court, there is no need to hold TI parade *[State of H.P.* v *Prem Chand* (2002) 10 SCC 518].

TI parade is a *weak* sort of evidence. It is not substantive evidence. The substantive evidence is the evidence of identification in court and TI parade provides corroboration to the identification of the witness in court, if required. However, the failure to hold a TI parade would not make inadmissible the evidence of identification in court *[Malkhan Singh* v *State of M.P.* (2003) 5 SCC 746]. In *Ramnath* v *State of T.N.* (AIR 1978 SC 1201), it was held that identification of the accused by the witnesses in the court, when no TI parade has been held before, will be useless evidence.

Where the only evidence against the accused person is that of identification by one witness, as a rule of prudence it should *not* be considered sufficient to justify the conviction *(Habib* v *State of Bihar* AIR 1972 SC 283).

(Time or place of happening

Whatever fact will help the court to fix the time or place of the happening of the relevant fact can be admitted in evidence. The report of an expert is relevant to fix the time of murder and the marks of struggle on the ground are relevant to fix the place of the crime. Suppose a person was murdered in a train, the dead body was seen at the Karnal station. The ticket found in his possession was from Delhi to Ludhiana; it proves that the murder was committed between Delhi and Karnal.)

Relation of parties

A large number of cases owe their origin to the pre-existing relations of the parties, such as, for example, those of undue influence and of libel.

Relevance of Conspiracy Evidence (Sec. 10)

fee under the Questions Section.

When Facts Not Otherwise Relevant become Relevant (Sec. 11)

According to Sec. 11, facts not otherwise relevant are relevant:-

(I) if they are inconsistent with any fact in issue or relevant fact,[22]

(ii) if by themselves or in connection with others facts they made the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations (a): 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.

(b) 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 either B, C or D is relevant.

Inconsistent Facts* (Plea of *Alibi)

Evidence can be given of facts which have no other connection with the main facts of a case except this that they are *inconsistent* with a fact in issue or a relevant fact. Their inconsistency with the main facts of the case is sufficient to warrant their relevancy.

(This section enables a person charged with a crime to take the plea of *alibi* which means his presence elsewhere at the time of the crime. His

22. Under which provision of the Evidence Act, facts if inconsistent with any fact in issue, become relevant. Cite an example of the same. *[LC. 11-2006]*

presence is inconsistent with the fact that he should be present at the place of the crime *[See* Illustration (a)].[23] However, it may be noted that the failure of the plea of *alibi* does *not* mean that the accused was present at the scene of the crime. It may further be noted that plea of *alibi* is irrelevant in the cases of "acting in furtherance of the common intention"; all would be liable to the whole crime even if they were not present at the scene of the crime. ,

Another instance is *non-access* of the husband to prove illegitimacy of a Child. Similarly, whether A committed a rape; the fact that his genital organs were such as to render the intercourse impossible. Other instances are: Survival of the alleged deceased (beyond the date of murder); Commission of the offence by a third person; Self-infliction of harm (suicide by the deceased). f

LEADING CASE: JAYANTIBHAI BHENKARBHAI v STATE OF GUJARAT[24]
[(2002) 8 SCC 165]

In this case, the question regarding plea of "alibi" under Sec. 1 l and burden of proof under Sec. 103 of the Act was raised.

The court observed that the word 'alibi' is of Latin origin and means "elsewhere." It is a convenient term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception (special or general) envisaged in IPC or any other law. It is only a rule of evidence recognized in Sec. 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of

23. Under what provision of the Evidence Act, is the following relevant: The question is whether X committed a crime at Amritsar on a certain day? The fact that 'X' produced a railway ticket of that day travelling from Bombay to Kanyakumari. [C.LC-2006]

24. 'Alibi is not an exception envisaged in IPC or any other law. It is only a rule of evidence recognized in Sec. 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant.' Explain the following with reference to the case of *Jayantibhai Bhenkarbhai* v *State of Gujarat.* *[LC.I!-2006*\

offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi._

The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence.

[An obligation is cast on the court to weigh in scales the evidence adduced by the prosecution in proving the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduce by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi.

The burden of the accused is undoubtedly heavy. This flows from Sec. 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to the benefit of that reasonable doubt which would emerge in the mind of the court.]

In *Munshi Prasad* v *State of Bihar* (2002) 1 SCC 351, it was held that the presence of a person at a distance of about 400-500 yards from the place of occurrence cannot be termed as "presence elsewhere". The plea of *alibi* is based on physical impossibility of being at the scene of crime and so the distance is a very material factor.!

In *Dasari Siva Prasad Ruddy* v *Public Prosecutor, High Court, A. P.* (AIR 2004 SC 4383), it was held that failure on the part of accused to establish plea of *alibi* does not help the prosecution and it cannot be held that the accused was present at the scene of occurrence, the prosecution must prove it by positive evidence. Thus by merely failure on the part of the accused to establish the plea of *alibi* shall not lead to an inference that the accused was present at the scene of occurrence. In *Bikam Pandey* v *State of Bihar* (AIR 2004 SC 997), it was held that the plea of *alibi* cannot be accepted in favour of an accused merely on the ground that the same was accepted in relation to co-accused.

In *Gade Iuikshmi Mangraju* v *State of Andhra Pradesh* (AIR 2001 SC 2677), it was held that the presence of a fingerprint at the scene of occurrence is a positive evidence but the absence of a fingerprint is not enough to foreclose the presence of the persons concerned at the scene. In this case, two persons were involved in a murder; the fingerprints of only one of them were found on an almirah and he did not challenge the evidence when produced by the prosecution. Held that the other accused could not challenge it; he was not heard to say that the absence of his finger impression was a guarantee of the fact of his absence from the scene of the crime.

Facts showing Probabilities

In many cases, particularly in reference to some of the facts which are not directly provable, the court has to go by the probabilities of the situation *[See* illustration (b)]. Under Sec. 11, an inference as to the existence of one transaction is made from the similar or simultaneousness of another transaction. Thus, in a prosecution for having conspired to bring false evidence against a person, the fact that the accused had previously instituted an unfounded prosecution against the same person, is admissible under Sec. 11. However, to prove the offence of forgery by the accused, evidence was offered of other forged documents found in his possession, as this would make it probable that he committed the forgery, was held not admissible^ *[Reg* v *Prabhudas* (1874) 11 BHC 90].

25. State the provision of law and give reasons as to rele- incy of the following fact: In a charge of forgery against A, production of number of forged documents in possession of A. *[D.U.-2009]*

Facts which make things highly improbable are also relevant. For example, in *Santa Singh* v *State of Punjab* (AIR 1956 SC 525), the witnesses testified that they saw the deceased being shot from a distance of 25 feet, rhe medical report showed that the nature of wound was such that it :ould have been caused only from a distance less than a yard. Thus, the expert opinion rendered the statement of the witnesses highly improbable.

In *Kalu Mirza* v *Emperor*, 1909 37 Cal. 91, where the question was whether a person was a habitual cheat, the fact that he belonged to an organisation which was formed for the purpose of habitually cheating people was held to be relevant, and it was open to the prosecution to prove against each person that the members of the gang did cheat people.

Where two persons were involved in a murder, and the fingerprints of only one of them were found on an almirah and he did not challenge ;he evidence when produced by the prosecution, it was held that the other accused could not challenge it. He was *not* heard to say that the absence jf his finger impressions was a guarantee of the fact of absence from :he scene of the crime *(Gade Lakshmi Mangraju* v *State of A.P.* AIR 2001 5C 2677).

Sec. 11 is very wide in its import - a "residuary" section dealing with relevancy of facts. At first sight it would appear that this section would make every fact relevant because of its wording. But care must not taken not to give this section an improperly wide scope by a liberal interpretation of the phrase "highly probable or improbable". These words indicate that the connection between the facts in issue and the collateral facts sought to be proved must be immediate so as to render the coexistence of the two highly probable The relevant facts under Sec. 11 either exclude or imply, more or less distinctly, the existence of the fact sought to be proved. Therefore, statements as to facts made by persons not called as witnesses, transactions similar to but unconnected with the fact in issue, and, opinions formed by persons as to fact in issue or relevant fact, are *not* relevant under Sec. 11.

Thus, Sec. 11 makes admissible only those facts which are of great weight (degree of probability immediate and high) in bringing the court Co a conclusion regarding the existence of fact in question. Such collateral facts are highly valuable to the accused in support of his defence, and

to expose the infirmity of the prosecution case. However, not much use has been made of this section.

Facts Enabling Court to Determine Amount of Damages (Sec.12)

"In *suit* for damages, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant."

The kind of facts admissible in actions for damages will vary with the nature of action i.e. whether it is a suit for breach of contract (the relevant facts are - mode and manner of breach, intention of the defaulting party, his riches, mental pain or suffering caused by breach) or a tort action or under other substantive law.

Facts Relevant when Right/Custom is. in Question (Sec. 13)

"Where the question is as to the existence of any *right* or *custom*, the following facts are relevant:

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its existence was disputed, asserted or departed from."

Illustration: The question is whether A has a right to fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of it by A's father, particular instances in which A's father exercised the right or in which he was stopped by A's neighbours, are relevant facts.

Sec. 13 applies to all kinds of 'rights' - public or private, right of full ownership or falling short of ownership (e.g. rights of easements), a corporeal or incorporeal right (e.g. right of way). The requisites of a valid 'custom' are that the same should be ancient, certain and reasonable (should not be opposed to public policy or morality). It is not necessary to prove that the right is being exercised from time immemorial; however it should have been exercised openly and peaceably.

Whether Judgment is a Transaction

Questions have arisen before the courts whether *a. previous judgment* on the joint in issue (not between the same parties) can be regarded as a transaction' under Sec. 13.

It has been held that the judgment in a previous suit through not *Inter partes* is admissible in evidence. It is not the correctness of the previous decision but the fact that there has been a previous decision that is established by the judgment. The finding of fact arrived at on the evidence of one case cannot be evidence of that fact in another case, [n *Tirumala Tirupati Devasthanams* v *KM. Krishniah* (AIR 1998 SC 1132), held that a judgment in a dispute over the same land between two other persons could be used by a party in a case in which the same land is in dispute through he was not a party to the earlier proceeding.

A judgment in which the illegitimacy of a person was recognized was held to be admissible under Sec. 13 where the question of his legitimacy was in issue in a subsequent suit.

Facts showing Existence of State of Mind/ Body/ Bodily Feeling (Sec. 14)

"Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person; or showing the existence of any state of body or bodily feeling, are relevant."

Explanation 1: *Evidence of Specific Facts, Not General Tendency*

"A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question." Explanation 1 lays down an important *restriction* upon the scope of Sec. 14 *(See* Illustrs. (n), (o) and (p)].

Illustrations

(a) *Fact in Issue.* A is accused of receiving stolen goods, *knowing* them to be stolen. He was in possession of a particular stolen article.

Relevant Facts: The fact that, at the same time, he was in possession of many other stolen articles is relevant; he knew such articles to be stolen *(Knowledge).*

(b) *Fact in Issue: A* sues B for damage done by a dog of B which B knew to be ferocious.

Relevant Facts: The facts that the dog had previously bitten X, Y and Z and that they had made complaints to B, are relevant *knowledge).*

(c) *Fact in Issue: A* is accused of defaming B by publishing an imputation intended to harm the reputation of B.

Relevant Facts: The fact of previous publication by A respecting B, showing ill will on A's part towards B is relevant, as proving A's intention to harm B's reputation *{Intention).*

(d) *Fact in Issue: 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.

Relevant Facts: The fact that, at the time of A's representation, C was supposed to be solvent by his neighbour and by persons dealing with him, is relevant, as showing that A's representation was in good faith *{Good faith).*

(e) *Fact in Issue:* The question is whether A has been guilty of cruelty towards B, his wife.

Relevant Facts: Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(g) *Fact in Issue:* The question is whether A's death was caused by poison.

Relevant Facts: Statements made by A during his illness as to his symptoms are relevant facts.

(h) *Fact in Issue:* The question is what was the state of A's health at the time an assurance on his life was affected.

Relevant Facts: Statements made by A as to the state of his health at or near the time in question are relevant facts.

(i) *Fact in Issue:* A sues B for negligence in providing him with a carriage for hire not fit for use, whereby A was injured.

Relevant Facts: The fact that B was *habitually* negligent about the carriage, which he let to hire, is *irrelevant* (See *Expl. 1* to Sec. 14).

(j) *Fact in Issue:* A is tried for the murder of B by intentionally shooting him dead.

Relevant Facts: The fact that A was in the *habit* of shooting at people with intent to murder them is *irrelevant* (See *Expl. 1).*

(k) *Fact in Issue:* A is tried for a crime.

Relevant Facts: The fact that he said something indicating an intention to commit that particular crime is *relevant.* The fact that he said something indicating a *general disposition* to crimes of that class is *irrelevant* (See *Expl. 1).*

Sec. 14 does not seem to lay down any principle. It rather leaves the whole thing at the court's discretion. The section says in essence that when a state of mind, etc. has to be proved every fact from which it can be inferred is relevant. An important fact for this purpose is the statement of the *affected* person respecting the state of his health or bodily feelings.

Explanation 2: Evidence of Previous Conviction

"When the previous commission by the accused of an offence is relevant, the previous *conviction* of such person is also a relevant fact."

The record of previous criminality is at best an evidence of bad character and Sec. 54 excludes such evidence. But, Sec. 14 permits evidence of previous offences to be admitted whenever this is necessary to prove a particular state of mind or of body. In fact, such evidence is also relevant under Sec. 8 (as showing motive) and Sec. 11 *(Res gestae).*

Evidence of Similar Facts

A fact is said to be similar to another when it is similar to a fact in issue. According to the maxim *Res inter alios actate,* a fact in issue cannot be proved by showing that facts similar to it, but now part of the same transaction, have occurred at other times. Thus, when the question is whether a person has committed a crime, the fact that he had committed a similar crime sometime ago is irrelevant.

The Indian Evidence Act does not anywhere mention the words "similar facts". There is nothing in the Act declaring that evidence of similar facts cannot be given or that it can be given. The general rule is that such evidence is *not* relevant unless it has some probative value in reference to the fact in controversy. Further, Sec. 15 *(See* below) is an exception to this general rule.

Facts Bearing on Question whether Act was Accidental/ Intentional (Sec. 15)

"When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of *similar* occurrences, in each of which the person doing the act was concerned, is relevant."

Illustrations

(a) 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, in each of which a fire occurred and A received payment from a different insurer, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. A makes an entry showing that on a particular occasion he received less than he really did receive. The fact that other entries made by A in the same book are false and in A's favour, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee. The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, showing that the deliver)-' to B was not accidental.

Sec. 15 is an *exception* to the general rule that the evidence of similar facts is not relevant. This exception became necessary to prove system or design or to overthrow the defence of accident in cases of "habitual crimes" by an offender. Thus, where A falsely represented to B that he was the manager of a mercantile firm, and obtained money for the purpose of deposit from B, the fact that A had made similar representations to C and D and obtained sums from them, is relevant.

It may be noted that evidence of similar facts can be given when will go to establish a state of mind or *mens rea* which is either a ndition of liability or is otherwise relevant. Such evidence falls both ider Sees. 14 and 15. Further, evidence of similar facts is relevant to tablish identity of the accused (under Sec. 9) and his *modus operandi.* aus, "exclusion of similar fact evidence is a rule of practice and not of v.

cistence of Course of Business when Relevant (Sec. 16)

X^hen there is a question whether a particular act was done, the existence *I* any course of business, according to which it naturally would have :en done, is a relevant fact."

lustrations: (a) The question is whether a particular letter was dispatched, he facts that it was the ordinary course of business for all letters put l a certain place to be carried to the post, and that particular letter was ut in that place, are relevant.

(b) The question is whether a particular letter reached A. The facts lat it was posted in due course, and was not returned through the Dead ,etter Office, are relevant.

The effect of Sec. 16 is that if an act is shown to have been done in a general course of business, the law draws a presumption that the act must have been done. When it is proved that a letter has been posted and has not been returned to the sender, the presumption is that it must have been delivered.

When the acknowledgement of a registered letter comes back (to he sender) with a signature purporting to be that of the addressee, there s a presumption of the fact of 'service'. The addressee's refusal to receive is a proof of the fact that the letter was taken to him for delivery.

FURTHER QUESTIONS

Q.1. Discuss the relevancy of the following under the Indian Evidence Act, 1872:-

(a) The question is whether A sold pure *ghee* to B ('fact in issue'). A wants to offer in evidence the fact that he sold pure *ghee* to C, D, E and some other customers on the same day.

(b) A was charged for the murder of his wife who was missing for some time ('fact in issue'). Later on, a dead body was recovered by the police and the photograph was published in the newspaper. After seeing the photograph, A said to his colleague, "People are saying that the photograph is of my wife. Please go and see". Then A left the office after taking leave.

(c) The fact testified to by D that soon before the alleged murder by A, C had peeped through the window and exclaimed "Look A is aiming his gun towards B".

(d) The fact that B was seen coming out of the house of A distressed and sobbing soon after her alleged rape by A.

(e) In As trial under Sec. 420, IPC for cheating by falsely representing to B that he was the manager of a Bank and would employ him as a cashier if he deposited with him Rs. 10,000/-, evidence is sought to be given that A had made similar representations to C and D and obtained Rs. 10,000/ - from each of them. *[C,LC.-91/93][D.U.-2007]*

A.1. Relevancy of Facts (Sees. 5-9,11)

In order to prove the existence or non-existence of the facts in issue, certain other facts may be given in evidence, called *relevant facts.* Such facts may have such a direct or indirect connection with the fact in issue, that they render the latter probable or improbable. According to *Sec. 5,* evidence may be given of the existence or non-existence of every fact in issue and of relevant facts, and of no others.

The provisions relating to *Sees. 6-9* could be summarised as follows:-

(1) *Sec. 6 (Relevancy of facts forming part of the same transaction)*

The principle of this section is that whenever a "transaction" such as a contract or a crime, is a fact in issue, then evidence can be given of every fact which forms part of the same transaction. Transaction refers to a series of acts so connected together as are capable of being called by a single name e.g. a contract, a crime, etc. The acts in a transaction need not occur at the same time and place.

Illustration (a) to Sec. 6 - A is accused of B's murder by beating him. Whatever was said or done by A or B or by the by-standers at the beating or shortly before or after it as to form part of the transaction, is a *relevant* fact.

Statements often accompany physical happenings. The question is to what extent such statements can be regarded as parts of the transaction. For a statement to be a relevant fact, it must be contemporaneous with the fact, i.e., made either during or *immediately* before or after its occurrence. If the statement is made after the act is over and its maker had the time for reflection and deliberation (or a narration of past events), then it is *not* relevant. Thus, A, while running in street, crying that B has stabbed him, is a relevant fact. But, statements made during the investigations of a crime are not relevant facts. Where shortly after the murder, the person suspected of it explained away the absence of the deceased by saying that he had left the village, held that statement is a relevant fact, being part of the transaction.

(2) *Sec. 7 (Facts which are the occasion, cause or effect of fact in issue)*

Occasion: The fact that the deceased girl was alone in her house at the time of murder is relevant as it constituted the occasion for the murder.

Cause. The fact that the accused was in love with the deceased's wife is relevant as it constituted the cause for the murder.

Effect: Footprints and finger impressions on the scene of the crime; where a person is poisoned the symptoms produced by poison; possession of stolen articles by a person immediately after theft.

Opportunity. The fact that accused left his fellow workers at about the time of the murder under the pretence of going to a Smith's shop was relevant as this gave the accused his opportunity.

(3) Sec. 8 (Motive, *preparation and conduct)*

Motive-. The question is whether A murdered 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.

Preparation: It is relevant to show that the accused hired a revolver a few days before the murder.

Conduct. The conduct of injured or accused person or the parties to a suit is relevant. The conduct (previous or subsequent) must be such as influences or is influenced by the facts in issue or relevant facts e.g. the defendant turned pale, when arrested; bribing; concealing one's identity; absconding, etc.

Explanation 1 to Sec. 8 -It provides that mere statements do not constitute 'conduct' unless they accompany and explain acts other than statements. For example, *complaints* made to a person in authority, shortly after the commission of the crime are relevant facts. If without making any complaint, the aggrieved party only stated the facts, that will not be relevant.

Explanation 2 to Sec. 8 - It provides that when the conduct of any person is relevant, any statement made to him in his presence and hearing, which affects such conduct, is also relevant. Thus, the fact that accused ran away immediately after hearing that the police is looking for the culprit.

(4) Sec. *9 (Facts necessary to explain/introduce relevant facts)*

Introductory. In a suit for libel, the state of parties' relations at the time of the alleged libel.

Explanatory. 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 a better offer". This statement is a relevant fact as explanatory of C's conduct.

Support/rebut inference: If after absconding, the acctised was arrested **in a** train travelling without ticket or in shabby dress, this will be relevant as fact supporting the inference of his guilt. However, if he shows that he left suddenly because of a urgent business work, it will rebut the inference of his guilt.

Identity of a person/thing: Age, height, voice, hand-writing, blood group, personal history, etc. are relevant facts.

Time/Place of happening: Facts that help to fix the time or place of the happening, are relevant facts.

Relation of parties: The fact of undue influence is relevant.

(5) *Sec. 11 {When irrelevant facts become relevant)*

(l) *Inconsistent facts* - The facts which are inconsistent with the main facts, become relevant e.g. the murder occurred in Delhi, the accused on that day was in Calcutta; non-access of the husband to prove illegitimacy of a child.

(ii) *Facts showing probabilities* - Facts which make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable (i.e. the connection between such facts and the fact in issue/relevant fact is *immediate).* Thus, in a case of false prosecution, the fact that the accused had previously instituted an unfounded prosecution against the same person is relevant. Where the witness testified that he saw the deceased being shot **from** 25-feet distance, but the medical expert opined that distance cannot be more than a yard considering the nature of wound, here expert opinion rendered the statement of witness highly improbable.

Decision of the case(s) in question

(a) The fact is *not* relevant under Sec. 6 (evidence **of pure** ghee being sold to other **customers is not part** of **the same transaction) or Sec. 11(2) (there is no immediate or necessary connection** with the fact in issue, **because a person can have bad** intentions towards one person **alone).**

(b) The facts are *relevant* under Sec. 8, as A's conduct is influenced by fact in issue or relevant fact. Instead of going to the police station himself, he asked a friend to do it; while he himself proceeded to go on leave. As his statement is in a way explanatory of his conduct, it is relevant under Explanation 1 to Sec. 8.

(c) The statement is *relevant* under Sec. 6, as it is contemporaneous with the fact in issue (made immediately before its occurrence) and thus form part of the transaction *(See* illustration (a) to Sec. 6).

(d) It is a *relevant* fact under Sec. 8, as B's conduct is influenced by fact in issue (i.e. rape).

(e) The evidence of similar but unconnected facts is *not* relevant evidence, either under Sec. 6 (not part of the same transaction) or Sec. 11(2).

Q.2. Discuss the relevancy of the following under the Indian Evidence Act -

(a) A is accused of committing murder of R. Evidence is sought to be given of the fact that R had murdered As brother and A had threatened that he would take revenge.

(b) On the basis of the F.I.R. A is suspected of having committed the crime. The fact that A was absconding after the incident and that he was located eight days after in a dilapidated condition.

(c) The question is whether rape was committed by A. The fact that A was admitted to a hospital with multiple fractures during the period of alleged rape.

(d) A DNA report that clearly establishes that the killed child was the son of an industrialist, who is disinterested in owning the paternity of the child.

(e) The witnesses depose that after hearing the first shot they climbed the boundary wall and saw the accused chasing the victim before the final shoot-out.

(f) After the alleged rape the victim narrated the whole incident to the police over phone. *[C.L.C.-94/95/96]*

I. (a)It is a *relevant* evidence under Sec. 8, as A had a motive to kill R.

(b) It is a *relevant* fact under Sec. 8 (conduct subsequent to and affected by fact in issue) and Sec. 9 (facts supporting the inference of A's guilt).

(c) It is a *relevant* fact under Sec. 11 (facts inconsistent with fact in issue, become relevant).

(d) It is a general rule of evidence that all such evidence is admitted which helps the court in arriving at the truth. Tape records, video-films, polygraph tests, DNA finger printing, etc. are tools of modern technology which make the probability of truth highly certain. A DNA report establishing the paternity of the child is a *relevant* evidence under Sec. 9 (identity of a person).

(e) It is a *relevant* fact under Sec. 6 [illustration (a)].

(f) It is a *relevant* evidence under explanation 1 to Sec. 8, because it amounts to a 'complaint'. The narration of incident to the *police* is made with a view to redress or punishment, thus it is not a bare statement so as to be excluded under Sec. 8.

Q.3. Discuss the relevancy of the following -

(a) A is accused of murder of his wife. The evidence given that he was in love with another woman and wanted to marry her. The wife had come to know of it and had threatened to report the matter to police.

(b) Accused was seen coming out of a room, from where the dead body of his wife was recovered. The accused ran away after hearing that the police is coming to arrest the murderer.

(c) The question is whether A murdered B during the course of a struggle. "Marks on the ground produced by the struggle at the place Of occurrence and a tape-recorded statement of A and B recorded simultaneously" are tendered in evidence.

(d) In a trial of A for raping B, the prosecution wants to rely upon a complaint made by B relating to the crime, the circumstances under which and the term in which the complaint was made.

If instead of a complaint, the prosecution relies on a narration of event by B to a friend telling him as to how A had performed the act, will it be relevant fact? *[LC. 1-95/96]*

A.3. **(a)It** is a *relevant* fact under Sec. 8 [illustration (a)] *{Motive).*

(b) It is a *relevant* fact under Sec. 6 and Sec. 8 (subsequent *conduct).*

(c) Marks on the ground is a *relevant* fact under Sec. 7 *(effect* of a fact in issue). A tape-recorded statement is a *relevant* fact under Sees. 6,7,8,9,10 or 11.

(d) It is a *relevant* fact under Sec. 8, explanation 1. If without making any complaint, the aggrieved party only stated the facts, that will not be relevant, for bare statements are not relevant under Sec. 8.

Q.4. Discuss the relevancy and admissibility of tape-recorded statement. *[C.LC-93/94; LC.I-95]*

Discuss the facts and points of law as enunciated in the case of *R.M. Malkani* v *State of Maharashtra* (AIR 1973 SC 157). *[L.C.I-94]*

It is held in *R.M. Malkani* v *State of Maharashtra* that a contemporaneous tape recording of a relevant conversation is a relevant fact. Discuss. *[D.U.-2007*

'A', a young girl, receives obscene calls on the telephone. She records the phone call on a tape-recorder in which the callei identifies himself to be 'X'. 'X' is being tried for making obscene calls to 'A. In the trial the prosecution wants to lead in evidence the recorded call. Can it be led in evidence? What is the tes for admissibility of tape-recorded conversation? Decide with reference to decided cases. *[LC.II-95*

A.4. Relevancy and **Admissibility of Tape-recorded Statement**

j The tools of modern technology like tape records, video films, *DNA* tests, Polygraph test (lie detection), etc. make the probability of truth

highly certain. It is a general rule of evidence that all such evidence is admitted which helps the court in arriving at the truth, r

Thus, tape-recordings can be used as evidence in a court to :orroborate the statements of a person who deposes that he had carried in a conversation with a particular person. A previous statement of a jerson which has been tape-recorded can also be used to test the veracity >f a witness and to impeach his impartiality, i

Similarly, if the court is satisfied that there is no 'trick photography' ind the photograph is above suspicion, it may allow the photograph to se received in evidence. Evidence of "dog-tracking", even if admissible, is not of much weight *(Abdul Razak* v *State of Maharashtra* AIR 1970 SC 283).

In *Yusufalli* v *State of Maharashtra* (1967) Bom LR 76 (SC), the Supreme Court observed: "If a statement is relevant, an accurate tape-record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voice must be properly identified. One of the features of the magnetic tape-recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with".

In *Mahabir Prasad* v *Surinder Kaur* (AIR 1982 SC 1043), the court held that tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation. In the absence of any such evidence, the tape cannot be used as evidence in itself.

LEADING CASE: R.M. MALKANI v STATE OF MAHARASHTRA
(AIR 1973 SC 157)

In this case, the prosecution case was based solely on the tape-recorded conversation, which clearly proved the appellant's intention to obtain a bribe. The appellant's contention was that such conversation cannot be admitted under the provisions of **Indian** Evidence Act, moreover as it was 'unlawful'. The Supreme **Court held** such **conversation** to **be relevant^]**

The Supreme Court laid down the law relating to tape-recorded conversation as:-

(1) Tape-recorded conversation is *admissible* in evidence provided the conversation is relevant to the matter in issue, the voice can be properly identified, and the possibility of erasing parts of the tape is eliminated.

(2) When the tape-recording is a contemporaneous record of such conversation (i.e. made simultaneously with the facts in issue or relevant facts), it is a relevant fact under Sec. 6. It is *res gestae.* Since it is like a photograph of a relevant incident, it is also admissible under Sec. 7. Such recording is also a 'document' under Sec. 3. The recording is also admissible under Sees. 8,9,10 or 11.

(3) As to evidentiary value, the court has said that such evidence must be received with caution. Thus, tape-recording must be genuine and free from tampering or mutilation; the court should be otherwise satisfied of its accuracy.

(4) Even if the tape-recording is obtained unlawfully, it will be admissible in evidence, as "detection by deception" is a form of police procedurejln *Magraj Patodia* v *R.K. Birla* (1970) 2 SCC 889, it was held that even if a document is procured by improper or illegal means, there is no bar to its admissibility provided its relevance and genuineness are proved.

The Madras High Court has, in *R. Venkatesan* v *State* (1980 Cr LJ41), considered the evidentiary value of a tape-recorded conversation. In that case, the conversation was not audible throughout, and was broken at a very crucial place. The accused alleged that the same has not been tampered with. The accuracy of the recording was not proved, and the voices were also not properly identified. In the circumstances, the court concluded

that it would not be safe to rely on the tape-recorded conversation as corroborating the evidence of the prosecution witness, i

As regards admissibility of tape-recordings, the Bombay High Court *(C.R. Mehta* v *State of Maharashtra,* 1993 Cr LJ 2863) has observed: "The law is quite clear that tape-recorded evidence if it is to be acceptable, must be sealed at the earliest point of time, and not opened except under orders of the court".

In *Ram Singh* v *Col. Ram Singh* (1985) Supp. SCC 611, the Supreme Court has tightened the rule as to relevancy of tape to this extent that it must be shown that after the recording the tape was kept in proper custody. In that case the Deputy Commissioner had left the tape with the stenographer. That was held to be sufficient to destroy the authenticity of the tape. The Supreme Court has further suggested that how the cassette came into existence is an important consideration. The court rejected tape recorded evidence of an election speech because the tape was prepared by a police officer and he was not able to explain why he had done so. The candidate had denied that the tape was in his voice *(Quammaral Islam* v *S.K Kanta* AIR 1994 SC 1733).

Decision of the case in question

/The tape-recorded call can be led into evidence, provided the conditions laid down in *KM. Malkani* case are satisfied. ,

Q.5. Define conspiracy. What is the principle laid down under Sec. 10 of the Evidence Act, 1872? *[D.U.-2007/201U*

"Rule in Sec. 10 of the Evidence Act confines the principle of agency in criminal matters to the acts of the co-conspirator." Comment. *[D.U.-2009]*

"A conspiracy is hatched in secrecy and executed in darkness. Naturally, therefore, it is not possible for the prosecution to connect each isolated act of statement of one accused with the acts and statements of others, unless there is a common bond linking all of them together". Explain with the help of relevant statutory provisions and case law.

[D.U.-2007l[C.LC-94]

"Section 10 of the Indian Evidence Act is an evil provision but perhaps it is a necessary evil". Do you agree with this observation? Discuss critically with reference to the leading cases. [C.L.C-93]

What is the test of *prima facie* conspiracy in Sec. 10? **[C.L.C.-96]**

A, B and C conspire to blow a rail-bridge. To achieve their object, they make a plan to place a time bomb below the railway-bridge. The time bomb is placed, but it does not explode. They return back and write a letter to the supplier of the time bomb explaining him the non-explosion of the device and requesting for another time-bomb. The letter is intercepted and the prosecution wants to use this letter against all accused persons including the supplier under Sec.10. Decide.

[D.U.-2007\[C.LC.-91; LC.i-96]

A.5. Evidence to Prove Conspiracy (Sec. 10)

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of conspiracy as for the purpose of showing that any such person was a party to it".

L *Illustration* -Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Government of India.

The facts that B procured arms in Europe for the purpose of 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 the contents of letter written by H giving an account of conspiracy, are each relevant, both to prove the existence of 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

wrere done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.[26].

Conspiracy' means a combination or agreement between two or lore persons to do an unlawful act or to do a lawful act by unlawful leans. The underlying *principle* on which Sec. 10 is based is the principle of 'agency' which means, if two or more persons conspire together to commit an offence, each is regarded as being the agent of the other and ach conspirator is liable for what is done by his fellow conspirator, j

The *conditions* of relevancy under Sec. 10 are:-

(1) There shall be *prima facie* evidence, affording a reasonable ground to believe that two or more persons have entered into a conspiracy.

(2) If the said condition is fulfilled, anything said, done or written, by anyone of them in reference to their common intention will be evidence against the other.

(3) Anything said, done or written by him should have been said, done or written by him after the time when the intention to conspire was first entertained by any of them.

(4) The acts/statements of a conspirator can only be used for the purpose of proving the existence of conspiracy or that a particular person was a party to it. It *cannot* be used in favour of the other party or for the purpose of showing that such a person was *not* a party to the conspiracy.

(5) Anything said, done or written may be proved against a conspirator who joined after or left before such thing was said, done or written

(Sardar Sardul Singh v *State of Maharashtra* AIR 1965 SC 682).

Thus, the special feature of the rule is that anything said, written or done by any member of the conspiracy is an evidence against the other members even if they are done in their absence and without their knowledge, the only condition being that the act must have reference to their common intention.

26. **A** question based on this illustration. *[D.U.-2007]*

Test of prima facie conspiracy - Only *A prima facie* case of conspiracy has to be made out to bring Sec. 10 into operation. The fact that the two accused, one of whom actually caused death, were seen together before the event isolating themselves on a roof top and making every possible effort to conceal their conversation from the family members, was held to be enough *prima facie* proof of conspiracy so as to punish one for the action of the other *{Kehar Singh* v *Delhi Admn.* AIR 1980 SC 1883).

Sec. 10 - A Necessary Evil

Sec. 10 has a potential to rope in the innocent with the guilty, and to rope in people who have genuinely abandoned and regretted. Illustration to Sec. 10 has been described to be unnatural. .

The case of *Kehar Singh* v *State {Delhi Admn.),* shows that the Supreme Court considered a mere act of two people isolating themselves at the house top and subsequently avoiding questions about the content of their conversation as enough reason to believe that they were conspiring about some thing.

However, it must be kept in mind that Sec. 10 only makes some facts relevant, appreciation of evidence and giving due weight to it is the function of the court. Where certain evidence has been admitted under reasonable belief of the existence of a conspiracy, but subsequently it appears that the belief was unfounded, the evidence can be struck out.;

Sec. 10 is nevertheless considered a "necessary evil". Explaining the reasons which necessitated the relaxation of the ordinary rules in cases of conspiracy,! B.P. Sinha, J. said: "Sec. 10 has been deliberately enacted in order to make such acts/statements of a co-conspirator admissible against the whole body of conspirators, because of the nature of the crime. A conspiracy is hatched in secrecy, and executed in darkness. Naturally, therefore, it is not feasible for the prosecution to connect each isolated act/statement of one accused with the acts/statements of the others, unless there is a common bond linking all of them together Badri _*Rai* v *State of Bihar* AIR 1958 SC 953).

LEADING CASE: MIRZA AKBAR v EMPEROR[27] (AIR 1940 PC 176)

ln this case, the allegation of the Prosecution was that W, the wife of Mr. X, and her paramour B, conspired to murder X. It is further alleged that W and B hired C for committing the murder of X. C was caught red-handed in murdering X. B, who reached the spot pleaded that C is innocent (absence of motive). W, B and C were prosecuted for murder and conspiracy to murder.

The principal evidence of the conspiracy between W and her lover B, consisted of certain letters, in which they expressed deep love towards each other and referred to 'money' and 'means' (most probably in connection with X's murder). W also made statements before the magistrate after she had been arrested on the charge of conspiracy. Her letters and her statements were admitted in evidence against B as being the things said and written by a conspirator in reference to their common intention, j B preferred an appeal to the Privy Council against the relevancy of this evidence.

It was *held* that the letters were relevant under Sec. 10 as their terms were only consistent with a conspiracy between W and B to procure the death of X, and they were written at a time when the conspiracy was going on and for the purpose of attaining their object. But the statement to the magistrate was held to be not relevant under Sec. 10 as it was made *after* the object of the conspiracy had already been attained and had come to an end.

The court observed: "The words 'common intention' signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, But it would be very different matter to hold that any narrative/statement/confession made to a third party *after* the common intention or conspiracy was no longer operating

27. A question based on the same facts. [LC./-94/95]

for his private record, or convenience, such as, the counterfoil of his cheque book. The question was admissibility of these books as evidence of conspiracy, and against the other person (S).

It was *held* that the book used for carrying out fraud is certainly relevant, but the second book is not. As the latter is a mere statement of what this party was doing. A mere statement made by one conspirator, or an act that he may chooses to do, which is not necessary to carry the conspiracy to its end, is not evidence to effect another. Acts and declarations are not receivable unless they tend to the advancement of the common object. If the object has been accomplished, the act or statement is not receivable. This was a mere statement as to the share of the plunder.

The essence of the decision seems to be that evidence of an act of a conspirator is relevant against other only if the act was done to carry out the conspiracy. The act should "relate to the furtherance of the common object". And it should not merely a narrative or description or confession.

LEADING CASE: MOHD. KHALID v STATE OF W.B. [(2002) 7 SCC 334]

Facts and Issue - In this case, the appellants were charged for striking terror in people by using explosives and killing large number of people in pursuance of a criminal conspiracy. TADA Court found them (appellants) guilty of offences mentioned in the charge sheet. An important question was raised during the appeal viz. whether confessional statement of a co- conspirator recorded two days after the incident and not immediately (while it was possible to do so) can come within the ambit of Sec. 10 of the Evidence Act?

Observations and Decision -The court observed: There is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence. Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence. lt is

not always possible to give affirmative evidence about the date of the formation of the conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. |

The express agreement need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Where trustworthy evidence establishing all links of circumstantial evidence is available the confession of a co-accused as to conspiracy even without corroborative evidence can be taken into consideration, j

The court further observed: The first condition for the applicability of Sec. 10 is the existence of reasonable ground to believe that the conspirators have conspired together. This condition will be satisfied even when there is some prima face evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the others, provided that there should have been a statement "in reference to their common intention. "The words "in reference to their common intention" are very comprehensive and have been designedly used to give them a wider scope than words "in furtherance of common object" used in English law. Intention is the volition of mind immediately preceding the act while the object is the end to which effect is directed, the thing aimed at and that which one endeavours to attain and carry on. Intention implies the resolution of the mind while the object means the purpose for which the resolution was made.

But the contention that any statement of a conspirator, whatever be the lapse of time, would gain admissibility under

Sec. 10 if it was made "in reference" to common intention, is too broad a proposition for acceptance. The bask mopjewhich underlines Sec. 10 is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Sec. 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person is out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under Sec. 10. Once common intention ceased to exist, any statement made by a former conspirator therefore cannot be regarded as one made in reference to their common intention. In other words, the post-arrest statement made to a police officer, whether it is a confession or otherwise touching his involvement in the conspiracy, would not fall within the ambit of Sec. 1O.

In *Mirza Akbar* v *King-Emperor* (AIR 1949 PC 176), it was held that any narrative or statement or confession made to. a third party after the common intention or conspiracy was no longer operating and had ceased to exist is not admissible against the third party.Jin *Sardul Singh Caveeshar* v *State of Bombay* (AIR 1957 SC 747), it was held that the rule in Sec. 10 confines the principle of agency in criminal matters to the acts of the coconspirator within the period during which it can be said that the acts were in reference to their common intention i.e. 'things said, done or written, while the conspiracy was on foot' and 'in carrying out the conspiracy'. It would seem to follow that where the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence.

In a given case, however, if the object of conspiracy has not been achieved and there is still agreement to do the illegal act the offence of criminal conspiracy continues and Sec. 10 applies. In other words, it cannot be said to be a rule of universal application. The evidence in each case has to be tested and the conclusions arrived at. In the present case, the prosecution has

not led any evidence to show that any particular accused continued to be a member of the conspiracy after his arrest, i

Comments - Normally, conspirator's connection with the conspiracy would get snapped after he is nabbed by the police and kept in their custody because he would thereby cease to be the agent of the other conspirator's *[State of T.N.* v *Nalini* ("Rajiv Murder case") (1999) 5.SCC 253'J. In *State of Gujarat* v *Mobd. Atik* (1998) 4 SCC 351, it was held that the principle is no longer *res Integra* that any statement made by an accused after his arrest, whether as a confession or otherwise, cannot fall within the ambit of Sec. 10. The court also said that a confessional statement made by a person who is no more alive would vanish from the ken of evidentiary use.

In *Sidharth* v *State of Bihar* (AIR 2005 SC 4352), it was held that a confessional statement implicating others made after the common intention of the parties was no longer in existence is not admissible. In *Jayendra Saraswatbi Swamigal* v *State of T.N.* (2005) 2 SCC 13, statements of a conspirator recorded a long after the murder and made in the absence of others with reference to past acts done in the actual course of carrying out the conspiracy were held to be statements taking place after the common intention was no longer there. In *State (NCT of Delhi)* v *Navjot Sandhu* (2005) 11 SCC 600, held that confessions made by conspirators in police custody under Sec. 32, POTA are not admissible against co-accused under Sec. 10.

In *Govt, of NCT of Delhi* v *faspal Singh* (2003) 10 SCC 586, it was held that once there was sufficient material to reasonably believe that there was concert and connection between persons charged with a common design, it is immaterial as to whether they were strangers to each other, or ignorant of the actual role of each of them, or that they did not perform any one or more of such acts by joint efforts.

In *Ram Narayan Popli* v *CBI* (2003) 3 SCC 641, and, *K. Hashim* v *State of T.N.* (2005) 1 SCC 237, it was held that things said, done or written before the conspirator against whom the evidence is sought to be proved had entered the field of

conspiracy or after he left it was clearly covered, in spite of the fact it being related to the period prior to commission of the offence.

In *State of T.N.* v /. *Jayalalitha* (AIR 2000 SC 1589), the Apex Court observed: The question of using anything said, done or written by any one of such conspirators would arise only if the facts were to help to sustain the first limb of Sec. 10 i.e. there is reasonable ground to believe that two or more persons have conspired together to commit an offence. But it is open to the court, even at this stage to consider the materials relating to what an accused would have said, done or written with reference to the common intention between the accused for the purpose of deciding whether there is reasonable ground to believe that the said accused would have been one of the conspirators.

LEADING CASE: CENTRAL BUREAU OF INVESTIGATION v V.C. SHUKLA ('Hawala Case') (AIR 1998 SC 1406)

In this case, it was alleged that during the years 1988 to 1991 the Jains (accused) entered into a criminal conspiracy among themselves, the object of which was to receive unaccounted money and to disburse the same to their companies, friends, close relatives and other persons including public servants and political leaders of India. In pursuance of the said conspiracy, S.K. Jain lobbied with various public servants and government organizations to persuade them to award contract to different foreign bidders with the motive of getting illegal kickbacks (through hawala channels) from them. An account of receipts and disbursements of the monies was maintained by J.K. Jain in the diaries and files recovered from his house and Jain brothers authenticated the same, i

It was held that entries in the diary of a person showing the names of certain persons to whom payments were supposed to have been made were not sufficient to create a reasonable ground to believe that a conspiracy existed between the persons whose names were mentioned and the person who was keeping the diary. The diary does not amount to an admission of conspiracy.

The court observed that ordinarily a person cannot be made responsible for the acts of others, unless they have been instigated by him or done with his knowledge or consent. Sec. 10 provides an exception to this rule, by laying down that an overt act, committed by one of the conspirators is sufficient - on the principles of agency - to make it the act of all. But such concept of agency can be availed of only after the court is satisfied that there is reasonable ground to believe that they have conspired to commit an offence or an actionable wrong. It is only when such reasonable grounds exist, that anything said, done or written by any one of them in reference to their common intention thereafter is relevant against the others, not only for proving the existence of the conspiracy but also for proving that the other is also a conspirator.

In this case, entries in the account book alleged to be showing conspiracy among all the accused. The evidence of prosecution witness only indicated that one of the accused in question was known to the other accused person and had gone to their residence on formal occasion; witness not speaking a word about the other accused in question. It was held that Sec. 10 cannot be pressed into service for holding that conspiracy amongst all the accused was proved. .

The court also held that only voluntary and direct acknowledgement of guilt is a confession but if it falls short of actual admission of guilt, it may be used as evidence against the person who made it or his authorized agent, as an admission under Sec. 21. Thus, entries in the diary of a person mentioning the names of certain persons as the recipient of money were not relevant against them but as between Jain brothers they were relevant as admissions under Sec. 18 as the statements of an agent who was authorized to make the payments. Further, it was held on facts that the entries in the Jain Hawala Diaries though admissible, .were not capable of charging anybody with liability being not supported by any independent evidence as to their truthfulness.]

Difference between English and Indian Laws[29]

As explained above, under English law, a mere statement about conspiracy would not be relevant. While under Indian law, it is enough if the act or statement has reference to the common intention.

But this difference of words does not seem to make a difference of substance also. In interpreting the words of Sec. 10, the court in *Mirza Akbar* v *Emperor*, *Sardul Singh* v *State* and *Badri Rai* v *State* **referred** to R v *Blake* and observed that Sec. 10 is on the same lines. Sec. 10 is based on the theory of agency. And the theory would be completely knocked out if Sec. 10 were interpreted to include narrative statements which have nothing to do with the carrying out of the common intention. Thus, an account of a conspiracy given by a conspirator in a letter to his friend is not relevant against the others as it is neither in the execution nor in support of the common purpose[30] [R v *Hardy* (1974) 24 HS Tr 451]. But in *Bhola Nath* v *Emperor* (AIR 1939 All. 567), such letter was held to be relevant.

The second suggested difference is based on the illustration appended to Sec. 10, according to which anything said, done or written may be proved against a conspirator who joined after or left before **such** thing was said, done or written. Under English law, such a **conspirator** is protected. When a person has not yet joined or when he **has already** left the conspiracy, there is no common intention in reference **to him,** and therefore, the act in question cannot have reference to **any intention which** is common with him.

In *Ram Narajan Popli* v *CBI* (2003) 3 SCC 641, **it was held: The** expression "in reference to their common intention" in Sec. 10 of **the Act**

29. What are the differences between English and Indian law of **Evidence** pertaining to conspiracy? *[O.U.-2010]*

30. After the murder, A writes a letter to his friend describing **the plan** and its execution. The letter is intercepted by the police. Is the letter **relevant** under Sec. 10? [C.LC. -96]

    X, Y and Z are allegedly involved in a conspiracy to bribe **members of** the Assembly in order to win the support for the government. In the **course** of the trial, 'X', who is also an author, writer a long letter to his friend 'A' describing how his best friends misled him, took huge amounts of money for lawfully eliciting support, but ultimately indulged in unfair practices. Can the prosecution use X's letter to 'A in the trial for conspiracy. *[C.LC-2006]*

is very comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of in the English law; with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed will be evidence against the other before he entered the field of conspiracy or after he left it.

Decision of the case in question

The present problem is based on the case - *In re,* IV. *Ramaratnam* (AIR 1944 Mad. 302). A letter was written *after* the common intention of the conspirators had been carried out, i.e. after the attempt (crime). As there was no conspiracy to execute, the letter will have reference to 'past acts', which is inadmissible *(Mirza Akbarv Emperor).* However, this will be so, if the supplier had agreed to supply *one* time-bomb only.

If the supplier has not restricted himself to the limit of one bomb, then it should be said that the conspiracy was still going on, and then the letter will be admissible and could be used against the supplier, under Sec. 10.

Q. 6. (a) A, B, C and D formed a religious group A, the leader, wrote a letter to B, C and D appreciating their resolve to launch a common struggle against injustice and ill-treatment to their *kaum.* The common plan involved some terrorist activities. After one such activity (a bomb blast), the police arrested many suspects, including A, B, C and D. The prosecution wants to adduce the following two facts under Sec. 10:-

(i) Two tape cassettes in which the specific roles assigned to each member of the common struggle is elaborated.

(ii) A personal diary of A in which the story of group awakening is recorded with a view to be published as a novel. Decide.
[C.L.C-95]

(b) A and B are being tried for conspiring to cheat C in the sum of Rs. 24,000. After the transaction, B made certain entries in a diary, showing that each of them had profited to the extent of Rs. 12,000 in the said transaction. These entries in the diary of B are sought to be used as evidence against A. Can they be admissible?

A. 6. (a)Anything said, done or written when the conspiracy was going on is relevant, but not when the conspiracy has ended *(Mirza Akbar Hmperoi).* Two tape cassettes are relevant because they are evidence of a time while the conspiracy was on foot, i.e., in existence. As to the personal diary, if it was written after the conspiracy had been carried out, then it cannot be tendered in evidence.

(b) These entries *cannot* be admissible in evidence under Sec. 10, as they were made by a conspirator after the common intention of the conspirators has been achieved, viz. the cheating of C.

The words "in reference to their common intention", under Sec. 10, means in reference to what at the time of the statement was intended in the future. Thus, narratives coming from the conspirators as to their past acts cannot be said to have a reference to their common intention.

In *Emperor* v *Vaishampayan* ('Lamington Road shooting conspiracy case') (AIR 1932 Bom. 56), a police officer and his wife were wounded by revolver shots, fired by some persons. After several persons were arrested, evidence was sought to be given of a statement of an absconding accused to the approver, that the conspirators had shot a police officer, and that a pamphlet should be printed and distributed to start a propaganda in furtherance of the objects of conspiracy. *Held that* the statement regarding 'shot' is a narration of past event and thus inadmissible, but that about pamphlet would be relevant because it furthers the object of conspiracy.[31]

31. Three revolutionaries A, B and C, shoot a S.H.O. of a police station. While fleeing from the scene one of them, C on seeing a fellow-traveller D, shouted to him loudly, "We have shot the S.H.O. of this police station; now get pamphlets published to this effect and distribute them in public." Later when all four of them are being tried for conspiracy to overthrow Constitutional Government through violent means, the prosecution relies on the above statement of C as a credible piece of evidence. Can it be permitted to do that? Support your answer with the aid of the legal provision and the decided cases on it. *[D.U.-2010]*

3
Admissions and Confessions

ADMISSIONS
(SECS. 17-23)

Admission Defined[1] (Sec. 17)

"An admission is a statement, oral or documentary, 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."

According to Sec. 17, an admission is a statement which suggests some inference as to the existence of a fact in issue or a relevant fact, An admission is a confession or voluntary acknowledgment about the existence of certain facts. An 'admission' is a statement of fact which. waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true.

If, for example, a person is sued for the recovery of a loan and there is an entry in his account book recording the fact of the loan, that is an admission on his part of his liability or if he makes any statement to the effect that "he does owes the money" that will also be an admission being a direct acknowledgment of liability.; It will be sufficient if the statement admits a fact which suggests an inference as to his liability. If for example, a person is charged with causing death by poisoning and hi

1. Define 'admission'. Who are the persons whose statements would amount t admission under the Evidence Act? *[LC.I-95/96][D.U.-2007/2011*

admits to have purchased poison. This statement suggests the inference :hat he is guilty of murder unless he can prove that he needed the poison For some innocent purpose.

Admissions are of many kinds; they may be considered as being on record actually if they are either in the pleadings or in answer to interrogatories or implied from the pleadings by non-traversal *[Uttam Singh Duggal & Co. Ltd.* v *United Bank of India* AIR 2000 SC 2740]. A statement which is of the nature of an admission on a mixed question of fact and law cannot be treated as an admission under Sec. 17 because only an admission of a fact binds the maker and not an admission on a question of law *[Ram Bharose Sharma* v *Mahant Ram Swaroop* (2001) 9 SCC 471].

The mere admission by a person that he put his thumb impression/ signature upon a piece of paper without knowing its nature and contents is not admission by him that he executed the documents. The admissions at best only suggest inferences. The court must examine the statement inside out and before holding a party to his statements must see that the statement is clear, unequivocal and comprehensive. There should not be any doubt or ambiguity. Further, it would be necessary to read whole of the statement.

It has been held that though statements made in a book cannot be considered as conclusive admissions, yet they can be taken as additional circumstances along with other circumstances *[Koran Singh* (Dr.) v *State of J&K* (2004) 5 SCC 698]. In this case, there was a statement in the book authored by the claimant in which he stated that valuable articles lying in the State Treasury belonged to his father, Maharaja Hari Singh.

If a party's admission falls short of the totality of the requisite evidence needed for legal proof of a fact in issue, such an admission would be only a *truncated* admission *(M.M. Chetti* v *Coomaraswamy* AIR 1980 Mad. 212). When a person applies for exemption under an Urban Land Ceiling Act, it does not amount to an admission on his part that the land in question is coming within the meaning of Act, because the court may hold that the Act was not applicable to the land in question.

Reasons for Admissibility of Admissions

An admission is relevant evidence. Admissions are admitted because the conduct of a party to a proceeding, in respect of the matter in dispute, whether by acts, speech or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue. Several reasons have been suggested for receiving admissions in evidence:-

(i) *Admissions a waiver of proof* - If a party has admitted a fact, it dispenses with the necessity of proving that fact against him. It operates as a waiver of proof. However, admissions constitute a very weak kind of evidence, and the court may reject an admission wholly or in part or may require further proof. Waiver of proof, thus, cannot be an exclusive reason for the relevancy of an admission.

(ii) *Admissions as statement against interest* - An admission, being a statement against the interest of the maker, should be supposed to be true, for it is highly improbable that a person will voluntarily make a false statement against his own interest. However, Sec. 17 does not require that a statement should be a self-harming statement, the definition also includes self-serving statements.

(iii) *Admissions as evidence of contradictory statements* - Another reason that partly accounts for the relevancy of an admission is that there is a contradiction between the party's statement and his case. This kind of contradiction discredits his case. However, a party can prove all his opponent's statements about the facts of the case and it is not necessary that they should be inconsistent with his case.

(iv) *Admissions as evidence of truth* - The most widely accepted reason that accounts for relevancy of admission is that whatever statements a party makes about the fact of case, whether they be for or against his interest, should be relevant as representation or reflecting the truth against him. 'Whatever a party says in evidence against himself ... what a party himself admits to be **true** may be presumed to be so.'

Admissions as Statement against Interest

Where a person's self-serving statement subsequently becomes adverse to his interest, it may be proved against him as an admission. "Though in L prior statement, an assertion in one's own interest may not be evidence, a prior statement adverse to one's interest would be evidence. Indeed, it would be the best evidence" *[Satrucharla Vijaya Ram Raju* v *Nimmakajaya laju* (2006) 1 SCC 212].

Thus, stray statements in the deposition of the landlord showing that there was no personal need of the premises, amounted to an admission against his own interest in filing the eviction proceedings *[S. Venugopal* v 4. *Karrupusami* (2006) 4 SCC 567]. Likewise, the admission of a bus conductor **that** he **had taken** money from a passenger without issuing ticket to him was considered to be the best piece of evidence against him. **But** he has **a right** to **rebut it** *[Delhi Transport Corporation* v *Shyam Lai* **AIR** Z004 SC **4271].**

Where the vendor of property admitted in his agreement, affidavits and other papers that delivery of possession was made to the purchaser on the date of the agreement, and subsequently he wanted to resile from admission saying that possession was only for sake of paper work, the court said that a heavy burden of proof would lie upon him to show that the statement was not true. The fact that a heavy amount was received for handing over immediate possession was a strong evidence of delivery *of* possession and was not easy to be countered *[Chetan Constructions Ltd. v Om Prakasb* **AIR** 2003 A.P. 145]. The aforesaid case also demonstrates the binding effect of an admission.

Forms of Admissions[2]

Every written or oral statement by a party about the facts of the case is an admission. Admissions are broadly classified into two categories: (a) judicial or formal admissions, and (b) extra-judicial or **informal** admissions. It is generally immaterial to whom an admission is made. An admission made to a stranger is relevant.

2. What type of admissions can be proved? *[D.U.-2007]*

Judicial admissions are made by a party to the proceeding of the case prior to the trial. Such admissions, being made in the case, are fully binding on the party who makes them. They constitute a waiver of proof. They can be made the foundation of the rights of the parties. In comparison, the evidentiary admissions which are receivable at the trial as evidence, can be shown to be wrong.

Informal or casual, i.e., extra-judicial admissions are those which do not appear on the record of the case, and may occur in the ordinary course of life, or in the course of business, or in casual conversation. The admission may be in writing (letters, account books, etc.) or oral. However, unlike judicial admissions, they are binding on the party only partially and not fully, except in cases where they operate as or have the effect of estoppel.

Admissions - an exception to hearsay rule

Admissions constitute an exception to the hearsay rule. This is so because an admission, though a hearsay, is nevertheless the best evidence. What is said by a party to the suit is not open to the objection 'that a party is going to offer worse evidence than the nature of the case admits' (the supposition on which rule of best evidence is founded).

Thus, if A sues B on a loan, which B denies and B makes a statement to C, a third person, that he had taken the loan, B's statement is an admission and C may give evidence of it although C was not present at the time of the loan and had only heard B admit the fact of the loan.[3]

Admissions by conduct

Active or passive conduct may in circumstances become evidence of an admission. In an Australian case, a woman registered the birth of the child but did not enter the name of father, his rank or profession. The court said: "That must mean either that she did not know who the father was and therefore was unable to give those particulars, or else that she was admitting that the child was illegitimate. Whichever view is taken, there is an admission of adultery and an admissible evidence of adultery" *[Mayo* v *Mayo* (1949) P. 172].

3. A question based on this illustration. *[D.U.-2009]*

Silence may amount to admission in certain situations *[See* illustration) to Sec. 8]. When a statement is made to a person in his presence and :aring affecting his position seriously and he does not deny it, he thereby Imits the truth of the statement. But silence will amount to admission tily if it is natural to expect a denial or reply. Just as a denial is not ways a negation of liability, failure to deny is not necessarily an admission f liability.

Persons Whose Admissions are Relevant (Sees. 18-20)

Secs. 18, 19 and 20 makes the statements of the following persons relevant:-

(i) a party to the suit or proceeding,

(ii) an agent authorised by such party,

(iii) a party suing or sued in a representative character making admissions while holding such character (e.g. trustees, executors, etc.),

(iv) a person who has a proprietary/pecuniary interest in the subject-matter of suit during the continuance of such interest,

(v) a person from whom the parties to suit have derived their interest in the subject-matter of suit during the continuance of such interest (predecessors-in-title) [Sec. 18];

(vi) a person whose position it is necessary to prove in a suit, if such statement would be relevant in a suit brought by or against himself (Sec. 19);

(vii) a person to whom a party to suit has expressly referred for information in reference to a matter in dispute (Sec. 20).

[t is important to note that under Sec. 18, an admission by one of several defendants in a suit is no evidence against another defendant, for otherwise die plaintiff can defeat the case of the other defendants through the mouth of one of them. So a defendant is bound by his statements only to the extent of his own interest. So is true of the statement of a co-plaintiff. But since every plaintiff has a pecuniary interest in the subject-matter of suit, his statement can fall in that category.

The admission of an *agent* is admissible, because the principal is bound by the acts of his agent done in the course of his business and within the scope of his authority. Thus, the acknowledgment of a debt by a partner is an admission against the firm. Likewise, admissions of facts made by a pleader in court, on behalf of his client, are binding on the client. But, an admission by a pleader on a point of law will not bind the client.

Sec. 19 deals with statements of persons whose position is in issue, though they are not parties to the case. The section is based on the principle that where the right or liability of a party to a suit depends upon the liability of a third person, any statement by that third person about his liability is an admission against the parties.

Illustration to Sec. 19 - A undertakes to collect rents 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 owed B rent is an admission, and is relevant fact against A, if A denies that C did owe rent to B.

Sec. 20 forms an exception to the rule that admissions by *strangers* to a suit are not relevant. Thus, the admissions of a third person are also receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed matter. To attract the operation of Sec. 20, there must be an express reference for information in order to make the statement of the person referred to admissible. *Illustration* to this section reads: 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.

Against Whom Admission may be Proved[4]

First *part* of Sec. 21 - "Admissions are relevant and may be proved as against the person who makes them, or his representatives in interest".

Sec. 21 lays down the principle as to proof of admissions. The *section is based upon the principle that an admission is evidence against*

3a. A question based on this illustration. *[D.U.-2010]*

4. Under what circumstances are admissions relevant? Discuss with reference to provisions under the Evidence Act. *[LC.II-93]*
[Note: Also see Sees. 22-23].

he party who had made the admission and, therefore, it can be proved a*gainst* him. He himself cannot prove his own statements, "otherwise very man, if he were in a difficulty, might make declarations to suit his own case", and then lodge them in proof of his case. In *R.* v *Petcherini* 1855) 7 Cox. C.C.70, a priest, facing the charge of blasphemy, was not permitted to prove his earlier statement to the effect that only immoral books should be destroyed. The court reasoned: If a man makes a declaration accompanying an act it is evidence; but declarations made 2 or 3 days, or a week, previous to the transaction in question cannot be evidence, otherwise it would be easy for a man to lay grounds for escaping the consequences of his wrongful acts by making such declarations.

Thus, the general rule is that "the statements of a living person cannot be received unless they are *against* his interests". No man should De at liberty to make evidence for himself through his own statements. Granted this facility, every litigant would construct a favourable case by his own statement. Thus, *'self-favouring'* admissions are not permissible. In 3ther words, admissions cannot be proved by, or on behalf of, the person who makes them, because a person will always naturally make statements :hat are favourable to him.[5]

Illustration {a) to Sec. 21 explains the main principle:

The question between A and B is, whether certain deed is or is not forged. A affirms that it is genuine, B that it is forged. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

It may be noted here that Evidence Act does not seem to require that an admission should be a 'self-harming' statement; the definition (Sec. 17) also includes 'self-serving' statements, though, of course, a party can prove a self-serving statement only under the *exceptions* laid down in Sec. 21. Where, however, a person's self-serving statement subsequently becomes adverse to his interest, it may be proved against him as an admission.

5. What is meant by self-favouring admissions and why are they not admissible?
[LC.//-94]

Second *Part of Sec. 21* (Exceptions to Sec. 21)

Admissions cannot be proved by, or on behalf of, the person who makes them, except in the following three cases[6]:-

Exception 1 - "When it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Sec. 32".

Thus, the statement should have been relevant as dying declaration or as that of a deceased person under Sec. 32.

Illustration (b) to Sec. 21 is on the point. The captain of a ship is sued by the ship-owner for casting away the ship by his negligence. The ship-owner gave evidence of the fact that the ship was taken out of her course. The captain was maintaining a diary in the ordinary course of his duty in which he recorded the course that the ship followed and which showed that the ship was not taken out of her due course. Now, if the litigation was between the ship-owner and the insurance company and the question was whether the ship was lost due to negligence or otherwise and the captain was *dead,* the contents of his book would have been relevant though they operate in his favour.

Illustration (c) is also on the same point. A is accused of crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore postmark of that day. The statement in the date of the letter is admissible, because if A were dead, it would be admissible under Sec. 32(2)7

Exception 2 - "When the admission 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 a state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable".

The exception enables a person to prove his statements as to his state of body or of mind. If, for example, a person is injured and the question is whether the injury was intentional or accidental, his statement

6. What are the exceptions to the non-permissibility of self-favouring admissions? [L.C.H-94]

   Under what circumstances can admissions be proved in favour of the maker? *[LC.I-96HD.U.-2007]*

7. A question based on this illustration. *[D.U.-2007]*

lat time as to the way he was injured can be proved by himself. However, such statement should be contemporaneous with the existence le condition of mind or of body. This rules out chances of fabrication, person is least likely to fabricate a statement when he is still reeling reeling the pain of die injury. Further, such statement should be accompanied conduct which renders the falsehood of the statement improbable, s ensures that the condition of mind or body described by the statement ;ally true and not feigned.

Illustrations (d) and (e) deal with the point. Where the question is whether a person received a stolen property with knowledge that it was stolen. In order to prove that he did not have guilty knowledge, he offers prove that he refused to sell the property below its value or natural price. His statement explains the state of his mind and is accompanied the conduct of the refusal to sell. He may thus prove his statement [illlustration (d)]. Similarly, where a person is charged with having in possession a counterfeit coin with knowledge that it was counterfeit. He offers to prove that he consulted a skilful person on the matter and he is advised that the coin was genuine. He may prove this fact [illustration

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

This exception is intended to apply to cases in which the statement sought to be used in evidence otherwise than as an admission, for stance, as part of the *res gestae*, or as a statement accompanying or explaining particular conduct.

Where, for example, immediately after a road accident, a person pulled up to the injured who then made a statement as to the cause of le injury. This statement may be proved by or on behalf of the injured person, it being a part of the transaction which injured him (Sec. 6). ^here A says to B, "You have not paid back my money, and B walks way in silence, A may prove his own statement as it has influenced the conduct of a person whose conduct is relevant (Sec. 8).

Similarly, where a person is seen running down a street in an injured condition and crying out the name of his assailant, he may prove his own statement as it accompanies some conduct and explains the fact of injury. Likewise, a statement may be proved on behalf of the person making it f it is relevant under Sec. 32.

Admissions How Far Relevant (Sees. 22-23)

When oral admissions as to contents of documents are relevant (Sec. 22)

Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under Sec. 65, or unless the genuineness of the document produced is in question.

When the question is whether a document is genuine or forged, oral admissions about this fact are relevant. A document can be proved by the primary evidence (original document) or secondary evidence (attested copies or oral account).

When oral admissions as to contents of electronic records are relevant (Sec. 22A)

"Oral admissions as to the contents of electronic records are not relevant unless the genuineness of the electronic record produced is in question."

Communication without prejudice[8] (Sec. 23)

"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".

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

Sec. 23 gives effect to the maxim *interest rei publicae ut finis litium* (it is in the interest of the State that there should be an end of litigation). Sec. 23 applies only to *civil* cases. When a person makes an admission "without prejudice", i.e., upon the condition that the evidence of it shall not be given, it cannot be proved against him. This protection or privilege against disclosure is intended to encourage parties to settle their differences amicably and to avoid litigation if possible.

8. Write a short note on 'Admission without prejudice'. *[LC.II-94/95*

As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them.

The party proposing compromise may expressly make his negotiation or letter to be "without prejudice". The words "without prejudice" simply mean this: "I make you an offer and if you do not accept it, this letter is not to be used against me". In other words, what the expression connotes is this: "I am making you an offer, which you may or may not accept, but, if you do not accept it, my having made it is to have no effect at all".

The rule under Sec. 23 applies only if there is a dispute or negotiation with another, or if they are written *bona fide.* A statement which is not related to the purpose of negotiations is not protected even if the negotiations are without prejudice. Sec. 23 does not protect all letters merely because they are headed with the words "without prejudice". At best, it only shows the desire on the part of one party to have the privilege, but the other party must also respect such privilege.

It is not, however, necessary for this privilege to arise that the words "without prejudice" should be expressly inserted, or that it should be an express condition that admissions shall not be used in evidence. An implied agreement to that effect can also be inferred from the circumstances of the negotiations. Oral statements made in connection with written correspondence would also be protected. It is to be noted that an admission made to a *stranger,* under whatever terms as to secrecy, is not protected by law from disclosure.

When letters marked "without prejudice" are tendered in evidence, and the other party admits them (instead of objecting to them), the admission implied that the other party has waived his privilege, and such letters can then be used in **a** judicial proceeding.

The *explanation* appended **to** Sec. 23 provides that an admission made to **a** lawyer which he **can** be compelled to disclose under Sec. 126 is not protected even if **it is made upon** the condition that it shall not **be used. Under** that section, **communication** made to lawyer in furtherance of **a crime are** not protected **from disclosure.**

Evidentiary Value of Admissions[9]

An admission does not constitute a conclusive proof of the facts admitted (Sec. 31). It is only *& prima facie* proof. Thus, evidence can be given to disprove it. The admissions thus constitute a weak kind of evidence. The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. But until evidence to the contrary is given an admission can safely be presumed to be true. The weight to be attached to it must depend upon circumstances under which it is made.

An admission is substantive evidence of the fact admitted and the admissions duly proved are admissible evidence irrespective of whether the party making them appears in the witness-box or not and whether that party when appearing as a witness was confronted with those statements in case he made a statement contrary to his admissions *(Bbarat Singh* v *Bhagirath,* **AIR** 1966 SC 405). Accordingly, where a person was contending **that** he **was** not **the real owner** of a certain property but he had made statements before the **I.T. Officer that** he was the owner of the property, it was held his admission was a direct evidence of the fact of ownership *[Union of India* v *Moksbi Builders* (1977) 1 SCC 68].

Sec. 17 makes no distinction between an admission made by a party in his pleading and other admissions. Thus, an admission made by a person in plaint signed and verified by him may be used as evidence against him in *other* suits. There is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore* (of its own force). Thus, an admission in an earlier suit is a relevant evidence against the plaintiff *[Bisbwanath Prasad* v *Dwarka Prasad* (197'4) 1 SCC 78].

An admission shifts the onus on the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established. Thus, a candidate's declaration in the nomination form has been held to be an admission against him. The burden lay upon him to show that a particular statement (his age, for example) was not **true.**

9. Discuss the evidentiary value of admissions. [LC./-95]
Write a short note on: Relevancy of Admissions. *[C.LC.-2006*

Admissions may operate as 'estoppels' under Sec. 31. Where an admission operates so, the party admitting the fact will not be allowed to go against the facts admitted. An estoppel will arise under Sec. 115 when the admission amounts to a representation that the fact stated is true and the other party has acted and altered his position on the basis of that representation.

The admissions at best only suggest inferences. The court must examine the statement inside out and before holding a party to his statements must see that the statement is clear, unequivocal and comprehensive. If a party's admission falls short of the totality of the requisite evidence needed for legal proof of a fact in issue, such an admission would be only a *truncated* admission.

CONFESSIONS
(SECS. 24-30)

Definition[10]

The term 'confession' is nowhere defined in the Evidence Act. The definition of 'admission' as given in Sec. 17 becomes applicable to confession also. Thus, a confession is a statement made by a person charged with a crime suggesting an inference as to any facts in issue or as to relevant facts. The inference that the statement should suggest should be that he is guilty of the crime.

[In *State (NCT of Delhi)* v *Navjot Sandbu* (2005) 11 SCC 600, the Apex Court observed that confessions are considered highly reliable because no rational person would make an admission against himself unless prompted by his conscience to tell the truth.

Confessions *Carrying Inculpatory and Exculpatory Statements*

In Pakala Narayan Swami v *Emperor* (AIE. 1939 PC 47), the court observed that it is improper to construe confession as a statement by an accused

10. Define confession. *[D.U.-2007][LC,I-95ft6; L.C.II-94]*

suggesting the inference that he committed the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constituted the offence. An *admission* of a gravely incriminating fact, even a conclusively incriminating fact, is not in itself a confession, for example, an admission that the accused is the owner of and was in recent possession of the knife/revolver which caused death with no explanation of any other man's possession.[11]

A confession is a statement made by the accused admitting his guilt. Thus, if the maker does not incriminate himself, the statement will not be a confession Further, 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 (e.g. killing done in private defence) which if true would negative the offence, cannot amount to a confession. This is so because a confession must either be accepted as a whole or rejected as a whole, and the court is not competent to accept only inculpatory part (self-incriminating) and reject exculpatory part (self-defence), *(Palvinder Kaur* v *State of Punjab* AIR 1952 SC 354). '

The facts of the *Palvinder's* case could be noted: "Palvinder was on trial for the murder of her husband; the husband's body was recovered from a well. The *post mortem* could not reveal whether death was due to poisoning or what. In her statement to the court, she said that her husband, a photographer, used to keep handy photo developing material which is quick poison; that on the occasion he was ill and she brought him some medicine; that the phial of medicine happened to be kept nearby the liquid developer and the husband while going for the medicine by mistake swallowed the developer and died; that she got afraid and with the help of the absconding accused packed the body in a trunk and disposed it of into the well." The statement, thus, consisted of partly guilty and partly innocent remarks.

11. A statement in order to amount to a confession must admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of an incriminating fact, howsoever,grave, is not by itself a confession. Explain. [LC.//-20O6]

In *Emperor* v *Balmukand* [ILR (1930) 52 All 1011], the confession comprised of two elements - an account of how the accused killed the man and an account of his reasons for doing so. The former elements being inculpatory and the latter exculpatory, *held* that the confession cannot split up and part of it used against the accused. However, in *Nisbi Kant* : v *State of Bihar* (1959) SCR 1033, the Supreme Court pointed out it there was nothing wrong in relying on a part of the confessional statement and rejecting the rest, and for this purpose, the court drew court from English authorities. Under the English law, a confession is t rejected only because of the exculpatory statements *[R.* v *Storey* '68) 52 Cr. App. R. 334]. When there is enough evidence to reject the exculpatory part of the appellant's statement, the court may rely on the exulpatory part *(Keshoram* v *State* AIR 1978 SC 1096).

In Veera Ibrahim v *State of Maharashtra* (AIR 1976 SC 1167), a person being prosecuted under the Customs Act told the custom officers it he did not know that the goods loaded in his truck were contraband, r they were loaded with his instructions. The court held that the statement is not a confession, but it did amount to an admission of an incriminatory :t (namely, load of contraband goods) and was, therefore, relevant under Sec. 17 read with Sec. 2LJ

In *Champa Rani Mondal* v *State of W.B.* (2000) 10 SCC 608, confessional statement that she caused the death to ward off rape, being wholly exculpatory, was held to be *not* relevant as a confession. In a statement recorded by the Magistrate, the accused did not admit his guilt terms and merely went on stating the fact of assault on the deceased *by* mistake. Held that such statement could not be used against the accused as a confession *(State of Haryana* v *Rajinder Singh*, 1996 CrLJ 175). Where the accused confessed that he knew about the conspiracy commit the murder in question but did not confess that he was a party the crime, the statement was held to be *not* relevant as a confession *habad Pulla Reddy* v *State of A.P.* AIR 1997 SC 3087).

In *Lokeman Shah* v *State of W.B.* (AIR 2001 SC 1760), the statement : the accused which showed that he joined an assembly when it had ready decided to chase the victim and finish him was regarded as a confession. The Supreme Court observed: "The statement must be read a whole (instead of dissecting it into different sentences) and then only

the court should decide whether it contains admission of his inculpatory involvement in the offence. If the result of that test is positive then the statement is confessional, otherwise not."

Form of Confession[12]

A confession may occur in any form. It may be made to the court itself *"(judicial* confession) or to anybody outside the court *(extra-judicial* confession). While, judicial confession is a good piece of evidence, the extra-judicial confession is a weak kind of evidence and has to be used with great caution, i

A confession may be written or oral. It is not necessary for the relevancy of a confession that it should be communicated to some other person. It may even consist of conversation to oneself, which may be produced in evidence if overheard by another. The Orissa High Court has held that a confession must be addressed to some person. So, if the accused goes around the village shouting that he had killed his wife, this would not amount to a confession *(Pandu Khadia v State of Orissa,* 1992 Cr LJ 762). It is submitted that the decision seems to be wrong, for, it is well known that a confession may take place even when one is talking to oneself.

An interesting question arises as to whether incriminating statements made by a person while "talking in sleep" are to be admitted. As a general rule, such statements are *not* to be taken as evidence against the person, mainly because the faculty of judgment of a person is almost completely suspended during sleep.

Extra-judicial Confession

It is made to anybody outside the court, and it could be a direct admission of guilt or in the form of repentance or in any other way. "An extrajudicial confession to afford a piece of reliable evidence must stand the test of reproduction of exact words, the reason and motive for confession **and the** person selected in whom confidence is reposed" *(Rahim Beg* v ***State of*** *U.P.* AIR 1973 SO 343).

12. What are "judicial' **and** 'extra-judicial' confessions? *[D.U.-2007]*

Thus, the court rejected the evidence of confession by the accused 3 another under-trial *(Heramba Brahma* v *State of Assam* AIR 1982 SC 595). Similarly, where the confession sought to be proved was supposed *o* have been made to a witness for the purpose of seeking his help to save the accused from harassment, but it was not shown how the witness was in a position to help him, the confession was described to be unreliable *Makhan Singh* v *State of Punjab* AIR 1988 SC 1705). A confession made to the Municipal Commissioner with whom the accused had no special friendship was held to be *not* trustworthy.

/Though extra-judicial confession by its very nature may possess some weakness, the court can act on it if the court believes the testimony of the person about the confession. A confession of a military sepoy to his superior's as to how he killed his wife and disposed off the dismembered parts of the body substantiated by recoveries was held to be capable of supporting conviction for murder without *more. Vinayak Shivajirao* v *State* 1998) 2 SCC 233]. It may be noted that law does not require that the evidence of an extra-judicial confession should in all cases be corroborated.

i An extra-judicial confession is admissible in evidence, and the court, n appropriate cases, can rely on it as substantive evidence arid convict :he accused. But it is safer to look for some re-assuring material. [State *of Punjab* v *Gurdeep Singh* (1999) 7 SCC 714]. An extra-judicial confession cannot be considered as judicial confession; similarly an alleged judicial confession proved to have been not legally recorded cannot be used as extra-judicial confession *[Dhanajaya Reddy* v *State ofKarnataka* (2001) 4-SCC 9] An extra-judicial confession may or may not be a weak evidence, each case should be examined on the basis of its own facts and circumstances *[Sivakumar* v *State* (2006) 1 SCC 714].

In *Vilas Pandurang Patil* v *State of Maharashtra* (AIR 2004 SC 3562), the court held such confession admissible in evidence when it was made to a close classmate/schoolmate. The confession was very clear and cogent and appeared to have been made in the normal course of things and without any pressure. On the contrary, a confession made by a large number of persons before the village *panchayat* was held to **be more** in **the** nature of a vague and general declaration. It could not **come** within the definition of confession which requires specific **admission** of **guilt** *[Kishan Lai* v *State of Rajasthan,* 1999 Cr.L.J. 4070 (SC)]. Likewise, a

confession made by a person at an *arrack* shop after consuming some liquor to another person who, being otherwise stranger, dropped there by chance at that very time was held to be not reliable *[C.K. Raveendran* v *State of Kerala* AIR 2000 SC 369].

Confessions when Irrelevant (Sees.24-26) *(Involuntary* confessions)[13]

(Sections 24 to 26 indicate the circumstances in which a confession is not voluntary and, therefore, not relevant. Involuntary confessions are never received in evidence.

Sec. 24 (Confession caused by inducement, threat or promise)

To attract the provisions of Sec. 24, the following facts must be established:

(a) The confession must have been made by an accused person to a person in authority.

(b) It must appear to the court that the confession has been caused or obtained by reason of any inducement, threat or promise proceeding from a person in authority.

(c) The inducement, threat or promise must have reference to the charge against the accused person.

(d) The inducement, etc. must be such that it would appear to the court that the accused, in making the confession, believed or supposed that he would, by making it, gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

When these conditions are present, the confession is said to be not free i.e. voluntary and will not be receivable in evidence. It is necessary that the above conditions must cumulatively exist, *t*

A positive/strict proof of the fact that there was any inducement, threat or promise is not necessary. On the evidence and the circumstances

13. Write a short note on 'Involuntary confessions'. [C.LC.-95]
What are the limitations to the admissibility of a confession as a piece of evidence **under the Evidence Act? Discuss. [LC.//-94]**

in a particular case, it should appear to the court that there was a threat, inducement or promise, though this fact may not be strictly proved *{Pyare* ***Lal*** v *State of Rajasthan* AIR 1963 SC 1094). Anything from a barest suspicion to positive evidence would be enough to *discard* a confession. Further, in deciding whether a particular confession attracts the frown of Sec. 24, the question has to be considered from the point of view of the confessing accused as to how the inducement, etc. proceeding from a person in authority would operate on his mind. The criterion is the reasonable belief of the accused that, by confessing, he would get an advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Where the prisoner is only told to tell the truth without exciting any hope or fear in him, his statement cannot be regarded as being made in response to any threat or promise. Similarly, where a prisoner was told by a constable that he need not say anything to criminate himself, but what he did say would be used in evidence against him. However, where the admission to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that, the confession was inadmissible, the objectionable words being that 'it would be better to speak the truth', because they import that it would be better for him to say something which made the confession involuntary. The words "you had better" carry a hidden threat or inducement *[R.* v *Jarvis* (1867) LR 1 CCR 96].

In *Satbir Singh* v *State of Punjab* (1977) 2 SCC 263, a senior police officer, after having failed to get any confessional statement from **the** accused through other sources, took upon himself to question the accused and he succeeded in securing confession. The question was whether the confession was voluntary. Held that it was not. The officer having stated to the accused that "now that the case has been registered he should state the truth", the statement would generate in the accused's mind some hope or assurance that if he told the truth he would receive his support. 0

Where the accused was told by the magistrate, "Tell me where **the** things are and I will be favourable to you", or **"If** you do **not tell the** truth you may get yourself into trouble and it will be worse for you", etc., the statements were held to be irrelevant. However, **mere moral or** spiritual inducements or exhortations **will *not* vitiate a confession. For**

example, where the accused is told, "Be sure to tell the truth", or "You have committed one sin, do not commit another and tell the truth", a confession made in response to this is valid ;[R. v *Sleeman* (1853) 6 Cox CC 245]. (The same is true where the accused is taken to a temple or church and is told to tell the truth in the presence of the Almighty.]

In *Bhagbaticharan* v *Emperor* (1933) 60 Cal 719, the accused, a post-office clerk, under suspicion, fell at his departmental inspector's feet begging to be saved if he disclosed everything, and the inspector replied that he would try his utmost to save him if he told the truth. The confession was held to be inadmissible, as there was an inducement by the inspector.

Inducement, etc. should be in reference to charge - The inducement threat or promise should be in reference to the charge in question. 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?)

Person in authority - The inducement, threat or promise should proceed from a person in authority, i.e., one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. Thus, government officials, magistrates, their clerks, police constables, wardens and others in custody of prisoners, prosecutors, attorneys, etc. A purely private person cannot be regarded as a person in authority, even if he is able to exert some influence upon the accused. The Panchayat officers can be said to be persons within the meaning of Sec. 24^)

Sec. 25 (Confession to Police)

. Under Sec. 25, "no confession made to a police officer can be proved as against an accused''. The object of it is to prevent the practice of oppression or torture by the police for the purpose of extracting confessions from accused persons. Sec. 25 is very widely worded, and it absolutely excludes from evidence against the accused a confession made by him to a police officer under any circumstances whatsoever. Whether such person is in police custody or not, whether the statement made during investigation or before investigation is irrelevant.

The reason for this rule is stated in *Queen Empress* v *Babu Lai* (1884) ,R 6 All 509, wherein it has been said that the object of the rule is to event the extortion of confessions by police officers who in order to in credit by securing convictions go to the length of positive torture, 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 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.

A series of conflicting suggestions as to the *rational* underlying this [flexible statutory bar emerges from the decided cases:

(1) An objective and dispassionate attitude cannot confidently be expected from police officers.

(2) The privilege against self-incrimination has been thought to lie at the root of the principle.

(3) Importance has been attached to the discouragement of abuse of authority by the police that could erode the fundamental rights of the citizen. The risk is great that the police will accomplish behind their closed doors precisely what the demands of our legal order forbid,[14]

i. *special* legislation may change the system of excluding police confessions. !or example, under the Terrorists and Disruptive Activities (Prevention) let (TADA), 1987, confessional statements were not excluded from vidence on the ground that the persons making them were in police ustody *(Lai Singh* v *State of Gujarat* AIR 2001 SC 746). Similarly, under he Prevention of Terrorism Act (POTA), 2001, a confession made to . police officer is admissible in evidence. However, both the Acts are now lot in existence.

Effect of police presence - Where the confession is being given to someone else and the policeman is only casually present and overhears it that will lot destroy the voluntary nature of the confession. But where that

14. What is the rationale of inadmissibility of confession to a police officer?

person is a secret agent of the police deputed for the very purpose of receiving a confession, it will suffer from the blemish of being a confession to police. J

In *Sita Ram* v *State*[15] (AIR 1966 SC 1906), the accused left a letter recording his confession near the dead body of the victim with the avowed object that it should be discovered by the police. The Supreme Court held that the confession is relevant, as it is not a confession made to a police officer under Sec. 25. The letter was addressed to the police officer, but the officer was not nearby when the letter was written, or knew that it was being written.

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 Sec. 27. The non-confessional part of the FIR can be used as evidence against the informant accused as showing his conduct under Sec. 8.[16]y

Wlw is police officer - A police officer not only includes a member of the regular police force, but would include any person who is clothed with the powers of a police officer viz. a chowkidar, a village headmen, a home guard, etc. Thus, excise inspectors are held to be police officers, but not the custom officers or an officer under the FERA or a member of the Railway Protection Force. .

It has been held that mere power of arrest, search and investigation are not enough and the police officers should also be empowered to file

15. Would the bar under Sec.25 apply even in a case in which the confession to a police officer is sent through post? [C.LC.-95]

    Is the following a relevant confession: "My dear Darogaji, today I have committed the murder of my wife Sonu. She was having illicit relations with my friend X, who has run away. I will trace out X and bring him before you". The letter is found by the side of the dead body. *[LC.I-961*

16. Vinay is accused of murder of his friend Ajay. Vinay, who was missing since death of Ajay is alleged to have phoned, the police, in a repentant mood after consuming some liquor, from a Hotel in a nearby city, confessing his crime. The police acting with alacrity had traced the call and arrested Vinay. Prosecution wants to prove that on the basis of the confession, police recovered the murdei weapon and certain letters written by Vinay's girlfriend to Ajay. Can the prosecution do so? [C.LC.-2006]

a charge sheet or lodge a report before a Magistrate. Thus, a sub-inspector is a police officer.

English law - In England, a confession made to a police officer would be relevant evidence. If the Judge feels confident that there was no oppression and the statement was free, fair and voluntary, he may admit it.

In *State Govt, of Delhi* v *Sunil* (2001) 1 SCC 652, the Apex Court observed: It is an archaic notion that actions of the police should be approached with distrust. It is time to start placing at least initial trust on their actions and the documents prepared by them. As a proposition of law the presumption should be that the police records are trustworthy because the official acts of the police have been regularly performed. Hence, when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused through cross-examination or through any other material to show that the evidence of the police officer is either unreliable or unsafe to be acted upon in a particular case.

Sec. 26 (Confession in Police Custody)

Under Sec. 26, "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"* The section will come into play when the person in police custody is in conversation with any person *other than* a police officer and confesses to his guilt. The section is based on the same fear, namely, that the police would torture the accused and force him to confess, if not to the police officer himself, at least to some one else. Thus the confession is likely to suffer from the blemish of not being free and voluntary.[17] ,

The word *custody* 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 under some sort

17. What is the rationale of inadmissibility of confessions in police custody? [C.LC-96]

of surveillance or restriction. police custody means police control even if be exercised in a home, in an open place or in the course of a journey and not necessarily in the walls of a prison (actual arrest). The immediate presence of police officers is not necessary, so long as the accused persons are aware that the place where they are detained is really accessible to the police. A temporary absence of the policeman makes no difference.

(The following confessions are, thus, held to be *irrelevant;*-

(1) A woman arrested for the murder of a young boy was left in the custody of villagers while the *chowkidar* (watchman) who arrested her left for the police-station and she confessed in his absence *(Emperor* v *Jagia* AIR 1938 Pat 308).

(2) While the accused being carried on a tonga was left alone by the policeman in the custody of the tonga-driver and he told of his criminality to the tonga driver *[R.* v *Lester,* ILR (1895) 20 Bom 165].

(3) Where the accused was taken to a doctor for treatment, the policeman standing outside at the door, the accused confessed to the doctor[18] *[Emperor* v *Mallangowda* (1917) 19 Bom. LR 683].

(4) A confession made to a person, while in police custody, overheard by a police officer.

(5) A confession to fellow-prisoners, while in jailj

However, if the confession was made when the accused was nowhere near the precincts of a police station or during the surveillance of the police, such confession held *not* to be hit by Sec. 26. The accused made his confession to two persons of the locality. Later, his confession was reduced to writing inside the police station on the accused being brought there. The Supreme Court said that such extra-judicial confession was not hit by Sec. 26 *[State ofA.P.* v *Cangula Satya Murthy* (1997) 1 SCC 272].

In *State (NCT of Delhi)* v *Navjot Sandhu* (2005) 11 SCC 600, the statements made to TV and press reporters by the accused person in the presence of police and also in police custody were held to be inadmissible.

18. A question based on the same facts. [C.LC.-92]

immediate presence of a Magistrate - Sec. 26 recognizes one exception. If the accused confesses while in police custody but in the immediate presence a Magistrate, the confession will be valid. The presence of a Magistrate rules out the possibility of torture thereby making the confession free, voluntary and reliable). The Magistrate must be present in the same room here the confession is being recorded. A confession made while the accused is in judicial custody or lockup will be relevant, even if the accused is being guarded by policemen.

The mere fact that the accused, after having made a confession before a police officer, subsequently says before a Magistrate that "I told e police officer that I murdered B" does not render the statement admissible.

Confession when Relevant (Sees. 27-29)

The following three types of confessions are relevant and admissible:-

Sec. **27 (How much of information received from accused may be proved)**[19]

When any fact is deposed to as discovered in consequence of information :ceived 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 e proved".*)*

[Under the Evidence Act, there are two situations in which confession to police are admitted in evidence. One is when the statement is made

19. Section 27 of the Evidence Act is in the nature of an exception to Sees. 24 to 26 in as much as when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of the 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. Elaborate with reference to case law. [LC.//-93]

How much of the information received from the accused by the police may be proved against him? [LC.//-2006]

Discuss the relationship between Sec. 26 and Sec. 27 of the Evidence Act. How is a 'fact discovered' different from 'object produced'? Discuss with case laws. *[D.U.-2007]*

in the immediate presence of a Magistrate, and the second, when the statement leads to the discovery of a fact connected with the crime. Sec. 27 is founded on the principle that if the confession of the accused is supported by the discovery of a fact, it may be presumed to be true and not to have been extracted. The *truth* of the confession is guaranteed by the *discovery of facts* in consequence of the information given. Sec. *27* is a proviso or exception to Secs. 25 and 26 of the Act.]

.Normally, the section is brought into operation when a person in police custody produces from some place of concealment some object e.g. a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. The 'discovery of fact' includes the object found, the place from which it is produced and the knowledge of the accused as to its existence. However, information as to the 'past use' of the object produced is *not* related to its discovery.

[The statements admissible under Sec. 27 are not admissible against persons other than the maker of the statement *Surendera Prasad* v *State of Bihar*, 1992 Cr LJ 2190). The discovery must be made by the police as a result of information given by the accused and not by any other source. Statements made by the accused in connection with an investigation in some other case which lead to the discovery of a fact are also relevant *[State of Rajasthan* v *Bhup Singh* (1997) 10 SCC 675].

The scope of Sec. 27 is explained by the Privy Council in *Pulukuri Kottaya* v *Emperor.*

LEADING CASE: PULUKURI KOTTAYA v EMPEROR[20] (AIR 1947 PC 67)

In this case, the appellants guilty of murder made some confessions in the police custody In the appeal, they contended that their statements were admitted in violation of Sees. 26 and

20 Where husband was charged for the murder of his wife, the statement made in the police station by the husband stated that "I have stabbed my wife with a knife as my wife was unchaste. I have thrown the knife in the drain at the back of my house. I can show you, if you come with me." The investigation officer proceeded to the spot and recovered the knife in the presence of independent witnesses. State the portion of the statement admissible in evidence. *[DU.-2007/2011]*

27. The statement of one of them was: "I, Kottaya, and others beat Sivayya and Subbaya to death. I hid the spear and my stick in the rick of my village. I will show if you come. We did all this at the instance of P. Kottaya". Another accused said: "I stabbed Sivayya with a spear. I hid the spear in a yard in my village. I will show you the place". The relevant articles were produced from their respective places of hiding,

Explaining the scope of Sec. 27 in general terms, their Lordships observed: Sec. 27 provides an exception to the prohibition imposed by Sec. 26 and enables certain statements made by a person in police custody to be proved. The condition necessary to bring Sec. 27 into operation is that discovery of a fact in consequence of information received from accused (in police custody) must be deposed to, and thereupon so much of the information as related distinctly to the fact thereby discovered may be proved.],The section seems to be 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. Normally, the section is brought into operation when a person in police custody produces from some place of concealment some object e.g. a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused .

Explaining the relationship between Sees. 26 and 27, their Lordships said: The proviso to Sec. 26 added by Sec. 27 should not be held to nullify the substance of the section. It is fallacious to treat the "fact discovered" as equivalent to the object produced; the fact discovered also embraces the place from which the object is produced and the knowledge of accused as to this and the information given must relate distinctly to this fact. Information as to the 'past use' of the object produced is *not* related to **its** discovery, j

Information supplied by a person in custody that "I **will** produce a knife concealed in the roof of my house" does **not** lead to the discovery of a knife. It leads to the discovery of a

fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of offence, the fact discovered is very relevant. But if to the statement the words "with which I stabbed A" are added, these words are inadmissible because they do not relate to the discovery of knife in the house of the informant. The part which relates as to 'what he did *to the* object' and not 'what he did *with the* object', is relevant under Sec. 27, because the latter entails a remote connection with the fact. Further, if there is no other evidence connecting the knife with the crime and the only evidence is a statement coming under Sec. 27, then the accused must be acquitted. J

Referring to the facts of the case, their Lordships held that the whole of the statement *except* the passage "I hid it (spear) and my stick in the rick in the village. I will show if you come", is inadmissible. The above passage is admissible as it served to connect the object discovered with the offence charged. The other portions of the statement relates to the past history of the object produced, thus not admissible.

[The Supreme Court in *Prabhu* v *State of U.P.,* AIR 1963 SC 1113, approved the tests laid down in the above case. In this case, a statement leading to discovery of blood-stained axe, clothes, etc. was held admissible, but a statement to the police that such clothes belonged to him (accused) and the axe was used in the murder was held inadmissible under Sec. 27].

Some Examples

(An accused stated to the police: "The throat was cut with a knife and the knife was on a *paniara* of the *mori* in the kitchen". The first pan, which

21. In a case involving robbery and murder, X, one of the accused persons told "I am wearing the pant which I washed after the commission of crime" while other accused Y said "I can show you the place where the looted property has been kept." The property was recovered at his instance from the place of hiding. Can statements made by X and Y be said to be confessions (within the rules of law of evidence)? *[D. U.-2009]*

[Hint: Confession by X is inadmissible, while that by Y is admissible.]

A, an accused of murder, after arrest confessed to police: "I will produce a knife concealed in the roof of my house, with which I stabbed A." How much of the above statement is admissible in evidence if the knife was finally recovered at his instance. *[D.U.-2010*

was the incriminating part of statement and which did not directly lead to the discovery of knife should be excluded, but not the second part of the statement.

An accused stated to the police: "I have buried the property stolen by me in the field. I will show it". The admissible part is "I have buried the property in my field. I will show it". The inadmissible part is "stolen by me" (similarly the statement 'with which I stabbed A' is inadmissible). J

The underlying principle is that any self-incriminatory statement or whatever else said by the accused at the time of giving the information by way of giving introduction or narrative or explanation must be rigorously excluded, as it leads to no discovery of facts, j

Place of Hiding

LEADING CASE: MOHD. INAYATULLAH V STATE OF MAHARASHTRA (AIR 1976 SC 483)

In this case, the accused, charged with theft, stated: "I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August". The facts discovered were - chemical drums, the place of deposit of drums, and the accused's knowledge of such deposit.

The Supreme Court in this case, laid down some propositions:-

(1) First condition necessary for bringing this section (Sec. 27) into operation is the discovery of a fact, *albeit* a relevant fact, in consequence of the information received from a person accused of an offence.

(2) The second is that the discovery of such fact must be deposed to. The 'discovery of fact' includes the object found, the place from which it is produced and the knowledge of the accused as to its existence.

(3) The **third is that** at the time of the receipt of the **information the accused must be in police custody.**

(4) The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably".

It was *held* that only the first part of statement, namely, "I will tell the place of deposit of three chemical drums" was relevant because only this part was the immediate and direct cause of the act discovered. The rest of the statement was a pure and simple confession (past history) which led to no discovery.

However, the relevant portion was not, by itself, sufficient to presume that the accused was a thief. He himself deposited drums, or he only knew that the drums were lying there? Since it was a public place (railway platform) and not a place of hiding, anyone could have put them there and the accused might have only knowledge of that fact. Thus, he was given 'benefit of the doubt' (if the whole of his statement had been admitted he would undoubtedly have been held guilty).]

It is incorrect to say that when recovery of an incriminating article is made from a place which is open or accessible to others it would vitiate the evidence. The crucial question is not whether the place was accessible to others but whether it was ordinarily visible to others *{State of H.P.* v *Jeet Singh* AIR 1999 SC 1293). An article could be concealed beneath dry leaves or tall grass on public places so as to be out of visibility of others in normal circumstances *{State of Maharashtra* v *Bharat Fakira Dhiwar* AIR 2002 SC 16).

LEADING CASE: BODHRAJ ALIAS BOAHA v STATE OF J&K (AIR 2002 SC 3164)

Facts and Issue - In this case, the question was whether discovery of weapon of assault on the basis of information given by the accused while in custody, was sufficient to fasten the guilt of the accused.]

^*Observations and Decision* - The court said that the exact information given by the accused which leads to the recovery of

the incriminating article must be proved and only then could such information become the basis of convicting the accused.

The court observed;., *O \±6&hJJUX&^&fA*

(i) Sec. 27 of Evidence Act was enacted as proviso to Sees. 25 and 26, which imposed a complete ban on admissibility of any confession made by accused either to police or to any one while the accused was in police custody. The object of making provision in Sec. 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. The ban imposed by Sees. 25 and 26 would be lifted if the statement is distinctly related to discovery of facts *IPandurang Kalu Patil* v *State of Maharashtra* AIR 2002 SC 733).

(ii) Under Sec. 27, in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The statement which is admissible under Sec. 27 is the one which is the information fading to discovery. So, what is admissible is the information and not the opinion formed on it by the police officer^

(iii) For the benefit of both the accused and prosecution the information given should be recorded and proved and if not so recorded and proved, the exact information must be adduced though evidence. The basic idea embedded in Sec. 27 is the Doctrine, pi, Confirmation by subsequent events. ,

, (iv) The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true The information might be confessional or non-inculpatory in nature

but if it results in discovery of a fact, it becomes a reliable information.

. (v) It is now well settled that recovery of an object is not discovery of fact envisaged in Sec. 27. The fact discovered envisaged in the section also embraces the place from which the object was produced, and the knowledge of the accused as to it. Information regarding concealing of the article of the crime does not lead to discovery of the article but it leads to discovery of the fact that the article was concealed at the indicated place to the knowledge of the accused.!

.(vi) The extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The information permitted to be admitted in evidence is confined to that portion of the information which 'distinctly relates to the fact thereby discovered' and must not be truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability.

. The court, therefore, held that the mere statement that the accused led the police and the witnesses to the place where he had concealed the article is not indicative of the information as contemplated under Sec. **27].j**

In *State of Maharashtra* v *Suresh* (2000) 1 SCC 471, the court observed: When a dead body was recovered from a place pointed out by the accused three possibilities arise: one is that he himself would have concealed it; the second is that he could have seen somebody else concealing it; and the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that **his** knowledge about the concealment was on account of one of the last two possibilities, the court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how he came to know of such concealment and if he refrains from telling the court as to how he came to know

out it, the presumption would be justified. Such an interpretation is not consistent with the principle embodied in Sec. *27.J*

In *State of Maharashtra* v *Damu* (AIR 2000 SC 1691), subsequent the discovery of a dead body from a canal, a statement was made by e accused to the investigating officer that the dead body was carried by m and the co-accused on the latter's motorcycle and thrown into the canal. Broken glass pieces were recovered by the investigating officer from the spot and they were found to be part of the missing tail lamp : the motor cycle of the co-accused. On this basis the investigating officer can be said to have discovered the fact that the accused carried le dead body to the canal on the motor cycle of the co-accused. Held that in view of the said discovery of the fact the information supplied by the accused that the dead body was carried on his motor cycle up to le particular spot is admissible in evidence. The information proves the prosecution case to the above mentioned extent.

In *Salim Akhtar* v *State o/U.P*. (2003) 5 SCC 499, the disclosure statement made by the accused led to the recovery of a polythene bag containing a pistol and other incriminating articles from an open place accessible to all. The court held that what was admissible was the knowledge f the accused of the place from where the polythene bag was allegedly :covered. The fact that some terrorist organization had given the pistol and other articles to the appellant was not admissible.

In *Anher Singh* v *State ofRajasthan* (AIR 2004 SC 2865), the Apex Court observed that the words "so much of such information as related directly to the fact thereby discovered" refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. This affords some guarantee of the truth of the statement and makes it admissible and this is not true of the other parts f the statement which are indirectly or remotely connected with discovery.

A fact can be discovered by the investigating officer pursuant to information elicited from the accused if such disclosure was followed by one or more of a variety of causes. Recovery of an object is only one such cause. Recovery or even production of object by itself need not necessarily result in discovery of a fact *[Pandnrang Kalu Patil* v *State of iaharashtra* AIR 2002 SC 733]. In this case, the accused disclosed: "I have kept the firearm concerned behind the old house under a heap of

wood". The same was recovered from that place. The court said that the fact discovered was not the gun but the fact that the accused had concealed it at the place from where it was found according to his disclosure. Thus, 'discovery of fact' means something more than the thing produced. The discovery of the fact arises by reason of the fact that the information given by the accused exhibited his knowledge or mental consciousness *[State (NCT) of Delhi* v *Navjot Sandbu* (2005) 11 SCC 600].

In *State o/H.P.* v *Jeet Singh* (AIR 1999 SC 1293), it was observed that there is nothing in Sec. 27 which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". Any object can be concealed in places which are open or accessible to others. The crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not then it is immaterial that the concealed place is accessible to others. Dealing with the same issue, the Apex Court in *State of Maharashtra* v *Bharat Fakir Dhivar* (AIR 2002 SC 16), held that unless the articles were discovered at the instance of the accused, their hidden state remained unhampered and it was only the accused who knew where they were until he disclosed it.

In *State ofKarnataka* v *David Rozario* (AIR 2002 SC 3272), the Apex Court observed: In order to render the evidence leading to discovery of any fact admissible, the information must come from 'any accused in the custody of the police.' The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information received form him. Information admissible becomes inadmissible under Sec. 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer.

JC. 28 (Confession made after removal of threat, inducement, etc.)

f such a confession as is referred to in Sec. 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".^

/Sec. 28 deals with the validity of confession which is made after the [feet of inducement is already over. Once the mind is set free from the fear created by threats of evil or from the hopes of advantage from confessing (e.g. by lapse of time), any confession made is likely to be free and voluntary and there can hardly be any objection as to its validity, "thus, a confession which is rendered irrelevant under Sec. 24 may become relevant under Sec. 28.)

iec. 29 (Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.)

If a confession is otherwise relevant, it does not become irrelevant, merely because it was made -

(a) under a promise of secrecy, or

(b) in consequences of a deception practised on the accused person for the purpose of obtaining it, or

(c) when the accused was drunk, or

(d) in answer to questions he need not have answered (whatever may have been the form of the question), or

(e) when the accused was *not* warned that he was not bound to make such confession and that evidence of it might be given against him (except in judicial confessions, under Sec. 164, Cr.P.C).

In criminal cases, the public interest lies in prosecuting criminals and not compromising with them. Therefore, where an accused person is persuaded to confess by assuring him of the secrecy of his statements or that evidence of it shall not be given against him, the confession is nevertheless relevant.

Where the confession is the outcome of a fraud being played with the accused, it is nevertheless relevant. Thus, where the two accused persons were left in a room where they thought they were all alone, but

secret tape recorders were recording their conversation, the confessions thus recorded were held to be relevant. A confession secured by intercepting and opening a letter has also been held to be relevant. A confession obtained by intoxicating the accused is equally relevant. The law is concerned to see that the confession is free and voluntary and if this is so it does not matter that the accused confessed under the influence of drink.

Confession of Co-accused (Sec. 30)

See under the Chapter 10.

Evidentiary Value of Confession

A confession is considered the best and most conclusive evidence, as no person will make an untrue statement against his own interest. It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt.

However, it must be noted that the evidential value of a confession is not very great. As observed by Best, a confession may be 'false' due to mental aberration, mistake of law, to escape physical or moral torture, to escape ignominy of a stifling enquiry, due to vanity, to endanger others by naming them as co-offenders, and so on. Therefore, confessions may not always be true.

therefore, the confessions must be checked in the light of the whole of the evidence on the record in order to see if they carry conviction. It would be very dangerous to act on a confession put into the mouth of the accused by a witness and uncorroborated from any other source ln *Muthuswamy v State* (AIR 1954 SC 47), the court observed that a confession should not be accepted merely because it contains a wealth of details. Unless the main features of the story are shown to be true, it is unsafe to regard mere wealth of uncorroborated details as a safeguard of truth. Normally speaking, it would not be quite safe as a matter of prudence, if not of law, to base a conviction for murder on a confession by itself.

In *Saboo* v *State of U.P.* (AIR 1966 SC 40), it was held that there is clear distinction between the admissibility of evidence and the weight to be attached to it. The court must apply a double test: (1) whether the

confession was perfectly voluntary, (2) if so, whether it is true and trustworthy The court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be relied on.

Retracted Confessions

When a person, having once recorded a confession which is relevant, goes back upon it at the trial, saying either that he never confessed or that he wrongly confessed or confessed under pressure, that is called a 'retracted' confession, j

Where an extra-judicial confession was recorded by the village assistant in the presence of the village administrative officer; the accused made no reference to the confession in his statement recorded by the C.J.M. under Sec. 164, Cr.P.C. and only said that he was innocent and had not committed any offence, it was held that this could *not* be called a retraction of the confession *[Pakkirisamy* v *State of T.N.* (1997) 8 SCC 158].

The Supreme Court has held that retraction is too insufficient a reason for overruling a confession *(State of T.N.* v *Kutty* AIR 2001 SC 2778). A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and voluntarily made. In the case of a retracted confession, one has only to find out whether the earlier statement which was the result of repentance, remorse and contrition was voluntary and true or not and it is with that object that corroboration is sought for.

. Thus, a court shall *not* base a conviction on such a confession without a general corroboration from independent evidence! *(Piyare Lai* v *State of Rajasthan* AIR 1963 SC 1094). Even if a confession is inculpatory, corroboration is necessary if the confession is retracted. The court can take into consideration retracted confession against the confessing accused and his co-accused.

The court upheld a conviction based on a retracted confession because it became supported by discovery of smuggled articles from different places of concealment *(State* v *Madhukar Keshav Maity* AIR 1980

SC 1224). In *Shan/earl State of T.N.* (1994) 4 SCC 478, conviction on the basis of retracted confession was held *not* proper when the statement was inconsistent with the medical evidence. 1

In a case, an accused was tried for murder. At the time of investigation he made a confession giving full details as to the manner in which he committed the murder. From him a bloodstained drawer and a *banian* worn by him were seized. On the information of the accused, a bloodstained bed-sheet was recovered. At the trial, the accused denied to have made the confession voluntarily. The confession was held to be voluntary, the reason for retraction untrue. On the above finding and also in the absence of any other evidence, the evidence of blood on the drawer, *banian* and bed-sheet were held to corroborate the confession and his conviction was upheld *(Sarvati Singh* v *State of Madras* AIR 1954 SC 4).

Admissions Not Conclusive Proof, but they May Estop (Sec. 31)

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

For comments, *see* under Sees. 23 and **115.**

FURTHER QUESTIONS

Q.1. (a) A admits in some earlier proceedings in a court that the shop X belongs to his brother B. In a suit between A and B about the shop, B produces a certified copy of the statement of A in the earlier suit. The court decides the suit in B's favour relying on the admission of A in the earlier suit.

A files an appeal and pleads that the court erred in relying upon the admission as B had not confronted him with his admission when he appeared as a witness. Decide.

[LC./-95/96]

(b) How are admissions different from confessions

[C.L.C-92/94: L.C.I-95/96: LC.Il-93/2006\{D.U.-2007/20W}

Ll. (a) **Admission made in an Earlier Suit**

An admission is a statement which suggests some inference as to the existence of a fact in issue or a relevant fact (Sec. 17). It has been held hat Sec. 17 makes no distinction between an admission made by a party n his pleading and other admissions. Therefore, an admission made by a person in plaint signed and verified by him may be used as evidence against him in other suits. Of course, the admission cannot be regarded is conclusive, and it is open to the party concerned to show that the statement is not true *(Basant Singh* v *Janki Singh* AIR 1976 SC 341).

The present problem is based on the following case:

LEADING CASE: BISHWANATH PRASAD v DWARKA PRASAD [(1974) 1 SCC 78]

In this case, the question was whether certain properties belonged to the defendant and certain others were liable to partition. The opposite party had made statements in dispositions in an earlier suit that they belonged to the defendant. Similar admissions occurred in the written statement filed by the plaintiff and his father in that suit. It was contended on behalf of the plaintiff, relying on Sec. 145 of Evidence Act, that if a witness is to be contradicted by his own earlier statement, the statement must be put to him so that he may have an opportunity to explain it and this was not done in the present case. Thus, the admission made in an earlier suit cannot be used against the plaintiff.

The court observed: There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by the use of his prior statement. In the former case, admission by a party is a substantive evidence if it fulfils the requirements of Sec. 21, in the latter case a prior statement is used to discredit the credibility of witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore* (of its own force). In the latter case the court cannot be invited to disbelieve a witness on the strength

of the prior contradictory statement unless it has been put to him, as required by Sec. 145.

Admissions are substantive evidence by themselves, though they are not conclusive proof of the matters admitted. Admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness-box or not and whether he was confronted with these statements in case he made a statement contrary to these admissions (vide *Bharat Singh's* case AIR 1966 SC 405).

The court further said that admissions are usually telling against the maker unless reasonably explained, and no acceptable ground to extricate the appellants from the effect of their own earlier statements has been made out. The court, thus, held that an admission in an earlier suit is a relevant evidence against the plaintiff.]

Decision of the case *in question*

A's admission in an earlier suit will be a relevant evidence against him. Thus, A will not succeed.

i(b) Distinction between Admission and Confession

There are many common features between an admission and a confession. In both there is the acknowledgment of the existence of a fact in issue in the case, which may in circumstances be accepted by the courts as a proof of the truth and accordingly acted upon. In criminal proceedings, both can be used.[22] But there are obvious points of distinction too. The Act lays down different rules as to their relevancy.

(1) Confessions find place in criminal proceedings only. Admissions are generally used in civil proceedings, yet they may also be used in criminal proceedings.

(2) Every confession is an admission, but every admission is not a confession. The word 'admission' is more comprehensive and

22. State two similarities between "admissions" and "confessions." *[LC.II-2006*

includes a confession also. A confession is only a species of admission.--}

A confession must either admit in terms the offence, or at any rate, substantially all the facts which constitute the offence. While in an admission, here is a mere acknowledgment of a fact suggesting an inference as to fact in issue or a relevant fact.

An admission of a grossly incriminating fact, even a conclusively incriminating fact, is not by itself a confession e.g. an admission that the accused is the owner of, and was in recent possession of, the knife/revolver which caused a death, with no explanation of any other man's possession, n *Veera Ibrahim* v *State of Maharashtra* (AIR 1976 SC 1167), a person being prosecuted under the Customs Act told the custom officers that he did not mow that the goods loaded in his truck were contraband, nor they were loaded with his instructions. Held that the statement was *not* a confession, but it did amount to an admission of an incriminatory fact (namely, load >f contraband goods) and was relevant under Sees. 17 and 2Lj

(3) A confession is the admission of guilt in reference to a crime and, therefore, invariably runs against the interest of the accused. A confession should necessarily be of inculpatory nature. The term 'admission' includes every statement whether it runs in favour of or against the party making it, and that is why Sec. 21 permits a person, in certain exceptional cases, to prove his own statements. It may be noted that there is nothing in Evidence Act which precludes an accused person from relying upon his own confessional statements for his own purposes^

(4) An admission made to any person whatsoever is relevant whether he be a policeman or a person in authority or whether it was the result of an inducement or a promise. On the other hand, the confession to a policeman or in police custody is irrelevant. Thus, the confession must be free and voluntary, j

Further, a statement may be irrelevant as a confession but it may be relevant as an admission. A statement not admissible as a confession may yet, for other purposes be admissible as an admission against the person who made it.

23. Every confession is an admission but not vice-versa. Explain. [C.LC.-2006]

(5) A confession always proceeds from the accused or suspect person, but in reference to admissions, the statements of certain persons, who are not parties to the case, as admissions against the parties./

(6) The confession of an accused person is relevant against all his *-» co-accused who are being tried with him for the same offence (Sec. 30). In the case of admissions, statements of a co-plaintiff or those of a co-defendant are no evidence against the others.

(7) The effect of an admission is that it does not constitute a conclusive proof of the fact admitted, though it may operate as an estoppel against the party making the admission. A confession is considered a satisfactory proof of the guilt of the accused, though as a rule of prudence, the courts may require corroborative evidence.

Q.2. Discuss the facts and law as laid down in *Aghnoo Nagesia* v *State of Bihar* (AIR 1966 SC 119). *[L.C.I-94]*

X goes to the police station and narrates the facts and circumstances in which he killed his girl friend and her brother. The police registered a case under Sec. 302, IPC against X and arrested him. The FIR has four distinct parts: (a) -Particulars relating to his identity, address, etc (b) Particulars relating to motive and preparations (c) Particulars relating to the actual killing (d) Particulars relating to after killing conduct such as hiding the dead bodies, concealing the knife and his blood-stained clothes.

^

On the basis of this information, the police recovered the dead bodies, knife and clothes. X is on trial and the FIR is the only evidence against him. Decide in the light of relevant case law!---------- *[C.L.C-93/94]*

The Supreme Court in *Aghnoo Nagesia* v *State of Bihar* has observed "Sec. 27 is in form of a proviso, and partially lifts the ban imposed by Sees. 24, 25 and 26." Elaborate the observations by discussing the provisions mentioned therein

threadbare. *[D.U.-2010]*

A.2. The present problem is based on the following case:

LEADING CASE: AGHNOO NAGESIA v STATE OF BIHAR
(AIR 1966 SC 119)

The facts of the case are same as given in the case in question (above). {The principal evidence was the confessional F.I.R. containing 18 parts and there was no eye witness to the murders. . But the medical report confirmed that the wounds on the dead bodies were caused by a sharp weapor^The question for decision

was whether the statement (FIR) or any portion of it was admissible in evidence. The appellant's contention was that the entire statement is a confession made to a police officer and is not provable under Sec. 25 against the appellants.)

The respondent State contended that Sec. 25 protects only those portions of the statement which discloses the killing by the appellant and rest of the statement is not protected under Sec. 25, and is relevant under Sec. 27.)

[The court observed: A confession or admission is evidence against the maker of it unless its admissibility is excluded by some provisions of law. Sec. 24 excludes confessions caused by certain inducements, threats and promises. Sec. 25 provides that no confession made to a police officer shall be proved as against a person accused of any offence (a confessional FIR, thus, hit by Sec. 25). Sec. 26 prohibits proof against any person of a confession made by him in the custody of a police officer unless it is made in the immediate presence of a magistrate. Sec. 27 is in the form of a proviso or exception and partially lifts the ban imposed by Sees. 24-26. These provisions have been made on grounds of public policy and fullest effect should be given to them..

. The court further observed: A confession may consist of several parts, and may reveal not only the actual commission of the crime but also the motive, preparation, opportunity, provocation, weapons used, intention, concealment of the weapon, and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e. some fact which by itself or along with other admitted or proved facts, suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of the confessional statement partakes of the character of the confession. If proof of the confession is excluded by any provision of law, the *entire* confessional statement, in all its parts, including the admissions

of minor incriminating facts, must also be excluded, unless proof of it is permitted by some other section.)

If an admission of an accused is to be used against him, *the whole* it should be tendered in evidence, and if part of the evidence is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. The accused is entitled to insist that the entire admission, including the exculpatory part, must be tendered in evidence.

.The court *held* that in the present case, no part of the statement can be separated and the entire confessional statement is hit by Sec. 25, *except* the formal part identifying the accused as maker of the report and the portions within the purview of Sec. 27. Thus, the information leading to the discovery of dead bodies, knife and clothes is admissible in evidence, being the 'discovery of facts' under Sec. 27. This evidence is insufficient to convict the appellant of the offence under Sec. 302, IPC. The corroboration by medical report will not be sufficient, j

Decision of the case in question

The confession made by X is hit by Sec. 25, and only part (d) of it and discovery of facts from it make it admissible under Sec. 27 (See *Pulukuri Kotayya* v *Emperor, Md. Inayatulla* v *State,* in the text). The accused, X, cannot be convicted on the basis of this evidence alone, as the only thing proved is that accused knew where the dead bodies, weapons, etc. were. Thus, he may be innocent or guilty. When two views of the evidence are possible, the view that favours the accused should be taken. Moreover, under criminal law, to establish the guilt of the accused, the prosecution has to prove beyond any reasonable doubt. Thus, X is liable to be acquitted.

Q.3. Can any part or parts of the following statements made by the accused person be admissible in evidence as confession, under Sec. 27:

(a) A statement made to the police officer - "I was drunk, I was driving the car at a speed of 80 miles per hour. I could see X on the road at a distance of 80 yards. I did not blow the

horn, I made no attempt to stop the car. The car knocked down X".

(b) Z was tried tor the murder of Y whose dead body was recovered from a well. Y was wearing certain ornaments, but they were not found on his body. Z made a statement to the police - "I had removed the ornaments, had pushed the body into the well and had pledged them with X". The ornaments were recovered from X.

(c) A person in police custody gives information in these terms: "I was in need of money. I took out 20,000 rupees from the cash-box. I deposited the money in my Bank Account the same day". The police is led to the Bank Account of the accused on the basis of information and confirms that 20,000 rupees were actually deposited by the accused on the concerned day.

(d) In police custody, B makes the following statement: "I was jealous of As success in business. I set fire to his shop and threw the petrol can and the lighter in the bush". On the basis of the information the can and lighter were recovered.

[C.LC.-91/92/95/96\ L.C.I-96; L.C.II-95]

A.3. Only such information as leads to discovery of facts is permissible; any self-incriminatory statement or whatever else said by the accused at the time of giving the information by way of giving introduction, or narrative or explanation must be rigorously excluded as it leads to no discovery of facts.

(a) The statement is irrelevant, as no part of it leads to discovery of facts under Sec. 27.

(b) Only statement that is relevant under Sec. 27 is that the ornaments are with X and that the accused knew about them.

(c) Only statement that is relevant under Sec. 27 is that Rs.20,000 were found in the bank account of the accused.

(d) Only statement that is relevant under Sec. 27 is that petrol can and lighter were found in bush, and the accused's knowledge about them.

Q.4. Is the following statement made to a police officer **a** confession? Discussq its relevancy also in a trial of murder - "My husband was suffering from bronchitis. He had a severe attack of bronchitis. In confusion I administered him Potassium Cyanide taking it to be a cough mixture. My husband never coughed again. I removed the dead body and threw it into a pond. I can point out the place where the dead body was thrown". • *[LC.I-95/96]*

A.4. A confessional statement made to a police officer is inadmissible under Sec. 25. However, by virtue of Sec. 27, that part or parts of statement can be received in evidence which leads to discovery of facts. In the present case, the place from where the dead body was recovered and the accused's knowledge about it are thus relevant parts of the statement.

The statement is also relevant under other provisions of the Evidence Act, viz. under Sec. 7 (cause of the happening of fact in issue) and under Sec. 8 (conduct, previous or subsequent, of the accused).

Statements by Persons Who Cannot be Called as Witnesses: Dying Declaration

Cases in which Statements of Relevant Fact by Person **who** is Dead or Cannot be Found, etc. is Relevant (Sec. 32)

A statement (written or verbal) of relevant facts made by a person (i) who is dead, (ii) who cannot be found, (hi) who has become incapable of giving evidence, or (iv) whose attendance cannot be procured without unreasonable delay or expense, is relevant under the following circumstances: j

. (1) When it relates to the *cause of bis death,* i

(2) When it is made *in the course of business,* such as an entry in books, or acknowledgement of the receipt of any property, or date of a document.

(3) When it is *against the pecuniary or proprietary interest of the person making it* or when it would've exposed him to a criminal prosecution.

(4) When it *gives opinion as to a public right/custom/matters of general interest.*

(5) When it relates to the *existence of any relationship between persons* as to whose relationship the maker had special means of knowledge.

(6) When it relates to the existence of any relationship between persons deceased and is *made in any will or deed or family pedigree,* etc.

(7) When it is contained in any deed, will or other document *relating to transaction mentioned in Sec 13(a).*

(8) When it is *made by several persons and expresses feelings relevant to matter in question.*

» Sec. 32 provides an *exception* to the principle of excluding hearsay evidence. The *principle* behind is that a'person who has the first-hand knowledge of the facts of a case, but who, because of death, disability, etc. is not able to appear before the court, then his knowledge should be transmitted to the court through some other person; the person who has shared the knowledge of that person will be considered as the best evidence. Thus, *necessity* and *convenience* are the underlying grounds^

(Proof of a person's death, disability, etc. will have to be offered in the first instance to make the evidence relevant under Sec. 32jWhen a statement is admitted under any of the *eight* clauses of this section, it is substantive evidence, and has to be considered along with other evidence.

Dying Declaration: Sec. 32 (1).

"When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in 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".

Illustration (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 B; *or* The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's 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.

Principle

Sec. 32(1) incorporates the principle of English law relating to what are popularly known as dying declarations. A 'dying declaration' means the statement of a person who has died (by way of homicide or suicide) explaining the cause or circumstances of his death.[1] As the person is lead, this statement before the court would be 'hearsay' which is excluded are the reasons that party against whom it is used has no opportunity of cross-examining the original source, and it is not delivered under an oath, j

• See. 32 is an *exception* to the hearsay rule. The three-main grounds in which dying declarations are admitted are:[2]

@ Death of the declarant,

(u) Necessity (only evidence available under the circumstances): the victim being generally the only eye-witness to the crime, the exclusion of his statement would tend to defeat the ends of justice, and

(jii) The sense of impending death, which creates a sanction equal to the obligation of an oath. *Nemo moriturus presurnuntur mentri* (no one when about to die is presumed to lie). "Truth sits upon the lips of dying men".)

The general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive o falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth.

The reason for admitting dying declaration is well-reflected by Shakespeare in Richard II, where he said - "Where words are scarce, they are seldom spent in vain; They breathe the truth that breathe their words n pain". Sec. 32(1) is a salutary provision of law and has helped in leaning convictions in *dowry death* cases and hence contributed to controlling his grave social evil.

1. What is meant by 'dying declaration'? *[LC.I-96; LC.II-94]*
2. What is the rationale of relevancy of dying declaration under our law? [C.LC. *-91/94/96]*

Write a short note on: The principles on which dying declaration is admissible in evidence despite being hearsay evidence. [D.U.-2007]

Distinction between English and Indian Law[3]

There are several vital points of distinction between the English and the Indian law on the point of admissibility of dying declaration:

(1) Firstly, in England, a dying declaration is relevant only in criminal cases where the cause of death is in question. In India, such statements are admissible both in civil and criminal proceedings; they are admissible even if the trial is not for a person's death.

(2) *Secondly*, under English law, the dying declaration is admissible only in the single instance of *homicide* i.e. murder or manslaughter. In India, cases of 'suicide' are also covered.

(3) *Thirdly*, under English law, to be relevant, a dying declaration must have been made in expectation of death. The declaration must be made at a time when the maker is under settled and hopeless expectation of death. A declaration made without appreciation of immediate or impending death would not be admitted, however it is not necessary that it should come immediately after the statement. There is no such requirement under the Indian law. If the declarant has in fact died and the statement explains the circumstances surrounding his death, the statement will be relevant even if no cause of death had arisen at the time of the making of the statement.

(4) *Fourthly*, under English law, it is necessary that the deceased should have completed his statement, before dying. In India, il the deceased has narrated the full story, but fails to answer the last formal question as to "what more he wanted to say", the declaration can be relied upon.

Conditions of Admissibility (Essential requirements of a dying declaration)[4]

, (1) *To whom the statement is to he made and its form* - A statement o: dying declaration could be made to *any* person - a doctor, *:*

3. Is there any difference between English and Indian law on dying declaration? *[C.LC.-92A3*

•*A* What are the essential requirements of a relevant dying declaration? *[C.LC.-91/94\[D.U,-200-/*

But, statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, would each to them be circumstances of the transaction.

In *Palaka Narayana Swami* v *Emperor* (AIR 1939 PC 47), the deceased made a statement to his wife that he was going to the accused to collect money from him (the accused being indebted to the deceased). He catch a train for Berhampur, where the accused lived. A couple of days later, his body was found in a trunk which had been purchased on behalf of the accused. It was *held* that the statement made by the deceased to his wife was admissible in evidence under Sec. 32(1) as a circumstance of the transaction which resulted in his death, j

The Supreme Court in *Sbarda Birdichand Sharda* v *State ofMaharashtra*[5] **(AIR 1984** SC 1622), held that proximity depends upon facts and circumstances of each case. In this case, a married woman had been writing to her parents and other relatives about her critical condition at the hands of **her** in-laws. She lost her life some four months later. Her letters were held to be admissible as dying declaration. The court also pointed out that Sec. 32 (1) is applicable to cases of suicide also.

Thus, the statements made *before* a person has received any injury or before the cause of death has arisen or before the deceased has any reason to anticipate of being killed are relevant as dying declarations, but such statements should have a direct relation to the cause or occasion of death. Thus, where A committed suicide as a result of the ill-treatment by the accused, that treatment was the cause, though not the direct cause, of the death. The whole affair, ill-treatment and subsequent suicide, being all one transaction, consequently the statement of the deceased was admissible under Sec. 32(1).

(4) *The cause of death must be in question* - The declaration under Sec. 32(1) must relate to the death of the declarant.. In *Re Dannu*

5. The girl's last letter to her father was written a few hours before her death by burning in which she had described in elaborate details the series of incidents concerning dowry demands. She had also expressed apprehensions aboul her well-being. Is such letter admissible evidence under Sec. 32(1)?

Singh v *Emperor* (25 Cr LJ 574), A and five other persons were charged with having committed a dacoity in a village. A, who was seriously wounded while being arrested, made before his death a dying declaration as to how the dacoity was committed and who had taken part in it. *Held* that declaration is not admissible in evidence against the other persons, as it does not relate to his death, but it relates to participation of his associates in the dacoity.

(5) *The statement must be complete and consistent* - If the deceased fail to complete the main sentence (as for instance, the genesis or motive for the crime), a dying declaration would be unreliable. However, if the deceased has narrated the full story, but fails to answer the last formal question as to what more he wanted to say, the declaration can be relied upon *[Kusa* v *State of Orissa* (1980) 2 SCC 207].

A. dying declaration ought not to be rejected because it does not contain details or suffers from minor inconsistencies. Merely because it is a brief statement, it is not to be discharged. Shortness, in fact, guarantees truth *(Oza* v *State of Bihar* AIR 1979 SC 1505). Where the bride recorded two declarations, one to a police officer and other to a magistrate, they being similar in material factors, evidence accepted though minor discrepancies were there *[Raoji* v *State of Maharashtra* (1994) Cr LJ 15 (SC)].

In *Kamla* v *State of Punjab* (AIR 1993 SC 374), four dying declarations were made by the deceased. One of them indicated the incident as an accident. The accused (mother-in-law of the deceased) had been convicted on the basis of another declaration implicating her. The court also found glaring inconsistencies as far as naming the culprit was concerned. *Held* that the conviction cannot be based upon such declarations.

(6) *Declarant must be competent as a witness* - It is necessary for the relevancy of a dying declaration that the declarant, if he had lived on, would have been a competent witness Thus, in a prosecution for the murder of a child, aged 4 years, it was proposed to put in evidence, as a dying declaration, what the child said shortly before her death. The declaration was held to be inadmissible *[R.* v *Pike* (1829) 3 C & P 598]. Thus, a dying declaration of a child is inadmissible.

(7) *Other points* - Where the injured person was unconscious, dying declaration should be rejected *(R'aka Singh* v *State ofM.P.* AIR 1982 SC 1021). Where for some unexplained reasons the person who noted down (scribe) the statement was not produced, the declaration was not accepted as evidence *(Govind Narain* v *State ofRajasthan* AIR 1993 SC 2457). Where there are more than one declarations, the one first in point of time should be preferred *(Mohan Lai* v *State of Maharashtra* AIR 1982 SC 839).

I (8) *FIR as dying declaration* - Where an injured person lodged the F.I.R. and then died, it was held to be relevant as a dying declaration *[K. Ramachand Reddy v Public Prosecutor* (1976) 3 SCC 104]. A report made by the deceased relating as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death shall be relevant as dying declaration *(Mahmood Ilahi* v *State of U.P.,* 1990 CrLJ 885). Similarly, a 'complaint' made to police could be taken as a dying declaration *Jai Prakash* v *State ofHaryana,* 1999 CrLJ 837 (SC)].

A dying declaration recorded by police alone is relevant under Sec. 32 (1), however, it is better to leave such a statement out of consideration unless the prosecution satisfies the court as to why it was not recorded by a magistrate or a doctor *(Lakshmi* v *Om Prakash* AIR 2001 SC 2383). Only because certain names were included in F.I.R. but were not mentioned in dying declaration does not detract from the value of dying declaration and would not by itself prove the falsity of the declaration.

Evidentiary Value of Dying Declaration[6]

, There is no rule of law that a dying declaration should not be acted upon unless corroborated. But, ordinarily, it is not considered safe to convict an accused person only on the basis of a dying declaration because of its inherent weaknesses (discussed below):

(1) It is *hearsay* evidence, not made on oath and its veracity cannot be tested by cross-examination in the court.

6. What is the evidentiary value of a dying declaration? Can it be relied upon without corroboration? [C. *L.* C-92; L *C. 1-94/96; L C. 11-94]*

(2) The *maker* of such a statement might be mentally and physically in a *state of confusion* and might well be drawing upon his imagination when he was making the declaration.

(3) Very often, the dying man takes that last opportunity to implicate all his enemies.

(4) In weighing the evidence of dying declaration, various *factors* or *circumstances* should be taken into consideration[7]:-

(a) Nature of its content, consistency of statements made at different times;

(b) Capacity to remember facts; opportunity of dying man for observation viz. availability of light if crime done at night, to identify assailant.

(c) Proximity of time between it and the accident; whether the statement made at the earliest opportunity and was not the result of any tutoring or prompting by interested parties (relatives). Thus, the opportunity to consult other persons is an important factor^/

1 a wife burning case, the wife remained alive for about 8 days after receiving burn injuries, but did not tell to any body visiting her in the hospital as to how she came to receive the burns. When her uncle visited her she stated that her husband had set her on fire. The Supreme Court held that statement seemed to have been tutored by the uncle *(State of ssam* v *M. Ahmed* AIR 1983 SC 274). However, the mere presence of datives is not in itself sufficient to show that the declarant was tutored *Habib Usman* v *State of Gujarat* AIR 1979 SC 1181). In *K.R. Reddy's* case, le deceased did not disclose the name of assailants on the first opportunity e had but until later when he made a declaration before the magistrate. : was held that there was prompting by the cousin of the deceased, who applied the name.

Thus, it is necessary that the dying declaration must be subjected to close scrutiny ('proved beyond reasonable doubt') in respect of all the

7. What precautions are required before convicting an accused solely on the basis of a dying declaration? [C.L.C-95; *LC.I-94]*

relevant circumstances of the case. The declaration must be true and voluntary.

Relevance of Circumstances of Transaction which Resulted in Death

LEADING CASE; PATEL HIRALAL JOITARAM v STATE OF GUJARAT (AIR 2001 SC 2944)

Facts and Issue - In this case, the statement made by the deceased woman in the FIR, where she wrongly mentioned the 2nd part of the name of the accused had been clarified by her by giving a clarifying statement under Sec. 161, Cr. P.C.

The first occasion on which she made the statement was when she talked to a pedestrian, the victim herself was sitting beneath the water column in the railway station frantically trying to get the flames quelled. The sadhus nearby asked her as to who had done it and she answered "Hiralal". A little later, she narrated the incident to her husband. He stated that she had told him that Hiralal asked her why she was defaming him by spreading the story that he had illicit relations with her sister.

The victim did not mention the name of the assailant to the doctor. Her main dying declaration was given to the executive magistrate in which she clarified that in her earlier statement she mentioned the name of the assailant as "Hiralal Lalchand", while before the investigating officer she rectified her mistake and that it was "Hiralal Joitaram" and not "Hiralal Lalchand".

The issue was whether her statement had been covered by Sec. 32(1) of the Evidence Act to be a reliable dying declaration.

Observations -(The Apex Court observed: By Sec. 32(1), two categories .of statements are made admissible in evidence and further made as substantive evidence. They are (a) statement as to the cause of death (b) statement as to any of the circumstances of the transaction which resulted in death. The second category can include a far wider range of facts than the first category^

The court further observed: The words "statement as to any of the circumstances" are by themselves capable of expanding the width and contours of the scope of admissibility. When the word "circumstances" is linked to "transaction which resulted in his death", the sub-section casts the net in a very wide dimension. Anything which has a nexus with his death, proximate or distant, direct or indirect, can also fall within the purview of the subsection. As the possibility of getting the maker of the statement in flesh and blood has been closed once for all, the endeavour should be to include the statement of a dead person within the sweep of relevancy and not to exclude it. Admissibility is the first step and once it is admitted the court has to consider how far it is reliable. Once that test of reliability is found positive the court has to consider the utility of that statement in the particular case.

In *Sharad Birdhichand Sarda* v *State of Maharashtra* (1984) 4 SCC 116, a three-judge Bench of this court considered the scope of Sec. 32(1). It was laid down that the legislature has thought it necessary to widen the sphere of Sec. 32 for avoiding injustice. The court observed: "The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case.... Entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death."

Decision - The court held: Looking at the dying declaration in the above perspective, there is no doubt that her statement is inextricably intertwined with the episode in which she was burnt and eventually died of such burns. Thus, the clarificactory statement made by the deceased under Sec. 161, Cr.P.C. would fall within the ambit of Sec. 32 (1) of the Evidence Act.

Comments - In the above-discussed case, the Supreme Court has emphasized the need for efforts by courts, as far as possible, to include a statement within the scope of Sec. 32(1). Hence, statements as to any of the circumstances of the transaction which resulted in the death would be included.

In *Rattan Singh* v *State of H.P.* (AIR 1997 SC 768), the statement of a woman made before the occurrence in which she died that the accused was standing near her with a gun in his hand and this fact being one of the circumstances of the transaction was held to be admissible as a dying declaration being proximate in point of time and space to the happening.

The court observed: When the deceased made the statement that appellant was standing with a gun she might or might not have been under the expectation of death, but that does not matter. The fact spoken by her has subsequently turned out to be a circumstance which intimately related to the transaction which resulted in her death. The collection of the words in Sec. 32(1) "circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which caused his death". There need not be direct necessary nexus between "circumstances" and "death". It is enough if the words spoken by the deceased have reference to any circumstances, which has connection with any of the transaction which ended up in the death of the deceased.

In *Dalbir Singh* v *State of U.P.* (ADR. 2004 SC 1990), a letter written by the deceased wife prior to her death was held to be admissible in evidence as it disclosed the cause of her death or circumstances which resulted in her death. However, where there was a telephonic conversation between the deceased and one of the witnesses but it did not relate to the cause of his death or to any of the circumstances of the transaction which resulted in his death, it was held that the statement did not come within the purview of Sec. 32(1) *[Jayendra Saraswathi Swamigal* v *State of T.N.* (2005) 2 SCC 13].

Facts and Issue - In this case, a school teacher aged about 20 years was allegedly raped by the head master and a co-teacher. The prosecutrix narrated the incident to her mother, brother and uncle and two or three days later to her father. The matter was reported to the police 11 days after the incident in which she narrated the whole incident and explained the delay for not lodging the report earlier. The doctor who examined the prosecutrix reported that she had been subjected to sexual intercourse in the recent past. Unable to withstand the humiliation of rape she committed suicide. The autopsy showed that the cause of death was poisoning. The prosecution relied upon the statement made to the police. The courts below also relied upon the aforesaid statement treating it as the dying declaration being admissible in evidence under Sec. 32 of the Evidence Act. The issue related to the admissibility of the aforesaid statement as a dying declaration.

Observations - The court observed that the statement of the prosecutrix (made to the police) does not directly state any fact regarding the cause of her death. At the most, it would be said to relate to the "circumstances of the transaction" resulting in her death. {The phrase "circumstances of the transaction" was considered and explained in *Pakala Narayan Swami* v *Emperor* (AIR 1939 PC 47):

> "The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so 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, atjfl would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of 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: though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that 'the circumstances' are of the transaction which resulted in the death of the declarant. 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's) death comes into question'."

Decision - In the present case, there is no legal evidence on record that the prosecutrix at or about the time of making the statement had disclosed her mind for committing suicide allegedly on account of the humiliation to which she was subjected to on account of the rape committed on her person. The circumstances stated in the statement made to the police do not suggest that a person making such a statement would under the normal circumstances, commit suicide after more than five-and-a-half months. The High Court was, therefore, not justified in relying upon the aforesaid statement as a dying declaration holding that the said statement was in series of circumstances of the transaction which resulted in the death of the deceased^

Comments - The words "as to any circumstances of transaction which resulted into his death" appearing in Sec. 32 makes it clear that the circumstances resulting in death must have *proximate* relation to actual occurrence. In other words, the statement of the deceased relating to cause of his death or circumstances of transaction which led to his death must be sufficiently and clearly related with the actual transaction*[Kans Raj* v *State of Punjab* AIR 2000 SC 2324].

Dying Declaration can be used as a Sole Basis of Conviction[8]

In *Rom_ Natb Madbo Prasad* v *State of M.P*$_U$ (AIR 1953 SC 420), the supreme Court observed: "It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination..."

By subsequent decisions, however, the Court has over-ruled its above ruling, i

LEADING CASE: KHUSHAL RAO v STATE OF BOMBAY (AIR 1958 SC 22)

In this case, the deceased made four separate and identical declarations before the doctor, police inspector, magistrate and to other persons, stating that he has been assaulted by Khushal and one other person.,

The question was whether the accused could be convicted only on the basis of this declaration, or the declaration needed corroboration There are divergent views of different High Courts in this regard. According to Bombay High Court, dying declaration is a weaker type of evidence and requires corroboration. According to Calcutta High Court, it is not permissible to accept a declaration in one part and reject the other part. According to Madras High Court, a declaration can be relied without corroboration, if the court is convinced of its truth, i.e., there is no suspicion of its credibility.

The Supreme Court, agreeing with Madras High Court, laid down the following principles:

(1) There is no absolute rule of law that a dying declaration cannot be the sole basis of conviction unless corroborated.

(2) Each case must be determined on its own facts keeping in view the circumstance in which the dying declaration was made.

"There is no absolute rule of law that dying declaration can not form the sole basis of conviction, unless it is corroborated". Comment and elaborate what are the tests laid down by the Supreme Court in *Khushal Rao* v *State of Bombay* for judging the veracity of Dying Declaration. *[LC.II-93][D.U.-2009]*

State the correct proposition of law in view of the Supreme Court's decision in *Ram Nath Madho Prasad* case and its over-ruling in subsequent decisions? *[D.U.-2010]*

(3) A dying declaration is not a weaker kind of evidence than any other piece of evidence. It stands on the same footing as any other piece of evidence.

(4) A dying declaration cannot be equated with a confession or evidence of approver, as it may not come from a tainted source. If it is made by a person whose antecedents are as doubtful as in the other cases, that may be a ground for looking upon it with suspicion.

(5) Necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, but from the fact that the court in a particular case come to the conclusion that a particular declaration is not free from infirmities.

(6) To test the reliability of a dying declaration, the court has to keep in view the circumstances like the opportunity of the dying man of observation, e.g. whether there was sufficient light if the crime was committed at night; whether the capacity of the declarant was not impaired at the time of the statement; that the statement has been consistent throughout if he had several opportunities for making a dying declaration; and that the statement was made at the earliest opportunity and was not the result of tutoring by interested parties.

(7) A dying declaration recorded by a competent Magistrate in a proper manner in the form of questions and answers, and in the words of the maker as far as practicable stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and character.

(8) If the court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The court must, of course, be fully convinced of the truth of the statement, and naturally, it could not be fully convinced if there were anything in the surrounding circumstances to raise suspicion as to its credibility.

Thus, a true and voluntary declaration needs no corroboration.[9]. The statement of the deceased in this case satisfied all these, conditions (the declaration was true in all respects e.g. consistent in so far as naming of the two accused) and therefore the appellants should be convicted.[10]

LEADING CASE: KUSA V STATE OF ORISSA (AIR 1980 SC 559)

In this case, the deceased made a dying declaration before a doctor. It was clear in all respects. However,, the appellants challenged it on the following grounds: (1) It did not contain all those names which were included in F.I.R. (2) The account of eye-witnesses is also different (3) The deceased was in a state of shock, thus his statement could not be relied (4) The declaration was incomplete as the deceased did not answered the last question put to him (To wind up the statement the doctor asked the injured if he had anything else to say, he lapsed into unconsciousness without answering this question).

The court observed that only because certain names were included in F.I.R. but were not mentioned in dying declaration does not detract from the value of dying declaration and would not by itself prove the falsity of the declaration. In *Surat Singh's* case, the first declaration did not mention the name of eyewitnesses, but the second declaration (which was more detailed) contained it. The court observed that first declaration was a

9. "The court must be fully satisfied that the dying declaration has the impress of truth on it, after examining all the circumstances, in which the dying person made his statement ex *parte* and without the accused having tne opportunity of cross-examining him. If on such an examination the court was satisfied that the declaration was the true version of occurrence, conviction could be based solely upon it". Elaborate it with the help of relevant case law. [C.L.C-93]

10. In a dowry death case the only evidence on record are three dying declarations of the victim, given to an immediate neighbour, the attending doctor and the Magistrate. In all the **three** declarations there is mention of the two accused. Can these dying declarations be the sole basis of conviction in the case? [C.LC.-96]

short version of the entire incident and contained true facts when the deceased was under great pain.

The court further observed: The statement of doctor was that deceased became semi-conscious when last question was put to him. Logically it means that prior to that he was fully conscious. The last question was in the nature of a mere formality "What more you want to say", and all the necessary questions were asked before that formal question. The statement was thus not incomplete.[11]

The court thus *held* that once the declaration is believed (true, consistent, coherent), it can be relied upon for conviction, even if there is no corroboration *{Khmhal Rao* v *State of Bombay* AIR 1958 SC 22). In *Lallubhai* v *State of Gujarat* (AIR 1972 SC 1776), a married woman was burnt to death by her in-laws, her dying declaration was accepted and conviction was based solely on the basis of the declaration. It was held that if the truthfulness of a dying declaration is accepted, it can always form the basis of conviction of the accused. The court, in the present case, thus convicted the appellants on the basis of the dying declaration.

LEADING CASE: P.V. RAOHAKRISHNA V STATE OF KARNATAKA (AIR 2003 SC 2859)

In this case of wife-burning, the Apex Court highlighting the utility of dying declaration, observed: "The principle on which a dying declaration is admitted in evidence is indicated in Latin maxim *nemo moriturus proesumitur mentiri*, a man will not meet his maker with a he in his mouth." The court further observed that a person on death bed is in a position so solemn and serene that it is equal to the obligation under oath. For this reason, the requirement of oath and cross-examination are dispensed with. The victim being generally the only principal eye witness to the crime, the exclusion of the declaration might defeat the ends of justice.

11. A question based on the same facts *[C.LC-94]*

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court must be satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. The court has to be on its guard and see for itself that the declaration is voluntary and seems to reflect the truth.

This court has laid down governing principles *(precautions)* in several judgments, which could be summed up as under:[12]

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. If the court is satisfied that dying declaration is true and voluntary it can base conviction on it without corroboration *[State of IIP.* v *Ram Sagar Yadav* AIR 1985 SC 416; *State of Karnataka* v *Sheriff* AIR 2003 SC 1074].

(ii) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(iii) The court has to scrutinize the dying declaration carefully and must ensure that it is not the result of tutoring, prompting or imagination.

(iv) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected *Kaka Singh* v *State of M.P.* AIR 1982 SC 1021].

(v) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected (AIR 1981 SC 617).

12. Whether the sole testimony of the dying declarant can be made **the** basis of conviction or not? Examine in the light of related judicial interpretation. In such a context, how is judge expected to appreciate **the** evidence of dying declaration? *[LC.II-2006][C.L.C.-2006\[D.U.-2007/2010/2011]*

(vi) Brief statement not to be discarded. Shortness of the statement itself guarantees truth *[Surajdeo Oza* v *State of Bihar* AIR 1979 SC 1505].

(vii) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon *[State of U.P.* v *Modem Mohan* AIR 1989 SC 1519].

(viii) In case of more than one statement, the first in point of time must be preferred. If plurality is trustworthy and reliable it has to be accepted *[Mohanlal Gangaram Gehavi* v *State of Maharashtra* AIR 1982 SC 839].

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition (so as to observe and identify the assailant) to make the dying declaration looks up to the medical opinion. But where the eye witness or Magistrate said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. *[Laxman* v *State of Maharashtra* (2002) 6 SCC 710]

Regarding the percentage of burns and credibility of statement, this court (in the present case) held that there is no hard and fast rule of universal application in this regard. Much would depend upon the nature of the burn, its effect and impact on faculties (mental abilities). Percentage of burns alone would not determine the probability or otherwise of makings or *a dy*ing declaration. It was held that the High Court was justified in placing reliance on the dying declaration.] In *Narain Singh* v *State of Haryana* (AIR 2004 SC 1616), the Apex Court observed that, dying declaration though an exception to the hearsay rule but like any other evidence, it has to pass the test of credibility. If found reliable, it can be the basis of conviction. It can be acted upon ii reference to one accused though not in reference to others. In *Ravi* j *State of Tamil Nadu* (2004) 10 SCC 776, it was held that if the truthfulness.

of dying declaration cannot be doubted, the same alone can form the basis of conviction without any corroboration. In *R. Mani* v *State of T.N.* (2006) 3 SCC 1661, it was held that a dying declaration must be wholly reliable, and if not wholly true it can be treated only as a piece of evidence but no conviction can be made solely on its basis.

In the "Pramod Mahajan Murder" case *(The Times of India,* December 8, 2007), the dying declaration played an important part. The victim, pramod Mahajan, named Pravin Mahajan (his brother and the accused) s the person who shot him while he was being rushed to the hospital. The trial court treated it as a dying declaration since it was made to jopinath Munde, a former minister and a responsible citizen who was not expected to lie to the court. The 'conduct of the accused before and after the shooting' also went in his disfavour. The court took into consideration the fact that the accused had left his home on the morning of the murder with the murder weapon. This indicated that it was a premeditated act. The accused did not try to rush his brother to a hospital f (as claimed by him) he had shot him accidentally after a scuffle. Also, he accused came to the victim's house in the early hours of the morning when the victim was to be most "vulnerable".

discrepancy in Dying Declarations: Credibility of Dying Declaration

In Kishan Lai v *State of Rajasthan* (AIR 1999 SC 3062), certain dying declarations were made by the deceased nearly two months after the incidence of burning. In the first oral declaration made before her relatives, the deceased mentioned the names of the accused. In the second declaration before the magistrate she could not mention the name of the accused on the ground that she could not recognize any accused because of fire darkness coming to her eyes. Second declaration not only giving to conflicting version but there was *inter se* discrepancy in depositions of witnesses given in support of the oral dying declaration. Also, the medical evidence clearly showed that the deceased died due to some aliments and not due to burn injuries. The court held that in such circumstances the conviction cannot be based on such dying declarations/")

The court also observed: Under Indian law, the dying declaration is relevant whether the person who makes it was or was not under expectation

of death at the time of declaration. While the English law admits statement/ statements only when it is made when the declarant is in actual danger of death (i.e. full apprehension of danger of death/hopeless condition), and, expecting imminent death. >Though under Indian law, imminence or danger of death does not affect the admissibility of a dying declaration but it will have effect on its credibility. In the present case, the dying declaration was not at a time when the deceased was expecting imminent death.)

In *Girdhar Sbankar Tawade* v *State of Maharashtra* (AIR 2002 SC 2078), the Apex Court observed that it is well settled that dying declarations have to be dealt with due care and admitted as evidence only upon proper circumspection. In *Sheikh Mehboob alias Hetak* v *State of Maharashtra* 2005 (3) SCALE 55, the endorsements in medical record mentioned that there was history of 'accidental burns' at one place and at another place that there was history of 'self-inflicted burns'. Dying declaration itself mentioned that the deceased had started to make a statement which suggested of his having poured kerosene oil on himself and set himself on fire as the accused was demanding interest and beating him. The circumstances raised serious doubts as to the credibility of dying declaration. Therefore, it was held to be not reliable.

Dying Declaration Made to Police whether Admissible[13]

LEADING CASE: STATE OF KARNATAKA v SHARIFF (AIR 2003 SC 1074)

f In this case, the deceased, wife of the respondent, before succumbing to injuries, made statement to the A.S.I. The question arose whether the dying declaration made before the police office is reliable and admissible as evidence.\The court observed that a dying declaration recorded by police cannot be discarded on

13. L, a lady shareholder in **a** property was called by her relatives in connection with settling the dispute relating to joint property. On her arrival, kerosene was poured on her and she was set ablaze. L died 5 days later. A statement in the nature of complaint was recorded by police officer in the hospital where she breathed last. Can the said complaint be treated as dying declaration in spite of the fact that some precautions of taking down such complaint were missing.
[D.U.-2009]

that ground alone. There is no requirement of law that a dying declaration must be made to a magistrate.

However, this court had laid down that it is better to leave such a statement out of consideration unless the prosecution satisfies the court as to why it was not recorded by a magistrate or a doctor *[Dalip Singh* v *State of Punjab* AIR 1979 SC 1173; *Lakshmi* v *Om Prakash* AIR 2001 SC 2383]. In *Munnu Raja* v *State ofM.P.* (1976) 3 SCC 104, this court observed:

"The practice of investigating officers himself recording a dying declaration during the course of investigation ought not to be encouraged. We do not mean to suggest that such dying declarations are always trustworthy, but what we want to emphasise is that better and more reliable methods should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method."

In the aforesaid case, the court admitted the statement made to I.O. at the Police Station by the deceased as admissible evidence. In *State of Punjab* v *Amarjit Singh* (AIR 1988 SC 2013), it was observed that no hard and fast rule could be laid down in this regard and it all depends upon the facts and circumstances of each case.

In the present case, it was also held that a dying declaration need not be in question-answer form. Very often the deceased is merely asked as to how the incident took place and the statement is recorded in a narrative form. In fact such a statement is more natural and gives the version of the incident as it has been perceived by the victim. In *Ram Bihar Yadav* v *State of,Bihar* (1998) 4 SCC 517/it was held that a dying declaration which was not in question-answer form can be accepted. It should, however, be in the actual words of the maker of the declaration.])

Medical Opinion and Dying Declaration

Normally the court in order to satisfy whether the deceased was in a fit mental condition (so as to observe and identify the assailant) to make the dying declaration looks up to the medical opinion. But where the eye

witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail *[Laxmanv State of Maharashtra* (2002) 6 SCC 710]. i

In the aforesaid case, the Constitution Bench observed that where the medical certificate indicated that the patient was conscious, it would not be correct to say that as there was no certification as to the state of mind of declarant the statement recorded by the Magistrate was inadmissible. The Magistrate in his evidence had stated that he had put some questions to the victim to find out whether she was able to make statement and on being satisfied he had recorded the statement of the deceased. The court said that what is essentially required is that the person who records the statement must be satisfied that the injured person was in a fit state of mind. Certification or examination by the doctor is only a rule of caution. Thus, a "voluntary and truthful" dying declaration without a doctor's endorsement that the victim was mentally fit to make the statement could be the basis for convicting an accused.

The court relied upon an earlier decision in *Ravi Chander* v *State of Punjab* (1998) 9 SCC 303, wherein it was observed that the Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise.

The court overruled its earlier decision in *Paparambaka Rosamma* v *State of A.P.* (1999) 7 SCC 695, wherein it was held that in the absence of a medical certification that the injured person was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration.

In *Rambai* v *State of Chhattisgarh* (2002) 8 SCC 83, the court held that dying declaration will not become invalid solely on the ground that it is not certified by the doctor. In *Sanmugam alias Kulandai Vellu* v *State of T.N.* (AIR 2003 SC 209), the dying declaration was recorded by the Magistrate within few hours the victim was admitted to the hospital. The Magistrate in his examination stated that victim was conscious. Medical officer present at the time of recording of dying declaration also made

endorsement about consciousness of the victim. Held that mere non-examination of doctor in whose presence the dying declaration was recorded does not affect its evidentiary value.

In *Gaffar Badshaha Pathan* v *State of Maharashtra* (2004) 10 SCC 589, vas held that a dying declaration could not be rejected on the ground it does not contain an endorsement of the doctor of the fitness of : victim to make the statement, as the certificate of the doctor only shows that the victim was in a conscious state.

Statements Made in Course of Business [Sec. 32(2)]

c. 32(2) declares relevant statements made by a person in the ordinary course of business and in particular when it consists of an entry/ memorandum in books; or in the discharge of professional duty; or knowledgement of the receipt of any property; or of the date of a letter/document usually written or signed by him.

Where the question is as to a person's date of birth, an entry in the entry of a deceased surgeon regularly kept by him stating that on a certain date he attended that person's mother and delivered her of a son relevant *[Must,* (b), Sec. 32]. Similarly, where the question is whether a person was in Calcutta on a given date, entries in the diary of a deceased solicitor (regularly kept by him) that he attended that person at a place . Calcutta is relevant *[Must.* (c)]. *Must,* (g) reads: The question is, whether , a person who cannot be found, wrote a letter on a certain day. The ct that a letter written by him is dated on that day is relevant.

Statements Against Interest of Maker [Sec. 32(3)]

Under Sec. 32(3), "declarations against interest" include statements against le pecuniary or proprietary interest of the person making it, or when it would have exposed him to a criminal prosecution or suit for damages.

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 *[Must.* (e)]. The question is whether A and B were legally married. The statement of a deceased clergyman that he married them under such circumstances that be celebration would be a crime, is relevant *[Must.* (f)].

Sec. 32(3) is based on the ground that what a person says against his own interests is very likely to be true. Thus, a statement made by a deceased in a deed, to the effect that he is governed by the Mitakashara law, is against his proprietary interest and admissible. A statement by a landlord who was dead, that there was a tenant on the land, was a statement against his proprietary interest and was held admissible.

Declaration as to Public Rights [Sec. 32(4)]

Sec. 32(4) deals with declarations of deceased persons as to *public* right or custom, or matters of *general* interest. It is necessary that he made the declaration before any controversy as to such right, custom or matter had arisen. If the statement is regarding a private right, it *cannot* be admitted under this clause.

The person making the declaration should be a person of competent knowledge. *Illust.* (i) to Sec. 32 reads: 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.

Declaration as to Relationship or Pedigree [Sec. 32 (5) & (6)]

Sec. 32(5) provides that a statement will be relevant when it relates to the existence of any relationship by blood, marriage or adoption as to whose relationship the maker had special means of knowledge and was made when *before* the question is dispute arose (i.e. *ante litem mortem* and not *post litemmortem).*

Thus, the statements made by deceased members of a family (in a pedigree or horoscope) are admissible in evidence if they are made before there was anything to throw doubt upon them. *Illust.* (k) to Sec. 32 reads: The question is, whether A, who is dead, was the father of B. A statement by A that B was his own son, is a relevant fact. Similarly, when the question was whether a certain person was the legitimate child, declaration by his deceased father and mother that he was born before marriage, was held to be admissible.

While Sec. 32(5) refers to statement relating to the existence ol relationship between any person (living or dead), Sec. 32(6) is concerned with deceased persons only. Further, while under Sec. 32(5), the evidence

is the declaration of a person who is deceased or whose attendance annot be secured; under Sec. 32(6), the evidence is that of concrete lings and is always written e.g. will or deed, tombstone, family pedigree/ ortrait, coffin plates, etc.

Must. (1) reads: The question is, what was the date of birth of A. L letter from A's deceased father to a friend, announcing the birth of A n a given day, is a relevant fact. *Must,* (m) reads: The question is, whether, and when, A and B were married. An entry in a memorandum ook by C (B's deceased father) of B's marriage with A on a given date, i a relevant fact.

Statements in Documents as to Custom or Right [Sec. 32(7)]

Under this clause, evidence can be given of a statement made in any leed, will, etc. which relates to any transaction by which any right or ustom was created, claimed, modified, denied, etc.

Statement of Several Persons Expressing Feelings [Sec. 32(8)]

A statement is relevant if it was made by a number of persons and expressed feelings or impression on their part relevant to the matter in question. This section may be compared with Sec. 14, which deals with expression of feelings by an individual. *Must,* (n) to Sec. 32 reads: A sues J 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.

Relevancy of Evidence in Prior Judicial Proceedings (Sec. 33)

Evidence given by a witness in a judicial proceeding or before any authorized person, is relevant for the purpose of proving, in a subsequent judicial proceeding the truth of the facts which it states, when the witness s dead or cannot be found, or is incapable of giving evidence, or is kept but of the way by the adverse party, or cannot be produced without unreasonable delay or expense.

Provided that the proceeding was between the *same* parties; that the idverse 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 enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Evidence of deposition *in former* trials is admissible, as it forms an exception to the hearsay rule. Sometimes it so happens that a person who has personal knowledge of the facts of a case, did appear before a court and his testimony was recorded, but at a later stage of the same proceeding or in a subsequent proceeding, he is *not* available as a witness; in such cases Sec. 33 applies. The section will apply, for example, when an *ex parte* decree is set aside and a new trial is ordered.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

Entries in Books of Account when Relevant (Sec. 34)

"Entries in books of account, 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 enquire; but such statements are not alone sufficient evidence to charge any person with liability."

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

Entries in the diary ("Jain Hawala Diary Case") showing certain payments made to a political leader were *not* admitted as evidence. The diary showed no dates on which the payments were supposed to have been made. Such diary cannot be regarded as a book maintained in the regular course of business *[L.K. Advani* v *CBI,* 1997 CrLJ 2556 (Del)]. Entries, even if relevant, are only corroborative evidence. Independent evidence, like the evidence of a transaction which brought about the entry, as to the trustworthiness of the entry would be necessary to fasten anybody with liability [CB/v *V. C. Shukla* (1998) 3 SCC 410].

Relevancy of Entries in Public/ Electronic Record (Sec. 35)

"An entry in any public or other official book/register/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 especially enjoined by the law of the country in which such book, record, etc. is kept), is itself a relevant fact." Sec. 35 is based upon the principle that public records maintained in the performance of official duties must carry a *prima facie* evidentiary value of their correctness. Thus, a municipal record of a person's date of birth or death is relevant to prove the date of birth or death of person concerned. There is, however, *no* presumption that such entries reflect only the truth. Though school register is relevant for showing date of **birth, but** in the absence of the material on the basis of which the entry was made, it would not be of much evidentiary value *(Birad Mai Singhvi* v. *Anand Purohit* AIR 1988 SC 1976). A statement of age in the pleadings of a party has been regarded as an evidence of his age.

Relevancy of Statements in Maps, Charts, etc. (Sec. 36)

According to Sec. 36, statements in maps, plans or charts which are meant for public sale or which are prepared with the authority of the State do carry *prima facie* evidentiary value of the truth of their contents and, therefore, can be offered in evidence whenever the facts stated in them are in issue or are otherwise relevant.

Relevancy of Statements in Acts of Parliament of England or India (Sec. 37)

"Statements of any facts of a public nature (as to the existence of which the Court has to form an opinion) made in a recital contained in any Act of Parliament of the U.K. or in any Central or Provincial Act or a State Act or in a Government Notification in the Official Gazette are relevant facts."

The Gazetted statements are **the best evidence** of facts stated in the Gazette and are entitled to due **consideration but** should not be considered **as** conclusive in respect of **matters requiring** judicial adjudication *[Vimal Bai* v *Hiralal Gupta* (1990) 2 **SCC 22].**

Relevancy of Statements as to Law in Law Books of a Foreign Country (Sec. 38)

When the court has to form an opinion as to law of any country, any statement of the law of that country contained in a book printed or published under the authority of the Government of such country and any report of a ruling of the courts of such country, is relevant.

HOW MUCH OF A STATEMENT IS TO BE PROVED

What Evidence to be given when Statements forms Part of a Conversation, Document, etc. (Sec. 39)

According to Sec. 39, where a long statement/conversation/document/ electronic record/book/series of letters or papers, is relevant to any proceeding the court may in its discretion require the production of only so much of the statement/ conversation/document, etc. *as is necessary* for a full understanding of the statement in the particular case.

The section has been substituted by the Information Technology Act, 2000, so as to include 'electronic records' also.

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

The general principle of law is that judgments whether previous or subsequent are *not* relevant in any case or proceeding. Every case has to be decided upon its own facts as they exist between the parties to it and not by reference to the judgments in other cases. A judgment in the criminal trial is not relevant to the civil case except for the purpose of showing the fact of trial and conviction for it.

Thus, in a suit for damages for damaging the plaintiff's trees, the fact that the defendant was acquitted on the same charge in a criminal prosecution was not admitted in evidence. For the same reason, a civil judgment is *not* relevant to a criminal trial though arising out of the same

facts. For example, a judgment in a civil suit for defamation is not relevant to a criminal prosecution based upon the same defamatory statement.

If an action is started against a manufacturer for supplying defective goods and the court holds the manufacturer to be not liable. Subsequently, other person starts an action against the same manufacturer, for supplying e same kind of defective goods. The previous judgment is *not* relevant the subsequent case.

Judgments are, however, relevant facts of great importance. Thus, the general principle that judgments are not relevant, the Act recognizes tew *exceptions* (Sees. 40-43).

Previous Judgment Relevant to Bar a Second Suit or Trial (Sec. 40)

Under Sec. 40, 'the existence of a judgment, decree, or order, is a relevant fact, if it by law has the effect of preventing any court from king cognizance of a suit or holding a trial.' It is intended to include all cases in which a general law relating to *res judicata inter partes* applies.

Res judicata means a thing upon which the court has exercised its judicial mind and no new action can be brought on the same cause of :tion and between the same parties (Sec. 11, C.P.C.). However, principle F estoppel or *res judicata* does not apply when they would contravene >me statutory direction. This is something which cannot be overridden r defeated by a previous judgment between the parties *[P.G. Eshwarappa M. Rudrappa* (1996) 6 SCC 96].

Similarly, the Criminal Procedure Code bars a second trial of a person ace tried and convicted *(autrefois convict)* or acquitted *(autrefois acquit).* Thus, le judgment by which he was acquitted or convicted will be relevant to every case or proceeding in which he is charged with the same offence.

Relevancy of Certain Judgments in Probate, etc. Jurisdiction (Sec. 41)

A. final judgment, order or decree of a court exercising probate (relating to will), matrimonial, admiralty (war claims) or insolvency jurisdiction which confers upon or takes away from any person any legal character,

or declares any person to be entitled to any such character or any specific thing absolutely, is relevant."

Sec. 41 deals with judgments *in rem* i.e. a kind of declaration about the status of a person (e.g. that he is an insolvent or married or not), and is effective against every body whether he was a party to the proceeding or not. A judgment *in personam*, on the other hand, means a judgment between the parties (e.g. in a tort or contract action), which binds only the parties and is *not* relevant in any subsequent case or proceeding.

Sec. 41 further lays down that such judgment is *conclusive* proof -that any legal character, which it confers, accrued at the time when such judgment came into operation; (ii) that any legal character to which it declares any person to be entitled or not, accrued or ceased at the time mentioned in the judgment; (iii) that any thing to which it declares a person to be entitled was that person's property at the time at which the judgment declares it to be his.

Relevancy and Effect of Judgments, etc. Other than those mentioned in Sec. 41 (Sec. 42)

"Judgments, orders or decrees other than those mentioned in Sec. 41 are relevant if they relate to matters of a *public* nature relevant to the inquiry but such judgments, etc. are *not* conclusive proof of that which the state." Judgments on such matters are relevant to every case or proceeding in which the matter is again in question, but shall not be conclusive c the matter.

Illustration: A sues B for trespass on his land; B alleges the existence c a public right of way over the land. The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same Ian in which C alleged the existence of the same right of way, is relevant bi it is not conclusive proof that the right of way exists.

Judgments, etc. Other than those mentioned in Sees. 40-4 when Relevant (Sec. 43)

"Judgments, orders or decrees, other than those mentioned in Sees. 40, 41 and 42, are *irrelevant,* unless the existence of such judgment, etc., a fact in issue, or is relevant under some other provision of this Act

Evidence can be given of a judgment when the existence of the judgment is itself a fact in issue or is fact otherwise relevant to the case. Thus, if a person is murdered in consequence of a judgment, the judgment being a cause or motive of the murder, will be a relevant fact. The *illustrations* appended to Sec. 43 amply show that the existence of a judgment may become relevant under any of the provisions relating to relevancy (Sees. 6-55).

(a) 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. Here, the judgment against B is *irrelevant* as against C.

(b) 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.*

(c) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence. Here, the existence of the judgment is *relevant* as showing motive for the crime.

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

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

The previous judgment which is final can be relied upon as provided under Sees. 4043 of the Evidence Act:

i) in civil suits between the same parties, principle of res judicata may apply;

ii) in a criminal case, Sec. 300, Cr.P.C. 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;

(iii) if the criminal case and the civil proceedings **are for** the same cause, judgment of the civil court would be relevant if conditions

f any of the Secs. 40-43 are satisfied, but it can not be said that the same would be conclusive except as provided in Sec. 41.

If a judgment, though not *inter partes,* is sought to be relied on not as a piece of evidence, it should be tendered in as evidence *[Surendra Kumar Vakil* v *Chief Executive Officer* (2004) 10 SCC 126]. Decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court *(Shanti Kumar Panda* v *Shakuntala Devi* AIR 2004 SC 115).

Fraud or Collusion in Obtaining Judgment/ Incompetency of Court (Sec. 44)

(Diminishing of the Evidentiary Value of Judgments)

"Any party to a suit or other proceeding may show that any judgment, order or decree, relevant under Sees. 40-42 and which has been proved by the adverse party, was delivered by a court *not* competent to deliver it, or was obtained by fraud or collusion."

The existence of a judgment over a matter which is again in question is a satisfactory piece of evidence, though, of course, nothing is said about its evidentiary value in the Evidence Act. The Act only provides that the value of a judgment may be demolished by showing that it was delivered by a court of incompetent jurisdiction, or it was obtained by fraud or collusion.

Such a judgment does not have the effect of *res judicata.* A judgment obtained by 'collusion' means that there was no cause of action between the parties and by collusion of the parties a cause of action was feigned thus enabling the court to pass its judgment.

FURTHER QUESTIONS

Q.1. (a) On the day of occurrence, the witness X heard the cries of Abha and on rushing out, saw her lying engulfed in flames in her house. X along with Abha's husband Sanjay put out the flames. She was taken to a nearby hospital at 9.15 P.M. and the police was informed about the accident. At 11.35 P.M. the duty doctor certified that Abha was fit enough to make a

statement. In the statement recorded by the duty doctor, Abha said that Sanjay poured kerosene oil on her and set fire to her. At 2.40 P.M. she again told her father and brother that Sanjay had set fire to her. She died at 8 A.M. the same day.

Can Sanjay be convicted for the murder of Abha solely on the basis of the above declarations? Decide. *[C.L.C.-91]*

(b) Mrs. X is brought to the hospital with 50% burn injuries by her husband and in-laws. She makes a statement to the doctor, stating that her mother-in-law had poured kerosene oil on her, her father-in-law has pushed her in the kitchen and her husband had set fire by a match stick. After 3 hours, Mrs. X is declared dead. Her husband and in-laws are put on a trial for X' murder. The prosecution relies on the only statement of Mrs. X. Can they be convicted? Decide. *[L.C.I-93]*

.1. (a) Once the dying declaration is believed (true, consistent, coherent, etc.) it can be relied upon for conviction, even if there is no corroboration (i.e. support from other evidences) *[Khushal Rao* v *State of Bombay; Kusa* v *State ofOrissa]*.

In the present case, the statement appears to be true and voluntarily ade, and conviction of Sanjay can be based solely on the basis of it. he following facts may be noted in this regard:

® The statement was made at the earliest opportunity. Abha made the statement soon after the occurrence.

(ii) The person making the statement (i.e. Abha) have died.

(jii) The statement made by her relate to the cause of her death or the circumstances of the transaction which resulted in her, death.

(iv) The statement made by her was complete and consistent. She made a consistent statement twice before she died as to the fact of Sanjay pouring kerosene over her.

(v) All ingredients of Sec. 32(1) are satisfied.

(b) The accused can be convicted solely on the basis of dying declaration of Mrs. X. *See* part (a) above.

5
Expert Evidence and Relevancy of Character

Opinion of Third Persons when Relevant[1] (Sees. 45-51)

The term 'opinion' means something more than mere relating of gossip or of hearsay; it means judgment or belief, that is a belief or conviction resulting from what one thinks on a particular question. What a person thinks in respect to the existence or non-existence of a fact is *opinion;* and whatever is presented to the senses of a witness and of which he receives direct knowledge without any process of thinking and reasoning is *not* opinion.

For example, the question is whether a certain injury was caused by a spear. A states that he saw the accused causing the injury by a spear. This is not A's opinion. But, if a doctor, who did not see the injury being caused, says that he thinks that the injury was caused by a spear, it is his opinion. What one sees, hears, feels by touch, and knows is not opinion and on the contrary what is the conclusion of an individual is his opinion. Opinion is what is formed in the mind of a person regarding a fact situation.

1..., What are the circumstances in which opinions of third persons are relevant? Discuss with reference to the provisions of the Evidence Act and decided cases. [LC.//-93/95]

Can the court look into the opinion of a person who is not party to the proceedings before court? *[D.U.-2007]*

Write a short note on 'Opinion Evidence'. [C.LC.-95]

Explain the relevancy of expert evidence. *[D.U.-2009/2011]*

The opinions or beliefs of third persons are, as a general rule, irrelevant, and therefore, inadmissible. Witnesses are to state the facts only i.e. what they themselves saw or heard, etc. It is the function of the judge or jury to form their own conclusion or opinion on the facts stated.

Thus, the opinion or the impression of a witness that it appeared him from the conduct of a mob that they had collected for an unlawful purpose is inadmissible to prove the object of the assembly. The witnesses are generally interested in the parties to the litigation and if their opinion were admissible, grave injustice would be caused.

There are, however, cases in which the court is not in a position to from a correct opinion (e.g. when the question involved is beyond the range of common experience or common knowledge), without the help of persons who have acquired special skill or experience in a particular object. In these cases, the rule is relaxed, and expert evidence is admitted to enable the court to come to a proper decision. The rule admitting expert evidence' is, thus, founded on necessity. A judge accepts the view which is more objective or probable.

Sec. 45 (Opinion of Experts)

When the court has to form an opinion upon a point of foreign law or f science or art, or as to identity of handwriting or finger impressions, be opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions, are relevant facts. Such persons are called experts".

llustrations (a): The question is, whether the death of A was caused by poison. The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, **incapable** of knowing the nature of act, or that he was doing **what was** wrong or contrary to law. The opinion of experts upon **the** question of unsoundness of A's mind, are relevant.

(c) The question is whether certain document **was written by A.** Another document is produced which is proved or admitted to

have been written by A. The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

Sec. 45 permits only the opinions of an expert to be cited in evidence. The term 'opinion' means something more than mere relating of gossip or of hearsay; it means judgment or belief, that is a belief or conviction resulting from what one thinks on a particular question. An 'expert' witness is one who has devoted time and study to a special branch of learning, and thus 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. An expert could be qualified by skill and experience as well as by professional qualifications. Thus, an experienced police officer may be permitted to give 'expert' evidence as to how an accident may have occurred.

An expert is not a witness of fact. His evidence is really of an 'advisory' character. An expert opinion will not be read into evidence unless he is examined before the court as a witness and is subjected to cross-examination. Thus the report submitted by an expert does not go in evidence automatically.

Difference between experts' testimony and that of ordinary witness

(1) An ordinary witness must depose to what actually took place. An expert's evidence is not confined to what actually took place, but covers his opinions on facts (e.g. a medical man may give his opinion as to the cause of a person's death).

(2) An expert can refer to and rely upon experiments conducted by him in the absence of the other party. Thus, on a charge of arson, evidence of an experiment conducted by an expert subsequent to the fire is admissible to show how the fire may have originated.

(3) An expert may quote passages from well-known text books on the subject and may refer to them to refresh his memory.

(4) An expert may state facts relating to other cases *in pari materia* similar to the case under investigation.

On *what matters expert opinion can be given*

The subjects on which an expert is competent to testify are: foreign law, matters of science, questions of art, identity of handwriting, or of finger impressions. The words 'science' or 'art' include all subjects on which the course of special study or experience is necessary to the formation of opinion. The matter in question must be of *technical* nature, lor no expert can be permitted to speak on a matter with which the judge may be supposed to be equally well acquainted.

The Supreme Court has held that the opinion of a person that a particular letter was typed on a particular typewriter is not admissible as it does not fall within Sec. 45 *(Hanurnant* v *State ofU.P.* AIR 1952 SC 343). The decision has been criticised and it has been suggested that "the claim of experts that the identity of machine may be established by proving the identity of defects or peculiarities which it impresses on paper should have been considered".

In *State ofH.P.* v *Jai Lai* (1999) 7 SCC 280, the court held that officer of the Horticultural Department of the State Government might have acquired some experience but is not sufficient to make him an expert in the field and to give the label of "expert evidence" to his testimony.

Proof of Age - A doctor's opinion as to age of a person based on his or her height, weight and teeth does not amount to legal proof of age of that person. But such evidence is relevant. An opinion based on the X-ray plate examination has been held to be admissible *{Ram Swaroop* v *State,* 1989 CrLJ 2435 All). However, in *Anita* v *Atal Bibari,* 1993 CrLJ 549 (M.P.), held that in ascertaining date of birth, opinion of radiologist cannot be preferred over the entry in the register of births and deaths maintained under the provisions of an Act.

In a case of kidnapping of a girl, the medical evidence showed her age between 17 and 18 years and the documentary evidence showed her to be above 18 years. Held that the medical evidence was not a conclusive proof of age *[S.K. Belal* v *State,* 1994 CrLJ 467 (Ori)].

Value of Expert Opinion

The Evidence Act only provides about the relevancy of expert opinion but gives no guidance as to its value. It is often said that there cannot be any more unsatisfactory evidence than that of an expert. The value of expert opinion suffers from various drawbacks:

(i) There is the danger of error or deliberate falsehood. "These privileged persons might be half blind, incompetent or even corrupt."

(n) His evidence is after all opinion and "human judgment is fallible. Human knowledge is limited and imperfect".

(iii) An expert witness, howsoever impartial he may be, is likely to be unconsciously prejudiced in favour of the side which calls him. Thus, expert witnesses are called witnesses "retained and paid" to support by their evidence a certain view on a scientific or technical question.

These factors seriously reduce the probative value of expert evidence. It would be highly unsafe to convict a person on the sole testimony of an expert. The reliability of such evidence has, therefore, to be tested the same way in which any other piece of evidence is tested. The Supreme Court has laid down following principles in this regard *(Murari Lai* v *State ofM.P.* AIR 1980 SC 531):

(l) There is no rule of law, nor any rule of prudence which has crystallised into a rule of law, that the opinion evidence of an expert must never be acted upon, unless substantially corroborated.

(ii) But, having due regard to the various adverse factors operating in case of expert opinion, the approach should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered.

(iii) In appropriate cases, corroboration must be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of an expert may be accepted.

(iv) The hazard in accepting the expert opinion, is not because experts, in general, are unreliable witnesses - the equality of credibility or

incredibility being one which an expert shares with all other witnesses - but because all human judgment is fallible and an expert may go wrong because of some defect of observation, or honest mistake of conclusion. The more developed and more perfect a science, less is the chance of an incorrect opinion. The science of identification of *fingerprints* has attained near perfection and the risk of incorrect opinion is practically non-existent. On the other hand, the science of identification of *handwriting* is not so perfect and the risk is, therefore, higher. But that is far from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, however the opinion may be backed by the soundest of reasons.

(v) The opinion of expert is not decisive or conclusive of the matter. The court should not surrender its opinion to that of the expert. An expert deposes and not decides. His duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of those criteria to the facts proved in evidence.

is the duty of the court to remove chaff from the grain *[Mohan Singh State of M.P.* (1999) 2 SCC 428]. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of an expert witness depends on the reasons stated in support f his conclusions and the data material furnished which form the basis f his conclusions.

'Medical opinion - Opinion of medical officer cannot be taken as contradicting te positive evidence of the witness of the facts. Where the direct evidence about assault by a particular person is satisfactory and reliable, medical evidence cannot override that because the latter is hypothetical *'punjab Singh* v *State of Haryana* AIR 1984 SC 1223). However, where the Medical report differed from injuries described by the witnesses, medical evidence should prevail *(Amar Singh* v *State of Punjab* AIR 1987 SC 726). between the opinion of two doctors, the opinion which supports direct evidence should be accepted *(Piara Singh* v *State of Punjab* AIR 1977 SC *174).*

In *Wilayat Khan* v *State* (AIR 1962 SC 122), it was held that expert opinion is not to be believed upon when it is in conflict with direct evidence. It has been held that medical evidence cannot be decisive of the matter. In case of any conflict between eye-evidence and the medical evidence the court will have to go by the evidence which inspires more confidence. Thus, where the eye-witnesses testified to one *lathi* blow upon the head of deceased, but the medical evidence recorded four external injuries, the court held that the medical evidence was more trustworthy and it showed that the so-called eye-witnesses had not seen the incident.

In respect of nature of injuries and causes of death, most competent witness is the doctor examining the deceased and conducting post-mortem. Unless there is something inherently defective, the court cannot substitute its opinion in place of the doctor's *(Mafabhai N. Raval* v *State of Gujarat* AIR 1992 SC 2186). Where the doctor failed to give his opinion about the nature of injury, the court cannot substitute its opinion assuming the role of an expert *[Babloo* v *State,* 1995 CrLJ 3534 (M.P.)].

In *Mohd. **Zahid*** y *State of T.N.* (1999) 6 SCC 120, it was held that while sufficient weightage should be given to the evidence of the doctor who conducted post-mortem examination, the evidence cannot be accepted if it is self-contradictory. The question in this case was whether death was homicidal, suicidal or accidental. The doctor's opinion was at variance with statements in text books. The prosecution made suggestion to the doctor on the basis of statements found in authoritative text-book. The doctor conducted the post-mortem examination on a decomposed body eight days after it was buried. While the courts below accepted the evidence of the doctor, the Supreme Court did not.

While expert evidence is relevant from the point of view of weight, it is a very weak type of evidence. The court is not bound by the opinion of the medical expert, but has to form its own opinion. In this case, the medical witness ruled out the possibility of two successive blows by a sharp weapon falling at the same place. The court rejected this opinion and accepted the prosecution version *[State of Haryana* v *Bhagirath* (1999) 5 SCC 96]. Reliable direct evidence should not be rejected on the hypothetical medical evidence. Where medical evidence shows that there are two possibilities, the one consistent with the direct evidence should be accepted *[Anil Roy* v *State of Bihar* (2001) 7 SCC 318]. Credible oculai

;stimony was preferable to medical opinion *[Ramakant Rai vMadan Rai* (2003) 12 SCC 395].

The court should see whether the eye-witness account is consistent with the medical evidence and, if not, whether the accused should not get le benefit. The opinion of the medical officer is to assist the court as e is not a witness of fact and the evidence given by him is really of an advisory character and not annibilatory of the witness of fact *[Vishnu* v s*tate of Maharashtra* (2006) 1 SCC 283].

Admissibility of the result of a scientific test will depend upon its authenticity. Whether the "brain mapping test" is so developed a science that the report should have probative value for enabling the court to rely upon it requires consideration. Since the High Court did not place reliance upon it, the Supreme Court also thought it not necessary to do so *Ranjitsingh Brahamajeetsingh Sharma* v *State of Maharashtra* AIR 2005 SC 277].

opinion of text writers - Opinion of Text Writers Opinion of text writers may have persuasive value, but cannot be considered to be authoritatively binding. Such opinion cannot be elevated to or placed on a higher pedestal ban opinion of experts examined in courts. The trial court in this case held the accused to be guilty on the basis of books on medical arisprudence. The Supreme Court did not approve this approach *[State of M.P.* v *Sanjay Rai* AIR 2004 SC 2174].

Salue of opinion of handwriting expert- - The opinion of an expert in writing s considered as the weakest and the least reliable evidence. It has been held that it is *not* safe to base conviction upon the opinion of writing expert alone. However, in *Ram Narain* v *State of U.P.* (discussed below), solely on the basis of expert evidence the accused was convicted by the court.

2. A, a handwriting expert gives opinion about a particular letter as being that of the accused. Can the judge disagree with his finding? What precautions are required before proving the handwriting? [C.LC-96]

Can an accused be convicted on the basis of testimony of the handwriting expert? Discuss with the help of leading cases and relevant statutory provisions. *[LC.II-2006]*

The handwriting experts' opinion simply corroborates the circumstantial evidence. Therefore, it is not possible to accept the contention that the handwriting experts' opinion being a weak piece of evidence ought not to be relied upon. Opinion of a 'handwriting expert' can be relied on when it is supported by other evidence. Though there is no rule of law that without corroboration opinion evidence cannot be accepted but due care and caution should be exercised and it should be accepted after probe and examination. Even if in some, **earlier** cases court had passed some adverse remarks against him, his evidence cannot be discarded on that ground alone. What is necessary to see is if the report relied upon suffers from any infirmity or not *[Alamgir* v *State (NCI) of Delhi* (2003) 1 SCC 21]. In this case, a woman met her death in a guest room and the police found two slips of paper and the evidence of the handwriting expert was that the writing on the papers was that of her husband (the accused).

LEADING CASE: **RAM NARAIN v STATE OF U.P. "**
(AIR 1973 SC 2200)

In this case, a child was kidnapped. The parent of the child received a handwritten post-card followed by an inland letter demanding Rs.1,000 and Rs. 5,000, respectively as ransom for the child. The author of the letters was traced and a handwriting expert testified the letters to be in the handwriting of the accused. Solely on the basis of this evidence the accused was convicted by the lower courts. The Supreme Court upheld the conviction.

The Court said: "Both under Sec. 45 and Sec. 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observation. In either case, the court must satisfy itself by such means as are open that the opinion may be acted upon. One such means is to apply its own observation to the admitted or proved writings, not become a handwriting expert but to verify the opinion of the witness. This is not to say that the court may play the role of an expert, but to say that the court may accept the fact only when it has satisfied itself on its own observation that it is safe to accept the opinion of the expert or the other witness".

In this case, Dua J. himself compared the handwriting in question with a proven handwriting of the accused and satisfied himself and held that no further corroboration was necessary.

The court held that if after comparison of disputed and admitted writings by court itself, it is considered safe to accept the opinion of expert, then the conclusion so arrived at cannot be attacked on special leave merely on the ground that comparison of handwriting is generally considered hazardous and inconclusive. It should be noted that the evidence of experts is not final or conclusive. The court may satisfy itself before relying on the expert opinion. Thus in many cases, their Lordships have come to the contrary opinion and rejected the expert opinion, it is more so in case of handwriting. In *State of Gujarat* v KC *Patni* (AIR 1967 SC 778), it was pointed out that expert opinion is relevant but is not conclusive.]

Note: In *Murari Lai* v *State of M.P.* (AIR 1980 SC 531), the Supreme Court had laid down some important principles in relation to the value of the opinion of a handwriting expert (discussed earlier). In this case, the court upheld the conviction on the evidence that the piece of writing left behind by the murderer in the room of the deceased was testified by a handwriting expert to be in the handwriting of the accused. The court also observed that even if no handwriting expert is produced before the court, the court has the power to compare the handwriting itself and decide the matter.

Such exercise of comparison is permissible under Sec. 73 of the Act. Sees. 45 and 73 are complementary to each other *[Lalit Popli* v *Canara Bank* (2003) 3 SCC 583].

Sec. 46 (Facts bearing upon opinion of experts)

"Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant".

The effect of the provision is that when the opinion of an expert is relevant and has been cited, any fact which will either support his opinion or contradict it will also become relevant *(Res inter alia acta).* Thus, where the question is, whether A was poisoned by a certain poison; the

fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

Sec. 47 (Opinion as to handwriting when relevant)

According to Sec. 47, when the court had to determine the question whether a document is written or signed by a certain person, the court can admit the opinion of a person who is acquainted with that person's handwriting. The explanation attached to the section gives guidance as to who is considered to be acquainted with another's handwriting. It includes a person -

(i) who has seen that person write, or

(ii) who has received documents written by that person in answer to documents written by himself or under his authority and addressed to that person, or

(iii) who has in the ordinary course of business, received documents written by that person or such documents are habitually submitted to him.

Illustration - The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A. The opinion of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

In *Fakhruddin* v *State ofM.P.* (AIR 1967 SC 1326), it was held that handwriting may be proved by evidence of a witness in whose presence the writing was done and this would be direct evidence and if it is available the evidence of any other kind is rendered unnecessary.

Modes of proving handwriting

Sees. 45 and 47 recognise the following modes of proving handwriting:

(i) By the evidence of the writer himself.

(ii) By the opinion of an expert (Sec. 45).

(iii) By the evidence of a person who is acquainted with the handwriting of the person in question (Sec. 47).

(iv) Under Sec. 73 by the court itself comparing the handwriting.

Sec. 47A (Opinion as to digital signature when relevant)

When the court has to form an opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the digital Signature Certificate is a relevant fact.

Sec. 48 (Opinion as to existence of right or custom)

sec. 48 makes those opinions relevant which proves the existence of any neral custom or right. The right of the villagers of a particular village use the water of a particular well is a general right within the meaning this section [Also *see* Sees. 13 and 32 (4)].

Sec. 49 (Opinion as to usages, tenets, etc.)

sec. 49 makes opinions of such persons relevant who have special means I knowledge regarding the usages and tenets of a body of men or family, the constitution and government of any religious or charitable foundation, and, the meaning of words or terms used in particular districts r by particular classes of people.

Sec. 50 (Opinion on relationship)

Sec. 50 makes the opinion of a person expressed by his conduct, who ; a member of the family or otherwise has special means of knowledge ; to the relationship of one person to another, relevant.

lustrations: (a) - The question is, whether A and B, were married. The fact that they were usually received and treated by their friends as husband rid wife is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family is relevant.

Relationship includes relation by blood, marriage or adoption, h may be noted that under Sec. 32, which also contains provision for proving relationship, the statements of dead persons are relevant; while under Sec. 50 the opinion of a person alive is relevant. The opinion must have been expressed by *conduct,* and not merely by words or statements It is very important to note that Evidence Act does *not* contain an) express provision making evidence of general reputation admissible *x* proof of relationship. A was the father of C and V is the father of F as stated by witnesses was held not admissible under Sec. 50.

Proviso to Sec. 50 - It lays down that in the cases under Sees. 494, 495 497 and 498 of IPC and a proceeding under the Indian Divorce Act, the evidence of marriage *cannot* be given by opinion of an expert. In these cases, strict proof of marriage is necessary i.e. witnesses in whose presence the marriage was celebrated must be produced.

Sec. 51 (Grounds of opinion when relevant)

Sec. 51 provides that whenever the opinion of a living person is relevant the grounds on which his opinion is based shall also be relevant. Ai expert may give an account of experiments performed by him for th purpose of forming his opinion.

The opinion of an expert by itself may be relevant, but would carr little weight with a court unless supported by a clear statement of whs he noticed and upon what he based his opinion.

CHARACTER WHEN RELEVANT[3]

(Sees. 52-55)

To what extent is the character, general reputation of a person relevant in civil or criminal proceedings has been made clear by Sees. 52-5! Character is "a combination of peculiar qualities impressed by nature c by the habit of the person, which distinguish him **from others". In** respect of the character of a party, two distinctions must **be drawn,** name!

3. Write a short note on - Character when relevant. [LC.//-9

btween the cases when the character is in issue and is not in issue and hen the cause is civil or criminal.

Sec. 52 (In Civil cases character to prove conduct imputed, irrelevant)

Sec. 52 lays down the broad general principle that "the evidence of a party's character cannot be given for the purpose of showing that it renders the conduct imputed to him as probable or improbable." Thus, party cannot give evidence of his good character for the purpose of lowing that it is improbable that he should be guilty of the conduct imputed to him. For example, if a person is charged with negligent driving e cannot give evidence of the fact that his character and conduct has been such that he could not have been guilty of negligence. Similarly, his opposite party cannot give evidence of the fact that his character and conduct had been so bad that he must have been negligent.

The reason is that the court has to try the case on the basis of its icts for the purpose of determining whether the defendant should be able or not. The court has not to try the character of the parties and le evidence of character will not only prolong the proceedings but will also unnecessarily prejudice the mind of the judge one way or other, further, in civil cases, the previous convictions of the defendant are relevant.

Sec. 52, however, also lays down that a fact, which is otherwise Levant, cannot be excluded from evidence only because it incidentally exposes or throws light upon a party's character. This is an *exception* to the general principle laid in Sec. 52. The court may form its own conclusions s to the character of a party to a suit as exhibited by the relevant facts roved in the case, and draw an inference that he might probably have been guilty of the conduct imputed to him.

There are other *exceptions* to the general principle laid in Sec. 52:

(1) Sec. 55 says "in civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant". The evidence of good or bad character of the defendant is irrelevant to damages. But the character of the plaintiff is relevant. In an action for damages,

for seduction or rape, evidence of bad character of the plaintiff is allowed as it is likely to affect the damages that the plaintiff ought to receive.

(2) Evidence can be given of a party's character when his character is itself a fact in issue. Where, for example, an action is brought for divorce on the ground of cruelty, the cruel character of defendant, being a fact in issue, the plaintiff can lead evidence of it. The character of a female chastity has been received in evidence in action for breach of promise for marriage.

Sec. 53 (In Criminal cases previous good character relevant)

Sec. 53 says that "in criminal cases, the fact that the person accused is of a good character is relevant". Normally, we presume that a person of good character and reputation will not generally resort to any criminal act. Thus, goodness if proved, leads to presumption against the commission of a crime

Evidence of good character is always admissible. But in any case, the character evidence is a weak evidence; it cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful in doubtful cases to tilt the balance in favour of the accused *(Bhagwan Swarup* v *State* AIR 1965 SC 682).

Sec. 54 (Previous bad character not relevant, except in reply)

According to Sec. 54, "evidence may not be received regarding the badness of party's character in criminal proceedings, unless evidence has been given that he has a good character, in which case it becomes relevant." In other words, the prosecution cannot lead evidence of the bad character of accused as part of its original case. They can produce evidence of bad character only in reply to the accused showing his good character.

Criminal cases also admit of certain *exceptions.* There are certain cases in which evidence of a prisoner's bad character can be given:

(1) To rebut prior evidence of good character (Sec, 54).

(2) The character is itself a fact in issue *(Explanation 1* to Sec 54). For example, in a prosecution for rape, the bad charactei

of prosecution (raped woman) may be a fact in issue for it may afford a defence to the accused. Under Sec. 110, Cr.P.C, a person is to be bound down if he is by habit a robber, a housebreaker, etc.

(3) A previous conviction is relevant as evidence of bad character in criminal cases *{Explanation 2* to Sec. 54). Under Sec. 71, IPC if it is proved that a person is a previous convict he shall be sentenced to much longer term of imprisonment than would ordinarily have been awarded to him.

Sec. 55 (Character as affecting damages)

sec. 55 says, "in civil cases the fact that the character of any person is much as to affect the amount of damages which he ought to receive, is relevant". The evidence of good or bad character of the defendant is irrelevant to damages. But the character of the plaintiff is relevant. In an action for damages, for seduction or rape or libel, evidence of bad character of the plaintiff is allowed, as it is likely to affect the damages ;hat the plaintiff ought to receive.

Explanation - It states that the word "character" used in Sees. 52-55 Includes both reputation and disposition; except as provided in Sec. 54, evidence may be given only of *general* character and not of particular acts by which the character is shown.

'Reputation' means what is thought of a person by others and is constituted by public opinion. It may be noted that the evidence of those, who know the man and his reputation is admissible. Evidence of those who do not know the man but have heard of the reputation (hearsay evidence) is *not* admissible. 'Disposition' implies one's own individual opinion *of* another person's character.

6
Facts Requiring No Proof & Oral/Documentary Evidence

Facts which Need Not be Proved[1] (Sees. 56-58)

The general rule is that all facts in issue and relevant facts must be proved by evidence, either oral or documentary. To this rule, there are two exceptions: (a) facts judicially noticeable (Sees. 56-57), (b) facts admitted (Sec. 58).

Sec. 56 reads: "No fact of which the court will take judicial notice need be proved".

Sec. 57 enumerates thirteen facts of which the court is bound to take the judicial notice:

{1) All laws in force in the territory of India.

(2) All Acts of the British Parliament.

(3) Articles of War for the Indian Army, Navy or Air Force.

(4) The course of proceedings of the British Parliament, of the Constituent Assembly of India, and of Parliament and Legislatures.

(5) The accession and the sign manual of the sovereign of U.K. and Ireland.

Write a short note on Facts which need not be proved'. [C.LC-M]

State **the** facts which the parties are prohibited from proving. **[LC.//-2006]**

State the facts which a litigant is not required to prove before the court. *[D.U.-2007]*

(6) All seals of which English courts take judicial notice; the seals of all the courts in India, etc. and all the seals which a person is authorised to use by the Constitution or an Act.

(7) The accession to office, names, titles, functions, and signatures of Gazetted officers.

(8) The national flag of every country recognised by the Government of India.

(9) The division of time, the geographical divisions of the world and public festivals, facts and holidays notified in the official gazette.

(10) The territories under the dominion of the Government of India.

(11) The commencement, continuance or termination of war between the Government of India and any other country.

(12) The names of court officials and of all advocates, pleaders, etc. authorised by law to appear or act before the court.

(13) The rule of the road, on land or at sea.

The provision is supplemented by two declarations at the end of the section. One of them says that in all these matters, and also on matters af public history, literature, science or art, the court may consult the appropriate books or documents of reference. The second declaration is that if a party calls upon the court to take the judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as the court may consider necessary to enable it to take judicial notice.

Judicial facts - The expression 'take judicial notice' means recognition without proof of something as existing or as being true. Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters within the common knowledge of every one. Judicial notice is the cognizance taken by the court itself of certain matters which are so notorious or clearly established, that the evidence of their existence is deemed unnecessary. Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence.

The matters enumerated in Sec. 56 do not form an exhaustive list. The court could take judicial notice of other facts, not to be found in the list. The court cannot take judicial notice of facts stated in a newspaper, as a statement of facts in it is merely a hearsay and, therefore, inadmissible in evidence unless proved otherwise. The Supreme Court in *Shashi Nayar* v *Union of India* (AIR 1992 SC 395) took judicial notice that the law and order situation had deteriorated over the years and continues to be worsening fast and, therefore, it is an opportune time to think of reconsidering death penalty.

In one interesting English case *[McQuaker* v *Goddard* (1940) 1 KB 687], the question was whether the court ought to take judicial notice that a camel is not a wild animal. The court took judicial notice of the fact that it is not a wild animal. Commenting on this decision, it has been remarked that since an English court has taken judicial notice of the fact that the camel is a domestic animal, it would now require an Act of the British Parliament to make it a wild animal.

Admitted facts - Another set of facts which need not be proved are facts which have been admitted. *Sec. 58* lays down this principal. Sec. 58 lays down that "if the parties to a proceeding agree to admit a fact at the hearing, or which they agree to admit by writing before the hearing, or which by any rule of pleading in force deemed to be admitted, it need not be proved by the opposite party".

Averments made in a petition which have not been controverted by the respondent carry the effect of a fact admitted. Facts which have been admitted on both sides are not in issue and, therefore, no proof need be offered of them. A files a suit against B for Rs. 1,000 on the basis of pronote. B admits to have borrowed the debt but pleads the payment of debt. In this case, A need not prove the execution of the pronote as that has been admitted by B on the hearing.

However, Sec. 58 also provides that the court may in its discretion require some other proof of an admitted fact. It may be noted that this section applies to civil suits only. It is an elementary rule that except by a plea of guilty, admissions dispensing with proof are *not* permitted in a criminal trial.

MODES OF PROOF

fact may be proved either by oral evidence of the fact or by documentary evidence, if any. Thus, there are two methods of proving fact, one is by producing witnesses of fact *{oral evidence),* and the other, *y* producing a document (including electronic records) which records the fact in question *(documentary evidence)?*

\\ Oral Evidence (Sees. 59-60)

Jl statements which the court permits or requires to be made before it y witnesses in relation to the matters of fact under inquiry are called ‘oral evidence'. In general, the evidence of witnesses is given orally, and his means oral evidence. A witness who cannot speak may communicate is knowledge of the facts by signs or by writing and in either case it will >e regarded as oral evidence.

Sec. 59. Proof of facts by oral evidence - All facts except the contents of documents, may be proved by oral evidence.

Oral evidence, if worthy of credit, is sufficient without documentary evidence to prove a fact or title. However, as per Sec. 60, where written documents exist, they shall be produced as being the best evidence of their own content and no oral evidence can be produced to prove as to what is wrong in the document. A and B enter into a written contract that 5 shall be supplying 20 mounds of wool to A every month. If controversy irises between the parties about the terms of the contract it can be proved only by the document. Oral evidence will not be allowed.

In *Virendra Nath* v *Mohd. Jamil* (AIR 2004 SC 3856), the person in possession of land was shown in the revenue records to be a mortgagee 3ut the mortgagor could not produce the unregistered mortgage deed because it was in possession of the mortgagee. Held that oral evidence could be admitted for the collateral purpose of ascertaining the nature of possession of the person claiming to be in adverse possession.

2. Discuss oral and documentary evidence. *[C.LC.-2006\[D.U.-2009]*

Sec. 60. Oral evidence must be direct - Oral evidence must, in all cases, whatever, be direct,-i.e.

"If it refers to a fact which could be seen (or heard or perceived by any other senses), it must be the evidence of a witness who says he saw (or heard or perceived it by that sense) it;

If it refers to an opinion or to the grounds on 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 an expert can be cited in his absence if it has been expressed in a book form and the expert himself is either dead or is otherwise unavailable as a witness. 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."

Thus, oral evidence must be *direct.* This means that a witness can tell the court of only a fact of which he has the first hand knowledge (eye-witness) in the sense that he perceived the fact by any of the five senses. If, on the other hand, the statement was not made in his presence or hearing and he subsequently came to know of it through some other source, he cannot appear as a witness, for his knowledge is a *derived* knowledge and is nothing but a "hearsay" and it is a maxim of law that hearsay evidence is not relevant.

Hearsay Evidence[3]

The word 'hearsay' mean whatever a person is heard to say (rumour or gossip) or whatever a person declares on information given by someone else, or it may be synonymous with irrelevant. A statement, oral or written, by a person not called as a witness (or statements made out of court) comes under the general rule of hearsay. Sec. 60 of Evidence Act is directed against avoiding or excluding hearsay evidence.

The test to distinguish between *direct* evidence and *hearsay* evidence is: It is direct evidence if the court, to act upon it, has to rely only upon

3. Write a short note on 'Hearsay evidence'. [LC./MJ4/95]

e witness, whereas it Is *hearsay* if it has to rely not only upon the witness, it some other person also. Thus, if X is charged with Y's murder, and Z, in his evidence, states that "I saw X stabbing Y with a knife", it would a *direct* evidence. Instances of *hearsay* evidence would be the evidence : A that "Z told me that he had seen X stabbing Y" or that "Z wrote letter to me stating that he had seen X stabbing Y" or that "I read in the newspaper that X had murdered Y".

It may be noted that hearsay evidence is not admissible even if not objected to, or even if consented to. The court has no discretion in this latter, except in certain exceptional cases. The rule *against*-the admission F hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person hose words are spoken to by another witness cannot be tested by cross-examination. It is always desirable, in the. interest of justice, to g^et the persons whose statements are relied upon, into court for examination the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be best brought to light and exposed.

Thus, its admission tends to open the door for fraud which might e practised with impunity. It is second-hand evidence; the person giving such evidence does not have any sense of responsibility. There is a tendency that truth will be diluted and diminished with each repetition and be frauds may be practiced under its cover. Further, its admission tends D prolong trials unduly by letting in statement, the probative value of which is very slight.

Exceptlons to the hearsay rule

People's memories are fragile and short. Subsequent publicity, discussions and suggestive questioning all exert their influence. This may lead to exclusion of evidence which is superior in trustworthiness to evidence which is freely admitted (i.e. direct evidence). In *Sharda Birdkhand Sarda ' State* (AIR 1984 SC 1622), the testimony of persons who had seen the finable condition of a young woman in her-laws' home where she lost her life was, thus, held to be relevant

The courts have modified the rigid rule as to direct evidence by a lumber of exceptions:

(1) *Res gestae* (Sec. 6) - A statement made by a person who is not a witness becomes relevant and admissible if the statement is part of the transaction in question.

(u) Admissions and confessions - An admission of liability or confession of guilt which takes place outside the court through the testimony of a witness to whom the admission or the confession was made. Such a witness is not a witness of fact.

(lii) *Statements relevant under Sec. 32* - These are mostly the statements of deceased person or persons who are not available as witnesses. Such statements include dying declarations, declaration as to public rights, etc.

(iv) *Entries in books of account* kept in the course of business (Sec. 34); *Entries in public registers* (Sec. 35).

(v) *Statements of experts in treatises* - According to Sec. 60, *proviso,* the opinion of an expert can be cited in his absence if it has been expressed in a book form and the expert himself is either dead or is otherwise unavailable as a witness.

(vi) Sometimes, a slanderous statement made by a third person and heard by the witness will be relevant, not regarding the truth of the contents of the statements, but regarding the fact of the statement being made.

[B] Documentary Evidence[4] (Sees. 61-90)

Documentary evidence means all documents produced for the inspection of the court. Documents are denominated as 'dead proof,' as distinguished from witnesses who are said to be 'living proofs.' Documentary evidence is superior to oral evidence in permanence, and in many respects, in trustworthiness.

Sec. 61. Proof of contents of documents - The contents of documents may be proved either by primary or by secondary evidence.

There is no third method of proving the contents of a document. The contents need not be proved by the author of document, and can be proved by any other evidence.

4. Write a short note on: Proof of facts by documentary evidence. *[D.U.-2007]*

In the absence of the documentary evidence which could have en available, the plaintiff was not allowed to rest his case on oral evidence which was against the record produced by the defendants *(Banarsi is* v *Maharaja Sukhjit Singh* AIR 1998 SC 179).

Primary Evidence (Sec. 62)

le expression 'primary evidence' includes:-

i) The original document itself produced for the inspection of the court.

(ii) Where a document is executed in several parts (e.g. duplicate, triplicate- required when there are several partners), each part is primary evidence of the document. Where a document is executed in counterparts, each counterpart is primary evidence against the party signing it *{Explanation 1).*

For example, in the case of a cheque, the main cheque is signed by the drawer so that it is a primary evidence against him, and the counterfoil ay be signed by the payee of the cheque so that it will be a primary evidence against the payee. Similar is the case of *patta* (executed by lessor / landlord) and the *qabuliat* or *muchilka* (executed by lessee/ tenant).

(iii) Where a number of-documents are all made by one uniform process, as for example, by printing, lithography or photography, each is primary evidence of the contents of document/ But, where they are all of copies of a common original, they are not primary evidence of the contents of the original *{Explanation 2).*

Primary evidence is the best or highest evidence, or in other words, it is £ kind of proof which, in the eyes of the law, affords the greatest certainty of the fact in question. Primary evidence of a transaction, evidenced *f* writing, is the *original* document itself, which should be produced in original to prove the terms of the contract, if it exists and is obtainable.

Secondary Evidence (Sec. 63)

he expression 'secondary evidence' includes:-

(i) Certified copies of the original document (i.e. public documents certified by a public officer).

(ii) Copies which are made from the original by mechanical processes (e.g. printing, lithography, photography), which in themselves assure the accuracy of the copy; and copies compared with such copies (e.g. a photograph of an original, a carbon copy).

A *Photostat* copy of a document is admissible as secondary evidence if it is proved to be genuine; it has to be explained as to what were the circumstances under which the Photostat copy was preferred and who was in the possession of the original document at the time its photograph was taken. It can be permitted to be given in evidence when it is proved that the original document was in possession of adversary {*Ashok* v *Madbo Lai* AIR 1975 SC 1748; *Govt, of A.P.* v *Karri CMnna Venkata Reddy* AIR 1994 SC 591).

An uncertified photocopy of a Government order cannot be given in secondary evidence {*Union of India* v *Nirmal Singh* AIR 1987 All 83). Generally speaking, "copy of a copy" is *not* admissible as secondary evidence *but* the copies prepared by a mechanical process and copies of a copy compared with the original are secondary evidence.

(iii) Copies made from or compared with the original. If a copy is prepared word-to-word from the original it is secondary evidence.

(iv) Counterpart of a document as against the party who did not sign it. Thus, *iLpatta* will be a secondary document against the lessee (tenant), as he did not execute it; and *qabultat* will be a secondary document against the landlord, as he did not execute it.

(v) Oral account of the contents of a document given by a person who has himself seen (i.e. read) the document. An oral account of a copy compared with the original is *not* a secondary evidence.

Proof by primary evidence (Sec. 64)

According to Sec. 64, a document must be proved by its primary evidence except in the cases hereinafter mentioned.

When secondary evidence relating to documents may be given[5] (Sec. 65)

In the following cases, the secondary evidence may be given of the existence, condition, or contents of a document:

5. Under what circumstances is the secondary evidence of a document admissible? Discuss. *[DU.-2011][LC.II-94]*

(1) When the original is shown or appears to be in the possession or power of a person against whom the document is sought to be proved (adversary party), or of any person out of reach of or not subject to the process of court, or any person legally bound to produced it, and although due notice has been given to him in accordance with the terms of Sec. 66, he does not produce it.

(2) When the existence, condition or contents have been proved to be admitted in writing by the party against whom the document is to be proved.

(3) 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.

(4) When the original is of such a nature as not to be easily movable (e.g. bulky documents).

(5) When the original is a public document within the meaning of Sec. 74.

(6) When the original is a document of which the Evidence Act or any other law of the country permits certified copies to be given in evidence.

(7) When the original consists of numerous accounts or other documents which cannot be conveniently examined in the court and the fact to be provided is the 'general result' of the whole collection.

may be noted that secondary evidence of the contents of a written instrument can not be given, unless there is some legal excuse for non-production of the original (primary evidence). Further, secondary evidence in only be given when the primary evidence or the document itself is admissible. Secondary evidence cannot be given of a document when the original is found to be inadmissible. If a deed of gift is inadmissible in evidence for want of registration, no secondary evidence of the deed can e given in a suit to recover the gifted property.

Where the document is in the possession of a party who does not :ven after notice) produce it, or when the original has been lost or

destroyed or when it is bulky, any kind of secondary evidence of the contents can be given. When the contents of document have been admitted by the party against whom it has to be proved, his written admission can be given as a secondary evidence of document. In case of public documents, only certified copies can be given.

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 Sees. 63 and 65 *[State (NCT of Delhi)* v *Navjot Sandhu* (2005) 11 SCC 600].

Objection as to secondary evidence when can be raised

Objection must be taken at admission and not at a later stage *[Dayamathi Bai* v *KM. Shaffi* (2004) 7 SCC 107]. Objection can be classified as: (i) objection that the document sought to be proved is itself inadmissible, and (ii) objection not directed against the admissibility of document but against the mode of proof on the ground of irregularity or insufficiency.

Objection under (i) ground can be raised even after the document has been marked as an exhibit or even in appeal or revision. Objection under (ii) ground can be raised when the evidence is tendered but not after the document has been admitted in evidence and marked as an exhibit *[R. V. Venkatachala Gounder* v *A. Viswearaswami* (2003) 8 SCC 752].

Sees. 65A/ 65B (Admissibility of Electronic Records in Evidence)

Sees. 65A and 65B have been added by the Information Technology Act, 2000. Sec. 65A lays down that the contents of electronic records may be proved in accordance with the provisions of Sec. 65B.

Sec. 65B lays down that "notwithstanding anything contained in this Act, information in an electronic record which is printed on a paper, stored, recorded or copied in a computer shall be deemed to be a *document* and shall be admissible in any proceedings (without further proof or production of the original) as evidence of the contents of the original or of any fact stated therein of which direct evidence would be admissible."

It is further laid down that the following *conditions* have to be satisfied in relation to a "computer output":

(a) Information was produced during the regular course of activities by the person having lawful control over the computer's use.

(b) Information has been regularly fed into the computer in the ordinary course of the said activities.

(c) Throughout the material part of the said period, the computer was operating properly, or the improper operation was not such as to affect the electronic record or the accuracy of its contents.

(d) Information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of activities.

Sec. 65B then lays down that for the purpose of evidence, a *certificate* identifying the electronic record containing the statement and describing le manner in which it is produced by a computer and satisfying the conditions mentioned above, and signed by an officer in charge of the operation or management of the related activities, shall be the evidence f any matter stated in the certificate; it shall be sufficient for a matter) be stated to the best of the knowledge and belief of the person stating

Sec. 66 (Rules as to Notice to Produce)

Sec. 66 lays down that a notice (to produce a document) must be given before secondary evidence can be received under Sec. 65 (a). The notice ; to be given to the party who has possession of the original document, r to his attorney or pleader. Notice should be given in a manner as is prescribed by law, and if there is no law on the point, such notice should be given as the court considers reasonable under the circumstances of be case.

Provided that such notice shall *not* be required in the following cases, or in any other case in which the court thinks fit to dispense with it:

(1) When the document to be proved is itself a notice.

(2) When, from the nature of the case, the adverse party (i.e. party in possession of document) must know that he will be required to produce it.

(3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force.

(4) When the adverse party or his agent already has the original in court.

(5) When the adverse party or his agent has admitted that the original has been lost.

(6) When the person in possession of the document is out or ready of, or not subject to, the process of the court (viz. a foreign ambassador).

A Question arises: when the opposite party fails to produce the original when demanded and the court has accordingly admitted secondary evidence, can the party in possession subsequently produce the original of his own choice. The answer is "No". Sec. 164 clearly lays down that where a party has required to another to produce a document and he had refused to do so, he con't afterwards use the document as ecidence unless he obtains the other party's consent or the court's order.

The requirement of notice under Sec. 66 is to be strictly complies with. The other party cannot be restrained from producing the original where the notice to produce has not been given, nor can secondary evidence be giben in such case.

Sec. 67 (Proof of signature and handwriting of person alleged to have signed or written document produced)

"If a document is alleged to be signed or written by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Sec.67A (Proof as to Digital Signature)

"Except in the case of a secure digital signature, if the digital signature of any subscriber is alleged to have been affixed to an electronic record the fact that such signature is the digital signature of the subscriber must be proved."

Sec. 67 does *not* prescribe any particular mode of proof of signature • handwriting of a person. However, the following modes of proving signature or writing are recognized by the Act, viz.

(1) by calling the person who signed or wrote the document;

(2) by calling a person in whose presence the document was signed or written;

(3) by calling a handwriting expert (Sec. 45);

(4) by calling a person acquainted with the handwriting of the person executing the document (Sec. 47);

(5) by comparing in court the disputed signature/writing with some admitted signature/writing (Sec. 73);

(6) by proof of admission by the person who is alleged to have signed or written the document, that he signed or wrote it; or

(7) by statement of a deceased professional scribe, made in the ordinary course of business, that the signature on the document is that of a particular person.

(8) Any other circumstantial evidence.

Sec. **68 (Proof of** Execution of Document Required by Law to be Attested)

To *attest* is 'to bear witness to a fact'. A document the execution of which s required by law to be "attested" means a document the signature upon *which* should be put *in the presence of two witnesses who themselves add* their signatures and addresses in proof of the fact that the document was signed or executed in their presence. They are called 'attesting witnesses', Attestation does *not* imply that the attesting witnesses have admitted to the contents of a document.

Sec. 68 lays down that if a document required by law to be attested produced as evidence, *at least* one attesting witness shall be called to rove the execution *of the* document. This principle will apply only if at least one of the attesting witnesses is alive, capable of giving evidence and subject to the process of the court.

Sec. 68 further provides that no attesting witness need be called in e case of document (not being a will), which has been *registered* under

the Indian Registration Act, 1908, and the person executing it does not specifically deny its execution. If there is a denial, then, an attesting witness have to be called.

Sec. 69 (Proof where No Attesting Witness Found)

"If no such attesting witness can be found, or if the document is 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 handwriting of that person."

Sec. 70 (Admission of Execution by Party to Attested Document)

Sec. 70 lays down that 'where the party 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 'admission' relates only to the execution and to be made in the course of the trial of a suit or proceeding. It must be distinguished from the admission mentioned in Sees. 22 and 65 (b), which relate to the contents of a document.

The admission must be *unqualified.* Thus, if a person admits his signature on a mortgage-bond, but denies that the attesting witnesses were present at that time, the bond will have to be proved under Sec. 68, by calling the attesting witnesses.

Sec. 71 (Proof when Attesting Witness Denies the Execution)

Sec. 71 lays down that 'if the attesting witness denies or does not remember the execution of the document, its execution should be proved by other evidence'. Thus, the fate of an attested document does not lie at the mercy of an attesting witness; if he turns hostile, other evidence may be given; such a document may then be proved in the same manner as documents not required to be attested.

Sec. 71 is in the nature of a safeguard to the mandatory provisions of Sec. 68 to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. Sec. 71 is permissive and enabling section permitting a party to lead other evidence in certain circumstances.

If one attesting witness is produced, the party has done his duty (under Sec. 68) even if that witness denies or does not remember the execution of the document, and then other evidence can be offered under Sec. 71 *[Chaitan Charan* v *Maheshwar Parida* AIR 1991 Ori. 125]. the court distinguished the case from a decision of the Bombay High Court to the effect that on the failure of one attesting witness to prove execution, the other attesting witness, if available, should be produced and on his failure also, Sec. 71 can be used to bring in any other evidence. *njanki Narayan Bboir* v *Narayan Namdeo Kadam* (2003) 2 SCC 91, it was held that Sec. 71 does not apply where out of the available attesting vitnesses to a will, only one is examined but he fails to prove due execution of the will and thus will is not proved as per Sec. 68.

Where the attester was an illiterate person and he attested by putting his thumb impression, he was *not* bound by the document unless it could le shown that the document was read out to him and he understood it *Badri Narayanan* v *Rajabajyathammal* (1996) 7 SCC 101].

Sec. 72 (Proof of Document Not required by Law to be Attested)

An *attested* document, *not* required by law to be attested, may be proved s if it was unattested." To prove an *attested* document, one must prove) attestation, and (ii) signature. To prove an *unattested* document, one has 3 prove execution only.

Sec. 73 (Comparison of Signature, Handwriting, etc. by the Court)

According to Sec. 73, when the Court has to satisfy itself whether the signature, writing or seal on a document is genuinely that of a person whose signature, etc. it purports to be, the Court may compare the same with another signature, etc. which is admitted or proved to be that of the person concerned although that signature, etc. has not been produced or proved for any other purpose. This *section* applies also, with necessary modifications, to finger impressions.

Sec. 73 also enables the court to require any person present in the court to write any words or figures to enable the court to compare them

with the words or figures alleged to have been written by such person (Tower to ask for specimen handwriting').

Whether the Court should do the comparison itself or appoint an expert is a matter of discretion." In *Murarilal* v *State ofM.P.* (AIR 1980 SC 531), it observed that the argument that the Court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. It is the plain duty of the court to compare the writings and come to its own conclusions. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from authoritative textbooks and the court's own experience and knowledge.

However, the court should be slow in making self-comparison (particularly where the signature with which comparison is to be made is in itself not an admitted signature). The court can attempt a comparison, but in the case of slightest doubt, should rely upon the wisdom of experts *(Ajit Savant v State* AIR 1997 SC 3255). The court cannot substitute its opinion for that of an expert. Weak expert opinion may be corroborated by the court's opinion under the section.

Sec. 73 does *not* make any difference between civil and criminal proceedings. It is *not* limited to parties to the litigation. By virtue of the expression "any person" used in Sec. 73, the court can direct even a *stranger* to give a specimen of his handwriting. It may be noted that where the case is still under investigation and no proceedings are pending before the court, a person present in the court *cannot* be compelled to give his specimen handwriting. The direction is to be given for the purpose of enabling the court to compare and not for the purpose of enabling the investigation or other agency "to compare". In pendency of proceedings, it is *sine qua non [State of Haryana* v *Jagbir Singh* (2003) 11 SCC 261].

Sec. 73A (Proof as to Verification of Digital Signature)

"In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the court may direct (a) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate; (b) any other person to apply the public key listed in such Certificate and verify the digital signature."

The *Explanation* to this section states that for the purpose of this section "Controller" is same as mentioned in sub-sec. (1) of Sec. 17 of Information *Technology Act, 2000.*

PUBLIC DOCUMENTS

The Act recognizes two kinds of documents, viz. public and private; it lays down special rule relating to proof of public documents.

Sec. 74 (Public Documents)

The following documents are *public* documents:

(1) Documents forming the acts, or records of the acts:

(i) of the sovereign authority (namely, the Parliament and Legislative Assemblies);

(ii) of official bodies and tribunals; and

(iii) 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.

Private documents, which are registered in public offices, also become public documents. For example, the memorandum and articles of a company registered with the Registrar of Companies; a private Waqf deed; etc. The following have been held *not* to be public documents: An application for a licence (AIR 1978 All. 185), a *post-mortem* report, an insurance policy (AIR 1998 Del. 386), a private sale-deed registered under the Indian Registration Act, a *panchanama* prepared by a police officer. Likewise, a plaint or written statement, and, income tax return are private documents.

A charge-sheet, arrest-warrant, order sheet, judgment of court, affidavit, administrative report, etc. are public documents. Also, marriage register, electoral roll, MLC report, and records of nationalized banks (AIR 2003 A.P. 251) are public documents. It has been **held that** publication

of feasibility reports on interlinking of rivers on the internet is a public document [(2004) 11 SCC 358].

A 'public record' is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and permanent evidence of something written, said or done. Thus, an original receipt executed by any individual and registered under the Registration Act is *not* a public record as the original has to be returned to the party. Entries made by a police officer in the site inspection map and site map have been held to be public documents *{Rajasthan S.R.T.C.* v *NandKisbore* AIR 2001 Raj 334).

Sec. 75 (Private Documents)

"All *other* documents are private".

Sec. 76 (Certified Copies of Public Documents)

According to Sec. 76, every public officer having the custody of a public document (which any person has a right to inspect) must, on demand and payment of legal fees therefor, give a copy of it with a certificate (dated, subscribed and sealed) at the food that it is a true copy. A copy so certified is called a *'certified copy'*.

This section provides the means of proof of public documents through which a certified copy of public documents can be obtained.

Sec. 77 (Proof of Documents by Production of Certified Copies)

According to Sec. *77,* 'the contents of public documents *may* be proved by the production of their certified copies'.

The word 'may' in this section denotes another mode of proof (optional to the party), viz. production of the original. An electoral role has been held to be a public document and, therefore, certified copy is admissible under Sec. *77*. The deposition of a witness is a part of the record of the acts of an official tribunal, and a statement made in it can be proved by a certified copy.

Sec. 78 (Proof of other Official Documents)

The following *public* documents may be proved as follows:

(1) *Acts, orders and notifications* of the *Central/State Government* or their *departments* may be proved by the records of the department as certified by the head or by any document purporting to be printed by the department's order.

(2) The *proceedings of the Legislatures* may be proved by the journal of the legislature concerned or by published Acts or abstracts, or by copies purporting to be printed by the Government's order.

(3) Proclamations, orders or regulations issued by *Her Majesty/Privy Council* can be proved by copies or extracts contained in the London Gazette, etc.

(4) Acts of the executive or the proceedings of the Legislature of *foreign* country can be proved by journals/certified copies, or by recognition of the same in Central Act.

(5) *Proceedings of a municipal body* in a State may be proved by a certified copy of such proceedings or an authoritative printed book.

(6) Public documents of any other class in a *foreign* country may be proved by the original or by a certified copy issued by the legal keeper of the document with a certificate under the seal of a notary public/Indian consul or diplomatic agent.

PRESUMPTIONS AS TO DOCUMENTS (SECS. 79-90)

Sees. 79-90 are founded on the maxim *amnio prosumuntur rite esse acta* which means that 'all acts are presumed to be rightly done'. But, these presumptions are *not* conclusive but only *prima facie* presumptions and if the documents are incorrect, evidence can be led to disprove them.

Presumptions under Sees. 79-85 and Sec. 89 are "compulsory" one in the sense that the judge is bound to raise the presumption in question.

The presumptions under Sees. 86-88 and Sec. 90 are in the "discretion" of the court in the sense that the court may or may not draw presumptions.

Sec. 79 (Presumption as to Genuineness of Certified Copies)

According to Sec. 79, when a certified copy of a document is produced before the court as evidence of the original the law presumes that the copy is a genuine reproduction of the original. However, it is necessary that the copy should have been certified by an officer of the Central/ State Government (including an officer in State of J&K authorized by Central Govt.) and the document should be substantially in the form prescribed by law and should also purport to be executed in that manner.

The court also presumes that the officer who signed or certified the document held the official character which he claims in such paper. It is *not* necessary to call such an officer in evidence.

Sec. 80 (Presumption as to Documents produced as Records of Evidence)

According to Sec. 80, when a person has appeared before a Court of law and has recorded his testimony or confession (taken in accordance with law and purporting to be signed by a judge, etc.) and his statement being relevant in a subsequent case, the court shall presume the genuineness of such certified copy and that such evidence, statement, etc. was duly recorded.

This section is based on the principle that acts presumed to have been done rightly and regularly in course of judicial proceedings will be accepted in evidence.

Sec. 81 (Presumption as to Gazettes, Newspapers, Private Acts of Parliament)

Under Sec. 81, Official Gazettes, newspapers or journals, copies of the private Act of Parliament of U.K., and other documents kept in accordance with the law are presumed to be genuine.

In spite of this presumption, it has been held that *newspaper reports* do not constitute admissible evidence of their truth. The presumption of genuineness attached under Sec. 81 to a newspaper report cannot be

treated as a proof of the facts reported therein *[Laxmi Raj Shetty* v *State rfT.N.* AIR 1988 SC 1274; *B. Singh (Dr.)* v *Union of India* (2004) 3 SCC >63]. The statement of a fact contained in a newspaper is merely a hearsay' and is, therefore, inadmissible in evidence *(Ramswaroop* v *State of lajasthan* AIR 2002 Raj 27).

Sec. 81A (Presumption as to Gazettes in Electronic Forms)

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 in the form required by law and is produced from proper custody.

iec. 82 (Presumption as to Document admissible in England without proof of seal or signatures)

Jnder Sec. 82, when a document is produced before a court which according to the laws of England or Ireland would be admissible without proof of seal, signature, etc, the court shall presume that such seal, etc. genuine and also that the person signing the document held at the time)f signing it, the judicial/official character which he claims.

Sec. 83 (Presumption as to Maps or Plans)

According to Sec. 83, maps or plans purporting to be made with the authority of the Central/State Government are presumed to be accurate. But, maps or plans made for the purpose of any cause must be proved :o be accurate.

Sec. 84 (Presumption as to Collection of Laws and Reports of Decisions)

According to Sec. 84, the Court presumes the genuineness of every book, printed or published under the authority of the Government of any country, which contains laws of that country. Similar is the case with a book published by the State which contains report of decided cases.

It may be noted that *Sec. 57* authorizes the Courts to take judicial lotice of the existence of all laws and statutes in the territory of India ind U.K. *Sec. 74* recognizes statutory records to be 'public records'. *Sec.*

78 lays down the method of proving the Statutes/Acts passed by the legislature.

Sec. 85 (Presumption as to Power of Attorney)

A 'power of attorney' is a document by which an agent is given the power to act for his principal. According to Sec. 85, a power of attorney duly executed before and authenticated by a notary public or any judge/court/ Indian Consul/Vice-Counsel/ representative of Central Government are presumed to be genuine. The presumption also applies to documents authenticated by notaries functioning in other countries.

Sec. 85A/85B/85C (Presumption as to Electronic Agreements, Records, etc.)

Sec. 85A raises a presumption as to 'Electronic Agreements': 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.

Sec. 85B raises a presumption as to a 'secure electronic record' (that it has not been altered since the specific point of time to which the secure status relates), and a 'secure digital signature' (that it is affixed by subscriber with the intention of signing or approving the electronic record). Except in these cases, there is *no* presumption relating to authenticity, etc. of the electronic record or any digital signature. Sec. 85C raises a presumption as to 'Digital Signature Certificates'.

Sec. 86 (Presumption as to Certified Copies of Foreign Judicial Record)

Under Sec. 86, the court is given the judicial discretion to presume that the certified copies of *foreign* judicial records are genuine.

Sec. 87 (Presumption as to Books, Maps and Charts)

According to Sec. 87, when books, maps, charts, etc. are produced before the Court in proof of a fact in issue or a relevant fact, the Court may presume that any such book, map, etc. was written or published by the

person whose name is shown as that of the author or publisher and was published at the place where it was published.

Sec. 88 (Presumption as to Telegraphic Messages)

According to Sec. 88, in reference to telegraphic messages, the Court may resume that the message delivered to the addressee corresponds with the message handed over to the post office and that the message was meant *n* the person whom it is purported to be delivered. But, the court shall not make any presumption as to the sender of the message since telegraphic messages can be sent by unauthorized persons. The court may treat telegraphic messages received, as if they were the 'originals' sent. A *telegram* is a primary evidence of the fact that the same was delivered to le addressee on the date indicated therein.

Sec. 88A (Presumption as to Electronic Messages)

he court may presume that an electronic message forwarded 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 resumption as to the person by whom such message was sent.

Sec. 89 (Presumption in relation to Documents Not Produced)

The court shall presume that every document, called for and *not p*roduced after notice to produce, was attested, stamped and executed in ie manner required by law.

SEC. 90 (Presumption as to Documents Thirty Years Old: Ancient Documents)

Sec 90 lays down that where a document is purported or proved to be 1-year old and is produced from any custody which the court in particular sc considers proper, the court may presume that signature and every but of document is in that person's *handwriting,* and in case of document tested or executed that it was duly attested or executed by the person f whom it purports to be attested or executed.

The *basis* of the section is that as time passes, the executants, vendors, witnesses may not be available to prove title, etc. *The documents which are thirty years old, prove themselves.* It may be noted that the presumption relates to the execution of the document (signature, attestation, etc.), in other words, its *genuineness,* but not to the truth of its contents *(Ramakrishna* v *Gangadhar* AIR 1958 Ori 26). Also, there is *no* presumption that the executants had the authority to do or not what the document purports to do. Further, the presumption can be raised only with reference to original documents and *not* to copies thereof.

Explanation to Sec. 90: According to the explanation, "proper custody" means: (a) the place where the document would normally 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; and (d) under the circumstances of the case the custody from which the instrument is produced is probable.

Illustrations

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his title to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee, the mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to land in B's possession which were deposited with him by B for safe custody. The custody is proper.

Because a document purports to be an ancient document and to come from proper custody, it does *not* follow that its genuineness is to be assumed. If there are reasonable grounds for suspecting its genuineness, and the party relying upon it fails to satisfy the court of its due execution, its genuineness will *not* be presumed. The presumption under Sec. 90 is of discretionary nature; the court may refuse to draw it and require the document to be proved in the ordinary manner. A party who has attempted to prove the document by direct evidence cannot afterwards rely on the presumption *[Chandabai* v *Anwarkhan* AIR 1997 M.P. 238].

In *Gangamma* v *Shivalingaiah* (2005) 9 SCC 359, the Apex Court held: Sec. 90 nowhere provides that authenticity of the recitals contained

the document is to be presumed. Even when the formal execution of le document is proved, this by itself does not lead to the presumption lat the recitals contained in the document are also correct. It is open to e parties to raise a plea to the contrary within the limits permitted under :cs. 91 and 92.

ic. 90A (Presumption as to Electronic Records Five Years Old)

'here any electronic record, purporting or proved to be 5-year old, is •oduced from a proper custody, the court may presume that the digital gnature which purports to be the digital signature of any particular :rson was so affixed by him or any person authorized by him in this shalf.

7
Exclusion of Oral by Documentary Evidence

Where both oral as well as documentary evidence are admissible, 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. The provisions as to exclusion of oral by documentary evidence are based on the rule of 'best evidence'. Where the fact to be proved is embodied in a document, the document (primary or secondary evidence of it) is the best evidence of the fact. The maxim of law is whatever is in writing must be proved by the writing. Sees. 91 and 92 of the Evidence Act incorporate this principle.

Best Evidence Rule[1]

The main object of the law of evidence is to restrict the investigation made by courts within the bounds prescribed by general convenience. Thus, the evidence must be confined to the matter in issue, hearsay evidence must not be admitted, and, the best evidence must be given in all cases.

The *'best evidence'* rule means that the best evidence of which the case in its nature is susceptible must always be produced. The rule does not require the production of the greatest possible quantity of evidence, but it is framed to prevent the introduction of any evidence which raises

1. One of the main purposes of the Evidence Act is that 'Best Evidence' must come before the court. Comment. *[LCI 1-93]*

the supposition that there is better evidence behind it, in possession or rider control of the party by which he might prove the same fact, and which is withheld by the party.

It is one of the cardinal rules of the law of evidence that the best evidence in possession of the party must always be given, i.e., if a fact to be proved by oral evidence, the evidence must be that of a person who had directly perceived the fact to which he testifies. Otherwise, it could be impossible to test, by cross-examination, the truth of the testimony; id the law rejects the evidence which cannot adequately be tested. Thus, hearsay evidence is not evidence; it is only in exceptional cases that such evidence is admissible.

Similarly, where the transaction sought to be proved is primarily evidenced by a writing, the writing itself must be produced or accounted for. It is only in the absence of best or primary evidence (original document) that the court will accept what is known as secondary evidence (copy of the original document). Secondary evidence will never be received until the party tendering it proves that it is out of his power to obtain *e* best evidence.

Further, it is a well-established rule of law that whenever written instruments are involved, any other evidence (e.g. oral) is excluded from being used, either as a substitute for such instrument or to contradict such instrument (Rule of exclusion of oral evidence by documentary evidence). The written instruments are entitled to more credit than parole r oral) evidence. However, in certain exceptional cases, oral evidence n be given regarding the documents.

Evidence of Terms of Contracts, Grants, etc. Reduced to Document (Sec. 91)

According to Sec. 91, "when the terms of a contract, grant or some other disposition of property is reduced to the form of a document or is required by law to be reduced to a document, no evidence shall be given r the proof of the terms of such contract, etc. except the primary or secondary evidence of the writing itself.

This section merely forbids proving the contents of a writing otherwise than by writing itself. It incorporates rule of "best evidence"

which in reality declares a doctrine of substantive law, namely, that in the case of a written contract all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it *[Roop Kumar* v *Mohan Thedani* (2003) 6 SCC 595].

The section extends to both types of transactions, namely, which have voluntarily been made by writing and for 'which "writing is compulsory; it does *not* apply to oral contracts. Thus, writing becomes its own evidence and excludes all other kinds of evidence. The writing excludes oral evidence altogether. The matters required by law to be in writing are public and judicial records such as judgments, examination of witnesses, deeds of conveyance of lands such as sale-deeds or mortgage-deeds of R.s. 100 or more, a partition-deed, etc. Where registration of a document is compulsory under the Registration Act, the document if unregistered will he inadmissible **in** evidence and no other evidence of the contents of it can be received.

For example, A leases his house to **B** via **a written lease. Later, A files a suit for arrears of rent and for ejectment. A alleges that the** tenancy was from month to month, while B contends that it ran from year to year. In this case, the terms of the contract between the parties having been reduced to document, none of them will be allowed to adduce oral evidence in the court. The document will have to be produced in the court.

A. sues B for the possession of a certain house alleging that it belongs to him and B is a trespasser. B contends that the house belongs to him and alleges that there was previous civil litigation between the same parties for the same house and it was decided that the house belongs to him. The contents of that previous judgment must be proved by the copy of the judgment. Oral evidence is shut out.

It may be noted that an oral account of the contents of document is *not* an oral evidence. Further, the rule contained in Sec. 91 applies to the terms and not to the factum (or existence) of a contract, and evidence in proof of a factum of a contract is not excluded.

Exception 1, Sec. 91 - 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 and the writing need not be

proved. When the question is whether A is a High Court Judge, the warrant of appointment need not be proved, the only fact that he is working as a High Court Judge will be proved. Similar is the case when A appears before the court as a witness and says that he is a civil surgeon.

Exception 2, Sec. 91- Wills admitted to probate in India may be proved by the probate. The document containing the will need not be produced. The word 'probate' means the copy of a will certified under the seal of the court of competent jurisdiction with a grant of administration to the estate of the testator.

Explanation 1, Sec. 91 - This section applies equally to cases in which the contracts, etc. are contained in one document or more than one. If a contract is contained in several letters, all the letters must be proved *[Must.* (a)].

Explanation 2, Sec. 91 - Where there are more originals than one, one original only need be proved.

Illustrations: (b) If a contract is contained in a bill of exchange, the bill of exchange must be proved, (c) If a bill of exchange is drawn in a set of three, one only need be proved.

Explanation 3, Sec. 91 - Where in addition to the terms of the contract, etc. a document refers to any other fact also, as to that fact oral evidence" is always allowed. For example, a contract for sale of goods mentions that the goods supplied on earlier occasions have been paid for. Since this is not a term of the contract, it is an extraneous fact and, therefore, oral evidence can be offered to show that no such payment was ever made *[Illust.* (d)]. A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible *[Illust.* (e)].

Exclusion of Evidence of Oral Agreement[2] (Sec. 92)

The provision in Sec. 91 is further supplemented by Sec. 92 by providing that once any such contract, grant or disposition has been proved by the

2. What are the circumstances when oral evidence can be given regarding documentary evidence? Discuss with reference to the provisions of Evidence Act and decided cases. : *[LC.II-94/95*

Write a short note on 'Exclusion of oral by documentary evidence'. vV

IC.L.®&1/9Z

writing, then no evidence can be given of any oral agreement to contradict or change the terms of the contract. In other words, no oral evidence can be given to qualify the terms of the document.

Sec. 92 precludes only the parties to the document and their representatives-in-interest from giving oral evidence concerning the contents of document. Other parties (or strangers) are left free to give such evidence. Further, evidence can be given of any oral agreement which does not contradict, vary, add or subtract from the terms of the document.

It may be noted that Sec. 91 lays down a universal rule and is not confined to the executant or executants of the document. It is after the document has been produced to prove its terms under Sec. 91 that the provisions of Sec. 92 come into operation. Both the sections would be ineffective without each other. Sec. 91 applies to both unilateral and bilateral documents, while Sec. 92 applies only to bilateral one (i.e. does not apply to third persons/persons). In *Roop Kumar* v *Mohan Thedani* (2003) 6 SCC 595, it was held that Sees. 91 and 92 are based on the recognition of the rural act of integration in the case of written instruments and applies even to a third party seeking to establish a contract.

Suppose A borrows Rs. 200 from B and executes a pronote in which the interest rate is given 1 per cent. B files suit for recovery of the principal and interest at the rate of 1 per cent. The pronote is filed and proved in the court. A wants to lead evidence to the effect that the interest settled between the parties was *Vi* percent. Now, this evidence *cannot* be allowed as it contradicts the terms of the pronote.

The *rationale* behind Sec. 92 is that the parties having made a complete memorial of their agreement, it must be presumed that they have put into writing all that they considered necessary to give full expression to their meaning and intention; further, the reception of oral testimony would create mischief and open the door to fraud *(Rajkumar Rajendra Singh* v *State of H.P.* AIR 1990 SC 1833).

If, for example, a policy of insurance applies to ships leaving Calcutta. One of the ships is lost. It is sought to be proved that by an oral agreement the particular ship was excepted from the policy. Such evidence is inadmissible *[illustration (a)* to Sec. 92]. Similarly, a written agreement to pay a sum of money on a certain day cannot be contradicted by proving

it the day in question was changed by an oral agreement. A agrees absolutely in writing to pay B Rs. 1000 on 1st March 1873. The fact that, :he same time, an oral agreement was made that the money should not paid till the 31st March cannot be proved *[illustration (b)* to Sec. 92].

An estate called "Rampur Tea Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in ; map had always been regarded as part of the estate and was meant pass by the deed cannot be proved *[Must.* (c)].

Exceptions - when Oral Evidence can be given regarding a Document

There are various exceptions to the general rule of exclusion of evidence oral agreement:-

(1) *Validity of document* (proviso 1, Sec. 92) - The 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 on the grounds of fraud, intimidations, illegality, failure of consideration, mistake in fact or law.

or example, A enters into a written contract with B to work certain lines of B, upon certain terms. A was induced to do so by a ^representation of B's as to their value. This fact may be proved *[Must.* I)]. A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of s provisions - inserted by mistake. A may prove that such a mistake was lade as would by law entitle to have the contract reformed *[Must.* (e)].

The owner of a house borrowed a sum of money and executed a ominal sale-deed and rent note. She was allowed afterwards to prove lat the documents were not intended to be acted upon and that the rent aid by her represented interest on the loan *(Gangabai* v *Chabbubai* AIR 982 SC 20).

(2) *Matters on which document is silent* (proviso 2, Sec. 92) - Evidence can be given of an oral agreement on a matter on which the document is silent. But the oral agreement should not be inconsistent **with the terms stated in** the document. The separate

oral agreement should be on a distinct collateral matter, although it may form a part of the transaction. In considering whether a case falls under this exception, the *formality* of the document is an important consideration. The more formal the document, the greater will be the court's reluctance to admit oral evidence.

The *illustrations* to Sec. 92 make clear the point. A written agreement, for example, is silent as to the time of payment of the price. If there is any oral agreement regarding this, it may be proved *[Illust.* (f)]. A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A horse for Rs. 500". B may prove the verbal warranty *[Illust.* (g)]. Where a room is hired in a lodging on a fixed rent per month by a written agreement, but the agreement does not make it clear whether the amount reserved was for lodging only or included boarding also. If there was any oral agreement on the point the same may be proved *[Illust.*

m

In *Brij Kishore* v *Lakhan Tiwari* (AIR 1978 All. 374), the document in question was one by which the existence of a deed was acknowledged and it was on a stamp paper. The document was silent about the interest payable and, therefore, oral "evidence was offered on the point. The question was whether the document was so formal as to shut out oral evidence. The court allowed the evidence.

The court observed: When the document is such that one may reasonably believe that the entire terms and conditions agreed were sought to be put into the document, then oral evidence should not be allowed. Generally speaking, mere acknowledgment of debt, even though stamped, cannot be deemed to be such a formal document as to incorporate all the terms and conditions of the borrowing. It is basically an acknowledgment of liability not mentioning the terms and conditions on which the borrowing was contracted. In that sense, it differs from a formal pronote which incorporates the terms and conditions of loan.

(3) *Condition precedent* (proviso 3, Sec. 92) - The existence of any separate oral agreement constituting condition precedent to the attaching of any obligation under the document may be proved This exception means that where there is a separate oral agreement that the terms of a written contract are not to take effect until a condition precedent has been fulfilled or a certain event ha;

happened, oral evidence is admissible to show that as the event did not take place, there is no written agreement at all. This rule would never apply to a case where the written contract has been performed or acted upon for some time.

a receipt for payment has been sent on an oral understanding that the receipt was to apply only when payment was made, this fact may be roved *[Must.* (i)]. Similarly, where the parties to a promissory note payable Q demand, orally agreed that payment would not be demanded for five ears, the court allowed the oral agreement to be proved *(Naraindas* v *apammal* AIR 1967 SC 333). A and B make a contract in writing to take [feet upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which ; was delivered *[Must.* (j)].

(4) *Rescission or modification* (proviso 4, Sec. 92) - Where after executing a document, the parties orally agree to treat it as cancelled or to modify some of its terms, such oral agreement may be proved. However, where the contract is one which is required by law to be in writing, or where it has been registered lawfully, then proof cannot be given of any oral agreement by which it was agreed either to rescind the contract or to modify its terms.

(5) *Usages or customs* (proviso 5, Sec. 92) - Under this exception, oral evidence is admissible to explain or supply terms in commercial transactions on the presumption that the parties did not intend to exit into writing the whole of their agreement, but tacitly (impliedly) agreed that their contract was to be interpreted or regulated by established usages and customs, provided they are not inconsistent with the terms of such contract. Thus, oral evidence may be offered that by the custom of the trade the seller had to arrange for wagons *(Bejoy Krishna* v *N.B. Sugar Mills Co.* AIR 1949 Cal 490).

(6) *Relation of language to facts* (proviso 6, Sec. 92) - Any fact may be proved which shows in what manner the language of a document is related to existing facts. This exception comes into play when there is latent ambiguity in a document i.e. when there is a conflict between the plain meaning of the language used and the existing facts. In such cases, evidence of the surrounding

circumstances may be admitted to ascertain the real intention of the parties. Thus, the conduct of the parties can also be taken into account so as to find out what they might mean by their words.

Where, for example, a person transfers the whole of his property, but does not describe or state what his property is. In such cases the property to which the document relates can be proved by oral evidence. A makes a will of his property to his children. He does not name them. Evidence may be given to prove as to who are his children. Oral evidence is also receivable to throw light upon the nature of a document.

(7) *Appointment of a public officer* (exception 1, Sec. 91) - *See* above.

(8) *Wills* (exception 2, Sec. 91) - *See* above.

(9) *Extraneous facts* (explanation 3, Sec. 91) - *See* above.

Case Law

In *Sara Veeraswami* v *Talluri Narayya* (AIR 1949 PC 32), the appellant sold some property through a registered sale deed in 1932. It was an outright sale. But simultaneously, there was an oral agreement for sale and right to re-conveyance if sale price was repaid within five years. The question involved in dispute is whether the document is a sale with or without right to re-conveyance as per oral agreement and benefit of proviso to Sec. 92 is available? According to operating part of Sec. 92, written agreement will prevail over oral agreement. But proviso 2, Sec. 92 makes a difference. In this case, it is necessary to see whether oral agreement as to the re-conveyance of property sold, contradicts, varies, adds to or subtracts from the term of sale document. The answer lies in the truth of the agreement.

The real issue was whether the transaction of sale and re-conveyance are a single transaction or two separate ones? There can be different agreements of sale and then resale or re-conveyance relating to the same subject-matter. The Privy Council held that, there were two different transactions. The determining factor is the ultimate shape of the agreement rather than the process by which it is reached. An oral stipulation may be purely collateral to the written agreement which it has induced, and,

both written as well as oral agreement can be separate transactions though touching on a common subject-matter.

Such was the character of transactions in this case and the oral agreement did not contradict, vary and subtract from the terms of sale deed (if the agreement was in truth a mortgage the oral agreement would obviously contradict the terms of the sale deed). On the contrary, it left those terms and the interest passing there under to the purchaser entirely unaffected. Can it then be said to have added to the terms of the sale deed? The words 'adding to' which are part of Sec. 92 must receive their due weight, but they do not suffice to exclude the oral agreement relied on by the appellants. It is of course, literally correct to say that as the agreement for re-conveyance related to the lands sold, it added a further stipulation respecting those lands. That, however, is not an appropriate test of the applicability of Sec. 92 which is concerned to defeat the modification of a particular document. It is not enough to ask if the oral agreement relates to what has been sold. To be excluded it must bear, in some one or more of the ways specified in the section, upon the terms of sale as contained in the instrument. To add a stipulation which is quite unconnected with the terms of sale is not an addition of the kind struck at by the section. Thus, proviso 2 to Sec. 92 is applicable and oral agreement is a valid separate transaction which will prevail. The appellants will succeed.

LEADING CASE: ROOP KUMAR v MOHAN THEDANI
[(2003) 6 SCC 595]

Facts and Issue - In this case the scope and ambit of Sees. 91 and 92 were in issue. The jural positions of these two sections was analyzed by the court.

Before the High Court the parties agreed that the basic question which required consideration was whether relationship between the respondent and the appellant was that of licensor and licensee or it was that of lessor or lessee. The Trial Judge had held that the transaction between the respondent and appellant evidenced by an agreement dated 15-5-1975 amounts to licence and not sub-letting. There was a finding recorded by the trial court to the effect that the appellant was a party to earlier

ejectment proceeding which was not factually correct. The High Court held that the agreement dated 15-5-1975 was entered into between them with mutual consent and the appellant-defendant signed the same voluntarily and out of his free will; it was not a sham document; was in fact acted upon; the appellant-defendant was an accounting party in terms of the agreement.

The question was whether the particular document was intended by the parties to cover certain transactions between them and, therefore, to deprive of legal effect all other utterances.

Observations and Decision - The Apex Court held that the High Court was justified in rejecting the plea of sub-tenancy. It observed that every jural act may have the following four elements:

(a) the enaction or creation of the act;

(b) its integration or embodiment in a single memorial when desired;

(c) its solemnization or fulfilment of the prescribed forms, if any; and

(d) the interpretation or application of the act to the external objects affected by it.

The first and fourth are necessarily involved in every jural act, and second and third may or may not become practically important, but are always possible elements. The integration of the act consists in embodying it in a single utterance or memorial - commonly, of course, a written one. When a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act. This rule is based upon an assumed intention on the part of the contracting parties, *evidenced* by the existence of the written contract, to place themselves above the uncertainties of oral evidence and on a disinclination of the courts to defeat this object.

The court cited *Thayen's* Preliminary Law on Evidence (pp. 397-398); *Phipson* on Evidence, 546 (7th Edn.); *Wigmore's* Evidence, 2406; ^/ffeWy i Evidence, 294; *Greenlear's* Evidence, 563, where

rule is exclusively associated is the rule that when the contents of a writing are to be proved, the writing itself must be produced before the court or its absence accounted for before testimony to its contents is admitted.

The Apex Court observed: Sec. 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. It merely forbids proof of the contents of a writing otherwise than by the writing itself; it is covered by the ordinary rule of law of evidence. In Sec. 92, the legislature has prevented the oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Sec. 91. Sees. 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Sec. 91 is concerned solely with the mode of proof of a document while limitations imposed by Sec. 92 relate only to the parties to the document. After the document has been produced to prove its terms under Sec. 91, provisions of Sec. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sees. 91 and 92 in effect supplement each other. Sec. 91 would be inoperative without the aid of Sec. 92 and *vice versa.*

The two sections, however, differ in some material particulars. Sec. 91 applies to all documents, whether they purport to dispose of rights or not; whereas Sec. 92 applies to documents which can be described as dispositive. Sec. 91 applies to documents, which are both bilateral and unilateral, unlike Sec. 92, the application of which is confined to only bilateral documents. Both the sections are based on the "best evidence rule", thus declaring a doctrine of substantive law. It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the truth of the agreement should be controlled by the party's memory. Even a third party if he wants to establish a particular contract between certain others when

such contract has been reduced to writing can only prove such contract by the production of such writing.

The grounds of exclusion of extrinsic evidence are: (i) to admit inferior evidence when law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

This court in *Gangabai* v *Cbbabubai* (AIR 1982 SC 20) and *Ishwar Dass Jain* v *Sohan Lai* (AIR 2000 SC 426) with reference to Sec. 92(1) held that it is permissible to a party to a^Jeed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar under Sec. 92 arises only when the document is relied upon and its terms are sought to be varied or contradicted. Oral evidence is admissible to show that the document executed was never intended to operate as an agreement and that some other document was entered into between the parties].

Comments - In *Ishwar Dass Jain* case (above), a mortgagor filed a suit for redemption. Oral evidence was sought to be given to prove that the mortgage deed, though executed, was not intended to be acted upon and that it was a sham document executed only as a collateral security. Held that it would not amount to varying or contradicting the terms of the document and would not be hit by Sec. 92.

In *Parvinder Singh* v *Renu Gautam* (2004) 4 SCC 794, it has been held that oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but that it was something different. In *R. Janakiraman* v *State* (2006) 1 SCC 697, the Apex Court clarified that Sec. 92 applies when a party to the instrument seeks to disprove its terms, it does not apply when anyone including a party to the instrument, seeks to establish

that the instrument itself is sham and fictitious, or nominal not intended to be acted upon. In *Savitree Devi* v *State of Bihar* (AIR 1989 Pat. 327), the Patna High Court observed that effectiveness of a gift depends upon the fact that whether it has been acted upon. Hence, oral evidence can be given to show whether a gift deed has been acted upon or not.

In *S. Saktivel* v *M. Venugopal Pillai* (AIR 2000 SC 2633), the court observed that a disposition conferring title to property is required by law to be reduced to writing in order to ensure its efficacy and effectiveness. The parties to the document cannot under Sec. 92, proviso 4 be permitted to adduce oral evidence to prove a subsequent agreement which has the result of modifying the written document especially when the document has been registered.

In *Ramachandran* v *Y. Theva Nesom Ammal* (AIR 2003 Mad. 262), the sale-deed of property mentioned an amount of consideration. The vendor was not allowed to prove that real consideration was agreed to be much more than what was mentioned. In *Bishwanath Prasad Singh* v *Rajendra Prasad* (2006) 4 SCC 432, in a sale of property with the condition of re-conveyance within a specified time, the seller failed to exercise the option within the time delimited. He was not afterwards allowed to say that the transaction was in essence a mortgage and he should be allowed to redeem it.

AMBIGUOUS DOCUMENTS

When a document is *ambiguous* i.e. either its language does not show the :lear sense of the document or its application to facts creates doubts, how far oral evidence can be allowed to clarify the language or to remove the iefect? Sections 93-98 lay down the rules as to interpretation of documents svith the aid of such 'extrinsic evidence' (evidence from the outside).

Ambiguities are of two kinds: *ambiguitas patens* i.e. patent ambiguity [Sees. 93-94) and *ambiguitas latens* i.e. latent ambiguity (Sees. 95-97). A *latent* ambiguity means a defect which is apparent on the face of the

document. In such cases the principle is that oral evidence is not allowed to remove the defect. A *latent* defect implies a defect which is not apparent on the face of the record, but is in the application of the language (used in the document) to the facts stated in it. The general principle is that evidence can be given to remove such defects.

Sec. 93 (Exclusion of Evidence to Explain or Amend Ambiguous Document)

"When the language used in a document is, on its face, ambiguous or defective, evidence may *not* be given of facts which would show its meaning or supply its defects."

Illustrations: (a) A agrees, in writing, to sell a horse to B for Rs. 1,000 or Rs. 1,500. Evidence cannot be given to show which price was to be given.

.(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

The reason for the exclusion of evidence in such cases is that the document being clearly or apparently defective, this fact must be or could've 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.

If the document had mentioned no price at all, oral evidence of the price could be allowed under Sec. 92 (2nd proviso). While no extrinsic evidence can be given to remove patent defect, the court may, if it is possible, fill up the gaps or blanks in a document with the help of the other contents of the document (e.g. where a lease deed left blanks at the place of date, but in another part it said that the first installment of rent would be paid on a certain date).

Sec. 93 deals with the rules for construction of document with the help of extrinsic evidence or in other words with the interpretation of documents by oral evidence.

Sec. 94 (Exclusion of Evidence against Application of Document to Existing Fact)

"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."

lustration: A sells to B, by deed "my estate at Rampur containing 100 ighas." A has an estate at Rampur containing 100 bighas. Evidence may *ot* be given of the fact that the estate meant to be sold was one situated t a different place and of a different size.

Sec. 95 (Evidence as to Document Unmeaning in Reference to Existing Facts)

According to Sec. 95, when the language of a document is plain but in ts application to existing facts it is meaningless, evidence can be given to how how it was intended to apply to those facts. It is based on the *xiaxim falsa demonstratio non necet.*

Illustration: A sells to B, by deed, "my house in Calcutta". A had no house tn Calcutta, but it appears that he had a house at Howrah, of which B bad been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house at Howrah.

Sec. 95 is an instance of latent ambiguity. According to Stephen's Digest, evidence to show that common words, whose meaning is plain, not appearing from the contract to have been used in a peculiar sense, have been in fact so used, is not admissible. In *North Eastern Railway* v *Hastings* (1900) AC 260, it was held that written instruments if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instruments themselves.

Sec. 96 (Evidence as to Application of Language which can apply to One only of Several Persons)

According to Sec. 96, when the language of a document is clear and is intended to apply to only one thing or person, but in its application to the existing facts it is difficult to say to which particular thing or person it was intended to apply, evidence can be offered to clarify this matter. *Illustrations:*

(a) A agrees to sell to B, for Rs. 1,000 "my white horse". A has two white horses. Evidence may be given of the facts which show which of them was meant.

(b) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Deccan or in the Sind was meant.

Where a pronote mentioned a date according to the local calendar and also according to the international calendar, the evidence could be offered to show which date was meant. In one case, a *Vakalatnama* did not contain the name of the pleader after the word "Mr." in the printed form but bore the signature of the party as well as the pleader. Held that the ambiguity in the document was *not* patent but latent which could be cleared up by extrinsic evidence under Sec. 96.

Sec. 97 (Evidence as to Application of Language to One of Two Sets of Facts)

According to Sec. 97, when the language of a document applies partly 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 doctiment was meant to apply.

Illustration: A agrees to sell to B "my land at X in the occupation of Y." A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

Sec. 98 (Evidence as to Meaning of Illegible Characters, etc.)

According to Sec. 98, evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local and provincial expression, of abbreviations and of words used in a peculiar sense.

Illustration: A, a sculptor, agrees to sell to B, "all my models", A has both models and modelling tools. Evidence may be given to show which he meant to sell. Thus, oral evidence is permissible for the purpose of explaining artistic words and symbols used in a document.

Sec. 99 (Evidence by Non-Parties)

"Persons who are not parties to document, or their representative-in-interest, may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document". It may be noted that the parties to a document or their representative-in-interest *cannot* give evidence of a contemporary agreement varying the terms of the document (Sec.

92) But, Sec. 99 provides that a third party can give evidence of such oral agreement if he is affected by it.

Illlustration: A and B make a contract in writing that B shall sell A certain tton, to be paid for on delivery. At the same time, they make an oral reement that 3 months' credit shall be given to A. This could not be own as between A and B, but it might be shown by C, if it affected ; interests.

Sec. 100 (Saving of Provisions of Indian Succession Act relating to Wills)

Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction *wills."*

It may be noted that Indian Succession Act, 1865 has been replaced I the Act of 1925.

8
Burden of Proof and Presumptions

BURDEN OF PROOF[1]
(SECS. 101-111)

Every judicial proceeding has for its purpose, to ascertain some right or liability. These rights and liabilities arise out of facts which must be proved to the satisfaction of the court. Sections 101 to 111 lays down provisions regarding who is to lead evidence and prove the case. These rules are called rules relating to 'Burden of Proof.

The burden of proof means the obligation to prove a fact. Every party has to establish facts which go in his favour or against his opponent. And this is the burden of proof. The strict meaning of the term 'burden of proof *(onus probandi)* is that if no evidence is given by the party on whom the burden is passed the issue must be found against him. The phrase "burden of proof" has two distinct meanings:

(1) *Burden of proof as a matter of law and pleading* - i.e., the burden of proving all the facts or establishing one's case. This burden rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It *is fixed,* at the

---

1. Write a short note on 'Burden of Proof. *[C.LC-91;* LC.//-95]
   What are the rules relating to Burden of Proof as given in the Indian Evidence Act, 1872? *ILC.II-20061*

beginning of the trial, by the statements of pleadings, and it is settled as a question of law, remaining unchanged under any circumstances whatever *(Sec. 101).*

(2) *Burden of proof as a matter of adducing evidence* - either at the beginning or[N] at any particular stage of the case. It is always *unstable* and may shift constantly throughout the trial (Sees. 102-103). It lies at first on the party who would be unsuccessful if no evidence at all was given on either side. The burden must shift as soon as he produces evidence which *prima facie* gives rise to a presumption in his favour. It may again shift back on him, if the rebutting evidence produced by his opponent preponderates. This being the position, the question as to the *onus of proof* \s only a rule for deciding on whom the obligation rests of going further if he wishes to win.

Burden of Proof (Sec. 101).

'Whoever desires any court to give judgment as to any legal right or lability dependent on the existence of facts which he asserts, must prove hat those facts exist. When a person is bound to prove, the existence of iny fact, it is said that the burden of proof lies on that person."

^*lustrations:* (a) A desires a court to give judgment that B shall be punished :or a crime which A says B has committed. A must "prove that B has :ommitted 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.

Similarly, where a landlord seeks eviction on the ground of *bona fide* personal need, burden lies upon him to establish that he is genuinely in need of accommodation *[SJE Benezer* v *Velayudhan* AIR 1998 SC 746; *Narbada Devi Gupta* v *Birendra Kumar Jaiswal* (2003) 8 SCC 745],

Normally, the affirmative facts are easy to prove in comparison to the negative facts. The principle of Sec. 101 is that a party who wishes the court to believe in the existence of a fact and to pass a judgment on the basis of it should have to prove the fact. When a party makes an allegation that a transaction is sham and bogus the party who makes the

allegation must prove it. But, where the question was "whether the transaction in question was a bona fide and genuine one" the party relying on the transaction must first prove its genuineness. It is only thereafter, that the defendant would be required to rebut such proof and establish that the transaction was sham and fictitious *[Subhra Mukherjee* v *Bharat Coking Coal Ltd.* AIR 2000 SC 1203; *Paka Venkaiah* v *Takuri Buchi Reddy* AIR2005NOC31(A.P.)].

The failure to prove a defence does not amount to an admission, nor does it reverse or discharge the burden of proof *[Manager, Reserve Bank of India* v S. *Mani* AIR 2005 SC 2179]. The burden of proving consent in a rape case is on the accused. It is not for the victim to show that there was no consent on her part. It is for the accused to show that she had consented *[State of HP.* v *Shree Kant Shekari* AIR 2004 SC 4404].

In *Neelkantan* v *Mallika Begam* AIR 2002 SC 827, the occupant/ tenant of the building in slum area claimed for protection from eviction. Plea of the tenant was that the property was situated in slum area. The landlady denied that the property was situated in slum area, so no protection of Slum Area Act, 1971 would be available. The burden to prove that the property was situated in Slum Area would be on the tenant.

On Whom Burden of Proof Lies (Sec. 102)

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." *Illustrations:* (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.

Similarly, in cases of insanity, burden of proving that fact lies or the person who wants to rely on it. Where the issue was whether the document in question was genuine or sham or bogus, the party whc

lleged that fact had to prove nothing till the party relying upon the locument established its genuineness in the first place *(Subhra Mukherje Bharat Coking Coal Ltd.* AIR 2000 SC 1203).

In an action for damages for negligence, if the defendant alleges ontributory negligence on the part of the plaintiff, he must prove this act, for his case would fail if no evidence were given on either side. This irinciple also verifies the fact that the burden of proof lies upon the >arty who affirms a fact rather than upon one who denies it. A person laiming the benefit of adoption must prove valid adoption.

Where the Government totally prohibits certain kinds of trade, it vould be for it to show that the prohibition is in the nature of reasonable estriction on trade liberty. Ordinarily, however, burden of proof is on he party who challenges the constitutional validity of an Act or Rule *Amrit Banaspati Co.* v *UOI* AIR 1995 SC 1340).

Burden of Proof as to Particular Fact (Sec. 103)

'The burden of proof as to any particular fact lies on that person who vishes the court to believe in its existence, unless it is provided by any aw that the proof of that fact shall lie on any particular person."

illustration: (a) A prosecutes B for theft, and wishes the court to believe hat B admitted the theft to C. A must prove the admission. B wishes the ;ourt to believe that, at the time in question, he was elsewhere. He must jrove it.

Similarly, a person who signed a loan document admitted the loan md if he says that he signed a blank paper, the burden would lie upon lim to prove that fact.

Burden and Onus of Proof

There is an essential distinction between "burden of proof and "onus af proof". Burden of proof lies on the person who has to prove a fact •md it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. Thus, in a criminal :ase, once the prosecution has satisfied the court of the fact that the accused committed the crime of which he is charged, the onus is shifted

to the accused to show as to why he should not be punished for it (discussed above).

Onus probandi - The term merely means that if a fact has to be proved, the person in whose interest it is to prove it, should adduce some evidence, however slight, upon which a court could find the facts which he desires the court to find. The *onus* is always on a person who asserts a proposition or a fact which is not self-evident. The question of *onus probandi* is certainly important in the early stage of his case. Thus, the onus of proving negligence of the Railway Company lies on the plaintiff when he asserts that the injuries caused to him are by reason of the negligence of the Railway Company.

When the entire evidence which is possible on a subject has already come before the court, from whatever source it may be, it is well settled that the question of burden of proof becomes immaterial.

A person cannot be relieved of his burden of proving a fact even if the fact is such that it is very difficult or rather impossible to prove. Where a wife in a divorce petition alleged adultery on the part of her husband; it was held that burden was upon her to prove that fact and it was no excuse to say that it was virtually impossible to procure evidence of that fact *(Pushpa Datta Misbra* v *Arcbana Misbra* AIR 1992 M.P. 260).

Importance of Burden of Proof

The question of *onus* or burden of proof at the end of the case, when both the parties have adduced evidence is not of very great importance and the court has to come to a decision on a consideration of all materials. When the entire evidence, which is possible on a subject, has already come before the court, from whatever source it may be, it is well settled that the question of burden of proof becomes immaterial. Burden of proof as determining factor of the whole case can only arise if the court finds the evidence *for* and *against* so evenly balanced that it can come to no conclusion. Then the *onus* will determine the matter and the person on whom the burden of proof lies will lose.

It may be noted that a person cannot be relieved of his burden of proving a fact even if the fact is such that it is very difficult or rather impossible to prove. Where a wife in a divorce petition alleged adultery on **the** part of her husband, it was held that burden was upon her to

rove that fact and it was no excuse to say that it was virtually impossible) procure evidence of that fact *(Pushpa Datta Mishra* v *Archana Mishra* JR 1992 M.P. 260).

The party on which the onus of proof lies must, in order to ucceed, establish *a. prima facie* case. He cannot, on failure to do so, take dvantage of the weakness of his adversary's case. He must succeed by he strength of his own right and the clearness of his own proof. The ;eneral rule that a party who desires to move the court must prove all acts necessary for that purpose is subject to two *exceptions:* (a) he will not >e required to prove such facts as are specially within the knowledge of he other party (Sec. 106); (b) he will not be required to prove so much)f his allegations in respect of which there is any presumption of law [Sees. 107-113), or in some cases, of fact (Sec. 114) in his favour.

Burden of Proving Fact to be Proved to Make Evidence Admissible (Sec. 104)

"The burden of proving any fact necessaiy 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) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

Burden of Proving Exception in Criminal Cases (Sec. 105)

According to Sec. 105, 'the burden of proof is upon the accused of showing existence, if any, of circumstances which bring the offence charged within any of the special as well as any of the general exceptions or proviso contained in I.P.C. or any law defining the offence. Further, 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) Sec. 325, IPC provides that whoever, except in the case provided for by Sec. 335, voluntarily causes grievous hurt, shall be punished. A is charged under Sec. 325. The burden of proving the circumstances bringing the case under Sec. 335 lies on A.

The fundamental principle of criminal jurisprudence is that an accused is presumed to be innocent, and the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. This general burden never shifts, and it always rests on the prosecution. Sec. 105 is an important *qualification* of this general rule. This section is an application, perhaps an extension of the principle laid down in Sec. 103.

In *Dayabhai* v *State of Gujarat* (AIR 1964 SC 1563), the Court observed that there is *no* conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused under Sec. 105. In *Rabindra Kumar Dey* v *State ofOrissa* (1976) 4 SCC 233, it observed: "Sec. 105 does not at all indicate the nature and standard of proof required. The Evidence Act does not contemplate that the accused should prove his case with the same strictness and vigour as the prosecution; it is sufficient if he proves his case by the standard of 'preponderance of probabilities' envisaged by Sec. 5 as a result of which he succeeds not because he proves his case to the guilt but because probability of the version given by him throws doubt on the prosecution case and, thus, the prosecution cannot be said to have established the charge beyond reasonable doubt."

The onus of an accused person may well be compared with the onus of a party in a *civil* case. Further, if the prosecution proves beyond reasonable doubt that the accused has committed offence, the accused can rebut this presumption either by leading evidence or by relying on the prosecution evidence itself. If upon evidence adduced in the case either by prosecution or by defence a *reasonable doubt* is created in the mind of the court, the benefit of it should go to the accused.

It may be noted that in certain "socio-economic" and "environmental" legislations, the burden lies upon the accused. For example, under the

Prevention of Corruption Act, 1988, the burden is on the accused to ccount for his possessions. Where the presumption of innocence is sversed by a statutory provision so that the burden is on the accused to how (e.g. that he was in innocent possession of an assault rifle), held that uch burden should not be as heavy as that of the prosecution but even *o* should be of greater probability *[Sanjay Dutt* v *State* (1994) 5 SCC 10]. In environmental cases, there is reversal of burden of proof based m precautionary principle *[A. P. Pollution Control Board* v *Prof. M. V. Nayudu* 1999) 2 SCC 718].

Surden of Proving Fact Especially within Knowledge (Sec. 106)

When any fact is specially within the knowledge of any person, the mrden of proving that fact is upon him."

llustrations: (a) When a person does an act with some intention other than hat which the character and circumstances of the act suggest, the burden)f proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The Durden of proving that he had a ticket is on him.

Sec. 106 applies only to the parties to a suit or proceeding. Sec. 106 s an exception to Sec. 101. It is designed to meet certain exceptional ;ases in which it would be impossible or very difficult for the prosecution to establish facts which are especially in the knowledge of the accused.

If a person is found in possession of a stolen property immediately after the theft and he claims that there was no intention to receive stolen property, he must prove that fact, for that fact is especially within his knowledge. Similarly, in the case of plea of *alibi*, since only the person raising the plea knows that where he was at the time, burden lies on him to prove that fact. This section also come into play in the cases of custodial or dowry death, and, negligence of carriers of goods. The principle stated in the section is an application of the principle of *res ipsa loquitur.*

Sec. 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt; but the section would apply to cases where the prosecution has succeeded in proving facts from which the reasonable inference can be drawn regarding the

existence of certain other facts unless the accused by virtue of a special knowledge regarding such facts offered an explanation which might drive the court to draw a different inference *[Sucha Singh* v *State of Punjab* (2001) 4 SCC 375].

If facts within the special knowledge of the accused are not satisfactorily explained by the accused it would be a factor against him, though by itself it would not be conclusive about his guilt. It would be relevant while considering the totality of the circumstantial evidence. It is submitted that under the Indian law, Sec. 106 should be more liberally used against the accused *[State of Punjab* v *Karnail Singh* (2003) 11 SCC 271].

Burden of Proving Death (Sec. 107)

"When the question is whether a person 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."

Burden of Proving that Person is Alive who is Unheard of for 7 Years (Sec. 108)

Sec. 108, on the other hand, provides that when it is proved that a person has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is living is shifted to the person who affirms it. Sec. 108 is an exception to the rule contained in Sec. 107.

There is a general presumption of continuity of things. Sec. 107 provides that when a person is shown to have existed within the last 30 years, the presumption is that he is still alive and if anybody alleges that he is dead, he must prove that fact. This presumption is, however, not a very strong one. According to Sec. 108, if a person is not heard of for 7 years, the presumption is that he has died, and, if anybody alleges that he is still alive, he must prove that fact. Thus, seven years' absence creates *rebuttable* presumption of death.

There is a simple presumption of death and not of the time of death, for which independent evidence is needed. The onus of proving that death took place at a particular time within the period of 7 years lies

on the person who claims a right for the establishment of which that fact is essential. In *Darshan Singh* v *Gujjar Singh* (2002) 2 SCC 62, the plaintiff claimed succession to the estate of a person who had not been heard of for 7 years. The High Court held that the date of the suit should be taken to be the date of death. The Supreme Court did *not* approve of this view.

In *Muhammad Sharif* v *Bande Ali* (ILR (1911) 34 All 36), one M mortgaged certain property to the defendant in 1890. Thereafter he disappeared and nothing was heard of him again. His heirs filed a suit for the redemption of mortgage 18 years after M's absence. They contended that as M disappeared some 18 years ago, he must be presumed to have been dead for the last 11 years. It was held that presumption in Sec. 108 does not go further than the mere fact of death. There is no presumption that he died in the first 7 years or in the last 7 years.

The presumption raised under Sec. 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. Further, the presumption would arise only on lapse of seven years and would not apply on expiry of six years arid 364 days or any time short of seven years. The presumption can be raised only when the question is raised in court, tribunal or before an authority who is called upon to decide whether a person is alive or dead, not otherwise *[LIC of India* v *Anuradha* (2004) 10 SCC 131].

Burden of Proof as to Relationship of Certain Kind (Sec. 109)

According to Sec. 109, where certain persons are shown to have acted as partners, or as landlord and tenant, or as principal and agent, the law presumes them to be so related and the burden of proving that they were never so related or have ceased to be so shall lie upon the party who says so. Thus, there is a presumption against change of *status quo,* namely that any existing state of things will continue as it is.

Burden of Proof as to Ownership (Sec. 110)

When a person is in possession of any thing as owner, the burden of proving that he is not owner is on the person who affirms that he is not the owner. This section gives effect to the principle that possession is the *prima facie* evidence of a complete title. The possession contemplated is the actual physical possession. Further, Sec. 110 is not limited to immoveable property and applies to moveable property as well.

In *Chief Conservator of Forest* v *Collector* (2003) 3 SCC 472, the plaintiff claimed to be *pattedar* of the land in question proving long and peaceful enjoyment of the land. It was held that though there was no proof of conferment *oipatta* and acquisition of title, a presumption of ownership arose in favour of the plaintiff and in absence of any evidence on behalf of the Government, rebutting the presumption, claim of the plaintiff must be upheld.

Proof of Good Faith (Sec. Ill)

When a person stands towards another in a position of active confidence, the burden of proving the good faith of any transaction between them lies on the person in active confidence.

Illustrations: (a) The good faith of a sale by a client to attorney is 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.

Relations of trust and confidence (i.e. fiduciary relation) include those of parent and child, lawyer and client, spiritual *giru* and his follower, principal and agent, partner and firm, doctor and patient, persons in authority and those over whom he exercises authority. In all such cases, the law imposes the duty of good faith upon the person occupying the position of trust and confidence, and he will have to prove that he acted in good faith before he can enforce the transaction against the other party. A contract with *apardanasbin* woman attracts Sec. 111.

The principle of equity is ingrained in Sec. 111. In *Krishna Mohan Kul* v *Pratima Maity* (2004) 9 SCC 468, it was held that onus of proof

to prove due execution of document in accordance with law is always on donee/beneficiary, irrespective of the fact whether such party is defendant or plaintiff. Considerations involved in judging validity of transactions between persons standing in active confidential or fiduciary relationships ire whether donor had competent and independent advice, his age, capacity md nature of benefit are very material.

PRESUMPTIONS

Definition[2]

A court can take into consideration certain facts even without calling for proof of them. When the court presumes the existence of a fact that is known as a presumption ('a thing taken for granted). A presumption is m inference of fact drawn from other known or proved facts. It means *i* rule of law that courts and judges shall draw a particular inference from a particular fact, or from a particular evidence, unless and until the truth Df aidn infereioe is disproved *'State o/A.P.* v *Vasudeva Rao* (2004) 9 SCC 319].

The effect of a presumption is that a party in whose favour a fact is presumed is relieved of the initial burden of proof (as a presumption furnishes *prima facie* evidence of the matter to which it relates) until the opposite party introduces evidence to *rebut* the presumption. 'Presumptions hold the field in the absence of evidence but when facts appear, presumptions go back.'

Presumptions are the result of human experience and reason as applied to the course of nature and the ordinary flow of life. If a man and woman are found alone in suspicious circumstances the law presumes that they were not there to say their prayers and the divorce laws would take this as evidence of adultery. Similarly, from the fact that a letter has been posted, the natural inference (presumption) would be that it reached the addressee.

2. Define **Presumptions. What** is their importance? **[LC./-95]**

Presumptions are aids to the reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or merely on policy and convenience. For example, the presumption in Sec. 112 of the legitimacy of a child born to married parents is a matter of policy and expediency and also of convenience. On whatever basis they rest, they operate in advance of argument of evidence.

Kinds of Presumptions[3]

Presumptions are of three kinds: (a) Presumption of fact (rebuttable) (b) Presumption of law (rebuttable and irrebuttable), and (c) Mixed presumptions or presumption of law and fact. Mixed presumptions are chiefly confined to the English law. While the 'presumption of fact' is *discretionary*, the 'presumption of law' is *legal* or *compulsory* presumption.

(a) Presumption of Fact[4] ('May *Presume')*

Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it (Sec. 4).

Presumptions of fact, or ^tow/presumptions, are inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. The sources being the common course of natural events, the common course of human conduct and the common course of public and private business. For example, where a doctor gave an injection for determination of pregnancy which resulted in miscarriage and death of the woman, it was held that the doctor could-be presumed to know the side-effects of the medicine as doctors are generally informed

Discuss the various kinds of presumptions under Indian law.
[D.U.-2010\lCLC.-95

What is the difference between 'May presume' and 'Shall presume'? Give examples and relevant provisions. *[D.U.-20Q9]*
What is the relevance of presumptions in a proof of a fact? [LC./-94]

of such effects by the manufacturers of medicines *[Akhil Kumar {Dr.)* v *ke,* 1992 Cr LJ 2029 M.P.].

A presumption of this kind is wholly in the *discretion* of the court, le court may or may not presume the existence of the fact in question. >r example, where a person is shown to be in possession of stolen goods on after the theft, the court may presume that he was the thief himself : had knowledge of the fact that the property in question was stolen. 11 the presumptions stated in Sec. 114 are of this kind.

Presumptions of fact are also *rebuttable,* as their evidentiary effect ui be negatived by a contrary proof. When the court refuses to exercise s discretion, then it may call upon the parties to prove the fact by :ading evidence The court may even require further proof of the fact resumed.

b) Presumption of Law *{'Shall Presume')*

Wherever it is laid down that "the court shall presume a fact", it means hat the court must regard such fact as proved, unless and until it is lisp roved (Sec. 4).

Presumptions of law are *arbitrary* inferences which the law expressly direct the judge to draw from the particular facts. These presumptions are aothing,but deductions drawn from human experience and observation, and expressed in the form of artificial rules. These presumptions are always *obligatory,* i.e., the court has no option in the matter, and is bound to take the fact as proved, unless the party interested in disproving it produces sufficient evidence for that purpose. Thus, if the opposite party is successful in disproving it, the court shall not presume the fact.

Examples of such presumptions include Sees. 79-85, 89, Sec. 111A. Thus, the court shall presume the accuracy of maps/plans made by a Government authority. All the presumptions stated in Sec. 118 of the Negotiable Instruments Act are presumptions of law.

There are two *kinds* of presumptions of law: *rebuttable* ('shall presume') and *irrebuttable* ('conclusive proof).[5]

Rebuttable Presumption	Irrebuttable Presumption ('Conclusive prooP)
(i) It means a presumption which can be overthrown by a contrary evidence.	(i) It is drawn so conclusively that no contrary evidence is allowed. It is *Juris et de jure*, i.e., incapable of rebuttal.
(ii) The court regard such fact as proved unless and until it is disproved. The court, here, dispenses with the necessity of formal proof (Sec. 4).	(ii) The court shall on proof of one fact regard the other as proved (when one fact is declared to be conclusive proof of another) and shall not allow evidence to disprove it (Sec.4).
(iii) *Examples* - A person not heard of for 7 years is dead, or that a bill of exchange has been given for value. Sec. 105 (burden of proving that case of accused comes within exceptions) and Sec.]14-A (presumption as to absence of consent in certain prosecutions for rape).	(iii) *Examples* - A child under a certain age is incapable of committing any crime (Sec.82, IPC). Sec.41 (final judgement in probate, matrimonial, admiralty or insolvency jurisdictions are conclusive in certain respects), Sec.112 (conclusive proof of legitimacy) and Seel 13 (valid cession of territory).

'Presumption' and 'Proof[6]

"ProoP 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

5. What is conclusive presumption of law and how its evidentiary value is different from that of other kinds of presumptions? [C.LC-94]
6. 'Presumptions and onus of proof are two sides of the same coin'. Elaborate. *[LC. 11-93]*

evidence, admissions or judicial notice. Thus, presumptions are the *means* nd proof is the *end* of judicial inquiry. Presumption is merely an inference.

A presumption is not in itself evidence but only makes a *prima facie* ase for party in whose favour it exists. It indicates the person on whom he burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence. A party in whose favour a fact is resumed is relieved of the initial burden of proof. The court presumes he existence of the fact in his favour and may act on it unless the :ontrary is shown.

Presumption and onus of proof are two sides of the same coin, because the burden of disproving a fact lies on the one party, the court nust presume the fact in favour of the other. A rule of burden of proof is lothing but a rule of presumption.

Presumptions Relating to Documents (Sees. 79-90)

Discussed earlier.

Presumption of Innocence and Sec. 105

Though the accused is presumed to be innocent, but Sec. 105 raises a presumption against the accused and also throws a burden on him to rebut the said presumption. According to Sec. 105, 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 I.P.C., is upon him and the court shall presume the absence of such circumstances.

Presumption of Survivorship or Burden of Proving Death (Sees. 107-108)

There is a general presumption of continuity of things. Sec. 107 provides that when a person is shown to have existed within the last 30 years, the presumption is that he is still alive and if anybody alleges that he is dead, he must prove that fact. This presumption is, however, not a very strong one. According to Sec. 108, if a person is not heard of for 7 years, the presumption is that he has died, and, if any body alleges that he is still alive, he must prove that fact. Thus, seven years' absence creates rebuttable presumption of death.

Presumption as to Offences in Disturbed Areas (Sec. 111-A)

Under this section (introduced in 1984), if a person is accused of having committed any offence under Sees. 121,121-A, 122 or 123 of the Indian Penal Code, or of a criminal conspiracy or attempt to commit, or abetment under Secs.122-123, in any declared 'disturbed area', etc. and it is shown that such person had been in that area when firearms or explosives were used to attack or resist armed forces, etc., it shall be presumed, unless the contrary is shown, that such a person had committed the offence.

Presumption of Legitimacy (Sec. 112)

See under the Questions Section.

Proof of Cession of Territory (Sec. 113)

A Government Notification that any portion of British Territory has before the commencement of the Government of India Act, 1935 been ceded to any Native State, Prince or Ruler, shall be *conclusive proof* that a valid cession of such territory took place at the date mentioned in such notification.

Presumption as to Abetment of Suicide by a Married Woman (Sec. 113-A)

Sec. 113-A deals with the question of abetment of woman's suicide by her husband or any of his relatives. In such cases, a presumption arises (the court *may* presume) that such a suicide has been abetted by the husband or his relatives, if the following two conditions are satisfied:-

(i) The suicide was committed within a period of 7 years from the date of her marriage.

(ii) Her husband, or his relatives, has subjected her to 'cruelty' (as the term is defined in Sec. 498-A, IPC).

Such a presumption must, however, be drawn by the court after having regard to all the other circumstances of the case. Once these things are proved, abetment of suicide is presumed to exist. It will then be for the husband or his relatives to prove that the suicide in question was the woman's personal choice. If it is not a case of suicide, but of accidental death, the presumption of abetment does not arise *[Suresh* v *State of Maharashtra,* 1992 CrLJ 2455; *Hans Raj* v *State ofHaryana* (2004) 12 SCC 257].

Sec. 113-A (inserted by.1983 Criminal Law Second Amendment Act) does not create any new offence, or any substantive right, but merely a matter of procedure and as such is *retrospective* in operation. In a dowry death case, presumption that suicide was attracted by the accused-husband of the deceased could be drawn only when prosecution has discharged the initial onus of proving cruelty. In *State ofW.B.* v *Orilal Jaiswal* (AIR 1994 SC 1418), held that the requirement of proof beyond reasonable doubt in dowry death cases does not stand altered even after the introduction of Sec. 498, IPC and Sec. 113-A of the Evidence Act.

Where the wife's suicide took place more than a month-and-a-half after the demand for dowry was met, and matters were settled, it was held that it would be unsafe, as well as unjust, to invoke the presumption of guilt under Sec. 113-A *(Samir* v *State of West Bengal,* 1993 CrLJ 134). However, *in Arjun Kusbwaha* v *State o/M.P.,* 1999 CrLJ 2538, where the relations with the husband were strained because of dowry demands; the wife poured kerosene on herself and the husband went on with his provocative language, it was held that this amounted to instigation of suicide.

Presumption as to Dowry Death (Sec. 113-B)

Under Sec. 113-B, 'when the question is whether a person has committed the 'dowry death' (as the term is defined in Sec. 304-B, IPC) of a woman, and it is shown that, soon before her death, she had been subjected by that person to cruelty or harassment in connection with any demand for dowry, the court *shall* presurne-that such a person had caused the dowry death. The burden is on the accused to rebut this presumption'.

In a dowry death case, it is a condition precedent to the raising of presumption that the deceased married woman was subjected to cruelty or harassment for and in connection with the demand for dowry soon before her death. The prosecution is required to give evidence of these circumstances so that the court draws a presumption of dowry death. Presumption as to dowry death begins to operate if prosecution is able to establish circumstances set out in Sec. 304-B, IPC *[State ofKamataka vM.V. Manjunathagowda* (2003) 2 SCC 188].

Where the death was by strangulation and evidence was available to show that dowry was being demanded and the accused husband was also

;\

subjecting his deceased wife to cruelty, it was held that the presumption under the section applied with full force making the accused liable to be convicted under Sec. 304-B, IPC {*Hem Chand* v *State of Haryana* AIR 1995 SC 120). In a case, presumption under the section was drawn from the drinking, late-coming and beating habits of the husband *[P. Bikshapathi* v *State ofA.P.*, 1989 CrLJ (NOC) 52 (A.P.)].

Where the prosecution was able to prove that the deceased woman was last seen alive in the company of the accused, she being at the moment in his special care and custody, that there was a strong motive for the crime and that the death in question was unnatural and homicidal, it was held that by virtue of Sec. 106 of the Evidence Act the burden of showing the circumstances of the death was on the accused as those circumstances must be specially known to him only *[Amarjit Singh* v *State of Punjab,* 1989 CrLJ (NOC) 13 P&H].

Presumption under Sec. 113-B does not stand automatically rebutted merely because the accused had been acquitted under Sec. 302, IPC *[Alamgir* v *State of Assam* (2002) 10 SCC 277].

Presumption of Existence of Certain Facts[7] (Sec. 114)

"The court *may* presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of (a) natural events, (b) human conduct, and (c) public and private business, in their relation to the facts of the particular case".

Sec. 114 is based on the maxim that 'all are presumed to have been done correctly and regularly'. Sec. 114 authorises the court to make certain presumptions of facts, without the help of any artificial rules of law. Such presumptions of facts are always rebuttable (i.e. can be disproved by a contrary fact). Looking at so many factors if the court thinks that a particular fact should exist, it presumes the existence of the fact. If, for example, a person refuses to answer a question the court may presume that the answer, if given, would have been unfavourable to the person concerned. There is the presumption that every person is presumed to

Write a short note on: Presumptions of facts under the Indian EvWence Art, 1872.

intend the natural consequences of his act, that every person charged ih a crime is innocent, etc.

In *M. Narsingha Rao* v *State ofAndhra Pradesh* (AIR 2001 SC 318), e Apex Court observed: Sec. 114 of the Evidence Act gives absolute scretion to the court to presume the existence of certain facts in the anner specified therein. Presumption is an inference of a certain fact awn from other proved facts. While inferring the existence of a fact sm another the court is only applying a process of intelligent reasoning, bat a prudent man would do under similar circumstances? Presumption not the final conclusion to be drawn from other facts. But it could be final if it remains undisturbed. In that event the court can treat the esumption as equivalent to proof. But it would be unsafe to use one •esumption to draw another discretionary presumption.

In *State ofKarnataka* v *David Rozario* (2002) 7 SCC 728, it was held at presumptions of facts are assumptions resulting from one's experience 'the course of natural events of human conduct and human character, and 1 those which one is entitled to make use of or has to make use of in the dinary course of life as well as the business of courts.

lllustrations - The court may presume:

(a) That a man 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 (if he cannot account for possession specifically but is continually receiving such goods in the course of his business, the court shall have regard to such fact) *[Praveen Kumar* v *State ofKarnataka* (2003) 12 SCC 199].

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars (if A, a person of the highest character, is tried for a murder, and, B, a person of equally good character, admits and explains the common carelessness of A and himself, the court shall have regard to such fact). Further, if a crime is committed by several persons; A, B and C three of the criminals, kept apart from each other, each gives an account of the crime implicating D and the account corroborate each other in such a manner as to render previous concert highly improbable, the court shall have regard to such fact).

(c) That a bill of exchange, accepted or endorsed, was accepte or endorsed for good consideration (if the drawer of a bill is a ma of business and the acceptor is a young man completely under th drawer's influence, the court shall have regard to such fact).

(d) That a thing or state of things which has been shown to be existence within a period shorter than that within which such thi or state of things usually cease to exist, is still in existence (if it proved that a river ran in certain course 5 years ago but it is knov that there have been floods since that time which might change course, the court shall have regard to such fact).

(e) That judicial and official acts have been regularly performed (if t judicial act was performed under exceptional circumstances, t court shall have regard to such fact).

(f) That the common course of business has been followed particular cases (if the usual course was interrupted bj disturbanc the court shall have regard to such fact).

(g) That evidence which could be and is not produced would, produced, be unfavourable to the person withholding it (if a m refuses to produce a document which would bear on a contrac small importance on which he is sued, but which might alsc inju the feelings and reputations of his family, the court shal ha regard to such fact).

(h) That, if a man refuses to answer a question which he is compelled to answer by law, the answer, if given, would unfavourable to him (if the answer might cause loss to hir matters unconnected with the matter in relation to which i asked, the court shall have regard to such fact).

(1) That, when a document creating an obligation is in the hands the obligor, the obligation has been discharged (if it appears obligor may have stolen it, the court shall have regard to s fact). Thus, where the instrument of debt and the security it are in the hands of the debtor, the presumption would be the debt must have been discharged; where a promissory no in the hands of the person who made it, the presumption is he must have paid it off *[CITI Bank N.A.* v *Standard Char*

Bank (2004) 1 SCC 12; *Chaudhri Mohd. Mehdi Hasan Khan* v *Mandir Das* (1911-12) 39 IA 184]. ;

The presumption permitted by *Must, (a)* does not arise until the prosecution established the following facts: (i) the ownership of the articles in stion, (ii) tkeir theft, (iii) their conscious, exclusive and recent possession the accused. A long period may be taken to be recent; in a case, two es of woolen cloth were stolen from M. Two months after the theft, y were found in possession of P, the presumption is that P stole it or eived it knowing it to be stolen.

If the articles were kept at places accessible to public it can not be erred that the accused were not in possession of those articles when :y in their confession stated that they had concealed the articles at those ices and they further led the investigation to those places *[Limbaji* v *tte of Maharashtra* (2001) 10 SCC 340]. The presumption of robbery s been drawn as against the appellant in view of the fact that he was und in possession of the looted property the next day, which could be d to be soon after the incident of robbery which may have taken place e previous day *[George* v *State of Kerala* (2002) 4 SCC 475].

In reference to illustration (e), the Supreme Court has observed: A esumption has to be drawn under Sec. 114(e) that the competent authority ust have before it the necessary materials which *prima facie* establish the mmission of the offence charged and that the authority had applied its ind before tendering the consent *{State of Bihar* v *P.P. Sharma* AIR 1991 *2* 1260). Death in custody does *not* by itself create a presumption of urder by police. When an official act is proved to have been done, it will : presumed to have been regularly done. Presumption can be drawn in vour of police officers as well *[Devender Pal Singh* v *State (NCT) of Delhi* 002) 5 SCC 234]. In *Shahnaz* v *Dr. Vijay* (AIR 1995 Bom 30), after a dicial divorce, the wife was not permitted to say that her signature on the ivorce petition was taken by force.

Further, the presumption under Sec. 114 (e) is limited to the *regularity* f the act done and does not extend to the *doing* of act itself. For sample, if a notification is issued under the powers given by law, there a presumption that it was regularly published and promulgated, but lere is no presumption that it was issued according to **that terms** of

section which empowered it. The correctness of procedure, but not the factum of act, is presumed under the illustration.

As far as presumption under *Must, (f)* is concerned, the maximum use of it is to be seen in connection with the delivery of letters. Where a letter is shown to have been posted and it is not returned through the dead letter office, the presumption is that it has been delivered. Similarly, there is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. Of course, the presumption is rebuttable.

The Supreme Court has observed, commenting on illustration (g), that an adverse inference against a patty for his failure to appear in court can be drawn only in absence of any evidence on record. Where the admission of the parties and other materials on record amply prove the point in issue, no presumption can be raised against the person who has failed to appear in the court *[Pandurangjivaji Apte* v *Ramchandra,* (1981) 4 SCC 569]. If evidence on record being already sufficient to establish the prosecution case, the failure to examine another witness did not affect the credibility of the case *[Rajendra Kumar* v *State ofU.P.* (1998) 9 SCC 343]. The court should not mechanically draw an adverse inference merely on the ground of non-examination of a witness, even if the witness is a material one.

Non-production of "daily police diary" or "inquest report" or "post-mortem report" was not taken to be supporting a presumption against the prosecution. Similarly, no adverse inference car oe drawn against the prosecution if it merely fails to obtain certain evidence e.g. opinion of expert not taken. An adverse presumption cannot be drawn where the party supposed to be in possession of the best evidence has neither been called upon to produce by the opposite party nor directed by the court to do so *(Oriental Fire & Gen. Ins. Co.* v *Bondili* AIR 1995 A.P. 268). If a person had no knowledge about the importance of the document and he fails to produce it, no adverse presumption should be made against such person.

LEADING CASE: LIMBAJI V STATE OF MAHARASHTRA (AIR 2002 SC 491)

Facts and Issue - In this case, the appellants were charged under Sections 302 and 34; 392 with 34, IPC for committing murder and robbery. They were charged of committing the murder of the deceased and robbing him of ornaments worn by him. The case rests on the circumstantial evidence of recovery of ornaments worn by the deceased, pursuant to the information furnished (confession) by the accused to the police. The High Court pressed into service the presumption under Sec. 114(a) of the Evidence Act in support of its conclusion. It is the correctness of that view that falls for consideration before the Supreme Court. *Observations and Decision* - The Supreme Court observed that: Among the illustrations appended to Sec. 114 of the Evidence Act, the very first one is what concerns us in the present case: "the court may presume - that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession".

Taylor in his treatise on the *Law of Evidence* has this to say on the nature and scope of the presumption similar to the one contained in Sec. 114(a): "The possession of stolen property recently after the commission of a theft, is prima facie evidence that the possessor was either the thief, or the receiver, according to the other circumstances of the case, and this presumption, when unexplained, either by direct evidence, or by the character and habits of the possessor, or otherwise, is usually regarded by the jury as conclusive. The question of what amounts to recent possession varies according to whether the stolen article is or is not calculated to pass readily from hand to hand."

In the present case, the presumption under Sec. 114, illustration (a) could be safely drawn and the circumstance of recovery of the incriminating articles within a reasonable time after the incident at the places shown by the accused unerringly points to the involvement of the accused. The appellants who were in a position to explain as to how they could lay their hands

on the stolen articles or how they had the knowledge of concealment of the stolen property, did nothing to explain on the other hand.

The fact that within a short time after the murder of the deceased the appellants came into possession of the ornaments removed from the person of the deceased and the first accused offered one of the stolen articles for sale on that very day and the further fact that the other articles were found secreted to the knowledge of the appellants coupled with non-accounting of the possession of the articles and the failure to given even a plausible explanation vis-a-vis the incriminating circumstances would go to show that they were not merely the receivers of stolen articles from another source but they themselves removed them form the person of the deceased. Thus, the presumption to be drawn under illustration (a) to Sec. 114 should not be confined to their involvement in the offence of receiving the stolen property under Sec. 114 but on the facts of the case, it can safely go beyond that.

It would be safer to so extend the presumption if there are additional incriminating circumstances reinforcing the same. It is not the prosecution case that the appellants carried any weapon with them or that the injuries were inflicted with that weapon. There is every possibility that one of the accused picked up the stone at that moment and decided to hit the deceased in order to silence or immobilize him or all the three accused might have decided to kill him instantaneously for whatever reason it be. However, if the idea was to murder him and take away the ornaments from his person there was really no need to forcibly snatch the earrings before putting an end to the victim. It seems to us that there was no premeditated plan to kill the deceased.

In the instant case, medical evidence showing that the ornaments worn by the deceased were forcibly removed from the person of the deceased by inflicting injuries in the process. Other evidence showing that the accused persons came in possession of the ornaments soon after the incident and divided it among themselves, and, stolen articles were recovered by the

police within a reasonable time on the basis of confession made by the accused. So, presumption can be stretched to commission of offence of robbery by the accused but the presumption cannot be further stretched to commission of murder also by them when there was reasonable scope for two possibilities and the coun is not in a position to know actual details of the occurrence. While drawing basis of recent possession of belongings of the victim with the accused, the court must adopt a cautious approach and have an assurance from all angles that the accused not merely committed theft.

The presumption of commission of offence of robbery or murder or both can be extended under the main part of Sec. 114 if it is part of the same transaction, which is not so in the present case. Hence, the accused liable to be convicted under Sec. 394 (Robbery) read with Sec. 34, IPC but not under Sec. 302 (Murder), IPC on the basis of extended presumption under Sec. 114 of the Evidence Act.]

Human Conduct: Presumption of Marriage

strong presumption arises in favour of wedlock where the partners (a an and woman) have lived together for a long spell (continuous ihabitation) as husband and wife, and treated as such by the relatives id friends. Although the presumption is rebuttable, a heavy burden lies i him who seeks to deprive the relationship of legal origin; law leans in vour of legitimacy and frowns upon bastardies.

The presumption was held to be *not* applicable where a married oman lived with another man for a long period and gave birth to lildren even during the life-time of her husband *[Lolo* v *Durghatiya* AIR 301 M.P. 188].

Presumption in Rape Cases (Sec. 114-A)

xcording to Sec. 114-A, 'where the question before the court (in a rosecution for rape under Sec. 376 (2), IPC and where sexual intercourse y the accused is proved) is whether an intercourse between a man and woman was with or without consent and the woman states in the court tiat it was against her consent, the court *shall* presume that there was no

consent'. The burden of proving becomes shifted to the accused. If he is not able to prove that there was consent, he becomes guilty.

The presumption under Sec. 114-A arises when the accused who commits rape is a police officer, a public servant, an officer of jail, Hospital, or he commits rape on a woman knowing that she is pregnant or when rape is a gang rape. This section has been added for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape.

Sec. 114-A was introduced because of the increasing number of acquittals of accused when the victim of rape is an adult woman. If she was really raped, it was very difficult for her to prove absence of consent. The new provision (inserted in 1983) has brought about a radical change in the Indian law relating to rape cases. This presumption would apply not only to rape cases, but also to cases of "attempted rape", as for instance, when the victim was disrobed and attempts were made to rape her, which however could not materialise because of intervening circumstances *(Fagnu Bhai* v *State ofOrissa*, 1992 Cr Lj 1808).

In a case of alleged 'gang rape' of a girl above 16, the F.I.R. was lodged 7 days after the occurrence. The girl admitted that she was desirous of marrying one of the accused, and the chemical examiner's report ran counter to any sexual intercourse, in the circumstances, it was held that the presumption under Sec. 114-A could not be invoked *{Sbarrighan* v *State ofM.P.*, 1993 Cr. LJ 120).

FURTHER QUESTIONS

Q.1. (a) "The presumption of legitimacy under Indian Evidence Act car be displaced by a strong preponderance of evidence and no by mere balance of probabilities." Discuss in the light o decided cases. *[D.U.-2009*

A Hindu woman was married to S in October 1986. S died it June 1990. She then married another man K in July 1990 an< gave birth to a son in September 1990. Can it be lawfull' claimed that the son is the legitimate son of K.

X and Y were married in October 1999. Their divorce took place in the month of March 2000. Y had conceived during the subsistence of marriage between her and X. She (Y) married T in the month of May 2000 and a baby was born in the month of July 2000. T disputes the paternity of the child. Advise T accordingly. *[D.U.-2007/2011][C.L.C.-2006]*

(b) Soon after marriage the husband and wife were estranged. They continue to live in the same house, but had separate bed-rooms and kitchen, etc. Just over 10 months after marriage, a daughter was born to the couple. Suspecting the fidelity of his wife the husband disclaimed the daughter right from the time of her birth. Can the husband adduce evidence of:

(1) Blood test to dispute the paternity of the son.

(2) Adulterous relationship of his wife, in order to dispute the presumption of legitimacy of the son?

[C.LC.-91/94/95/96, LC. 1-94/95/96]

Naresh was successfully prosecuted for adultery u/s 497 of I.P.C., 1860, with Lata, wife of Mahesh. Lata gave birth to a daughter, who was conceived around the alleged period of adultery. After getting divorce from Lata on the ground of adultery, Mahesh wants the court to order blood test so tfiat child may be declared illegitimate? Can the court do so?

[D.U.-2007]

A.l. (a)Presumption of Legitimacy: Birth during Marriage Conclusive Proof of Legitimacy (Sec. 112)

According to Sec. 112, the fact that any person was born:

(1) during the continuance of a valid marriage between his mother and any man, or

(2) within two hundred and eighty days after its dissolution (the mother remaining unmarried), is *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 begottenj

Maternity is a fact and paternity is a matter of inferences or surmises. Sec. 112, which applies only to a *married* couple, lays down the rule for the proof of the paternity of an individual. *"Semper praesumiter pro legitimatione puerorum"* (it is always to be presumed that children are legitimate - legal maxim). Sec. 112 is an instance of law furthering social objectives by leaning against the tendency to bastardize the child. It does so by making a conclusive presumption in favour of the legitimacy of the child^The *basis* of the rule contained in Sec. 112 seems to be a notice that it is undesirable to enquire into the paternity of a child whose parents have access to each other.

The presumption of legitimacy is a presumption of law, not a mere inference to be drawn by a process of logical reasoning from the fact of marriage and birth or conception during wedlock. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.

The following important points, regarding Sec. 112, may be noted:-

(j) This section refers to thejxnnt of time of the birth of the child as the deciding factor and not to the time of conception of that child; the latter point of time has to be considered only to see whether the husband had no access to the mother.

(ii) As legitimacy involves 'sexual intercourse' between husband and wife, there is therefore, a presumption when a child is conceived and born during marriage that such intercourse took place at a time when according to the laws of nature, the husband could be the father of child,

(iii) The presumption applies with equal force even where the child is born within a few days or even hours after the marriage. Further, it is immaterial that the mother was married or not at the time of the conception.

SethuyPalani[lL'R (1925) 49 Mad 523] - A Hindu woman was married to S in Oct. 1903. She was divorced by him in June 1904. She married another man, T, in July 1904 and gave birth to a son in Sept., the same year. Thus, the conception was formed when she was the wife of one and birth took place when she was the wife of another man.

The child was held to be the legitimate child of *second* husband, the court relying upon the fact that no proof was available of the fact that T could not have had access to her even when she was the wife of S. The marriage of the mother to one person is not considered to be a proof of the lack of access to any other person.

If a man marries a woman not knowing that she is pregnant, he could, by showing that he could not have had access to the woman when the pregnancy commenced, make out that the child is not his. But if a person knowing that a woman is pregnant marries her, the child of woman though born immediately after the marriage becomes in law his child unless the man proves that he had no access to the woman when he could have been begotten.

(iv) Sec. 112 appears to provide a simple presumption of legitimacy which applies to children born during a marriage whether conceived before or after the marriage took place, and to children conceived during the marriage, whether born before the marriage is dissolved by the husband's death or otherwise..

(v) Under Sec. 112, the only way to rebut the presumption is the proof of "non-access" between the parties to marriage[8] *(Kanti Devi* v *Posbi Ram* AIR 2001 SC 2226). The phrase "non-access" implies non-existence of opportunity for physical intercourse. As the presumption of legitimacy is highly favoured by law it is necessary that proof of non-access must be clear and satisfactory.

The presumption of legitimacy will not be allowed to be rebutted by the proof that wife had adulterous relationship. Proof *per se* that the woman was living with the paramour is no evidence of non-access by the husband. It may be noted that if sexual intercourse is proved the law will not permit an enquiry whether the husband or some other man was more likely to be the father of the child, the presumption of legitimacy then becomes irrebuttable one.

8. Though Sec. 112 of the Evidence Act, deals with conclusive proof however, takes within its fold rebuttable presumption. Elucidate. *[C.L.C.-2006]*

In *Chilukuri Venkateswarlu* v *Chilukuri Venkatanarayana* (AIR 1954 SC 176), the husband tried to show that he had provided separate residence to his second wife and thereafter never visited her. The wife alleged visits by the husband and the husband being not able to prove his allegation, a child born by the second wife was presumed to be a legitimate child.

Even the illness of the husband may not be sufficient to displace the presumption of access, unless the illness is totally disabling. The word "access" means effective access as is shown by the use of the words 'when he could have been begotten' and physical incapacity to procreate amounts to non-access within the meaning of this section. In *Chandramatbi* v *Fa~betti Ba/an* (AIR 1982 Ker. 68), a married woman became pregnant even after her husband had undergone vasectomy operation. The court held that vasectomy was not sufficient by itself to over throw the presumption of legitimacy. No proof was offered to show whether the operation was successful. Nor there was any evidence regarding the fact that parties had no access before the conception.

(vi) *Biomedical tests'*- It has been held that only way to rebut presumption under Sec. 112 is by proving non-access, and biomedical evidences like blood test, DN A test, etc. *cannot* be allowedjtGwtoz? *Kundu* v *State of W.B.* AIR 1993 SC 2295; *lushar Roy* v *Sukla Roy,* 1993 Cr LJ 1659 (Cal)]. Where, however, such evidences are available, it can be used as a circumstantial evidence.

LEADING CASE: GOUTAM KUNDU v STATE OF W.B. (AIR 1993 SC 2295)

The courts do not normally order anybody to submit himself for blood test. No one can be compelled to give sample of blood for analysis. Where the presumed father of the child prayed for blood test of the child for the purpose of denying legitimacy (i.e. he was not the father of the child) and liability to maintenance, his prayer was not accepted. It was held that the only way to rebut presumption under Sec. 112 is by proving non-access, and biomedical evidences like blood test, DNA test, etc. cannot be allowed.

"The law presumes both that a marriage ceremony is valid and that every person is legitimate." Explain the provision with special reference to its brush with blood test, controversy. *[D.U-2010]*

The court pointed out that Sec. 112 is based on the maxim *Pater est quem nuptiae demonstrant* (he is the father whom the marriage indicates). It is an irrebuttable presumption of law that a child born during lawful wedlock is legitimate and that there was access between the parents. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of a probabilities.... There must be a strong *prima facie* case in that the husband must establish non-access - to dispel the presumption arising under this section. Access_aod Non-access mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation^

In England, a judge of the High Court has power to order a blood test whenever it is in the best interests of the child. However, the court has no power to order a blood test against the will of the parties; the consent is must. But, if an adult unreasonably refuses to have a blood test, or to allow a child to have one, it is open to the court in any civil proceedings to take his refusal as evidence against him, and may draw an inference therefrom adverse to him *[B.R.B. vJ.B.* (1968) 2 All ER 1023]. Blood group serology, using proven genetic marker systems, represents the most accurate scientific information concerning paternity and is so recognized in the United States and a number of European countries. Laws have been passed in these countries providing the courts with statutory authority to order blood testing in disputed paternity cases.

But, in India there is no special statute governing this. Neither the Criminal Procedure Code nor the Evidence Act empowers the court to direct such a test to be made. The Kerala High Court in *Vasu*rv *Santha*.(1975, Kerala Law Times, p. 533) observed: "A special protection is given by the law to the status of legitimacy in India. The law is very strict regarding the type of evidence which can be let in to rebut the presumption of legitimacy of a child. Even proof that the mother committed adultery with any number of men will not of itself suffice for proving the illegitimacy of the child. If she had access to her husband during the time the child could have been begotten the

law will not countenance any attempt on the part of the husband to prove that the child is not actually hisjThe presumption of law of legitimacy of a child will not be lightly repelled." The evidence of non-access for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. The standard of proof in this regard is similar to the standard of proof of guilt in a criminal case.

in the present case, the Apex Court observed: The rigours imposed by the Evidence Act are justified by considerations of public policy for there are a variety of reasons why a child's status is not to be trifled with. The stigma of illegitimacy is very severe and we have not any of the protective legislations as in England to protect illegitimate children. No doubt, this may in some cases require a husband to maintain children of whom he is probably not their father. But, the legislature alone can change the rigour of law and not the court. The court cannot base a conclusion on evidence different from that required by the law or decide on a balance of probability which will be the result if blood test evidence is accepted. Further, marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality .

I*n Hargovind Spui* v *Ramdulari* (AIR 1986 M.P. 57) it was held: "The blood grouping test is a perfect test to determine questions of disputed paternity of a child and can be relied upon by courts as a circumstantial evidence. But no person can be compelled to give a sample of blood for blood grouping test against his will and no adverse inference can be drawn against him for this refusal; In *Smt. Dukhtar Jaban* v *Mohammed Farooq* (AIR 1987 SC 1049) it was observed that the courts in general incline towards upholding the legitimacy of a child unless the facts are so compuls've and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father.

In the present case, the court concluded:

(i) The courts in India cannot order blood test as a matter of course.

(ii) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(iii) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Sec. 112.

(iv) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(v) No one can be compelled to give sample of blood for analysis, the reason being that this test is a constraint on one's personal liberty.

Comments - The evidence of blood grouping test cannot be received by the court as long as legitimacy is a matter of conclusive proof. The only permissible evidence is non-access between the parents at a time when the child could have been conceived, and this in the present conditions, it is impossible to establish. At the time when the section was drafted in 1872, probably such non-access could have been established by showing that the husband was undergoing imprisonment or that he was serving in the army and engaged in actual action in a foreign country, at the time when the child might have been conceived. But today, since human rights activists encourage release of the prisoners on parole and even periodic conjugal relations in prison such non-access cannot now be established.

The husband who wants to disown the child must prove impossibility. In the present day life it is almost impossible for a father to prove that it was impossible for him to have had access to his wife at the time of conception of the child. If that is so, it is submitted that the burden of proof would be as high as in a criminal case where the prosecution will have to prove the case in a case of circumstantial evidence beyond all reasonable doubt

[Kamti Devi v *Poshi Ram* (2001) 5 SCC 311] *[See,* Vepa P. Sarathi, *Law of Evidence,* Eastern Book Co., pp. 265-267 (2006)],

(vii) It may be noted that an admission by the wife that the child is *illegitimate* is admissible in evidence.

Decision of the first case *in question*

In the present case, the son has been born during continuance of valid marriage between his mother and another man, K. Unless K proves that he had no access to A during the time when the son was conceived, it can be lawfully claimed that son is the legitimate son of K *(Setbu* v *Palani).*

Decision of the second case in question

In the present case, the baby has been born during continuance of valid marriage between her mother (Y) and another roan, T. Unless T proves that he had no access to Y during the time when the baby was conceived, it can be lawfully claimed that baby is the legitimate child of T.

(b) A child born during the continuance of a valid marriage i; presumed to be legitimate. Under Sec. 112, the only way to rebu this presumption is the proof of '"non-access" between the partie to marriage. Thus, a blood-test report is not an admissible evideno *(Goittam Kundu* v *State ofW.B.).* Likewise, the presumption o legitimacy will not be allowed to be rebutted by the proof tha wife had adulterous relationship.

Q.2. Can a party successfully argue that certain fact recognised b the statute as conclusive evidence are different from conclusiv proof? Give reasons. [C.LC.-9I

A.2. Conclusive Proof v Conclusive Evidence

The distinction between the conclusive proof and conclusive evidence illustrated in the following case:

LEADING CASE: SOMWANTI v STATE OF PUNJAB (AIR 1963 SC 151)

In this case, the land belonging to the appellants was acquired by the Government of Punjab on the grounds of 'public purposes', after a notification in the official gazette. The petitioners contended

that the said action violate their fundamental rights under Article 19 to possess said land and carry on their trade, etc. And, the governmental declaration is 'conclusive evidence' only of a need and nothing more, and is not a 'conclusive proof.' The contention of the State government was that its opinion about 'public purposes' was a 'conclusive proof and court cannot go behind the question. The question is, when a fact is only 'conclusive evidence' as to existence of another fact, other evidence as to the existence of other fact is shut out or not.

The Supreme Court observed: The object of adducing evidence is to prove a fact. Since an evidence means and includes all statements which the court permits, when the law says that a particular kind of evidence would be conclusive as to existence of a particular fact, it implies that fact can be proved either by that or some other evidence which the court permits. Where such other evidence is adduced, the court could consider whether upon that evidence, the fact exists or not.

On the other hand, when evidence which is made conclusive is adduced, the court has no option but to hold that fact exists. Otherwise, it would be meaningless to call a particular evidence as 'conclusive'. A *'conclusive evidence'* shuts out any other evidence which would detract from the conclusiveness of that evidence.

The concept of '*conclusive proof* is defined under Sec. 4: 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.

In substance, therefore, there is no difference between 'conclusive evidence' and 'conclusive proof. In each, the *effect* is same i.e. making a fact non-justiciable (irrebuttable). The *aim* of both being to give finality to the establishment of existence of a fact from the proof of another.

In the present case, thus, the opinion or declaration of State government is conclusive proof or conclusive evidence,

and any further judicial probe is barred. The petitioners cannot lead evidence to disprove the irrebuttable presumption. *[Note:* Under Sec. 6 of the Land Acquisition Act, 1894, the State's declaration of land being required for a public purpose, is a 'conclusive presumption.']

Decision of the case in question

A party *cannot* successfully argue that certain fact recognised by the statute as conclusive evidence are different from conclusive proof.

9
Estoppel

According to the doctrine of estoppel there are certain facts which the parties are prohibited from proving. Estoppel is a principle of law by which a person is held bound by the representation made by him or arising out of his conduct. Estoppel is dealt with in Sees. 115 to 117 of the Evidence Act. While Sec. 115 contains the general principle of estoppel by conduct, Sees. 116 and 117 are instances of estoppel by contract. However, there are other recognised instances of estoppel, viz., The Indian Contract Act (Sec. 234), The Specific Relief Act (Sec. 18), The Transfer of Property Act (Sees. 41 and 43). Estoppels which are not proved by the Evidence Act may be termed 'equitable estoppels'.

Sec. 115. Estoppel[1]

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

1. Explain the doctrine of estoppel as enunciated in Sec. 115 of the Evidence Act. *[D. U. -2010\[L C. II-93S94/95I*

   Write a short note on Doctrine of Estoppel. *[C.LC.-2006I*

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..

Estoppel is not a rule of equity or law, but a rule of evidence which is based on the maxim *Allegans contraria non est audindus* (person alleging contrary facts will not be heard). Doctrine of estoppel is founded on the famous English case *Pickard* v *Sears* (1837) 6 A & E 475, stating the principle that it is inequitable and unjust to allow a person to deny the truth of a statement which he has made to another and the other person has acted on it believing it to be true. The object is to prevent fraud and secure justice between parties by promotion of honesty and good faithj

The principle says that a man cannot approbate and reprobate or that)a man cannot blow hot and cold at the same timejor that a man shall not be allowed to say one thing at a time and different thing at other time. It must be noted that estoppel is only a rule of civil action and has no application in criminal proceedings.

. Essential Ingredients of Sec. 115[2]

Three essential ingredients of Sec. 115 are:

(i) a representation is made by a person to another,

(ii) other person believes it and acts upon such belief thereby altering his position,

(iii) then in a suit, between the parties, the person who represented shall not be allowed to deny the truth of his representation, i

Representation

Representation of the existence of a fact may arise in any way - a declaration, act or omission. Anything done which has the effect of creating in the mind of the other a belief as to the existence of the fact represented will do. j

2. What are the essential conditions for the application of the rule of estoppel? [C.LC-95]

What a person, who sets up an estoppel against the other, must show? *[D.U.* -20071

The focus of law of estoppel is the position in law of party who induced to act.(Thus a person who is estopped (i.e. person making the presentation) may not have intention to deceive and may himself be ting under mistake or apprehension. The estoppel will nonetheless operate such cases also *[Surat Chunder Dey* v *Gopal Cbander Laha* (1892) 19 IA 203].

Representation of a mere intention cannot amount to an estoppel, representation as to the legal effect of an instrument (if not *ultra vires)* ill create an estoppel^A representation may also arise from an "omission" i do an act which one's duty requires one to do. An estoppel will arise hen the failure to perform one's duty has misled another and also the aty should be a kind of legal obligation. In *Mercantile Bank of India Ltd. Central Bank of India Ltd.* (1938) AC 287, an omission to stamp the :ceipts was held sufficient to create an estoppel. Estoppel by *negligence* is ased on the existence of a duty which the person estopped is owing to le person led into the wrong belief or to the general public of whom ie person is one.

Estoppel by conduct may be active or passive. Estoppel by *silence* or cquiescence arises only when there is a duty to speak or disclose.

llustrative cases - In *Secy, of State* v *Tatya Holkarhhe* government acquired uid of the respondent and paid compensation thereof. Later on, overnment discovered that the land actually belonged to it. The overnment sought to recover the amount paid. It was held that pvernment is estopped by its conduct.

In a case, a judge, who had showed high age in his certificates right rom the beginning of his career, sought to deny it by showing actual nunicipal birth-records, so as to retire at a later age. Held that the judge s estoppedYln another case, the wife was of Buddhist faith and the msband a Muslim. She sought a divorce under Buddhist law. Held that ;he was estopped from denying her earlier committal to Islamic law.

Reliance and Detriment

The second condition necessary to create an estoppel is that the plaintiff *tltered* his position on the basis of the representation and he would suffer a loss if the representer is allowed to resile from his statementjDetriment is a prerequisite of actionable promissory estoppel. Thus, a mere statement

of a person that he would not assert his rights does not create an estoppel unless it is intended to be acted upon and is in fact acted upon *{Sida Nitinkumarv Gujarat University* AIR 1991 Guj. 43). However, detriment is *not* necessary to create an estoppel against the State.

Where a Government licence was granted to a person to establish saw mill and he spent huge sums of money acting on the grant and the Government subsequently changed policy refusing to grant any further licences, the Government was held bound to grant that particular licence, though the policy may be revised for the future] *(Joyjit Das* v *State of Assam* AIR 1990 Gau. 24).

Certain candidates were admitted to recognised course in Physical Education for the purpose of appointment as physical training instructors in Government schools. The Government was not permitted to derecognize the course in reference to such candidates but had a right to do for the future *(Suresh Pal* v *State ofHaryana* AIR 1987 SC 2027).

Promissory Estoppel[3]

Doctrine of estoppel has gained a new dimension in recent years with the recognition of an equitable doctrine of 'promissory estoppel' both by English and Indian courts.jAccording to it, if a promise is made in the expectation that it should be acted upon in the future, and it was in fact acted upon, the party making the promise will not be allowed to back out of it^The development of such a principle was easy in Britain and USA, where estoppel is a rule of equity (common law), but in India, it is a rule of law, and terms of Sec. 115 must be strictly complied with.

The concept of promissory estoppel differs from concept of estoppel as contained in Sec. 115 in that representation in the latter is to an existing fact, while the former relates to a representation of future intentionj But it has been accepted by the Supreme Court as "advancing the cause of justice". Though such promise (future) is not supported in point of law by any 'consideration' (the basis of a contract), but only by party's conduct; however, if promise is made in circumstances involving legal rights and obligations, it is only proper that the parties should be enforced

3. Differentiate between estoppel u/s 115 and principle of promissory estoppel. *[D.U.-2007]*

to do what they promised. In cases, where government is one of the >arties, the court will balance the harm to public interest by compelling ;overnment to its promise and harm to citizen to allow government to jack out of it.... to see that the government does not act arbitrarily.

The doctrine has been variously described as "equitable estoppel", 'quasi estoppel" and "new estoppel". The doctrine is not really based jpon the principle of estoppel, but it is a doctrine evolved by equity in arder to prevent injustice where a promise made by a person knowing that it would be acted on.... it is inequitable to allow the party making the promise to go back upon it. The doctrine of promissory estoppel need not, therefore, be confined to the limitations of estoppel in the strict sense of the word *(M.P. Sugar Mills* v *State of U.P.* AIR 1979 SC 61JJ

in that case, there was news in the papers that the State of U.P. would grant exemption from sales tax for 3 years to new industrial units. The petitioner wanted to set up a *vanaspati* plant. He applied to the Director of Industries and the Chief Secretary and both confirmed the availability of the exemption. The petitioner proceeded with his plans. But the State Government abrogated its policy of exemption. The petitioner contended that the Government should be estopped from going back upon the declared exemption. The Supreme Court allowed the petition, holding that the Government was bound by its declared intention. The court also held that detriment is not necessary to create an estoppel against the State. What is necessary is only that the promisee should have altered his position in reliance on the promise.*)*

A mere promise to make a gift will not create an estoppel. It would require a clear and unequivocal promise to import the doctrine into a matter. A leading institution intimated the sanction of a loan with a remark that it did not constitute a commitment on the part of the institution. Held that there was no promise to found the doctrine of promissory estoppel *(RabisankarvOrissa State Fin. Corpn.* AIR 1992 Ori. 93).

The promise of State Government to absorb its village officers whose posts had been abolished into other services on certain basis, was not afterwards permitted to be amended by inserting the requirement of age which was not there in the original commitment *(R.K. Rama Rao* v *State ofA.P.* AIR 1987 SC 1467).

In Madhuri Patel v AddL Commissioner, Tribal Development (AIR 1995 SC 94), the Supreme Court did not allow the benefit of promissory estoppel to a candidate who secured admission through false caste certificate. It was held that a candidate obtaining admission to educational course by fraud cannot claim to continue on the basis of estoppel.

Exceptions to the Doctrine of Estoppel

There are various *exceptions* to the doctrine of estoppel:-

(1) *No estoppel against a minor* -Where a minor represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, then in an action founded on contract, the infant is not estopped from setting up infancy as a plea. However, equity demands that he should not retain a benefit which he had obtained by his fraudulent conduct.

(2) *When true facts are known to both the parties* - Sec. 115 does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement *(Madnappa* v *Chandramma* AIR 1965 SC 1812)_;J

(3) *Fraud or negligence on the part of other party* ~ If the other party does not believe the representation but acts independently of such belief, or in cases where the person to whom representation is made is under a duty to make a further inquiry, the estoppel will not operate. Likewise, if there is a fraud on the part of the other party, which could not be detected by promisor with ordinary care, the estoppel will not operate. >

(4) *When both the parties plead estoppel* - If both the parties establish a case for application of estoppel, then it is as if the two estoppels *cancel* out and the court will have to proceed as if there is no plea of estoppel on either side. Further, if both sides had laboured under a mistake however *bona fide* or genuine, the plea of estoppel may not be available.

(5) *No estoppel on a point of law* - Estoppel refers only to a belief in *a. fact.* If a person gives his opinion that law is such and such and another acts upon such belief, then there can be no estoppel against the former subsequently asserting that law is different.

One cannot be estopped from challenging the effectiveness of something (e.g. partition deed) for want of law (e.g. registration). Representations under Sec. 115 should be of facts, not of law or opinion *{Union of India* v *K.S. S'ubramamam* AIR 1989 SC 662).

(6) *No estoppel against statut^ I sovereign acts* - A rule of law cannot be nullified by resorting to the doctrine oFestoppel. A person who makes a statement as to the existence of the provisions of a statute is *not* estopped, subsequently, from, contending that the statutory provision is different from what he has previously stated. For example, where a minor has contracted by misrepresenting his age, he still can afterwards disclose his real age. It is a rule of law of contract that a minor is not competent to contract and that rule would be defeated if a minor not permitted to disclose his real age. Hence there can be no estoppel against the provisions of a statute.j

Thus, if a person is given rights under a statute, and he gives them up it one stage voluntarily and later on tries to enforce those rights, no sstoppel can be invoked against him.(For example, under the Rent Control f\ct, the landlord can demand from his tenant only a fair/standard rent, [f a tenant agreed to pay a high rent and thereafter files a petition for fixing the fair rent, he won't be estopped.

Similarly, the statute provided that a tenant could not sublet and on subletting he was liable to ejectment. By a bilateral agreement the landlord allowed the tenant, to sublet as he did so. The landlord brought a suit for the ejectment of the tenant. It was pleaded that the landlord was estopped from suing for ejectment. Held that the right founded upon or growing out of an illegal transaction cannot be sustained; the ejectment was ordered.^

In *Bal Krishan* v *Rem University* (AIR 1978 M.P.86), it was pointed out if a candidate has appeared at an examination by misrepresenting facts (viz., a non-graduate appearing at law examination), the university will not be estopped from cancelling the examination if his candidature is against a rule of law.[3b]

An appointment which is void by reason of non-compliance of an applicable statute was held as not creating an estoppel against a statutory

3a. Can there be estoppel against statute. *[DU.-2010]*

3b. A question based on this case *[D.U.-2011]*

employer (corporation) from challenging its validity *[MP. State Agro Industrial Dev. Corpn.* v *S.C. Pandey* (2006) 2 SCC 716].

If the statute is solely for the benefit of a person he may waive his right or benefit, if he thinks fit or give up the rights of a personal nature created under an agreement, but he cannot waive a benefit conferred by a statute which has public policy for its object. It may be noted that a statement made under misapprehension of legal right is *not* estoppel.

The Supreme Court has laid down that it is well settled that there cannot be any estoppel against the Government in the exercise of its sovereign, legislative and executive functions. Where a local development authority announced a housing scheme and accepted applications under it, subsequendy finding that the scheme was in violation of the Master Plan cancelled it. It was held that to be free to do so without any shackles of promissory estoppel {*Housing Board Cooperative Society* v *State* AIR 1987 M.P. 193).

In *State ofRajasthan* v *Mahavir Oil Mills* (AIR 1999 SC 2302), when new industry was set up on basis of Incentive Scheme from Government and by relying on promise of benefits held out by it, the Supreme Court held that the State Government was bound by the promise held out by it in such situation. But this does not preclude the State Government from withdrawing the benefit prospectively even during the period of Scheme, if the public interest, so requires. Even in case the party had acted on promise, if there is any supervening public interest which requires that the benefit be withdrawn or the same be modified, that supervening public interest would prevail over promissory estoppels.

LEAPING CASE: R.S. MADNAPPA v CHANORAMMA[4]
(AIR 1965 SC 1812)

I In this case, in a suit for possession of plaintiff's half share of rcertain properties, a decree was passed in favour of the defendant No. 1 (brether of planing**)** with respect to the other half sharej , In appeal by the other defendants, it was contended that defendant No. 1 was estopped from claiming half share (decreed), because:

4. Explain the doctrine of Estoppel with special reference to the case of *R.S Maddanappa* v *Chandramma* (AIR 1965 SC 1812). *[LC.II-2006*

(i) he did not reply to a notice by the plaintiff asking him to join her in filing the suit,

(ii) he wrote a letter to his step mother disclaiming interest in suit property, and,

(iii) he attested a will executed by his father disposing of suit properties.

The Supreme Court *held* that: *6 \j&Pt*JLO£, <*

(i) the conduct in not replying to notice does not mean there was implied admission (or acquiescence) that he had no interest in properties, justifying an inference of estoppel,

(ii) when the father (defendant No. 2) knew about true legal position that he was not the owner of properties and his possession was on behalf of plaintiff and defendant No.l, the defendant No. l's letter to stepmother could not have created an erroneous or mistaken belief in father's mind about his title to the suit properties,

(iii) similarly, the reason of conduct of defendant No. 1 in attesting his father's will could not justify an inference of estoppels.

Thus, in this case, as the facts are known to both the parties, the cloctrine of estoppel cannot be invoked. Sec. 115 does not apply ^^ to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. Also, in the present case, there is no detriment to the other party by the actions of defendant No. l.]

Sections 116-117

Seaions 116 and 117 are *illustrative* of the principle of estoppel laid down in Sec. 115. These two sections deal with estoppels in specific cases.

Sec. 116. Estoppel of Tenant and of Licensee of Person in Possession

Sec. 116 provides that a person who comes into an immovable property . taking possession from a person who he accepts as the landlord, is *not* permitted during the continuance of tenancy to say as against his landlord that he had no title to the property at the commencement of the tenancy. Similarly, a person who comes upon any immovable property with the licence of the person in possession is not permitted to say afterwards that his licensor had no right to the possession of the property.}

In short, a tenant licensee is *not* permitted to deny the title of his landlord/ licensor. Where a landlord files a suit for ejectment and for arrears of rent the tenant who has been put into possession of the property in suit by the landlord *cannot* be allowed to say that the landlord had no interest in the property of *suit Moti Lai* v *YarMd.* AIR 1925 All. 275).

In *S.K. Sharma* v *Mahesh Kumar Verma* AIR 2002 SC 3294, the respondent was a railway servant. He was allotted premises in question as official residence. The respondent was estopped from alleging title of railway administration over premises in question till he was in possession in view of Sec. 116 of the Evidence Act. In *Rita Lai* v *Raj Kumar Singh* AIR 2002 SC 3341, the tenant was not allowed to defend because his only defence would have been to deny the title of the landlord.

The estoppel is confined to the state of things at the commencement of tenancy/ licence. The tenant/ licensee is always free to talk of the subsequent developments i.e. the landlord/ licensor has lost his title. After the tenancy had ceased, the tenant is free to deny the title of the landlord. Estoppel between landlord and tenant comes to an end when tenant openly restores possession by surrender *[T. Lakshmipatbi* v *P. Nithyananda Reddy* (2003) 5 SCC 150].fit may be noted that where tenancy is itself in question (i.e. created by fraud, coercion, etc.) the tenants are *not* estopped from disputing 'he landlord's title J

Rule of estoppel which governs an owner of an immovable property and his tenant would also *mutatis mutandis* govern a tenant and his sub-tenant [*Vashu Deo* v *Balkrishan* (2002) 2 SCC 50].

Sec. 117. Estoppel of Acceptor of Bill of Exchange, Bailee/ Licensee

Sec. 117 provides that no acceptor of a bill of exchange can deny that "the drawer had authority to draw such bill or to endorse it; but he may deny that the bill was really drawn by the person by whom it purports to have been drawn (it can always be shown that the drawer's signature was forged).

Likewise, no bailee/licencee can deny that his bailor/licensor had, at the time when the bailment/licence commenced, authority to make such bailment or grant such licence. But, if a bailee of the goods bailed to a person other than the bailor, he may prove that such person has a right to them as against the bailor^

[Note: Estoppel by attestation - An attestor ordinarily knows nothing of the contents of document, and so he is not estopped from denying the truth in document. But, if he knows about contents, then estoppel operates.]

Comparison of Estoppel with Other Concepts

Estoppel and Presumption - An estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving particular facts, whereas a presumption is a rule that a particular inference is to be drawn from particular facts, whoever proves them. In presumption, evidence to rebut it can be given, while in estoppel, the party is estopped from denying the truth.

Estoppel and Conclusive Proof- When a fact is conclusively proved, it is so against all the world. Estoppel operates only as a personal disability. In both, however, the very same fact cannot be denied (irrebuttable).

Estoppel and Admission - Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are either mistaken or untrue. But an estoppel creates an absolute bar. Further, estoppel being a rule of evidence, an action cannot be founded on it, whereas an action may be founded on an admission. It may be noted that admissions, if they have been acted upon by a third person, and if substantive rights have been created, operate as estoppel.

Estoppel and Waiver - Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver requires a positive relinquishment of something which one had before, but estoppel does not require any such thing as that; and a party waiving his rights may in circumstances reinforce them, while in estoppel it cannot be so. In waiver, there is full knowledge of facts, while in estoppel, even a mistake or omission has no effect.

Estoppel and Res Judicata - Res judicata precludes a man averring the same thing twice over in successive litigation, while estoppel prevents him saying one thing at one time and the opposite at another. Thus, res judicata prohibits a court from inquiring into a matter already adjudicated, while estoppel prohibits a party. Further, res judicata is not a rule of evidence, but a rule of procedure.

Estoppel and Fraud - An action cannot be founded on estoppel, while a fraud gives rise to a cause of action. Similar is the case of estoppel and breach of contract.

FURTHER QUESTIONS

Q.1. (a) A intentionally and falsely leads B to believe that a particular plot of land belongs to A and B under a *bona fide* belief buys *it for* five *lac* rupees. A, afterwards becomes the owner of the said plot of land and seeks to set aside the sale on the ground that at the time of the sale, he had no title. Can he be allowed to prove it? Decide. [C.LC.-97/93]

(b) A trustee, alleging that the trust property, consisting of land was his own property, mortgaged it. The mortgagee took possession in good faith, for valuable consideration, and without notice of trust. The mortgagee obtained a decree against the trustee for the sale of land and the land was sold in execution of that decree. The trustee, later, brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. Decide. [C.LC.-92]

(c) A, who was declared pass in B.A., on the basis of the result appeared in Civil Services Exams. However, before the Civil Services results came out the University communicated to A that his B.A. result was wrongly decided and that he had failed. A moved the court. Can the University adduce evidence to justify it revision of the results? *[C.LC.-95/96]*

Pending the results of his qualifying exam, X appeared for LL.B entrance test, of Delhi University and obtained rank 10 in the merit list. He was provisionally admitted to graduate course in law. In the meantime his result of qualifying exams was declared and he as per the marks card issued, secured 60% marks. He appeared in 1st and 2nd term of law and was promoted to 3rd term. The University issued a notice to Mr. X stating that it was by error that he was shown getting 80% in fact he obtained only 45% marks, hence was not qualified to be a student of graduate course in law. University proceeds to cancel his admission. Can the university do so? Give reasons. *[D.U.-2007/2009]* \.*I.*

(a)Estoppel

Estoppel is a principle of law by which a person is held bound by the representation made by him or arising out of his conduct. If, for example, i person made a statement intending that some other person should act lpon it, he will be estopped, i.e., will be prevented, from denying the truth if his statement once the other person has altered his position on the lasis of the statement.

The following conditions must be satisfied to bring a case within the scope of estoppel as defined in Sec. 115 *[Cbhaganlal Mehta* v *Haribbai 'atel* (1982) 1 SCC 223]:-

(i) There must have been a *representation* by a person to another person, which may be in any form - a declaration or an act or an omission.

(ii) Such representation must have been of the *existence of a fact,* and not of future promises or intention.

(iii) The representation must have been meant to have been *relied* upon.

(iv) There must have been *belief* on the part of the other party in its truth.

(v) There must have been some *action* on the faith of that declaration, act or omission. In other words, such declaration, etc., must have actually caused the other person to act on the faith of it and to alter his position to his prejudice or *detriment.*

(vi) The misrepresentation or conduct or omission must have been the *proximate* cause of leading the other party to act to his prejudice,

(vii) The person claiming the benefit of an estoppel must show that he was *not* aware of the true state of things. There can be no estoppel if such a person was aware of the true state of affairs or if he had means of such knowledge,

(viii) Only the person to whom the representation was made or for whom it was designed, can avail of the doctrine. The *burden of proving* estoppel lies on such person,

(ix) Where the plea of estoppel is not set up in the pleading, it *cannot* be availed of later,

(x) No action arises on the estoppel itself. It is not a cause of action. It may assist in enforcing a cause of action.

Decision of the case *in question*

A makes a false representation to B who believes it in good faith and acts upon it. By acting so, B has altered his position to his detriment. Thus, B can claim the benefit of an estoppel, as all the conditions of Sec. 115 are satisfied. B can retain possession of the land as its lawful owner, and A will be estopped from proving his want of title at the time of original case.

(b) The trustee has made a false representation, and the mortgagee has acted upon his representation in good faith. Thus, the doctrine of estoppel applies. The trustee cannot be now allowed to deny the truth of his earlier statement.

(c) Estoppel against Universities

The doctrine of estoppel has been allowed to .be invoked against a University.Jn *Univ.vfMadras* v*SundaraShetti* (1956) MLJ 25, the university was estopped from claiming that a student had not actually massed, but

at his mark sheet contained a mistake. The respondent (student) was clared successful in SSLC exams, got certificates and admitted in college, hile in senior class, he received a notice that his name was not in the t of SSLC holders. Thus, his name was removed from the college rolls. *dd* that it was a case of legal or equitable estoppel which satisfies actically all the conditions in Sec. 115. The university could not deny m his right, moreover there was no *mala fide* on the part of the spondent. The fact of a miscalculation of marks was within the special lowledge of the university and was not known to any other person, i

I The Supreme Court has held in *Sri Krishna* v *Kurushetra Univ.* **(AIR 1976 SC** 376), that once a candidate has been admitted to an examination s candidature cannot afterwards be cancelled even if his form carried rtain infirmities. The candidate is not guilty of fraud if he mis-state cts the truth of which the university could have discovered with ordinary

The Rajasthan High Court acted upon this principle in refusing amission to a University after 3-4 years to cancel the admission to a edical college on the basis that the candidate's declaration that he belonged i a scheduled caste was a false one *(Harpbool Singh* v *State* AIR 1981 Raj. . But, M.P. High Court did not raise any estoppel against a polytechnic hich had admitted a candidate on the basis of a false declaration that \ was a SC. The institution was allowed to cancel the admission because lere *was fraud* in him *(Israr Ahmad* v *State* AIR 1932 M.P. 205). The A.P. Igh Court has also taken the same view *(B. Venkata Rao* v *Principal, ndhra Medical College* AIR 1989 A.P. 159).

Where the mistake in making the marks-sheet was *apparent* in that te marks entered showed that the candidate failed, but the result column towed that he passed, there was no estoppel, and the Board could rectify te mistake. Similarly, no estoppel arose where a marks-sheet issued to :veral candidates with "passed" remark carried the impression of error ti the face *(Reetanjali Pali* v *Board of Sec. Education* AIR 1990 Ori. 90).

In Sanatan Gauda v *Berhampitr University* (AIR 1990 SC 1075), the jpeTlant candidate while securing his admission in Law College had Imittedly submitted his M.A. mark sheet along with the application for imission. The law college had admitted him. He pursued his study for vo years. The University had also granted him the admission card for

the pre-law and intermediate law examination. He was admitted to the final year of the course.

The University raised an objection about his eligibility at the stage of declaration of result of pre and intermediate stage. The University contended that since the appellant had not secured the required number of marks in the M.A. examination, he was not entitled to be admitted to the law course. The appellant had secured few marks in a particular paper of M.A. and the University relied on certain technical rules, which were challenged by the appellant. It was held that the University is clearly estopped from refusing to declare the result of the appellant or from preventing him from pursuing the final year course. The appellant had produced his mark sheet before the college authority with his application for admission, and cannot be accused of making any false statement or suppressing any relevant fact before anybody. It was the bounden duty of the University to have scrutinized the matter thoroughly before permitting the appellant to appear at the examination and not having done so it cannot refuse to publish hisresults.l

Decision of the first case in question

A has acted upon the representation by the University. The doctrine of estoppel clearly applies. The University is estopped, and cannot adduce evidence to justify it revision of the results.

Decision of the second case in question

X has acted upon the representation by the University. The doctrine of estoppel clearly applies. The University is estcpped, and cannot adduce evidence to justify it revision of the results.

10
Witnesses

“Witness" as Bentham said are the eyes and ears of justice. If the witness imself is incapacitated from acting as eyes and ears of justice, the trial ets putrefied and paralysed, and it no longer can constitute a fair trial, "he incapacitation may be due to several factors, like the witness being iot in a position for reasons beyond control to speak the truth in the ourt or due to negligence or ignorance or some corrupt collusion *[Zahira iabibullah Sheikh* v *State of Gujarat* I (2006) CCR 193 (SC)].

Sections 118-121 and Sec. 133 (Accomplice) deal with the ompetency of the persons who can appear as witnesses. A witness may >e competent and yet not compellable i.e. the court cannot compel him o attend and depose before it (viz. Foreign ambassadors and sovereigns). Vgain, a witness is competent and also may be compellable yet the law nay not force him to answer certain questions. This is called 'restricted ompellability' or 'privilege', conferred on Magistrates, lawyers, spouses, itc. (Privileged witnesses) under the sections 124-132. Sec. 134 lays down ule as to the number of witnesses required to give evidence in a case.

COMPETENCY OF WITNESSES[1]

Sec. 118. Who may Testify[2]

Sec. 118 lays down that all persons are competent to testify, unless the court considers that, by reason of tender age, extreme old age, disease

1. Explain the term 'Competence of a witness'. *[LC. 11-93/2006]*
2. Write a short note on'Who may testify'. [LC.//-94] Who is competent to testify? *[D.U.-2007/2009/2011]*

(of body or mind), or infirmity, they are incapable of understanding the questions put to them, and of giving rational answers. Even a lunatic is competent to testify, provided he is not prevented by his lunacy from understanding the questions put to him and giving rational answers to them *{Explanation).*

Thus, no person is particularly declared to be incompetent. It is wholly left to the discretion of the court to see whether the person who appears as a witness is capable of understanding the questions put to him and of giving rational answers. Although an accused person is incompetent to testify in proceedings in which he is an accused, an accomplice is a competent witness against an accused person (Sec. 133).

Child witness3 - A child (even of 6 or 7 years) is a competent witness, unless he is unable to understand the questions or is unable to give rational answers. There is no provision in India by which corroboration to the evidence of a child is required. It is a sound rule in practice not to act on the uncorroborated evidence of a child, but this is a rule of prudence, and not of law *(Nirrnal Kumar* v *State ofU.P.* AIR 1952 SC 1131).

In *Ratansinh Dalsukhbhai Nayak* v *State of Gujarat* (2004) 1 SCC 64, it was held that a child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The decision on the question whether the child witness has sufficient intelligence rests with the trial judge. Child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded.

There is a need for carefully evaluating the testimony of a child. Adequate corroboration of his testimony must be looked from other evidence. In this case, the child of 6 years saw his mother being assaulted and killed at mid-night. lie went back to sleep after witnessing the incident. This showed unnaturality of conduct. He could not be relied upon *[Bhagwan Singh* v *State of MP.* AIR 2003 SC 1088].

3. Can an evidence given by a child be admissible *[D.U.-2009]*

The statement of the child may be recorded without administering aath to him.-The courts should, however, always record their opinion that the child understands the duty of speaking the truth.

Chance witness - If by coincidence or chance a person happened to be at the place of occurrence when the incident is taking place, he is called a chance witness. Merely because there is no compelling reason for him to be present at the time of the occurrence, that by itself need not necessarily mean that his evidence has to be rejected.

Victim of rape - The Supreme Court has prescribed a new approach to the testimony of the victim of a sex offence. She (prosecutrix) is a competent witness under Sec. 118 and her evidence must receive the same weight as is attached to an injured in cases of violence. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars *(State of Maharashtra* v *C.K. Jain* AIR 1990 SC 658).

Partisan/ Relation Witnesses (Interested Persons as Witnesses)

If a witness is a relative of the person who produces him, his statement cannot be discarded only for that reason, unless it is shown that the statement is a tainted one and was given only to benefit the person producing him *(Union of India* v *Savita Sharma* AIR 1979 J & K 6). It may, however, be that the evidence of such witness should be scrutinized carefully. Where such scrutiny establishes reliability, evidence ought not to be rejected *(Krishna Pillai* v *State of Kerala* AIR 1981 SC 1237).

An 'interested witness' means a person who wants to see the accused convicted because of his own *animus* or otherwise (evidence of police officers falls in this category). A relative may not be so interested. A person cannot be said to have such *animus* merely on the ground that he deposed against the accused on an earlier occasion *(Suk Bahadur Subha* v *State ofSikkim,* 1988 CrLJ 1453).

The credibility of the witness does not get affected merely because he is related to the deceased or does not state the incident in the same language or manner which in the opinion of the court is natural. Where the testimony of the injured eye-witness was convincing and of sterling worth and was also corroborated by medical evidence, his testimony

could not be disregarded only because he was related to the deceased {*Aidan* v *State of Rajastban,* 1993 CrLj 2413).

Similarly, evidence of a police officer cannot be rejected for that reason alone. Where the testimony of a police officer that he seized the driving licence and other documents from the possession of the accused who was charged with rash and negligent driving, this was held sufficient to prove that the accused was driving the vehicle, though no other independent witness was produced {*State of MP.* v *Jagdisb,* 1992 CrLJ 718 P&H).

Official witness: He is a public servant who is joined in or associated with the investigation of an offence. While conducting raids or searches, or while laying traps, certain officials of the concerned departments are joined in the raiding party i.e. the officials of the police department, income-tax or sales-tax department, etc. At the trial, such public servants are examined as prosecution witnesses against the accused.

The evidence of such witnesses is *not* to be discarded merely because they are *interested* in in the success of the prosecution case. Their testimony is to be approached like the evidence of any other ordinary witness. If the evidence of such a witness is found to be trustworthy, there is no need to seek corroboration *[Hajari Lai* v *State {Delhi Admn)* AIR 1980 SC 873].

Sec. 119. Dumb Witness[33]

A person who by reasons of dumbness or otherwise is unable to speak, may give evidence by any means by which he can make himself intelligible, such as, by writing or by signs. Evidence so recorded shall be regarded as oral evidence.

Sec. 120. Parties to Suit or Proceeding/ Husband or Wife

In all aw/proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witness. In *criminal* proceedings against any person the husband or wife of such person, respectively, shall be a competent witness.

In all civil proceedings, the parties to the suit are competent witnesses. Therefore, a party to a suit can call as his witness any of the defendants

3a. Whether a dumb person can be considered a competent witness?
[D.U.-2010/2011]

to the suit. The plaintiff and the defendant can give evidence against each ther. Husband and wives are, in all civil and criminal cases, competent witnesses against each other (In olden days, the husband and wife were ne person in law).

Sec. 121. Judges and Magistrates

ec. 121 lays down that a Judge or Magistrate cannot be compelled iccept upon the special order of a higher court, to give evidence about is conduct in relation to a case tried by him, nor can he be made to epose anything which he came to know as a court in course of trial; but e may be examined as to other matters which occurred in his presence 'hilst he was so acting.

Illustrations

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, a Magistrate. B cannot be compelled to answer as to this, except upon the special order of a superior court.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of a superior court.

(c) A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B, a Session Judge. B may be examined as to what occurred.

A judge or magistrate is a competent witness. A judge can be witness to slevant facts as an ordinary man. If a judge is personally acquainted with ly material or particular fact he may be shown as a witness in the case, he saw something happen, he can testify to it even if it happened efore him when he was presiding as a judge or magistrate. If, for cample, the accused attempted to shoot down a witness while he was istifying before a judge, the judge may be questioned as to what he saw.

But, subject to this, no judge or magistrate can be questioned as to is judicial conduct or as to any matter that came to his knowledge while sing as such judge or magistrate. However, a judge can be questioned ren as to judicial matters with the court's order. Moreover, a judge can

waive his privilege and voluntarily offer to explain his conduct as such judge or magistrate. The privilege under Sec. 121 is also available to an arbitrator.

PRIVILEGED COMMUNICATIONS
(SECS. 122-129)

There are certain matters which a witness cannot either be compelled to disclose or even if the witness is willing to disclose, he will not be permitted to do so. Such matters are known as 'privileged communications.' The production of certain communications and documents is either *privileged* from disclosure or *prohibited* from being disclosed, as a matter of public policy or on the ground that the interest of State is supreme and overrides that of an individual.

Sec. 122. Communications during Marriage[4]

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

(ii) in proceedings in which one married person is prosecuted for any crime committed against the other.

(Thus, Sec. 122 prevents communications between a man and his wife from being disclosed. This section rests on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence which is the most endearing

Write a short note on 'Privileged communication between spouses'.
[C.LG-95; *LC.II-94*\

solace of married life. Thus, the prohibition is founded on a principle of high import which no court can relax.

The protection is not confined to cases where the communication sought to be given in the evidence is of a strictly confidential character, but the seal of law is placed upon *all* communications of whatever nature which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record.

It is important to note that the protection is limited to such matters as have been communicated 'during the marriage'. Such communication (during subsistence of marriage) remains protected even after the dissolution of marriage[5] or when one spouse dies. But those made either *before* marriage or *after* its dissolution are not protected *(M.C. Verghese* v T.J.Ponnam). Further, the privilege is for the communication and not to be the witness. The section says that a spouse shall not be compelled to disclose such communication and that they shall *nothe* even permitted to disclose even if he or she volunteers to do so.

Protection When Not Available: Exceptions to Sec. 122[5a]

The privilege admits of certain exceptions also. It is not every communication which is exempt from disclosure. The exceptions are as followsj

(1) *Acts apart fivm communications* - The acts or conduct of spouses apart from communications are not protected under Sec. 122. A wife can testify as to what her husband did on a certain occasion, though not as to what he said to her.

In *Ram Bharose* v *State of U.P.* (AIR 1954 SC 704), the accused was on his trial for murdering a neighbour for the purpose of robbing some ornaments and then to present them to his wife. While presenting them

5. X communicated to her wife Y the whole episode as to how he misappropriated the money from the office and obtained this property. Five years later X and Y separated through a decree of divorce. Y married another person M. Two years later in a case of possession of assets disproportionate to the income X was prosecuted. Can the divorced wife of X (namely Y) be produced as witness against X. *[D.U.-2009]*

5a. What are exceptions to the privileged communication between Husband and Wife? *[D.U.-2010]*

to his wife he *said* that he had gone to the middle house (where the deceased lived), to get them. His wife then told the court that she saw one early morning her husband coming down the roof. He then went inside the fodder store and had a bath. He put back the same clothes and came to her to present the things. *Held* that what the husband said to his wife was not admissible, but she could testify as to his conduct.°l

(2) *Waiver of privileg* - Evidence of a privileged communication can be given by a spouse with the *consent* of the party who made the communication. This is known as waiver of the privilege^

(3) *Suit or criminal proceeding between the two spouses* - As the basis of Sec. 122 is to preserve mutual confidence, it is obvious that the section does not apply when the spouses are ranged on opposite side.

(4) *Communication made before marriage or after its dissolution^}*

(5) *Proof of communication by third person* - Communications or conversations between husband and wife taking place in the presence of a third person, or when overheard by a third person, can be testified to by the third person (without putting any of the spouses in the witness-box). This is so because privilege under Sec. 122 is that of the parties to marriage, and not of others.

Thus, if a correspondence (e.g. letter) containing communication from a husband to wife (or *vice versa)* falls into the hands of a third person, it is admissible in evidence, because this section protects the individual and not communication. What is barred is the *person* himself i.e. spouses can not be compelled to appear as witness and disclose communication; the *communication* is not barred - it is the letter that discloses and not a spouse In *Queen Empress* v *Danoghue,* ILR (1899) 22 Mad. 1, a letter containing

6. 'A' was charged for the offence of murder of his father and step-mother. Investigations led to discovery of jewellery articles and a gandasa from the water tank at the roof of house owned by the accused 'A' at his instance. Expert evidence revealed matching of human blood on recovered articles and dhoti of 'A' with that of the deceased. Besides other circumstantial evidence, As wife stated: "I saw my husband coming down from the roof of their house in the early hours." Whether statement of As wife is admissible in evidence? -J C *[D.U.-2007*

a communication by the accused to his wife was seized during search of house in the presence of wife. The letter was held admissible for she had not put letter into the hands of authorities^

In *Appu* v *State* (AIR 1971 Mad. 194), a confession was made by a man to his wife in the presence of other persons. The court allowed the confession to be proved through those other personsj

While a third person overhearing a confidential communication may testify to it, yet, as to documents, letters, etc., coming into the possession of a third person, a distinction should obtain. Thus, if they were obtained from the addressee spouse by voluntary delivery, they should still be privileged (for otherwise the privilege could by *collusion* be practically nullified for written communications); but if they were obtained surreptitiously (secretly) or otherwise without the addressee's consent, the privilege should cease.

LEADING CASE: M.C. VERGHESE v T.J. PONNAN[7] (AIR 1970 SC 1876)

ln this case, the husband wrote certain letters to his wife which contained defamatory imputation about his wife's father. His father-in-law brought a suit on the evidence of these letters. The letters were passed on by the wife to her father. The Kerala High Court rejected the evidence under Sec. 122. The Supreme Court, however, overruled the decisional

The Supreme Court laid down the following propositions with regard to Sec. 122:

(i) Protection conferred by Sec. 122 is limited to such matters as have been communicated during marriage; communication before marriage would not be

M's daughter R was married to P. During August 1993, when R was residing with her parents at Bombay, P wrote two letters to R from Calcutta which contained defamatory imputations about M. M filed a complaint charging P with the offence of defamation. P raised the plea that the letters were inadmissible in evidence as they were expressly prohibited by law from disclosure. Decide.

[C.LC-92/93/94]

protected. But privilege continues even after marriage has been dissolved by death or divorce. (In the present case, a decree for nullity of marriage had been passed against the husband on the ground of impotency, since the matter reached the court).

(ii) The bar relates to the status on date when communication was made and not on the date when evidence is sought to be given.

(In the present case, marriage was subsisting at the time of communication of letters and not on the date when evidence given in the court).

(iii) The word 'communication' does not extend to correspondence. Thus, even though a spouse is debarred from deposing to the contents of such correspondence, the same can be proved by a third person (wife's father, in the present case).

(iv) Except where the spouse to whom communication is made is a witness .ani-claim privilege (under Sec. 122), the evidence as to communication between husband and wife is admissible, under any other provisions of the Act or on the grounds of public policy.

In *Rumping* v *Dir. of Public Prosecutions* (1862) 3 All ER 256, the letter by the appellant to his wife (containing a confession about the murder committed by him) was given by the appellant to a colleague for posting it. After his arrest, the colleague handed over the letter to captain of the ship, who gave it to the police. The letter was held admissible in evidence; the crew members and captain gave evidence, but the wife was not called as witness. In the present case, the court thus *held* that the letters are admissible in evidence. The letters could not claim the benefit of Sec. 122.]

Sec. 123. Evidence as to Affairs of State[8]

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, *except* with the permission of the officer (at the head of the department concerned), who shall give or withhold such permission as he thinks fit/j

(Sec. 123 protects unpublished State records from being disclosed. This section is based on the maxim *"Saluspopuli est supreme lex"*, i.e., regard for public welfare isjthe hjghest law. The general rule is that the witness is bound to tell the whole truth and to produce any document in his possession or power, relevant to the matter in issue. However, in certain cases, the production of official document may be injurious to larger public interest, as for instance it may harm State's security, good diplomatic relations, etc. In such cases the State has been given the privilege not to produce certain documents which relate to "affairs of the State".

Sec. 123 must be read in conjugation with Sec. 162. Sec. 162 provides that when a person has been summoned to produce a document he should produce it even if he has any objection to its production and the court shall decide the matter of his objection; the court may inspect the document, unless it refers to matters of State.)

The privilege under Sec. 123 should be claimed either by the Minister, or his Secretary, or by Head of the Department. The usual method of claiming the privilege is by filing an *affidavit.* The affidavit has to state that the document in question has been carefully read and examined and the Department is satisfied that the disclosure would not be in public interest. After looking at the nature of the document, the grounds for the claim of the privilege, and the totality of the circumstances, the court decides the question of ordering the production or not.)

In *State of Punjab* v *Sukbdev Singh Sodhi* (AIR 1961 SC 493), the Supreme Court has laid down the following propositions in this regard:

(i) It is a matter for the authority to decide whether disclosure would cause injury to the public interest. However, the court

8. In certain cases the State has been given the privilege not to produce certain documents which relate to the "affairs of the State". Discuss the law relating to it. *[C.L.C-91]*

would enquire into the question whether the evidence sought to be excluded from production relates to State affairs.

(iii) The court is bound to hold a preliminary enquiry into the character of the document. For this pupose it may call forth clooateral evidence. In no case, can the court inspect the socument itself.

(iv) Thus, the court cannot enquire into the possible injury to the public interest, but the court could hold a preliminary enquiry and determine the validity of objection.

The court, was overruled by the Supreme Court "m us \AVer &ec»\ora. *Amur Chcmd Butali w State* (AIR 19fe4 SC 1658"), Stdte of U.P. V *Raj Narain* (AIR 1975 SC 865), *S.P. Gupta v~Union of India* (AIR 1982 SC 149), and *R.K. Jain* v *Union of India* (AIR 1993 SC 1769).

LEADING CASE: STATE OF U.P. v RAJ NARAIN "
(AIR 1975 SC 865)

In this case, the defendant quoted certain parts of the 'Blue Book' - an official document (relating to security arrangements of the Prime Minister), and its production as an evidence, as it was *not* an unpublished document. The court *held* that the disclosure of certain portions does not render it published, for such portions may have no concern with 'affairs of State'.!

The Supreme Court, in this case, laid down some authoritative propositions:

(i) Foundation of law behind Sec. 123 and Sec. 162 is injury to public interest.

(ii) Public interest which demands evidence to be withheld must be weighed against public interest in the administration of justice that the courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, evidence cannot be admitted.

(iii) The 'confidentiality' of the matter has to be decided by the Head of the Department. However, the

court can summon any document notwithstanding any objection under Sec. 162 and can discuss the admissibility (as an evidence), and can get the help of translators to decide whether the document relates to the 'affairs of State'.

(iv) If the court is satisfied with the reasons cited in affidavit, matter ends there.

(v) If not, the *court may inspect the document* and if it finds that any part of the document is innocuous (not related to affairs of State) it could order disclosure of such part. While ordering of the disclosure of innocuous part, the court must seal the other parts whose disclosure is undesirable, i

An R.K. Jain v *Union of India* (AIR 1993 SC 1769), the Supreme Court reaffirmed the above views, by observing that the court can 'see in camera' and that no 'privilege' is available against the court (in other words, court can examine the documents)* In this case, the appointment was in accordance with the amended Rules. The merits of the appointee and the reasons behind the amendment were not permitted to be examined in a public interest litigation.]

Sec. 124. Official Communications

"No public officer shall be compelled to disclose communications, made him in official confidence, when he considers that the public interest uld suffer by the disclosure".

This section is confined to public officers whereas Sec. 123 embraces ryone. The court can compel the disclosure of document, if the court agrees with the officer. Further, people have a 'right to know' how ir State is functioning; the State cannot withhold information on matters ich have nothing to do with sovereignty or State secrets.

Sec. 125. Information as to Commission of Offences

"No Magistrate or Public Officer shall be compelled to say whence he any information as to the commission of any olfence, and no Revenue

Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue".

The section is intended to encourage people to give information about offences by protecting the source of information, for otherwise, no one would like to give such information. It is well established that the police may suppress the identity of the informants in the interest of combating crime.

Sees. 126-129. Professional Communications

See under the Questions section.

Sec. 130. Production of Title deeds of Witness, Not a Party

According to this section, an ordinary witness i.e. a witness who is not; party, *cannot* be compelled to produce - (i) his title-deeds to any property (ii) any document by which he became the pledgee or mortgagee of am property, and (iii) any document which might tend to criminate him. Bu he can be so compelled if he has agreed to produce any such documen with the person seeking its production.

Sec. 131. Production of Documents or Electronic Records

This section, an extension of Sec. 130, lays down that if any person i entitled to refuse the production of a document, the privilege or protectio of the document/electronic record should not suffer simply because it: in the possession of another person. Thus, a person in possession c other person's documents (e.g. attorney, vakil) is not compellable to produc them, unless that person (owner of documents) consents to the: production.

Sec. 132. Witness Not Excused from Answering Incriminatin Questions

Sec. 132 lays down that where a question put to a witness is relevant i the matter in issue in any suit or in any civil or criminal proceeding, tl witness can be compelled to answer it and he cannot be excused fro: answering it simply because the answer would tend to criminate him

civil or criminal liability or to a penalty or forfeiture. Thus, it is *not* in the power of the judge to excuse a witness from answering if the question is relevant to the issue.

The *proviso* to this section, however, protects the witness in an important way. It provides that if a witness has been compelled to give an answer, his answer should not be used to subject him to any arrest or prosecution; nor the answer can be proved against him in any criminal proceeding.

Thus, the answers, which the witness is compelled to give, should not constitute any evidence against him. But, if the answer is false, the witness may be prosecuted for giving false evidence (i.e. perjury).

"The object of the law is to afford a party, called upon to give evidence, protection against being brought by means of his own evidence within the penalties of the law." Sec. 132, however, is essentially designed *not* to deprive the court of the information (solely within the knowledge of a witness) essential to its arriving a right decision.

The protection is *not* available when a witness voluntarily answers without any compulsion. When a witness objects to a question being put to him or when he asks the court to be excused from giving answer but he is compelled to give answers, he is said to be "compelled" to give evidence. They suppose an objection from the witness, which has been over-ruled by the judge, and a constraint put upon the witness to answer particular question.

The compulsion referred to in proviso does *not* include the compulsion by the general law of the land (viz. fear of punishment under Sec. 179, IPC). This is a compulsion which acts against every witness and is inherent in the very idea of a person, being a witness. The giving of evidence is a matter of duty and not of compulsion.

Further, Sec. 132, Evidence Act does *not* apply to a statement made by a person during an investigation under Sec. 161, Cr.P.C. A person who is interrogated under Sec. 161 by a police officer making an investigation is *not* a witness.

ACCOMPLICE EVIDENCE[9]
[SECS. 133, 114 (b)l

An *accomplice* is a person who has taken part in the commission of a crime - a guilty associate or partner in crime. When an offence is committed by more than one person in concert, every one participating in its commission is an accomplice. He is called an *approver* if he is granted pardon under Sec. 306 of the Code of Criminal Procedure, 1973. An accomplice by becoming an approver becomes prosecution witness.[10] When he appears as a witness for the prosecution against the accused person with whom he acted together in the commission of the crime, the question arises as to what is the value of the evidence of a former criminal turned witness. Two provisions in the Act touch this problem.

Sec. 133. Accomplice

"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."

Sec. 114. Illustration (b)

"The court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars."

However, Sec. 114 also gives two instances when this does *not* apply - 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.

The other instance is - 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

9. Write a short note on'Accomplice evidence'. *[C.L.C-92]*
10. Who is an Accomplice? *[D.U.-2011]*
Who is an Approver? *[C.L C -2006]*

D, and the accounts corroborate each other in such a manner as to render previous concert highlv improbable.

No Antithesis between Sec. 133 and Sec. 114[11]

There is no antithesis between Sec. 133 and Sec. 114, illustration (b), because the illustration only says that the court 'may' presume a certain state of affairs. It does not seek to raise a conclusive presumption. Sec. 133 is a clear authorisation to the courts to convict on the crroborated testimony of an accomplice, but since such a witness, being criminal himself, may not always be trustworthy, the courts are guided by the illustration appended to Sec. 114 that, if it is necessary the court should presume that he is unreliable unless his statements are supported or verified by some independent evidence *[Dagdu* v *State of Maharashtra* (1977) 3 SCC 268].

Sec. 133 lays down a rule of law. But Sec. 114, illustration (b) lays down a rule of prudence. This rule of prudence has now come to be accepted as a rule of law by judicial legislation both in Indian and English law.

Evidentiary value of an Accomplice[12]

(The evidence of an accomplice should stand the test of verification at least in main points. This is known as *corroboration.*

There are the following dangers in accepting the "uncorroborated testimony" of an accomplice:-

11. How have the courts reconciled the conflict between Sec. 133 and Sec. 114(b) in matters of approver evidence? *[C.LC-95/96]*

12. "An accomplice is unworthy of credit unless corroborated in material particulars". Discuss with reference to relevant statutory provisions and case law. *[D.U.-2007/2009/2010/2011]{C.L.C.-93/94;LCII-93/95*\

What is the credibility of approver's testimony? Does it require any corroboration? [C.LC-2006]

Discuss with the help of decided cases the evidentiary value of an accomplice. *[L.C.II-2006]*

Write a short note on: Credibility of accomplice evidence. *[D.U.-2007]*

(1) He *participes criminis* (a participant in the commission of actual crime), hence evidence comes from a tainted source. His testimony should not carry the same respect as that of a law-abiding citizen.

(2) He has been faithless to his companions and may be faithless to the court because he has motive to shift the guilt from himself to his former companions. The paramount danger is that he may weave a story which may implicate even the innocent with the guilty.

(3) If he is an approver (i.e. granted pardon), he has been favoured by the State and is therefore likely to favour the State.

These reasons dictate the necessity for corroboration. In fact, an *approver's* evidence has to satisfy the double test: (i) his evidence must be reliable; (ii) his evidence should be materially corroborated. 'Every person who is a competent witness is not a reliable witness and the test of reliability has to be satisfied by an approver all the more before the question of corroboration of his evidence is considered by criminal courts.'

The *nature* and *extent* of corroboration of accomplice evidence must necessarily vary with the circumstances of each case, and it is not possible to enunciate any hard and fast rule. But the guiding rules laid down in *R.* y *Baskerville* (1916 2 KB 658) are clear beyond controversy. They are:-

(1) It is not necessary that there should be independent confirmation, in every detail, of the crime related by the accomplice. It is sufficient if there is a confirmation as to a material circumstance of the case.

(2) The confirmation by independent evidence must be of the identity of the accused in relation to the crime. Thus, there must be confirmation that not only has the crime been committed but that the accused committed it.

(3) The corroboration must be by independent testimony, i.e., by some evidence other than that of the accomplice, and therefore, one accomplice cannot corroborate the other.

(4) The corroboration need not be by direct evidence that the accused committed the crime; it may even be circumstantial.

In *Rameshwar* v *State ofRajasthan* (1952) SCR 370, the Supreme »urt has confirmed the said rules. In *Haroon Haji* v *State of Maharashtra* IR 1968 SC 832), *Ravinder Singh* v *State ofHaryana* (AIR 1975 SC 856), d, *Kannan Singh* v *State of T.N.* (AIR 1989 SC 396), the Supreme Court s reaffirmed the decision of *Rameshwar* v *State.*

In Ravinder Singh v *State ofHaryana* (AIR 1975 SC 856), the accused is charged with murder of his wife. His friend turned approver, who iclosed the accused's intimacy with other girl. The accused had hatched :onspiracy with the help of approver. It was held that the approver was liable and his statement was corroborated by independent witnesses lat the accused was accompanying the deceased in the train). Moreover, e subsequent conduct of the accused was a true-tell-tale of his guilty ind; the real motive for the crime being illegitimate intimacy with a girl. le court held that the *approver's test* is fulfilled if the storv he relates volves him, and the[1] Vtory appears to be natural and probable catalogue events, and'the story must implicate the accused in such a manner so to give rise to conclusion of guilty beyond reasonable doubtj

In *Suresh Chandra Bahri* v *State of Bihar* (AIR 1994 SC 2420), the ipreme Court re-emphasised the need for raising the presumption that e approver evidence is untrustworthy unless corroborated.

In *M.O. Shamsnddin* v *State of Kerala* (1995) 3 SCC 351, the two ipellants have been found guilty under the Prevention of Corruption ct and under Sec. 161 read with Sec. 120B, IPC. The Supreme Court jserved: Section 133 of the Evidence Act lays down that an accomphce a competent witness against an accused person. The conviction based i such evidence is not illegal merely because it proceeds upon the icorroborated testimony of an accomplice. However, there is a rider in ustration (b) to Sec. 114 of the Evidence Act which provides that the >urt may presume that the accomphce is unworthy of credit unless he corroborated in material particulars. This presumption is in the nature ' a precautionary provision incorporating the rule of prudence which is Lgrained in the appreciation of accomplice's evidence.

Therefore, the courts should be guarded before accepting the romplice's evidence and look for corroborating evidence. The discretion F the court upon which the rule of corroboration rests, must be exercised i a sound and reasonable manner. Normally the couns may not act on

an uncorroborated testimony of an accomplice but whether in a particular case it has to be accepted without corroboration or not would depend on an overall consideration of the accomplice's evidence and the facts and circumstances. However, if on being so satisfied the court considers that the sole testimony of the accomplice is safe to be acted upon, the conviction can be based thereon. Even if corroboration as a matter of prudence is needed it is not for curing any defect in the testimony of the accomplice or to give validity to it but it is only in the nature of supporting evidence making the other evidence more probable to enable the court to satisfy itself to act upon it.

The court held that in a case of bribe, the person who pays the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to given evidence about the bribe and it is not possible to get absolutely independent evidence about the payment of bribe. However, it is cautioned that the evidence of a bribe-giver has to be scrutinized very carefully and it is for the court to consider and appreciate the evidence in a proper manner and decide the question whether a conviction can be based upon it or not in those given circumstances. In the present case, it was held that a pers. n who plays the role of the bribe-giver in a trap is not an accomplice. He is only an interested witness.

LEADING CASE: NARAYAN CHETANRAM CHAUDHARY v STATE OF MAHARASHTRA [(2000) 8 SCC 457]

In this case, the main question of controversy was whether the evidence provided by the accomplice (approver) is acceptable against the other co-accused or not. It was held that once corroboration in material particulars is found, the testimony of an accomplice can be the basis of conviction.

The court observed: Section 133 of Evidence Act provides that an accomplice is a competent witness against an accused person and the conviction is not illegal merely because it proceeds on uncorroborated testimony of the accomplice. No distinction is made between an accomplice who is not an approver. As both have been treated alike, the rule of corroboration applies to both.

Accomplice's evidence is taken on record as a necessity in cases where it is impossible to get sufficient evidence of a heinous crime unless one of the participators in the crime discloses the circumstances within his knowledge on account of tender of pardon. According to Taylor "accomplices who are usually interested, and always infamous witnesses, and whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice."

This court in various cases held that:

(1) The basis of tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. So there is no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused *[Suresh Chandra Sahri* v *State of Bihar* (1995) Supp. SCC 80]

(ii) The evidence of the approver be shown to be of a reliable witness.

(iii) Material particulars of the approver's statement should be corroborated, as he is a self confessed traitor *(Jnanendra Nath Ghose* v *State ofW.B.* AIR 1959 SC 1199).

(iv) The combined effect of Sec. 133 and Sec. 114, illustration (b) is that an accomplice is competent to give evidence but it would be unsafe to convict the accused upon his testimony alone. Though conviction cannot be said to be illegal but as a matter of practice the court will accept the evidence with material particulars *[Bhiva Doulu Patil* v *State of Maharashtra* AIR 1963 SC 599].

The court, in the present case, further observed: Testimony of an accomplice is evidence under Sec. 3 of the Act and has to

be dealt with as such. The evidence is of a tainted character and as such is very weak, but it is evidence and may be acted upon. For corroborative evidence the court must look at the broad spectrum of the approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon the facts of different cases and it need not be in the form of ocular testimony of witness and may be in the form of circumstance. It must be independent and not vague or tinreliable.

No time limit is provided for recording of statement of approver and delay is one of the circumstances to be kept in mind as a measure of caution for appreciating the evidence of the accomplice. Human mind cannot be expected to be reacting in a similar manner under different situations. Any person accused of an offence, may, at any time before the judgment is pronounced, repent for his action and volunteer to disclose the truth in the court. Repentance is a condition of mind differing from person to person and from situation to situation. The delay in granting the pardon may be a just criticism, where it is found that the pardon had been tendered at the end of the trial and in effect was intended to fill up the lacuna in the prosecution case.]

In *Jasbir Singh* v *Vipin Kumar* (AIR 2001 SC 2734), the court observed that the evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. But the suspicion may be removed and if the evidence of the approver is found to be trustworthy and acceptable then that evidence might well be decisive in securing a conviction.

In *K. Hashim* v *State of T.N.* (2005) 1 SCC 237, the Apex Court observed: In reference to the requirement of corroboration, the word used (in Sec.135) is "may" and not "must", and no decision of a court can make it "must". It ultimately depends upon the cotirt's view as to the credibility of the accomplice's evidence. If it is found credible and cogent, the court can record a conviction on its basis even if uncorroborated. Corroboration in material particulars means that there should be some additional or independent evidence:

(3) rendering it probable that the story revealed by the accomplice is true and that it is reasonably safe to act upon it;

(ii) identifying the accused as one of those, or among those, who committed the offence;

(iii) showing the circumstantial evidence of his connection with the crime, though it may not be direct evidence; and

(iv) ordinarily the testimony of one accomplice should not be sufficient to corroborate that of the other.

The court further observed that the reasons why corroboration has been isidered necessary are that:

(1) he has been criminal himself, and, therefore, his testimony should not carry the same respect as that of a law-abiding citizen;

(2) he has been faithless to his companions and may be faithless to the court because he has motive to shift the guilt from himself to his former companions; and

(3) if he is an approver, he has been favoured by the State and is therefore, likely to favour the State.

The fact that the testimony of an accomplice was found to be not :eptable in respect of one of the accused persons for want of lependent corroboration should not be taken to cast a doubt upon her lability as a witness in respect of other accused persons *[Ramadhar Basu >tate ofW.B.* AIR 2000 SC 908]. In *Dinah* v *State o/Rajasthan* (2006) iCC 771, the Supreme Court has again emphasized that the victim of)e is not an accomplice. Corroboration is not the *sine qua non* for nviction in a rape case. To insist upon corroboration in the Indian ting amounts to adding insult to injury.

Who is Not an Accomplice

The following classes of persons are *not* accomplices:-

(i) When a person, under threat of death or other form of pressure which he is unable to resist, commits a crime along with others, he is not a willing participant in it, but victim of such circumstances.

(ii) A person who merely witnesses a crime, and does not give information of it to any one else out of terror, is not an accomplice,

(iii) Detectives, paid 'informers' and *'trap* or *decoy witnesses'* (to trap the accused) are not accomplices. A court may convict on an uncorroborated testimony of trap witnesses if it is satisfied of their truthfulness *(Prakash Chand* v *State* AIR 1979 SC 400).

It is always for the judge to decide whether it is safe to rely and act upon a trap-witness. His partiality for the prosecution is a factor which can hardly be ignored. The character, position in life, and the social standing of the witness would go a long way in helping the judge to appreciate his evidence.

Confession of Co-accused v Accomplice Evidence[13]

Sec. 30. Confession of co-accused[14] - When more persons than one are being tried *jointly* for the *same* offence, and a confession made by one of suet persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such othei person as well as against the person who makes such confession.

Illustrations

(a) A and B are *jointly* tried for C's murder. It is proved that A said "B and I murdered C". The court may consider the effect o the confession against B.[15] .

13. What is the difference between the confession of a co-accused and tti testimony of an accomplice? [LC.//-93/200I
14. How and under what circumstances is the confession of a co-accuse relevant? Discuss the applicable position of law with decided cases. *[D.U.-200*

[Note: Also see under the Questions section.]

15. In a case of child rape, the accused 'A makes a statement, whereby he accep his guilt. He also describes the involvement of 'B' in the whole episode. Is tl statement given by 'A relevant and can it be used against 'B' equally wh< both of them are co-accused in the same offence? *[D.U.-20C*

(b) A is on trial for C's murder. There is evidence to show that C was murdered by A and B, and that B said: "A and I murdered C". This statement may not be taken into consideration by the court against A as B is not being jointly tried.

It may be noted that the confession of co-accused must implicate himself well as some other accused. Further, the confession made at a previous al will not be relevant. When they are jointly tried but for different fences (e.g. abduction and rape), then also the confession will be irrelevant, ill further, the confession must not have been made under force or fraudj

The confession of a co-accused is not treated in the same way as e testimony of an accomplice:

(1) The confession of co-accused is not "evidence", as it is not recorded on oath, nor it is given in the presence of the accused and nor its truth can be tested by cross-examination.

The accomplice evidence is taken on oath and tested by cross-examination; a higher probative value is thus given to it.

(2) The confession of co-accused must only be taken into consideration along with other evidence in the case, and it cannot alone form the basis of a conviction.

A conviction is not illegal merely because it proceeds upon the Orcorroborated testimony of an accomplice.

(3) The philosophy of Sec. 30 is that confession of co-accused affords some sort of sanction in support of the truth of his confession against others and himself.)

An accomplice evidence is also not free from criticism. "An approver is most unworthy friend, if at all, and he, having bargained for his nmunity, must prove his worthiness for credibility in court". However, le Supreme Court has taken care of it by insisting on corroboration. In lany cases of prosecution of members of organised crime, an approver id few co-accused may be the only evidence and it is obvious that such ersons would never be convicted if Sec. 133 was not there in the statute ook/)

'etracted evidence and approver i *evidence* - In the case of the person confessing rho has resiled from his statement i.e. retracted confession, general

corroboration is sufficient, while an accomplice's evidence should be corroborated in material particulars. When compared to a retracted confession and to an approver's evidence, 'dying declaration' stands on a very high level. Corroboration is needed in the two cases but in the case of dying declaration it cannot be laid down as an absolute rule that a dying declaration cannot form the sole basis of conviction unless corroborated.!

. *Evidence of prosecutrix* - The evidence of a prosecutrix (victim of rape) *cannot* be treated as the evidence of an accomplice requiring corroboration. Like the evidence of any other injured witness, the evidence of a girl or woman raped or molested should bear weight. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars *{State of Maharashtra* v *C.K. Jain* AIR 1990 SC 658)j

FURTHER QUESTIONS

Q.1. (a) A, a client, says to B, an attorney - "I wish to obtain possession of property by use of forged deed on which I request you to sue". Is the communication made by A barred by law or expressly prohibited by law from disclosure? Decide. *[D.U.-2011][C.LC.-92/2006]*

A, a client, says to B, an attorney - "I have committed forgery and I wish you to defend me". Is this statement protected from disclosure? *[D.U.-2010]*

A communication between a lawyer and his client is privileged subject to certain conditions. Explain. *[D.U.-2009]*

(b) A had shared all his business secrets with his wife during the subsistence of their marriage. The communications have been ta^ed by the wife. After their divorce, the wife becomes friendly with As business rivals who have filed cases for conspiracy and cheating against A. Can the former wife appear in the witness box to testify to the husband's earlier communications? Will the bar of Sec. 122 apply in case the former wife gives the cassettes containing the communications to As business rivals for the purpose of establishing conspiracy and cheating charges? *[C.LC.-96]*

A.l. (a) Professional Communications (Sees. 126-129)

A professional communication means a confidential communication between a professional (e.g. lawyer) and his client made to the former in the course, and for the purpose, of his employment as such adviser. The privilege attaching to confidential professional disclosures is confined to the case of legal advisers, and does not protect those made to clergymen, doctors, etc. Further, *no* privilege attaches to communication to an attorney or pleader consulted as a friend and not as an attorney or pleader.)

The main ingredients of Sec. 126 are:-

No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to -

(i) disclose any communication made to him by or on behalf of his client, or any advise given by him to his client in the course and for the purpose of his employment;

(ii) state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his employment.

(iii) disclose any advice given by him to his client in the course and for the purpose of such employment.

Provided that nothing in this section shall *not* protect from disclosure -

(1) .any such communication made in furtherance of any illegal purpose,

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

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

Explanation - The obligation stated in this section continues after the employment has ceased, i

Illustrations

. (a) A, a client, says to B, an attorney - "I have committed forgery and I wish you to defend me". As the defence of man known

to be guilty is not a criminal purpose, this communication is *protected* from disclosure.

(b) A, a client, says to B, an attorney - "I wish to obtain possession of property by use of forged deed on which I request you to sue". This communication, being made in furtherance of a criminal purpose, is *not* protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceeding, A observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is *not* protected from disclosure.

The principle underlying Sec. 126 is that if communications to a legal adviser were not privileged, a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he lslike'ly to be thrown into litigation. Every person, however guilty, is entitled to a fair trial - which involves the service of a counsel and counsel cannot defend his client unless he knows the whole truth. In the absence of privilege under Sec. 126, it would have been difficult for any body to get the best professional advice.

The provisions of Sec. 126 apply to interpreters and the clerks or servants of barristers, pleaders, attorneys and vakils *(Sec. 127).* They are also likely to come to know of the confidential information relating to litigation. A paid or salaried employee who advises his employer on all questions of law and relating to litigation must get the same protection of law.

It is not every communication made by a person to his legal adviser that is privileged from disclosure. The privilege extends only to communications made to him confidentially and with a view to obtaining professional advise *[Franji Bhicaji* v *Mohan Singh Dhan Singh* (1893) 18 Bom 263]. The prohibition extends to all communications made in

16. A question based on the facts of this illustration. *[DU.-2007]*

confidence pertaining to any pending or contemplated case or for the purpose of soliciting professional advice. ln *D. Veerasekaran* v *State of* iH£il992 Cr LJ 2168 (Mad.)], the advice of an advocate to his client to remain absconding was not allowed to be citedjin the prosecution of the advocate under the TADA Act, 1987| It was held to be a professional communicationjand not an "abetment" under the TADA.

Exceptions to Sec. 126

'Explanation' to Sec. 126 embodies the rule 'once privileged always privileged'. Thus, if the communication is made during the existence of the relationship the privilege does not get terminated by the termination of the litigation or the death of the parties. The privilege under Sec. 126 is subject to few *exceptions:-*

(1) *Communication made infitrtherance of illegal purpose {proviso 1)* - Such communications are not protected. A client consulted a lawyer for the purpose of drawing up a bill of sale which was alleged to be fraudulent. The communication was held to be not privileged, for the consultation was for an illegal purpose *[see* illustration (b)].

(2) *Crime or fraud since employment began {proviso 2)* - If a lawyer finds in the course of his employment that any crime or fraud has been committed since the employment began, he can disclose such information *[see* illustration (c)]. It is based on the rule that no private obligation can dispense with that universal one which lies on every member of society to disclose every design, which may be formed contrary to laws of society, to destroy the public welfare.

(3) *Disclosure with express consent of client* -waiver of privilege. This section has been enacted for the protection of the client and not of the lawyer. The lawyer is therefore bound to claim privilege unless his client waives it.

(4) *Information falling into hands of third person* - If the communication is overhead by a third person, he may be compelled to disclose it. The prohibition works against the lawyer, but not against any other person.

(5) *Lawyer's suit against client* - If the lawyer himself sues the client for his professional services, he may disclose so much of the information as is relevant to the issue.

(6) *Joint interest* - No privilege attaches to communication between solicitor and client as against persons having a joint interest with the client in the subject matter of communication e.g. as between partners, a company and its shareholders.

(7) *Documents already put on record* - No privilege is available in respect of such documents.

Sec. 128. Privilege Not Waived by Volunteering Evidence

Sec. 128 lays down that if the party making the communication under Sec. 126 gives evidence (at his own instance or otherwise) of the matter covered by the communication, that does not amount to a waiver of privilege. Even if such party calls the lawyer as a witness, it will not amount to a "consent to disclosure.' But if he questions the lawyer on the very matter of the communication that will amount to consent and by reason of it the lawyer can disclose the communication.

Sec. 129. Confidential Communication with Legal Advisers[17]

The bar of Sec. 126 is partially lifted by Sec. 129 - No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal adviser; but when a client offers himself as a witness, he may be compelled to disclose such communication as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

It may be noted that Sec. 126 prohibits a lawyer from disclosing matters which have come to his knowledge from his client for the professional purpose. Sec. 129, on the other hand, places the client beyond the range of compulsion as to matters which have passed between him and his professional legal adviser.

17. Comment upon the confidential communications with legal

Declsion of the* case *in question

Sec. 126 does *not* protect communications made in furtherance of an legal purpose, according to proviso (1). Obtaining possession of property y a forged document is a crime *[See* illustration (b)]. Thus, communication lade by A is *not* protected from disclosure.

(b) In the *case in question,* the former wife cannot appear in the witness box to testify; nor can she give in evidence the cassettes containing the communications, as such communications were made during the subsistence of marriage (See *M.C. Verghese v T.J. Ponnan* in the text).

Q.2. (a) In a murder trial, the approver's evidence is corroborated only by:

(i) An earlier confession of the approver himself, in which he has narrated the crime story to the magistrate.

(ii) Confession of a co-accused who was arrested along with the approver and others. Is this enough corroboration?

It is on the record that all the accused were arrested and detaned separately and that they had no chance of meeting each other before the trial. *[C.LC-95/96]*

(b) A, B and C are alleged to have committed the murder of X, a political opponent. C did the actual killing and was arrested on the spot with B. C later turns an approver and deposes before the court that he and B committed the murder in pursuance^ of a plan to which both A and B were a party. Discuss the legality and desirability of A and B's conviction on the basis of C's testimony. *[C.LC.-91]*

A.2. (a) Accomplice Evidence (Sec. 133)

'**or** the legal provisions, *see* the text. The present problem is"based on the allowing case:

LEADING CASE: BHUBONI SAHU v EMPEROR (AIR 1949 PC 257)

In this case, eight persons were prosecuted for a murder; four of them were acquitted. Of the remaining, one appealed to the Privy Council. The evidence *against* the appellant consisted of (a) evidence of an accomplice who had taken part in the murder and had become an.approver, (b) the confession of another accused person implicating himself and the appellant, and (c) the recovery of a cloth which the deceased was wearing and a *khantibadi* (an instrument for cutting grass) in circumstances which were taken to verify the evidence of the accomplice.

The appellant was acquitted by the court. The court observed: A combined reading of Sec. 133 and illustration (b) to Sec. 114 makes it clear that whilst it is not illegal to act on an uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused. |

The corroboration must be not only with regard to the occurrence, but also as against each of the accused. An accomplice cannot corroborate himself.JThe previous statement of approver (even recorded under Sec. 164, Cr.P.C.) cannot be used to corroborate himself. A tainted evidence does not lose its taint by repetitionjThe danger of acting on accomplice evidence is not merely that the accomplice is on his own admission a man of bad character...., the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to oight of them, but untrue as to the other two, whose names have been introduced because they were enemies of the approver. This tendency to include the innocent with the guilty is particularly prevalent in India. The only real *safeguard* against the risk of condemning the innocent with the guilty lies in insisting on *independent evidence* which in some measure implicates each accusedj

The court should be slow to depart from the rule of caution which requires some independent evidence implicating the accused person. The evidence of one accomplice cannot be used to corroborate the testimony of another accomplice. In the present case, the discovery of the cloth and *khantibadi* could not corroborate the story held out by the accomplice because the discovery of cloth at the suggestion of the accomplice did not show that it was put there by the appellant and the recovery of a *khantibadi* from him was not an unusual thing (particularly one which was not blood-stained), for, a farmer is likely to possess it.

As to the confession of co-accused under Sec. 30, it can be taken into consideration by the court. Illustration (b) to Sec. 114 also says so. In the present case, the court thus *held* that as thejopportunity of previous concert could not be ruled out, and there is no independent evidence corroborating the accomplice evidence, the appellant is to be *acquitted.*

This tendency to include the innocent with the guilty is particularly prevalent in India. The only real *Safeguard* against the risk of condemning the innocent with the guilty lies in insisting on *independent evidence* which in some measure implicates each accused. The court, where there is no opportunity of previous concert, can consider confession of co-accused.

In a later case, *Haroon Haji* v *State of Maharashtra* (AIR 1968 SC 832), where there was no opportunity of previous concert the conviction of the accused was upheld. Thus if several accomplices give evidence (identical version) implicating the accused, the court may act on it if it is satisfied that there was no opportunity for prior concert. However, such confession must inspire confidence both in its content and in manner and circumstances of its making e.g. all accused were detained separately and they had no chance of meeting each other before the trial.

InState of T.N. v *Suresh* (AIR 1998 SC 1044), it observed: "The law is not that the evidence of an accomplice deserves outright rejection if there is no corroboration. What is required

is to adopt great circumspection and care when dealing with the evidence of an accomplice". The fact that the testimony of an accomplice was found to be ncft acceptable in respect of one of the accused persons for want of independent corroboration should *not* be taken to cast a doubt upon her reliability as a witness in *respect of other accused persons (Ramadbar Basu v State of W.B.* AIR 2000 SC 908).

Decision of the case *in question*

(i) The testimony of an approver must be necessarily corroborated by independent evidence. The earlier confession of the approver before a magistrate is not an independent evidence, thus cannot be used for corroboration,

(ii) Confession of co-accused can be considered by the court, where there is no opportunity of previous concert. As it is so in the present case, the confession of co-accused can be used for corroboration,

(b) Now it is accepted rule of law that conviction is not made_on the basis of uncorroborated testimony of an approver. Thus, if A and B are to be convicted, C's testimony must be corroborated in material particulars by independent evidence.

11
Examination Of Witnesses

Sec. 134. Number of Witnesses (Testimony of Sole Witness whether Reliable?)

"No particular number of witnesses shall in any case be required for the proof of any fact." How many witnesses are necessary for the proof of a fact is wholly left to the judgment of the court. As a general rule, a court can and may act on the testimony of a single witness, though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character *[Chacko* v *State of Kerala* (2004) 12 SCC 269]. Sec. 134 marks a departure from the English law on this point.

"The public are generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor is it proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable" *[State ofU.P.* v *Anil Singh* AIR 1988 SC 1998].

The Supreme Court has in a number of cases sustained convictions on the basis of the testimony of a *sole* witness. It has opined that it is the *quality* (veracity) and not quantity of evidence that matters. The testimony of single witness if it is straightforward, cogent and if believed is sufficient or wholly reliable to prove the prosecution case, the conviction can be based on it. The sole witness whose testimony was neither consistent nor corroborated by medical evidence, other circumstances also showing his

unreliability, conviction on such testimony could not be sustained. The infirmity in the testimony of the sole eyewitness, if of minor nature, could be ignored *[Badri* v *State ofRajasthan* (1976) 1 SCC 447; *Jayararn Shiv Tagore* v *State of Maharashtra* AIR 1991 SC 1735; *Chaudhari Ramjibhai* v *State of Gujarat* (2004) 1 SCC 184].

The court *cannot* be asked to insist upon corroboration by other witnesses particularly where the time and place of occurrence exclude the possibility of the presence of any other witness. However, sometimes the nature of the testimony of the witness itself requires, as a rule of prudence, the corroboration, viz. in the case of a child witness, or a witness who is accomplice or of an analogous character. In cases of rioting, etc. it would be prudent to insist upon at least two reliable witnesses to testify to the participation of a particular accused person. Where an offence involves a large number of offenders and victims, a conviction can be sustained only if it is supported by two or three or even more witnesses *[Wakil Singh* v *State of Bihar* AIR 1981 SC 1392]. In *Mohd. Khalid* v *State of West Bengal* (2002) 7 SCC 334, the Supreme Court held that, normally, the prosecution's duty is to examine all the eyewitnesses the selection of whom has to be made with due care, honestly and fairly. The witnesses have to be selected with a view not to suppress any honest opinion, and due care has to be taken that in selection of witnesses no adverse inference is drawn against the prosecution. However, no general rule can be laid down that each and every witness has to be examined even though his testimony may or may not be material. The most important factor for the prosecution being that all those witnesses strengthening the case of the prosecution have to be examined; the prosecution can pick and choose the witnesses who are considered to be relevant and material for the purpose of unfolding the case of the prosecution. It is not the quantity but the quality of the evidence that is important. In the case at hand, if the prosecution felt that its case has been well-established through the witnesses examined, it cannot be said that,non-examination of some persons rendered its version vulnerable *[State of MP.* v *Dharkole* (2005) SCC (Cri.) 225].

Evidence is weighed and not counted. Thus, convictions can be based on the evidence of a single eyewitness if otherwise found reliable *[Chacko* v *State of Kerala* AIR 2004 SC 2688]. Similarly, as held in *Rang*

Bahadur Singh v *State o/U.P.* (2000) 3 SCC 454, even though eyewitnesses Lave been examined the non examination of a person whose testimony nay destroy their veracity would cast a doubt on the prosecution case.

In *Joseph* v *State of Kerala* AIR 2003 SC 507, a conviction on the iasis of a solitary witness was held to be not proper, though he was tijured in the incident but his statements were in conflict with medical vidence and the other evidence. He was also not believable in other espects.

Sec. 135. Order of Production and Examination of Witnesses

According to Sec. 135, 'the order in which witnesses are to be produced nd examined shall be regulated by the law relating to civil and criminal irocedure respectively and, in the absence of such law, by the discretion if the court'.

Order XVIII of C.P.C. and the Chapters XVIII, XX, XXI, XXII nd XXVIII of Cr.P.C. deal with the manner of the examination of witnesses. In *civil* cases, the party who has the right to begin i.e. on whom he burden of proof lies examines his witnesses first. In *criminal* cases, the irosecution has to examine its witnesses first.

Primarily it is lawyer's privilege to determine the order in which the witnesses should be produced and examined. The order is to be decided >y the party leading his evidence. However, Sec. 135 gives the court a tower to dictate the order in which the witnesses may be produced.

Exclusion of Witnesses from Courtroom - The witnesses should be examined one-by-one and when a witness is being examined, other witnesses to be xamined afterwards must *not* be allowed to remain in the courtroom. If . witness remains so, his examination cannot be refused; however, a note s to be made to the extent that he was present in the courtroom when nother witness was being examined.

Sec. 136. Judge to Decide as to Admissibility of Evidence

When either party proposes to give evidence of any fact, the Judge may sk the party proposing to give the evidence in what manner the alleged act, if proved, would be relevant, and the Judge shall admit the evidence f he thinks that the fact, if proved, would be relevant, and not otherwise."

A Judge has been so empowered in order that the proof may be confined to relevant facts. The court must, at the time when the evidence is tendered, decide whether or not it is admissible. A Judge may allow the evidence to be placed on the record provisionally, and subject to objection, in cases where that course would ultimately save time. But the question of admissibility is to be decided after the counsel has been given an opportunity to address the court on the point. A party seeking to put a document in evidence must show the section or provision under which the document is admissible.

Sec. 136 also empowers the court to control the sequence of the production of evidence in the case where the proof of one fact is dependent on the proof of another fact. In such cases, the other fact should be proved before the evidence of the first fact is offered. Thus, if a person wants to prove a dying declaration he must prove that the person whose declaration it is supposed to be, is dead *[Illust.* (a)]. Similarly, if a party wants to give the secondary evidence of a document on the ground that he has lost the original, he should first prove the loss of the original *[Illust.* (b)]. However, in order to assure the flexibility of the procedure, the court may allow the evidence of the first fact without proof of the second if the party undertakes to prove the second at a subsequent stage.

Sec. 136 further lays down that where the relevancy of one alleged fact depends upon the proof of another fact, the court may allow the first fact to be proved without proof of the second and may require the second fact to be proved subsequently. Where, for example, it is sought to be proved that the stolen property was recovered from the possession of the accused, but the accused denies it. Logically, it should first be proved that the property in fact recovered was one that was stolen. But the court may allow the recovery to be proved before the identity of the property is established *[Illust.* (c)J.

It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate fact; (B, C and D) which must be shown to exist before the fact (A) can b< regarded as the cause or effect of the fact in issue. The Court may eithei permit A to be proved before B, C and D is proved, or may requin proof of B, C and D before permitting proof of A *[Illust.* (d)].

Sec. 137. Examination-in-Chief, Cross-Examination, Re-Examination[1]

The testimony of a witness is recorded in the form of answers to questions put to him. Witnesses are not permitted to deliver a speech to the court. This way, their testimony can be confined to the fact relevant to the issue. Such questioning of the witnesses is called his *examination.*

According to Sec. 137, 'the examination of a witness by the party who calls him shall be called his *examination-in-chief;* 'the examination of a witness by the adverse party shall be called his *cross-examination';* and, 'if the party who has called a witness seeks to question him again after the cross-examination that is known as *re-examination.'*

Examination-in-chief: When a witness appears before the court, he is given oath or affirmation; his name and address is taken down. Then the party who calls him, examine him to elicit the truth and to prove the facts which bear upon the issue in favour of that party. This is called 'examination-in-chief'. It may be noted that the witness can give evidence of fact only and no evidence of law.

Cross-examination: After the party calling a witness has finished the examination-in-chief, the opposite party has a right to cross-examine the witness. *The purpose* of 'cross-examination' is to expose the truth about the testimony of the witness. The *object* of the cross-examination is threefold: First, to elicit from an adverse witness something in your favour; second, to destroy or weaken the force of what the witness has said against you, and third, to show from the present attitude of the witness or from his past experience that he is unworthy of belief in whole or in part.

The lawyer seeks to discover the flaws, if any, in the testimony of the witness and also to unmask perjury by the method of cross-examination. Opportunity to cross-examine a witness *must* be provided to the party. A tenant who wanted to cross-examine the old landlady allowed to do so if he could arrange for travel *[Pyarelal* v *Devi Shanker* AIR 1994 M.P. 115].

1. Explain the scope of examination-in-chief, cross-examination and re-examination under the Indian Evidence Act. State briefly their objects.

Re-examination: The party who called the witness may, if he likes and if it be necessary, 're-examine' him. The *purpose* of it is the explanation or clarification of the expressions used by the witness in cross-examination.

Where the prosecution failed to submit any clarification through reexamination, benefit of doubt to go to defence *[Ramsewak* v *State ofM.P.* (2004) 11 SCC 259]. In *Anil Sbarma* v *State ofjharkband* AIR 2004 SC 2294, held that a prayer for an order of re-examination has to be consulted objectively. The prayer on behalf of the accused for reexamination of a witness was rejected twice by the trial court. It was also dealt with elaborately by the High Court. Thus it obtained finality. The Supreme Court refused to interfere.

Sec. 138. Order of Examination

"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.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. *Direction of re-examination:* 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."

The following *important* points may be noted:

(i) cross-examination can extend to all the relevant facts, whether touched in the examination-in-chief or not.

(ii) A witness *cannot* be thrown open to cross-examination unless he is first examined-in-chief. Where the prosecution did not examine its witness and offered him to be cross-examined, held that this amounted to abandoning one's own witness. Such an approach seriously affected the credibility of the prosecution case *[Sukhwant Singh* v *State of Punjab* AIR 1995 SC 1601].

(iii) *Effect of not cross-examining:* When a fact is stated in examination-in-chief and there is *no* cross-examination on that point, naturally

it leads to the inference that the other party accepts the truth of the statement.

But there are several *exceptions* to this rule: (i) where the witness had notice before hand, (ii) where the story itself is of an incredible or romantic character, (iii) where the non cross-examination is from the motive of delicacy, (iv) where counsel indicates that he is not cross-examining to save time, and (v) where sevefal witnesses are examined on the same point, all need riot be cross-examined. Further, if the oral testimony of a witness is on the face of it unacceptable, courts are not bound to accept it merely because there was no cross-examination *SJuwar Singh* v *State of M.P.* AIR 1981 SC 373].

(iv) A cross-examination follows upon the examination-in-chief, *unless* the court, for some reason, postpones it. The court may permit the person who calls a witness to cross-examine him under some circumstances.

(v) If a witness after being examined in chief does *not* appear to subject him to cross-examination his evidence become valueless *[Gopal Sarvan* v *Satya Narayan* AIR 1989 SC 1141].

(vi) A co-defendant in a case can be cross-examined by another co-defendant when their interests are adverse to each other.

(vii) The proper limit of re-examination is to confine it to an explanation of the matters dealt with in cross-examination. If the re-examination introduces new matter, the adverse party will have the right to cross-examine the witness over that new matter.

(viii) An order of re-examination can be made by the court on an application by a party. It is not restricted to the court's own motion.

Re-examination of witness is not confined to clarification of ambiguities a-ising in cross-examination. New matter can be elicited with the permission of the court and court must be liberal in granting such permission. Any number of questions can be asked in re-examination *[Rammi* v *State of M.P.* (1999) 8 SCC 649].

Sec. 139. Cross-Examination of Person called to Produce a Document

"A person summoned to produce a document 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."

A person may be summoned to produce a document without being summoned to give evidence. Such witnesses will not be cross-examined unless and until they give some oral statement. Where the wife of a partner was called upon to produce the deed of dissolution of the firm, she was not permitted to be examined as a witness *[Parmeshwari Devi* v *State* AIR 1977 SC 403].

Sec. 140. Witnesses to Character

"Witnesses to character may be cross-examined and re-examined". A witness who appears to give evidence of a party's character may be examined-in-chief and may also be cross-examined and re-examined. The evidence of character is meant to assist the court in estimating the value of evidence brought before the court through the mouth of a witness.

Sec. 141. Leading Questions[2]

"Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question."

Sec. 142. When They Must Not be Asked

"Leading question must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion, been already sufficiently proved."

2. What are leading questions? Who can put them? Illustrate your answer.

Sec. **143. When They May be Asked**

"Leading questions may be asked in cross-examination."

A 'leading question' is one which *suggests* to the witness the answer which it is desired he should give (i.e. the question carry an in-built answer in it). A question is leading one when it indicates to the witness the real or supposed fact which the examiner expects and desires to be confirmed by the answer.

Thus, the following are the instances of leading questions: Is not your name so and so? Do you not reside in such and such place? Are you not in the service of such and such a person? All these questions put the answers in the mouth of the witness and all that he has to do is to throw them back. Thus, a question - "where do you live" is *not* a leading question. It may be noted that the leading questions are by *no* means limited to those which may be answered in 'yes' or 'no'.

Leading questions *cannot* ordinarily be asked in examination-in-chief or re-examination. The purpose of an examination-in-chief is to enable the witness to tell to the court by his own words the relevant facts of the case. If leading questions were permitted, the lawyer questioning him would be able to construct through the mouth of the witness a story that suits his client. The witness is presumed to be biased in favour of the party examining him and might thus be prompted. A fair trial of the accused is not possible (and there would be violation of Art. 21 of the Constitution) if the prosecution can ask leading questions to a witness on a material part of his evidence against the accused *[Varkey Joseph* v *State of Kerala* AIR 1993 SC 1892].

If the opposite party objects to the leading questions being asked in examination-in-chief or re-examination, the court may in its discretion either permit a leading question or disallow it. Further, such questions can only be asked when they refer to matters which are (i) introductory (ii) undisputed, or (iii) sufficiently proved. For, if such questions were not allowed, the examination would be prolonged. Leading questions can, however, be asked in cross-examination. This is so, because the very purpose of a cross-examination is to test the accuracy, credibility and general reliability of the witness. The court *cannot* disallow leading questions in cross-examination.

Thus, leading questions may be asked in the following cases:

(i) where they are *not* objected to by the opposite party;

(ii) where the opposite party objects but the court overrules the objection;

(iii) where they deal with matter of introductory or undisputed nature or the matter has already been satisfactorily proved; and

(iv) they may always be asked in cross-examination.

Sec. 144. Evidence as to Matters in Writing

Sec. 144 lays down that any witness who is about to give evidence as to a contract, grant or other disposition of property, may be asked whether it was not in writing, and if he says that it was, the opposite party may object to such (oral) evidence being given until the original document is produced or until the party producing the witness is entitled to give secondary evidence of it.

An *explanation* appended to the section says that a witness may give oral evidence of statements made by other persons about the contents of a document, if such statements are themselves relevant faces. Where, for example, the question is whether A assaulted B, evidence is offered through the mouth of C that he heard A saying to D that B had written him a letter accusing him of theft and that he will take his revenge. This statement about the letter may be proved though the letter itself is not produced because the statement is relevant as showing A's motive for the assault *(lllust.).*

It may be noted that Sec. 144 lays down a rale for the purpose of carrying out the provisions of Sec. 91 as to the 'exclusion of oral by documentary evidence.'

Sec. 145. Cross-examination as to Previous Written Statements[3]

Sec. 145 lays down the procedure by which 'a witness may in cross-examination be contradicted by his previous statement in writing or reduced

3. How the purpose of contradicting the witness under Sec. 145 of the Evidence Act is different from the purpose of proving the admission? Explain briefly. *[D.U.-2007]*

into writing. A witness may be asked in cross-examination whether he made a *previous* statement in writing relevant to the matters in issue, different from his *present* statement without such writing being shown to him or proved. But, if it is intended to contradict him by the writing, his attention must be drawn to it'.

This section provides for one of the methods in which the credit of a witness may be impeached (Also *see* Sections 138, 140, 146-148, 153-155). The *object* of the provision is either to test the memory of witness or to contradict him by previous written statement. Further, the witness is given a chance of explaining or reconciling his statements before the contradiction can be used as evidence (by calling his attention to those written parts). It is essential to fair play and fair dealing with a witness. If a witness is not shown or confronted with the part of the statement with which he was sought to be contradicted, the requirements of Sec. 145 could *not* be said to be complied with *[Rajendra Singh* v *State of Bihar,* 2000 CrLJ 2199 (SC)].

A previous statement used to contradict a witness does *not* become substantive evidence. The only purpose to contradict with a previous statement is to prove that the statement made in the court is *not* reliable. A 'tape-recorded' evidence may also be used for contradiction under Sec. 145, as like a document, letter, depositions, police diaries, etc.

The statement not only includes what is expressly stated therein but also what is necessarily implied therefrom. In this way, 'omissions' in a statement may amount to contradiction. For example, A made a statement previously that he saw B stabbing C to death; but before the court he deposes that he saw B and D stabbing C to death. The court can imply the word 'only' after B in the previous statement. This would contradict the present statement that he saw B and D stabbing C.

The previous statement must be of the witness who is being cross-examined. A was employed by B to write his account-books. B supplied A with necessary information. In this case, A cannot be contradicted with the entries in the account-books as it is not his statement but that of B. Previous statement of a party can be used only to contradict him and not to contradict his witnesses. Sec. 145 is *not* attracted when a statement made by one witness is contradicted by another witness *[Mohan Lai* v *State* AIR 1982 SC 839].

Evidence in Criminal Proceedings

Evidence recorded in criminal proceedings can be used to contradict under Sec. 145. The statements in the FIR made by the witness can be used *(Nankhu Singh* v *State* AIR 1973 SC 491). Sec. 162, Cr.P.C. imposes a bar on the use of any statement made by any person to a police officer in the course of investigation, except for the purpose of contradicting the witness under Sec. 145.

Sec. 145 *whether Applicable to Admissions?*

Sec. 145 is *not* attracted in the case of admissions. Admissions duly proved are admissible evidence irrespective of whether the pany making them appeared in the witness-box or not and whether that party when appearing as a witness was confronted with those statements in case he made a statement contrary to those admissions *[Bharat Singh* v *Bha.gira.thi* AIR 1966 SC 405]. Thus, the court did *not* allow a party to the case appearing as a witness to demand that he should be shown his earlier statements in the matter of family partition which amounted to an admission *[Tapan Das* v *Sasti Das* AIR 1986 Cal 390].

Sec. 146. Questions Lawful in Cross-examination[4]

In the course of a cross-examination, a witness can be asked all questions relating to relevant facts. But, in addition to such questions, Sec. 146 lays down that a witnesi can be asked 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 to expose him to a penalty or forfeiture.

The statements of a witness being testimonial of their nature, it is right to subject them to impeachment in the appropriate ways. 'Testing the

4. When a witness is cross-examined, what other questions can be asked in addition to the questions relating to the incident?
How is the credibility of witnesses tested? *[D.U.-2007]*

veracity of a witness' means ascertaining his honesty as to advise the court to what extent the witness is creditworthy. A witness may always be subjected to a *strict* cross-exarnination as a test of his veracity or accuracy, his understanding, his integrity, his basis and his means of judging. Sec.146 supplements Sec.145.

Questions can also be asked to find out his 'position in life' i.e. who he is, what he does, what is his source of livelihood or whether he is a genuine or a professional witness. It is common practice to make inquiry into the *relationship* of the witness with the party on whose behalf he is called - business, social or family - also to inquire as to his feeling towards the party against whom his testimony is being given.

'Shaking the credit of a witness by injuring his character' means to expose his respectability i.e. whether he is a respectable man and whether his character and conduct are such that he can be trusted to tell the *truth to the court. This kind* of questioning of the witness is known as "cross-examination as to credit". However, questions should *not* be directed towards laying bare with private life of the witness. The credit of witness can be said to have been shaken only if it can be shown that he is not a man of veracity, and not that he is of bad a moral character. A black-marketeer is not necessarily untruthful nor a non-black-marketeer necessarily man of veracity *[Chari* v *State* AIR 1959 All 149].

The mere fact that the answer may tend to criminate the witness is *no* justification to refuse to answer. However, he may object to the question on the ground that the question is not relevant to the matter in issue.

RULES FOR CHECKING IMPROPER USE OF CROSS-EXAMINATION[5] [SECS. 147-152]

sections **147** to 152 lay down rules against aggressive cross-examination. Since the character of a witness is allowed to be opened up in the course at cross-examination, tor trie purpose oi ascertaining his credit worthiness, it is natural that a person would not like to appear as a witness unless he were assured of some protection against aggressive cross-examination.

5 every witness be compelled to answer every question?

Sec. 147. When Witnesses to be Compelled to Answer

Sec. 147 supplements the provision in Sec. 146 by providing that if the question put to the witness (under Sec. 146) relates to a relevant fact, the provisions of Sec. 132 will apply. Under Sec. 132, a witness will have to answer the question notwithstanding that the answer may criminate him.

Sec. 148. Court to Decide when Question Shall be Asked and when Witness Compelled to Answer[6]

According to Sec. 148, 'when in the course of a cross-examination the question asked to the witness is not relevant to the facts, but is asked only to shake his credit by exposing his character, the court has to decide whether or not the witness shall be compelled to answer it. The court may *warn* the witness, if it thinks necessary that he is not bound to answer it'. In deciding as to whether a witness should be compelled or not to answer a question the court shall have regard to the following considerations:

(1) *Proper questions:* If the court is of the opinion that the truth of the n imputation could seriously affect the court's opinion as to credibility of the witness the court should allow the question. Thus, in cases of rape, the prosecutrix may be cross-examined as to her connection not only with the accused but also with other men. However, the court must also ensure that cross-examination is not made a means of .harassment or causing humiliation to her *[State of Punjab* v *Gurmit Singh* (1996) 2 SCC 384].

Where a person appears as an eyewitness to a murder and he is questioned "whether he is cruel to his wife". This fact, even if true, will not detract from the value of his evidence as an eyewitness and, therefore, the question is *improper*. But, if the question imputes to him the charge that at one time he himself was the member of the accused's gang and subsequently broke apart from it, this fact, if true, would seriously run down the court's opinion about him and, thus, the question is *proper*.

(2) *Improper questions:* Such questions are improper if the truth of the imputation is very remote in time or is of such a character that , it would not affect at all or would affect only very slightly, the

6. How would the court decide that a particular question is proper or improper?

credibility of the witness as to the matter on which he gives evidence. A question as to previous conviction 30 years' old put to an intended surety was disallowed on the ground that it related to matter so remote in time that it ought not to influence the court's decision as to fitness of such sureties.

The testimony of a witness cannot be rejected only on the ground of his conviction in a murder case 43 years ago. The long gap of time might've restored his credit *[Anurag Nair v State of T.N.* AIR 1976 SC 2588].

(3) *Improper questions:* Such questions are improper if there is a great disproportion between the importance of the imputation and the importance of his evidence. Where, for example, a person appears to testify on a minor matter of a party's date of birth, and it is imputed to him that he belonged to a gang of dacoits.

(4) If the question is proper and the court asks the witness to answer it, but even so he refuses to do so, the court may, if it sees fit, draw the inference that the answer if given would be *unfavourable* to the witness.

Sec. 149. Questions Not to be Asked without Reasonable Grounds

Sec. 149 lays down another important safeguard against assassination of the character of a witness in that no question carrying an imputation to the witness shall be asked unless the person asking the question has reasonable ground to believe that the imputation contained in the question is well founded.

Illustrations

(a) A barrister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(b) A pleader is informed by a person in court that an important witness is a dacoit. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

7 A woman prosecutes a man for picking her pocket. Can this question that she had given birth to an illegitimate child ten years before be asked?

(c) 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.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

Sec. 150. Procedure of Court in case of Reckless Questions

"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/other authority to which such barrister, etc. is subject in the exercise of his profession."

Sec. 150 is the *penalty* that may ensue against a reckless cross-examination, if the court is of opinion that the questions were asked without reasonable grounds. Any advocate who asks such questions without written instructions shall be guilty of 'contempt of court' and that the court may record any such question, if asked by a party to the proceedings. The records of the question are to be admissible as evidence of the publication of an imputation intended to harm the reputation of the person affected.

Sec. 151. Indecent and Scandalous Questions

Under Sec. 151, 'the court can prevent indecent and scandalous questions (or inquiries) from being asked even if the question has some bearing upon the matter in hand. Such questions may be allowed only if they relate to the facts in issue or are necessary for determining whether the facts in issue existed'. The Supreme Court has held that no such questions should be put unless there are reasonable grounds to believe them to be **true** *[Prakash* v *State,* 1975 CrLJ 1297].

Sec. 152. Insulting or Annoying Questions

Sec. 152 enables 'the court to forbid questions which are asked only to insult or annoy the witness'. Even if the question is on a proper point, the court may forbid it if it is needlessly offensive.

Sec. 153. Exclusion of Evidence to Contradict Answers to Questions Testing Veracity

According to Sec. 153, 'if a witness has answered a question as to his credit (i.e. affecting his character), whatever be his answer, *no* evidence is allowed to be given to contradict his answer. But, if the answer given by him is false, he may afterwards be prosecuted for giving false evidence'.

It is obvious that questions, asked merely to discredit a witness by injuring his character, introduce matters altogether foreign to the enquiry, and that if controversy about matter so introduced is allowed the court would be occupied with deciding not the merits of the case but merits of the witness and, thus, suit might be indefinitely prolonged.

Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud. The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it. Evidence is offered to show that he did make such a claim. The evidence is *inadmissible.*

(b) 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 *inadmissible.*

In these illustrations, no evidence can be given to contradict a witness, but, as the answer is false, he may be prosecuted for giving false evidence (under Sec. 193, IPC).

Exception 1, Sec. 153: If a witness is asked whether he has been previously convicted of any crime and he denies it, evidence may be given of his previous conviction.

Exception 2, Sec. 153: If a question is asked to impeach the impartiality of a witness and he denies the suggestion contained in the question, his answer may be contradicted. Thus, a parry may call evidence to show that a witness on the other side has given his evidence out of an ulterior motive (bribery, malice or revenge).

A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence. He denies it. He may be contradicted on the ground that the question tend to impeach his impartiality *[Must.* (d)].

Illustration (c) lays down another exception to Sec. 153. Where a fact, which is relevant as having direct bearing at the issue, is denied by a witness, his answer may be contradicted by independent evidence. For example, A affirms that on a certain day he saw B at Lahore. A is asked whether he himself was not on that day at Calcutta. He denies it. Evidence is offered to show that A was on that day at Calcutta. The evidence is *admissible,* not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

Anything about which the witness has not been questioned so that there is no answer which could be contradicted, no evidence could be allowed to contradict the witness otherwise *[State of Karnataka* v R. *Yarappa Reddy* AIR 2000 SC 185]. Evidence affecting veracity of the testimony given by witness can be offered irrespective of his character *[Vijajan* v *State* (1999) 4 SCC 36].

Sec. 154. Questions by Party to His Own Witness: Hostile Witness[8]

Sometimes a witness makes statements against the interest of the party who has called him. This makes it necessary that he should be cross-examined by that party so as to demolish his stand. Sec. 154 lays down that "the coun may, in its direction, permit the party who has called a witness to put him such questions as could have been asked in cross-examination by the adverse party."

Sec. 154 is based on the principle that 'a witness whether of one party or another should not be given more credit than he really deserves.' Cross-examination under this section means that he can be asked (i) leading questions under Sec. 143, (ii) questions relating to his previous statement in writing under Sec. 145, and (iii) questions which tend to test his veracity or to shake his credit under Sec. **146.**

A 'hostile witness' (the term has *not* been used in Indian law, unlike **English law)** is one who from the manner in which he gives the evidence shows that he is not desirous of telling the truth to the court. A witness who is gained over by the opposite party is also termed as a hostile witness. An 'adverse' or 'unfavourable' witness is one called by a party to prove a particular fact, who fails to prove such fact or proves an opposite fact.

When is a witness said to have turned hostile? Whether the evidence given by such a witness considered relevant and admissible? *[D.U.-2011]*

A witness *cannot* be said to be hostile:

(i) whenever his testimony is such that it does not support the case of the party calling him or is not in accord with the evidence of other witnesses *[Tulsi Ram Sahu* v *R.C. Pal* AIR 1953 Cal 160].

(ii) when he has not been produced out of the fear that he might disfavour the party who has to produce him *[Ram Ratan* v *Bittan Kaur* AIR 1980 All 395].

(iii) only because he gives inconsistent or contradictory answers (e.g. at a Sessions trial, a witness tells a different story from that told by him before the Magistrate).

The inference of the hostility of a witness would be drawn from the answer given by him and to some extent from his demeanour, attitude, etc. A prosecution witness can be declared hostile when he resiles from his previous statement made under Sees. 161 or 164, CrJP.C. Besides this, when a prosecution witness turns hostile by stating something which is destructive of his prosecution case, the prosecution is entitled to get this witness declared hostile.

Court's permission under Sec 154 - The permission for cross-examining one's own witness should not be granted to the party at the mere asking. The granting of permission is entirely the discretion of the court. The discretion conferred by Sec. 154 is *apart* from any question of hostility. It is to be liberally exercised whenever the court from the witness's demeanour, attitude, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice *[Sat Paul*' v*Delhi Admn.* AIR 1976 SC 294].

Questions of cross-examination can be allowed by the court to be asked by the party calling him even though the witness does *not* show to be hostile. When the adverse party has elicited new matter, in cross-examination, from a witness the court may permit the party examining the witness to test his veracity.

In *State of Bihar* v *Laloo Prasad* (2002) 9 SCC 626, the prosecution witness did not make statement in consonance with the prosecution case but the public prosecutor did not seek permission of the court to cross-examine the witness at that stage. Adverse party thereupon cross-examined the witness where the witness only stated the details of what he had stated in examination-in-chief. After the cross-examination, the Public Prosecutor

sought the witness be treated as hostile on the ground that he gave answers in favour of defence during cross-examination. The trial judge declined to permit the cross-examination. The Supreme Court refused to interfere in the order refusing permission, and held that the trial court was justified in declining to exercise discretion under Sec. 154. However, during final consideration, it was open to the public prosecutor to tell the court that he was not inclined to own the evidence of the said witness.

The court observed: Though it is open to the party who calls the witness to seek the permission of the court at any stage of the examination, nonetheless a discretion has been vested with the court whether to grant the permission or not. Normally, when the public prosecutor requests for permission to put cross-questions to a witness called by him, the court would grant it. The public prosecutor if not prepared to own the testimony of the witness examined by him he can give expression to it in different forms, under Sec. 154, or to tell the court during final arguments that he is not relying on the evidence of the witness.

Value of the Evidence of a Hostile Witness

The whole testimony need not be rejected, nor such witness can be regarded as a wholly reliable witness. The court can rely upon that part of the testimony which inspires confidence and credit *[Rabinder Kumar Dey* v *State o/Orissa* AIR 1977 SC 170].

The testimony of a hostile witness requires close scrutiny because he is contradicting himself, and that portion of his statement, which is consistent with the prosecution or defence, may be accepted *[State ofU.P.* v *Ramesh Prasad Mishra* (1996) 10 SCC 360]. The testimony of a hostile witness can be used to the extent to which it supports the prosecution case *[Koli Lakbmanbhai* v *State of Gujarat* AIR 2000 SC 210]. The whole of the evidence so far as it affects *both* parties favourably or unfavourably must be considered for what it is worth.

In *Balu Sonba Shinde* v *State of Maharashtra* (2002) 7 SCC 543, the moot question was whether the evidence provided by the hostile witness would be acceptable or not. The statement (oral) of prosecution witnesses were not consistent with the facts (proved), and the Prosecutor declared the witness as hostile witness and prayed for permission to cross-examine the witness (after the cross examination was completed by the opposite

party). Held that declaration of a witness to be hostile does not *ipso facto* reject the evidence and it is now well settled that the portion of evidence being advantageous to the parties may be taken advantage of but the court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance.

In *Leela Srinivasa Rao* v *State ofAndbra Pradesh* AIR 2004 SC 1720, the Supreme Court held that the fact that some of the witnesses have been declared by the prosecution to be hostile does not result in automatic rejection of their evidence. Even the evidence of a hostile witness if it finds support from other evidence may be taken into account while examining the guilt of the accused. In *Bhola Ram Khushwaha* v *State of M.P.* AIR 2001 SC 229, the fact of an independent witness turning hostile was held to be not in itself a ground for acquittal.

Sec. 155. Impeaching Credit of Witness[9]

Impeaching the credit of a witness means exposing his real character to the court so that the court may not trust him. Sections 138, 140, 145 and 154 provide for impeaching the credit of a witness by cross-examination; 5ec. 146 permits questions injuring the character of a witness to be put to him in cross-examination. Sec. 155 lays down a different method of discrediting a witness by allowing *independent* evidence to be led.

As laid down by Sec. 155, the credit of a witness may be impeached jy the adverse party, or by the party who calls him (with the court's xmsent) in the following ways:

(1) *Unworthy of credit:* 'By producing witnesses who testify from their personal knowledge of the witness that he is unworthy of credit.'

(2) *Corrupt inducement:* 'By showing that the witness has either taken bribe or has accepted the offer of a bribe or some other corrupt inducement for giving his evidence' (a mere offer of bribe to him will not impeach his credit). Such a "pocket witness" is *not* an independent witness but is one who has been hired.

9. How credit of a witness may be impeached under the Indian Evidence Act? *[D.U.-2007]*
What is the procedure **for** impeaching the credit of a witness? [LC.//-2O06]

(3) *Former inconsistent statements:* 'By showing previous statements of the witness which contradict his present statements'. This is commonly used to impeach the credit of a witness.

A sues B for the price of goods sold and delivered to B. C says that A delivered the goods to B. Evidence is offered to show that, on a previous occasvotv,\\e said tV\ax he had not delivered the goods to B. The evidence is admissible *[IUust.* (a)]. A is indicted for the muraer oVfe.C ^x^'tasO&^Ws. dying, declared that A had given B the wound of which he died. Eviden *is* offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence. The evidence is admissible *[IUust* (b)]. The previous contradictory statements of a witness can be used to discredit only his testimony and not that of other witnesses. Further, Sec. 155 is controlled by Sec. 145 (the attention of the witness must be draw to his former statements before he is contradicted). A 'tape-recorde statement' is admissible under Sec. 155 (3).

(4) *Immoral character:* 'When a man is being prosecuted for rape or an attempt to ravish, it may be shown that prosecutrix (i.e. the complainant) is generally a woman of immoral character'.

A reading of Sec. 155 would indicate that all inconsistent former statements are not sufficient to impeach the credit of the witness. A former statement though seemingly inconsistent with the evidence needTnot necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted" would affect the credit of the witness. Sec. 145 of the Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein *[Rammi* v *State of MP.* (1999) 8 SCC 649].

Explanation **to Sec. 155**

In examination-in-chief a witness cannot be asked the reasons for his belief that another witness is unworthy of credit. Such questions can only be asked in cross-examination. Whatever reasons he may give shall not be contradicted, but if the answer is false, he may be prosecuted for giving false evidence.

Stock Witness

A 'stock witness' is a person who is at the back and call of the police. He obliges police with his tailored testimony. Such a witness is used by the police in raid cases. Such witnesses are highly disfavoured by the judges.

Once it is proved that a certain witness examined by the prosecution is a stock witness of the police, the court would be justified in discarding his testimony. But that in itself is not enough to falsify the entire prosection case. In such a case, it is the duty of the court to brush aside the testimony of the stock witness and to see if the remaining prosecution evidence is enough to sustain the conviction of the accused *[Hazara Singh* v *State* ***of*** *Punjab* (1971) 3 S.C.R. 674].

Material Witness

A witness who is essential to the unfolding of the narrative on which the prosecution is based is known as 'material witness'. Though the prosecution is not bound to examine all the witnesses named on the charge sheet, it is, however, bound to examine all material witnesses. This is so even when the prosecution apprehends that his evidence will not be favourable to the prosecution.

If a material witness is not examined and the prosecution has no satisfactory explanation to offer for his being withheld, the court could examine such a witness as a 'Court witness', or to draw an adverse inference to the prosecution in respect of that portion of its case to which the witness withheld could have given evidence *(Sardul Singh* v *State of Bombay* AIR 1957 SC 747). Such a circumstance casts a serious reflection on the fairness of the trial; the accused is entitled to ask the court to draw the inference under Sec. 114, illustration (g), that if produced the evidence of that witness would be unfavourable to the prosecution.

RULES RELATING TO CORROBORATION [SECS. 156-157]

The rules relating to corroboration (i.e. evidence which *supports* the testimony of a witness) are laid down in Sees. 156-157.

Sec. 156. Questions tending to Corroborate Evidence of Relevant Facts Admissible

Sec. **156** lays down that when **the evidence of a witness requires to be corroborated, he may be questioned (apart from the main event) as to**

any other circumstances which he observed at or near to the time or place where the main fact happened, if the court is of opinion that such circumstances, if proved, would *corroborate* the *testimony* of the witness as to the relevant fact which he testifies.

Illustration: A, 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.

Sec. 156 provides for the admission of evidence given for the purpose, not of proving a particular fact but of testing the truthfulness of the witness.

Sec. 157. Former Statements as Corroboration

Sec. 157 lays down 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 competent to investigate the fact, may be proved'.

Some of the former statements *allowed* under this section are: A statement irrelevant under Sec. 32 because the maker of the statement ultimately survived can be used to corroborate the testimony of that person in the court; The complainant's conduct of narrating the incident of extortion to her colleagues after it was over, when it was corroborated by three witnesses was held to be relevant under Sec. 157.

In a case, B, the accused, was the cashier of a company. He was suspected to have embezzled the company's fund. Before filing FIR, B was taken to S, a solicitor ol trie company. Certain conversation took place between B and S in that interview. S prepared notes of attendance of the conversation soon after the interview. At the trial, S gave evidence as to what happened at the interview with B. These notes were tendered by the prosecution to corroborate the testimony of S, when he deposed to what had taken place between him and the accused. These notes were beld to be admissible under Sec. 157 *[Bhogilal Chunilal* v *State* AIR 1959 SC 356]. In *Sashijena* v *Khandal Swain* AIR 2004 SC 1492, it was held that the former statement of witness can be used to corroborate only his own evidence at the trial and not that of any other witnesses.

Statements At or About the Time of Occurrence

Sec. 157 provides an *exception* to the general rule of excluding hearsay evidence. However, the statement must be made as early as can reasonably be expected in the circumstances of the case and before there was an opportunity for tutoring or concoction. A statement made by a girl about her abduction 10 days after the incident, held, to be inadmissible under Sec. 157.

In *Rameshwar* v *State of Rajasthan* (1952) SCR 377, the Supreme Court allowed the statement to the court of a young girl - a victim of rape - to be corroborated with the girl's own statement to her mother four hours after the incident to the effect that she had been raped by the accused.

The statement of the father of a kidnapped child to the effect that a person standing at the site of the crime gave him the identity by name of the kidnappers and the motor vehicle number in which they whisked away the child, but the father was not able to recall the number of vehicle, his testimony was held to be hearsay but usable for *supporting* the testimony of the witness of fact *[Vijender* v *State of Delhi* (1997) 6 SCC 171].

It may be noted that if the statement is made to an investigating authority, it would be usable even if it was made after gap of time viz. few days. Statements before an investigating officer are *not* evidence (e.g. FIR) but can be used for corroboration or contradiction. The First Information Report (FIR) can be used to corroborate the testimony of the maker of it or to contradict him under Sec. 145. The previous statements of an accomplice who becomes an approver witness have been regarded as insufficient corroboration. However, the previous statements of an accomplice witness may be proved as corroborative evidence, if the court so desires.

Sec. 158. Corroboration or Contradiction of the Statements of Persons who Cannot be Found

5ec. 158 lays down that 'when the statement of a person who cannot be ound or is dead is relevant under Sec. 32 or 33 and has been proved e.g. a dying declaration), all matters which either confirm the statement)r contradict it, may be proved. Evidence can also be given of any fact ivhich might confirm or impeach the credit of the person who made the ;tatement to the same extent as if that person had appeared as a witness md had denied upon cross-examination the truth of the matter suggested'.

Thus, this section places a person whose statement has been **used** is evidence under Sec. 32 or 33 in the same category, as a witness

actually produced in the court for the purpose of contradicting his statement by a previous statement made by him. No sanctity attaches to such statements simply because the person is dead or cannot be examined as a witness. His credibility may be impeached or confirmed in the same manner as a living witness.

RULE AS TO REFRESHING MEMORY [SECS. 159-161]

Sections 159-161 deal with the extent to which and the mode in whicr a witness may refer to a writing in order to refresh his memory while giving evidence.

Sec. 159. Refreshing Memory[10]

Sec. 159 enables a witness to look at the following writings for thi purpose of refreshing his memory:

(i) a writing made by *him* either at the time of transaction (happenini concerning which he is questioned) or so soon afterwards tha the court considers that the transaction must have been still fresl in his mind when he was recording it;

(ii) any writing made by any *other person* about the transaction whicl was read by the witness within the time aforesaid and he kne^ it to be correct;

(iii) any professional *treatises* (books) where the witness is an experi

This section also lays down that 'when a witness wants to refresh hi memory by referring to any *document* he may, with the court's permissior refer to a copy of it. Provided the court be satisfied that there i sufficient reason for the non-production of the original'.

Although a witness should always state what he himself remember he may nevertheless, when giving evidence, refresh his memory as t details. The *reason* of the rule of refreshing is that the witness should nc suffer from a mistake and may explain an inconsistency.

10. In the Indian Evidence Act, what is meant by 'refreshing memory'? Can a witness refresh his memory by referring to notes? *[D.U.-20C*

Any writing can be made use of for the purpose of refreshing the memory of a witness. This includes: Reports, Diaries, Certificates, Account books, Dying declaration, Notes of a speech, *Panchnamas,* Deposition, : Notes of a Police Officer, Notes of a brief of a Barrister, and, even a Horoscope. A witness was allowed to look at the dying declaration which was noted by him. A police officer may use his special diary for refreshing his memory *[State ofKarnataka* v *K. Yarappa Reddy* (1999) 8 SCC 715].

A medical man was allowed to refresh his memory by referring to a report prepared by him in his post-mortem examination.

It is *not* necessary that the document or writing used for refreshing the memory should be relevant or admissible in evidence, but facts tried to be proved must be admissible under Sec. 159. A document which was not produced within die time permitted for its production and, therefore, rejected by the court, may be used for refreshing memory if it otherwise satisfies the spontaneity requirement of the section. Even where *Pancbanama* is not admissible in evidence, it may be used by a witness to refresh his memory where, after having been made by the police, it was read over to the *punch* who admitted it to be correct *[Emperor* v *Mahadeo Dewoo* (1945) 47 Bom LR 992].

This section gives a permission to the witness. It does *not* compel lim to do so. Nor can the opposite party prevent him from doing so. In i case, a witness testified that the accused was in possession of a controlled drug. He could not give a statement as detailed as he gave to the police when he was first interviewed. The accused raised an objection which was overruled. The court said that a witness should be allowed to supplement bis testimony with certain essential details which were eluding him from his own statements recorded earlier. This is allowed in all cases with a view to laying a proper foundation for the testimony of the witness *[R. f Sutton* (1992) Cr App Rep (CA)].

Sec. 160. Testimony to Facts Stated in Document mentioned in Sec. 159

Sec. 159 deals with cases where a reference to the writing revives in the nind of the witness a recollection of the facts. But it may be that even . perusal of a document does not refresh his memory i.e. it does *not* revive *a* his mind a recollection of facts. Under Sec. 160, 'it is not necessary that he witness looking at the written instrument should have an independent <r specific recollection of the matters stated therein. He may testify to the

facts referred to in it, if he recognizes the writing or signature and feels sure that the contents of the document were correctly recorded'.

Illustration: A bookkeeper may testify the facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

It may be noted that under Sec. 159, the document is not in itself evidence nor is it tendered. Under Sec. 160, the document itself is tendered and is evidence.

Sec. 161. Right of Adverse Party as to Writing used to Refresh Memory

Sec. 161 lays down that 'any writing (referred to under Sees. 159 and 160) used for the purpose of refreshing the memory of witness, *must* be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon'.

The right must be exercised at that very moment because it may not continue throughout the period for which the witness remains under examination. The *purposes* of such inspection are: (l) to secure the full benefit of the recollection of the witness as to the whole of the facts, (ii) to prevent improper use of documents, and (iii) to compare the oral testimony with the written version *[In Rejhoubhoa Mabton* (1832) 8 Cal 739].

RULES AS TO PRODUCTION OF DOCUMENTS [SECS. 162-164]

Sees. 162-164 lay down the rules as to production and translation of documents.

Sec. 162. Production of Documents[11]

"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

11. State the exceptions to the general rule that a witness is bound to tell the whole truth and to produce any document in his possession relevant in issue'.

objection shall be decided of 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."

Sec. 162 makes it obligatory on the witness to produce the document summoned by the court and he has *no* right to decide whether the document shall be produced. Order XVI, Rule 6 of the C.P.C. also provides that a person may be summoned to produce a document without being summoned to give evidence. Sec. 139 of the Evidence Act similarly provides that a person summoned to produce a document does not become a witness by the mere fact that he produces the document and he cannot be cross-examined.

The party producing the document under court order may raise his *objections* to its production or admissibility. It is then for the court to decide the validity of the objection. To enable the court to do so, it may hear the parties and may also ask them to produce evidence touching upon the validity or otherwise of the objections.

Affairs of State - Under Sec. 162, the court may inspect the document to determine on its admissibility, unless it refers to matters of State. Reading Sees. 123 and 162 together, it becomes clear that the court cannot hold an enquiry into the possible injury to the public interest which may result from the disclosure of the document in respect of which privilege is claimed under Sec. 123. That is a matter for the authority concerned to decide.

But, the court is competent to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether evidence relates to an affair of State under Sec. 123 or not *[State of Punjab* v *S.S. Singh* AIR 1961 SC 493].

Translation of Documents

Sec. 162 further lays down that if it is necessary for the document to be *translated,* the court may direct the translator to keep the contents secret, unless the document is to be given in evidence. If the translator disobeys the instruction he may be held to have committed an offence under Sec. 166, IPC [Public servant disobeying law with intent to cause injury to any person].

Sec. 163. Giving, as Evidence, of Document Called for and Produced on Notice

Sec. 163 lays down that 'where a party has given a notice to another to

produce a document and the document has been produced and has been inspected by that party, he is bound to use it as evidence if the party producing the document so desires'.

This section applies not only to civil cases but also to criminal trials. It has *no* application where the document has already been produced before the court by any party to the case. The section comes into play when the party in possession or power of the document has not produced the same in the court and runs the risk of adverse inference being drawn against him or being debarred from producing the document in the court at a later stage of the proceedings unless his opponent becomes instrumental in seeking production and inspection of the document.

There is no authority for the proposition that the evidence, which is admitted under this section, must be deemed to be conclusive against the party who has inspected the document. A document so produced becomes 'evidence' only when it is produced for the inspection of the court and only then the court will pronounce upon its relevancy, admissibility and will call upon the party on whom the burden of proof Ues to prove the truth of its contents and its genuineness. Cross-examination could be used for that purpose *[Phoolchand Garg* v *Gopaldas Agarwal* AIR 1990 M.P. 135].

Sec. 164. Use of **Document Not Produced** on **Notice**

According to Sec. 164, 'where a party has been called upon by the other party to produce a document but the request was refused, such refusing party is no longer at liberty to produce the document of his own. It would require consent of the other party or permission of the court to enable him produce the document'.

Illustration: A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. B *cannot* do so.

Thus, where an opponent in possession of a document refuses to produce it on demand, he is afterwards forbidden to produce the document to contradict other party's secondary evidence. This is in one sense a proper *penalty* for unfair tactics or refusal to cooperate with the judicial process. The section does *not* enable a party to seek actual production of the document. It contemplates only a disability the fear of which may

perhaps bring about a positive response *[Shyamdas Kapur* v *Emperor* (1932) 60 Cal 341]. The section may *not* perhaps apply to criminal proceedings.

Sec. 165. Judge's Power to Put Questions or Order Production[12]

Under Sec. 165, 'for the purpose of obtaining proper proof of relevant facts, the Judge has been given the power to ask any question to a witness *or* to a party. Such question may be asked at any time and may take any form and the question itself may relate to a relevant-Qr an irrelevant fact. The court *may* also order the production of any document or thing. No jarty or his agent shall be entitled to raise any objection to any such juestion or order, nor, without the court's permission, the witness shall be cross-examined as to any answer that he may give'.

Every criminal trial is a voyage of discovery in which truth is the [uest. A judge must participate in the trial. He must show intelligent interest nd put questions to witnesses in order to ascertain the truth. It is his duty o question witnesses on points which the lawyers for the parties have either •verlooked or left obscure or willfully avoided. But, this he must do, without unduly trespassing upon the functions of the counsel of parties. He nust *not* play a part of a party or a prosecutor, nor should he frighten or iully the witnesses *[Ram Cbander* v *State ofHaryana* AIR 1982 SC 1036].

"In India, in an enormous mass of cases, it is absolutely necessary hat the judge should not only hear what is put before him by others, but hat he should ascertain by his own inquiries how the facts actually stand. *a* order to do this, it will frequently be necessary for him to go into aatters which are not themselves relevant to the mattes in issue, but may >ad to something that is (relevant), and it is in order to arm judges with xpress authority to do this that this section has been enacted *[Krishna [yyar* v *Balakrishana Ayyar* (1933) 57 Mad 635].

The object of allowing the judge to ask irrelevant questions was to btain "indicative evidence" which might lead to discovery of relevant evidence. : may be noted that Order X, Rules 2 and 4, Order XVI, Rule 14 of C.P.C. nd Sec. 311, Cr.P.C, have conferred similar powers on the court.

12. What are the powers of the Court to put questions to a witness? Is there any limitation on the use of these answers?

Write a short note on: Powers of the judge in relation to witnesses.

[D.U.-2007]

Sec. 165 confers vast and unrestricted powers on the court. The court may question the accused as to what he told to police although Sec. 162 of Cr.P.C. prevents parties from questioning the accused on that point. A judge may look at a police diary although not requested by either party and may question a witness on that basis. This may enable the judge to expose discrepancies in the statements of witnesses in the court and those recorded in the police diary *[Emperor* v *Lai Miya* (1943) 1 Cal 543]. The questions intended to remove the *confusion* of mind from which the witness happened to suffer are proper *[State ofRajastban* v *Ani* (1997) 6 SCC 162]. However, there is an inherent danger in a judge adopting a much too stern an attitude towards witness. Thus, in *Ram Chandra* cases, two of the prosecution witnesses did not adhere to their earlier statements. The judge rebuked them and threatened them with prosecution for perjury if they changed their statements. It was held that the judge *exceeded* the power conferred upon him by this section.

The answers given by the witness in reply to questioning by the judge can be subjected to cross-examination only with the permission of the judge. The judge should allow such cross-examination to the party where answers have been adverse to him. The witness should have the freedom to answer or refuse to answer questions put by the judge to the same extent to which he is privileged otherwise.

Provisos (Exceptions) *to* Sec. 165

A judge is empowered under Sec. 165 to put irrelevant questions to a witness, but he cannot base his judgment on irrelevant facts. The/irst *proviso* to this section lays down that the judgment must be based on facts declared relevant by the Act and duly proved.

The *second proviso* lays down that this section shall *not* authorize any Judge to:

(i) *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 Sees. 121-131 (privileges), if thei questions were asked or the documents were called for by the adverse party; (II) *ask* any question which it would be improper for any other person to ask under *Sees. 148-149;*

Q£> dispense ^VxXn.^vra^ e^Aence , ' ^»£ any document, except \ hereinbefore excepted.

Where the question is asked, with a view to criminal proceeding being taken against the witness, the witness is *not* legally bound to answer it and he cannot be punished under Sec. 179, IPC for refusing to answer *[Queen Express* v *Isbari* ILR All. 672].

Sec. 166. Power to Jury or Assessors to Put Questions

"In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper."

It may be noted that trial by jury or assessors does *not* now prevail in India.

Sec. 167. No New Trial for Improper Admission or Rejection of Evidence

Sec. 167 lays down that 'the improper admission or rejection of evidence is *not* a ground for reversal of judgment or for a new trial of the case, if the court considers that 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'.

The *object* of this section is that "technical objections will not be allowed to prevail where substantial justice has been done." The section applies to *civil* as well as *criminal* cases. The matter of wrongful rejection or admission of evidence can be raised either before a court of review or appellate court. It may be noted that Sec. 99, C.P.C. also provides that no decision is to be disturbed in appeal unless there is an error which affects the merits of the case. Sec. 465 of Cr.P.C. provides that a decision can be reopened on the ground of failure of justice and not otherwise.

Rejection of an important document or refusal of permission for examination of a material witness may justify reversal of the decision *[Devidas Jagjivan* v *Pirjada Begam* (1984) 8 Bom 377]. As regards 'rejected' evidence, the question under Sec. 167 is not so much whether the evidence rejected would not have been accepted against the other testimony on the record as whether the evidence "ought not to have varied the decision" *[Narayan* v *State of Punjab* AIR 1959 SC 484].

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 exvluded freom consideration whereas in the latter case the evidence wrongly rejected can only be brought on record by having recourse to further proceeding.

Where it is clear from the record that the prosecjution, though it had cited certain Person as witness was not very keen to examine him and when that person objected to give evidence, the prosecution dropped his; it is not a case in which evience can be said to have been rejected within Sec. 167[Narayan's case, above].

Objection in Appeal to Documents Admitted by Evidence

Where evidence is admitted by the court with the consent of the parties and the evidence is admissible and relevant, no objection will be allowed to be taken to its reception at any stage of te litigation on the ground of improper proof.

But , if the evidence is irrelevant or inadmissible (e.g. owing to want of registration), consent or omission to take objection to its reception does not make it admissible and the objection may be raised even in appeal for the first time. The question of relevancy is a question of law and can be raised at any stage, but the question of mode of proof is a question of procedure and stands waived if not raised at the first opportunity [Padnappa v Shivlingappa, 47 Bom LR 962].