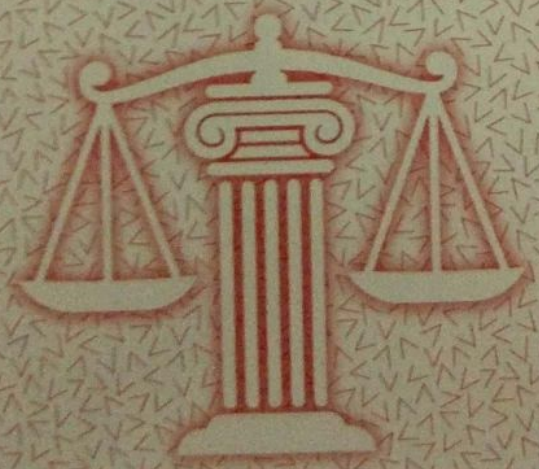
N. H. Jhabvala

The Indian Evidence Act

2020



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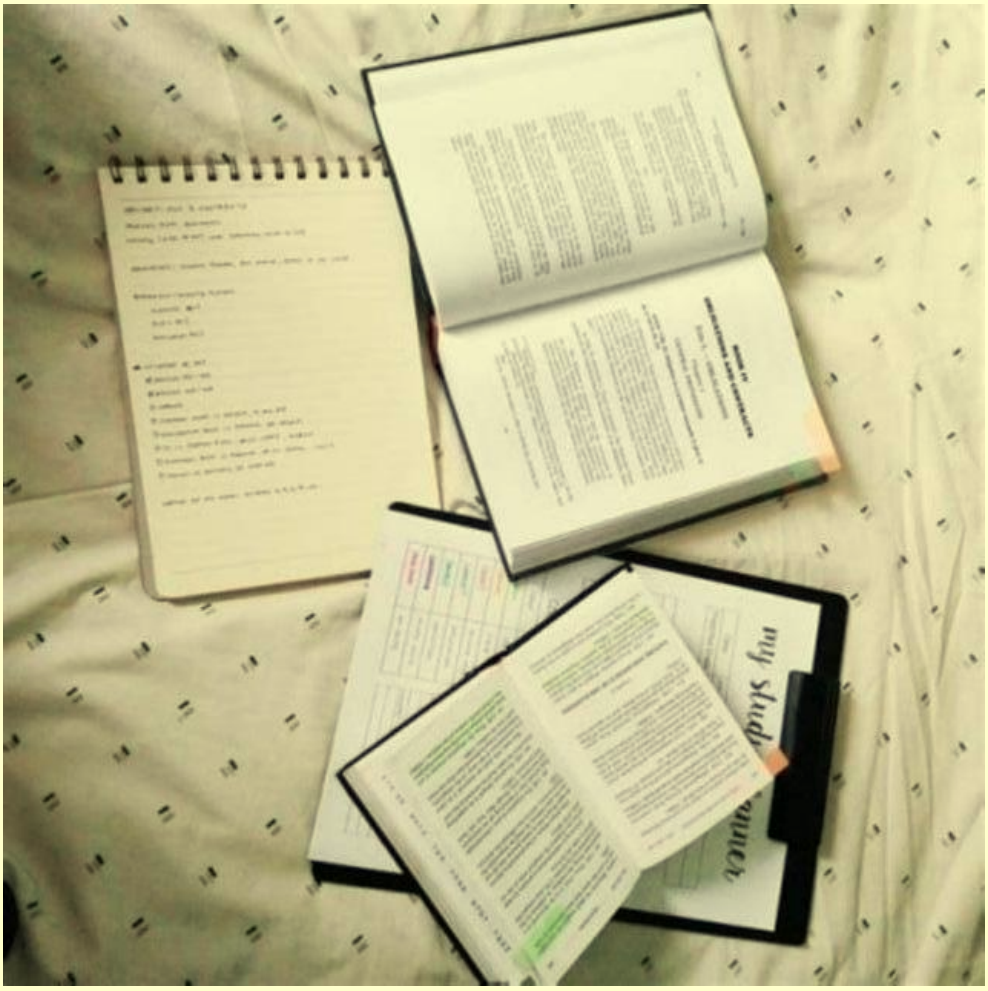

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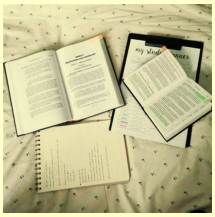

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Preface to the Twenty-Ninth Edition

We are glad to present the twenty-ninth revised edition of our popular book on the Law of Evidence in India. The present edition has been carefully revised and includes several cases decided by the Supreme Court and the various High Courts. The Case-law is updated and a Summary of the Indian Evidence Act is given in the Appendix. Questions set at the recent examinations have been indicated at the appropriate places.

All amendments made in the Indian Evidence Act by the **Criminal Law (Amendment) Act, 2018,** have been incorporated at the relevant places.

We trust this popular book will continue to be useful to the student community.

— **Publishers**

CONTENTS

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INTRODUCTION

TO THE LAW OF EVIDENCE

(STUDENTS ARE ADVISED TO READ THIS INTRODUCTION BEFORE EMBARKING ON A DETAILED STUDY OF THE ACT)

Laws may be divided into *substantive* laws and *procedural* laws. The laws by which rights, duties and liabilities are defined are called *substantive laws.* The *purpose* of the substantive laws is to deal with the principles creating or destroying rights, duties and liabilities. The *laws of procedure,* on the other hand, prescribe the *mode* by which the *application* of the substantive law is regulated. Such procedures 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. For example, the Indian Penal Code defines several offences, and lays down the punishment for such offences. This is the *substantive* criminal law. The Criminal Procedure Code deals with the rules of investigation of a crime, methods of conducting trials, provisions for appeal, *etc.* The Evidence Act, on the other hand, is concerned with the mode of proving whether a particular person committed the offence or *not.*

The problems dealt with by the law of evidence can briefly be stated as under:

What facts can be proved in a court of law when there is a particular dispute before it? The obvious answer *seems to be* that whatever facts make the *belief* or *disbelief* in the *existence* or *non-existence* of a particular fact in dispute may be brought before the court as evidence. In other words, whatever facts *logically* make it possible for the courts to entertain a belief in the existence *or* non-existence of a fact may be adduced as evidence. The logical relevancy of the facts that could be adduced as evidence is *not* fully admitted by the law of evidence. It is *not merely* the logical relevancy that matters, *but also* the *veracity* of the particular facts. For example, that certain people heard a certain conversation about a murder may be logically relevant, but its 'truth value' may be highly doubtful. It may be a mere gossip, having no 'truth value' at all.

Therefore, there are *two cardinal principles of the law of evidence. What is relevant may be proved; but everything that is relevant may not be admissible as evidence.* This admissibility of evidence is tested on the basis of the 'truth value' of the relevant facts. For example, certain facts, though relevant, are excluded under the Evidence Act, *viz.*—

(1) Facts similar to, but specially connected with each other, would be excluded, *unless* it is an experimental case.

(2) Similarly, *hearsay evidence,* that is, the assertion regarding the existence of any fact by any person who is *not* called as a witness, is generally excluded.

(3) Evidence regarding the *opinion of others* regarding the existence or non-existence of a fact is generally excluded, though in some exceptional cases, it may be admitted.

(4) The fact that *any person's character* is such as to render certain conduct imputed to him probable or improbable is also excluded.

Thus, it should be noted that the law does *not* admit *every* fact which is *logically relevant.*

The fundamental principle of the law of evidence, namely that evidence must be confined to the matters in issue, is qualified by the following *two* fundamental principles :

(1) *Hearsay evidence* is *not* to be admitted.

(2) In all cases, the *best evidence* must be given.

The Act makes an attempt to define positively and enumerate what are *relevant facts*. The concept of relevancy is laid down in S. 11 the Act. Facts which are inconsistent with facts in issue or relevant facts, or those which render highly probable or improbable the fact in issue, are themselves relevant. This is the gist of the relevancy of facts. A fact is relevant *only when* it has a tendency of making the existence or non-existence of the facts in issue highly probable in the opinion of the Court.

In *English law*, the law of evidence generally states what facts *cannot* be adduced as evidence, the inference being that the rest *can* be adduced as evidence. The Evidence Act, on the other hand, makes an attempt to state positively what facts *are* relevant.

The whole of the Evidence Act can be divided into the following *three parts:*

(1) *What* facts may and may *not* be proved? — Sections 1 to 55 deal with the answers to this question.

(2) *How* are the relevant facts to be proved, *or* what kind of evidence must be given of a fact which may be proved? — Sections 56 to 117 deal with these questions.

(3) *By whom*, and *in what manner*, must the evidence be produced? — In this part of the Evidence Act, the competency of the methods of testing their creditworthiness are discussed. Sections 118 to 167 of the Act lay down the rules in this connection.

In brief the questions which the law of evidence attempts to answer are the following :

(1) *What kind of facts* may be proved in order to establish the existence or non-existence of a fact in issue?

(2) *What kind of proof* is to be given of those facts?

(3) *Who* is to give that proof?

(4) *How* is that proof to be given?

Each of the above *four* questions is briefly discussed below.

(1) WHAT KIND OF FACTS MAY BE PROVED?

The Evidence Act states that facts which are logically connected with the facts in issue, and which make the existence or the non-existence of the facts in issue probable or improbable, can be proved. For example, in a trial for murder by poisoning, the fact that the accused had a *motive* for committing the murder makes the inference of the murder possible. Similarly, the fact that he had purchased some *poison* just before the murder, when the death is suspected to have been caused by such poison, makes his having committed the murder probable. Further, that fact that after the victim drank the contents of the glass, the accused cleaned the glass, might make the inference of his having committed the murder possible, as by this subsequent conduct, the accused might have attempted to destroy the evidence. In the same way, the fact that the accused had opportunities to offer a drink to the victim just before the victim died may make the inference of the

accused having committed the murder possible, as it afforded an opportunity for committing the offence.

Thus, the gist of the contents of Sections 6 to 16 is that whenever a fact, either by itself, or in connection with other facts, makes the legal inference of the *existence* or *non-existence* of the facts in issue, such facts become *relevant* and may be *proved*. But this rule of relevancy is determined by the second question that the law of evidence has to answer.

(2) WHAT KIND OF PROOF IS TO BE GIVEN OF THOSE FACTS?

The general principle is that the *best evidence* must be given in all cases. But this maxim is a *half truth*. What it meant by *best evidence* is the evidence of facts which have the *maximum truth value*. In a sense, this question is answered mostly in a negative way by the Evidence Act. Hearsay evidence *cannot* be given. The contents of a document *cannot* normally be proved by oral evidence, when the law requires a transaction to be contained in a document. This rule is contained in the statement that *primary evidence* must be given, unless *secondary evidence* is permitted to be given.

(3) WHO IS TO GIVE THAT PROOF?

The third question deals with the *burden of proof*. There are certain facts which need *not* be proved because the court takes notice of them. There are certain other facts which *must* be proved by one of the parties to the dispute.

The party who has the responsibility of proving a certain fact is said to have the *burden* (or *onus*) *of proof* on him.

The law of evidence generally lays down that he who wants the court to believe certain things must prove them. But this general rule is modified by the law of *presumptions*. In certain cases, the court *may believe in the truth of a thing, unless* it is disproved. In such cases, the Court *may presume* the existence of a particular state of affairs. In some other cases, the law prescribes that the court *must believe* in the existence of certain things, *unless* they are disproved. There are cases where the Evidence Act lays down that a court *shall presume* a particular thing. There are certain circumstances when the law will say that the court must believe in the existence of a thing, and should *not* allow any evidence to disprove such a thing. Thus, one thing may be declared to be *conclusive proof* of another. In some other cases, the law might also *prevent* a party from leading evidence contrary to his prior statement or conduct, by applying the *doctrine of estoppel*.

(4) HOW IS THAT PROOF TO BE GIVEN?

In this part of the law of evidence, questions relating to the competency of the witnesses, as also the method of examining them and testing their veracity, are discussed. Here, the rule is that all persons who are capable of understanding the nature of the questions put to them, and who can answer those questions, can be witnesses. This general rule is, however, qualified by what is known as *the rule of privileged communications*. In some circumstances, the law prescribes that one person shall *not* give evidence of certain communication which he received under particular circumstances. For example, it is provided that a wife or a husband *cannot* give evidence of the communication which he or she received from the other party to the marriage during the period of the marriage.

The other aspect of this branch of the law of evidence deals with the *manner* in which a witness is to be examined by the party who calls him. It lays down what kinds of questions *can* be put to him and what kinds of questions *cannot* be put to him at such an examination of the witness by the party who has called him. How the opposite party can test the veracity of the deposition and how he can impeach his creditworthiness (by way of a cross-examination) are also discussed when considering this aspect of the law of evidence.

ILLUSTRATIVE CASE

Bearing in mind that it may be rather complex to understand the *exact scope* of the Evidence Act, and particularly the scope and application of Sections 6 to 16, an *illustrative case* is given below at length.

The *facts* of the case as adduced in the court are mentioned below; in the *foot-note, how* those facts are *relevant* and *admissible* is explained by reference to the different sections of the Evidence Act. The student is advised to read this case *twice; — first, before* undertaking a detailed study of the Act, and *again, after* studying the entire Act.

R. *v.* Donellan

John Donellan was tried at Warwick Spring Assizes, 1781, before Mr. Justice Buller, for the murder of Sir Theodosius Broughton, his brother-in-law, a young man of fortune, twenty years of age,[1] who, up to the moment of his death, had been in good health and spirits, with the exception of a trifling ailment, for which he occasionally took a laxative draught[2]. Mrs. Donellan was the sister of the deceased, and together with Lady Broughton, his mother, lived with him at Lawford Hall, the family mansion.[2]

In the event of Sir Broughton's death, unmarried and without issue, the greater part of his fortune would descend to Mrs. Donellan[3] but it was stated, though *not* proved, by the prisoner that he, on his marriage, entered into an agreement for the immediate settling of her whole fortune on herself and the children, and deprived himself of the possibility of enjoying even a life-estate in case of her death, and that this settlement extended *not only* to the fortune, *but also* to expectances.[4]

For some time before the death of Sir Theodosius, the prisoner had, on several occasions, falsely represented his health to be very bad, and his life to be precarious.[5] On the 19th of August,[6] the apothecary in attendance sent him a mild and harmless drought to be taken the next morning. In the evening, the deceased was out fishing[7], and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which assertions were false.[8]

1. Introductory fact (Section 9)
2. State of things under which facts in issue happen (Section 7)
3. Motive (Section 8)
4. Fact rebutting an inference suggested by a relevant fact (Section 9)
5. Facts showing an inference suggested by a relevant fact (Section 8). The statements are also admissions as against the prisoner (Section 17)
6. A fact affording an opportunity for facts in issue (Section 7)
7. Introductory to what follows (Section 9)
8. Preparation (Section 8) Admission (Section 7)

When Sir Theodosius called on the following morning, he was in good health,[9] and at about seven o'clock, his mother went to his chamber to give him the draught,[10] of which he immediately complained[11] and she remarked that it smelt like bitter almonds.[12] In about two minutes, he struggled very much as if to keep the medicine down, and Lady Broughton observed a gurgling in his stomach[13]; in ten minutes, he seemed inclined to doze, but five minutes later, she found him with his eyes fixed, his teeth clenched and froth running out of his mouth; and within half an hour after taking the dose, he died.[13]

Lady Broughton ran down stairs to give orders to a servant to go for the apothecary, who lived about three miles distant.[14] In less than five minutes after Sir Theodosius had been taken ill, Donellan asked where the bottle was, and Lady Broughton showed him the two bottles. The prisoner then took up one of them and said "Is this it?" and being answered "Yes", he poured some water out of the water bottle which was near into the phial, shook it and then emptied it into some dirty water which was in a basin. Lady Broughton said, "You should *not* meddle with the bottle", upon which the prisoner snatched up the other bottle and poured water into that also, and shook it, and then put his finger into it and tasted it. Lady Broughton again asked what he was about, and said he ought *not* to meddle with the bottles, on which he replied that he did it to taste it,[15] though he had *not* tasted the first bottle.[15] The prisoner ordered a servant to take away the basin, the dirty things, and the bottles, and put the bottles into her hands for that purpose; she put them down again on being directed by Lady Broughton to do so, but subsequently removed them on the peremptory order of the prisoner.[17]

On the arrival of the apothecary, the prisoner said the deceased had been out the preceding evening fishing, and had taken cold, but he said nothing of the drought which he had taken.[16] The prisoner had a still in his own room which he used for distilling roses;[17] and a few days after the death of Sir Theodosius, he brought it full of wet lime to one of the servants to be cleaned[18]. The prisoner made several inconsistent statements to the servants as to the cause of the young man's death;[19] and on the day of his death, he wrote to Sir W. Wheeler, his guardian, to inform him of the event, but made no reference to its suddenness.[19] The coffin was soldered up on the fourth day after the death.[20] Two days later, Sir W. Wheeler, in consequence of the rumour which had reached

9. State of things under which fact in issue happened (Section 7)
10. It was suggested that Donellan changed the apothecary's draught for a poisoned one administered by Lady Broughton, an innocent agent. Therefore, the administration of the draught suggested to be poisoned was a fact in issue (Section 5)
11. As to this, see Section 14
12. *I.e.*, of prusis acid. Lady Broughton perceived by smell the presence of the poison. Therefore, she smelt a fact in issue (Section 5)
13. Effects of facts in issue (Section 7). All these facts go to make up the fact of the death, which was a fact in issue.
14. Introductory to next fact as finding the time (Section 9)
15. Subsequent conduct influenced by a fact in issue and statement explanatory of conduct (S. 8)
16. Subsequent conduct and explanatory statements (Section 8)
17. Opportunity to distill laurel water, the poison said to have been used (S. 7)
18. Subsequent conduct (Section 8)
19. Admission (Ss. 17, 18).
20. Introductory to what follows (Section 9)

him of the manner of Sir Theodosius's death, and that suspicions were entertained that he had died from the effects of poison,[21] wrote a letter to the prisoner requesting that an examination might take place, and mentioning the gentlemen by whom he wished it to be conducted.[22] The prisoner accordingly sent for them, but did *not* exhibit Sir Wheeler's letter alluding to the suspicion that the deceased had been poisoned, nor did he mention to them that they were sent for at his request. Having been induced by the prisoner to suppose the death to be case of ordinary death,[23] and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination on the ground that it might be attended with personal danger.

On the following day, a medical man who had heard of their refusal to examine the body offered to do so, but the prisoner declined his offer on the ground that he had *not* been directed to send for him.[24] On the same day, the prisoner wrote to Sir Wheeler, a letter in which he stated that the medical men had fully satisfied the family, and endeavoured to account for the event by the ailment from which the deceased had been suffering but he did *not* state that they had *not* made the examination.[25]

Three or four days later, Sir W. Wheeler, having been informed that the body had *not* been examined,[26] wrote to the prisoner insisting that it should be done[27] which, however, he prevented by various disingenuous contrivances[28] and the body was interred without examination.[29]

In the meantime, the circumstances having become known to the coroner, he caused the body to be disinterred and examined on the eleventh day after death. Putrefaction was found to be far advanced, and the head was *not* opened, nor were the bowels examined, and in other respects, the examination was incomplete.[30] When Lady Broughton, in giving evidence before the coroner's inquest, related the circumstances of the prisoner having rinsed the bottles, he was observed to take hold of her sleeve and endeavor to check her, and he afterwards told her that she had no occasion to have mentioned those circumstances, but only to answer such questions as were put to her; and in a letter to the coroner and jury, he endeavoured to impress them with the belief that

21. Introductory to, and explanatory of, what follows (Section 9). It should be observed that proof of the rumours and suspicions for the purpose of showing the truth of the matters rumoured and suspected would *not* be admissible. The fact that there were rumours and suspicions explain Sir Wheeler's letter.
22. Statement to the prisoner and affecting his conduct (S. 8, Explain. 2)
23. Subsequent conduct of prisoner (Sec. 8)
24. Subsequent conduct (Section 8). The fact that the first set of doctors refused explains the prisoner's conduct by showing that it had the effect of preventing examination (Sec. 7). The ground on which they refused tends to rebut that inference (Section 9), but the second doctor's offer and the prisoner's conduct thereon, tend to confirm it. (Sec. 9)
25. Subsequent conduct (Section 11) and admissions (Section 17)
26. Introductory (Section 9)
27. Statement to the prisoner affecting his conduct (Section 8, Expln. 2)
28. Each contrivance and each circumstance which showed that it was disingenuous would come under the head of subsequent conduct (Section 8)
29. The burial was part of the transaction (Section 6). The absence of examination is explanatory of parts of the medical evidence. The whole is introductory to medical evidence (S. 9).
30. Introductory to opinion of experts (Section 9, 45, 46)

the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish.[31]

Upon the trial, three physicians and an apothecary were examined on the part of the prosecution; these witnesses expressed a very decided opinion, mainly grounded upon symptoms, the suddenness of the death, the postmortem appearances, the smell of the draught as observed by Lady Broughton, and the similar effects produced by experiments upon animals, that the deceased had been poisoned with laurel water[32]. One of them stated that on opening the body, he had been affected with a biting acrimonious taste like that which affected him in all the subsequent experiments with laurel water.[33] An eminent surgeon[34] and anatomist stated a positive opinion that the symptoms did *not* necessarily lead to the conclusion that the deceased had been poisoned; and the appearances presented upon dissection explained nothing but purtefaction[34]. The trial concluded, and ultimately, the prisoner was *convicted* and *executed*.

31. Subsequent conduct (Section 8) and admissions (Section 17)
32. Opinion of experts (Section 45)
33. This is a case of testing a fact in issue, *viz.*, the laurel water present in the body. See definition of fact : Section 3.
34. This was the famous surgeon of repute, John Hunter.

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BRIEF HISTORY OF THE 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".

In all civilized countries of the world, the law of evidence is based on the following *two axioms, viz.* —

(i) No facts other than those having some connection with the matter in controversy should be gone into by the Court. In other words, only facts having a *rational probative value* should be admitted in evidence.

(ii) *All* facts having rational probative value are admissible in evidence, *unless* excluded by some rule of paramount importance, as for instance, a confession made by a client to his advocate.

However, until these rational rules were evolved, trials in various parts of the world were based on all possible irrational methods, as for instance, trials by ordeal (where the hot iron and boiling water methods were used), *or* the corpse-retouching method (where the corpse was supposed to react in several ways, *e.g.*, opening an eye, pointing a finger, oozing blood, *etc.*). Even today, one such horrible practice which is still in vogue is *torture*, and cases are *not rare* where third degree methods are resorted to for gathering evidence, even in the so-called developed countries of the world.

Before the Indian Evidence Act was passed, there was no comprehensive or systematic enactment in India on this subject. In the Courts established in the Presidency towns of Calcutta, Bombay and Madras, the English rules of evidence were followed. However, outside these Presidency towns, there were no fixed rules of evidence. The Mofussil Courts applied rules which were both *vague* and indefinite, and at times, also rules based on *customary laws* prevailing in some parts of the country. However, there being no definite or fixed rules, the administration of this important branch of the law was far from satisfactory.

The first step was taken in 1835, when an Act was passed on this subject, and was made applicable to *all* Courts in British India. Then, in 1855, another Act was passed on this subject, and although this Act did *not* contain a complete body of rules, it nevertheless embodied some important and valuable provisions on this topic.

It became apparent, especially in legal circles, that the state of this branch of the law was quite fluid, and urgent reforms were called for. Commenting on the state of the law at that time, *Field* remarks that the entire Indian Law of Evidence, as it then existed, could be divided into *three portions*, namely, *one* portion settled by express enactments, *another* settled by judicial decisions, and a *third* (and the largest) portion which was unsettled, and which remained to be classified under either of the other two portions.

It was, therefore, decided to enact a formal piece of legislation on this subject. The need of the day appeared to be the introduction into India of the English Law of Evidence, which was broad-based on experience and learning of the English judges, with such modifications as the peculiar conditions of this country would require. In 1868, a draft Bill on the subject was prepared and circulated to the local governments. However, this Bill did *not* see the light of the day and was discarded after its first reading in the legislature. The unanimous opinion of local authorities at that time was that this Bill was unsuitable to the needs of the country.

It was after this that a fresh Bill was tabled, which finally became law in shape of the Indian Evidence Act, 1872. *This Act is based mainly on the English law of evidence,* and the plethora of rules and principles to be found in the jungle of English law has been classified and modified, although within a very narrow compass. There is no doubt that this branch of the law covers a very vast ground, and one can appreciate the difficulty in compressing this wide field in merely one hundred and sixty-seven sections. This Act has now been in force for almost 150 years, and valuable case-law has sprung up in this field. An attempt has been made in this book to deal only with the most important cases falling within the fold of this interesting branch of the law.

The Indian Evidence 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 take the help of the relevant English Common Law. However, the Courts *cannot* import any principle of English Law relating to the law of evidence which is inconsistent with what is laid down by the Act.

OBJECT BEHIND THE LAW OF EVIDENCE — 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 excessive or irrelevant evidence. One must realise that if *every* circumstance which might tend to throw light on the matter in issue were to be let in, trials would be protracted to an intolerable length.

Thus, the *main object* of the law of evidence is to restrict the investigation made by Courts within the bounds prescribed by general convenience. Now, this object would be completely frustrated by the admission of *every* circumstance, on either side, having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of collateral issues, growing up in endless succession as the inquiry proceeded. Evidence which tends to divert the attention of the Court and to waste its time is, therefore, to be rejected.

As the following study of the Act will show, there are *three main principles* which underlie the law of evidence. These three principles are :

(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.

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PRELIMINARY (Ss. 1-4)

A. GENERAL

[M.U. = Mumbai University]

The Indian Evidence Act *came into force on* 1st September, 1872, and it *extends* to the whole of India. (S. 1)

Earlier, the Act applied to the whole of India, except the State of Jammu and Kashmir. *Now*, the words "*except the State of Jammu and Kashmir*" have been *deleted by the Jammu and Kashmir Reorganisation Act, 2019.*

LEX FORI. — Matters of evidence are governed by the *lex fori, i.e.*, the law of the *forum* or *court* in which a case is tried. Whether a witness is competent or *not*, whether a certain matter requires to be proved by writing or *not*, whether certain evidence proves a certain fact or *not*, are *all* to be determined by the law of the country where the *question* arises, *i.e.*, where the *remedy* is sought to be enforced and where the *Court* sits to enforce it. [*Bain* v. *W. & F. Rail Co.* (1850 3 H. L. C. I.)]

It follows that if it is desired in an English Court to prove a foreign document, then, although such a document may be provable in its country of origin by production of a copy, it *cannot* be so proved in the English Court, *unless* the circumstances are such as to render the copy admissible by *English law*. [*Brown* v. *Thomton,* (6 Ad. & El. 185)]

To what proceedings does the Act

To which proceedings is the Indian Evidence Act not applicable?
(2 marks)
M.U. May 2013

Apply (S. 1)	*Not* apply (S. 1)
The Act *applies* to all *judicial* proceedings in or before any Court, including Courts-Martial (except those specified in the second column).	The Act *does not* apply to — (i) *affidavits* presented to any Court or officer, *or* (ii) proceedings before an arbitrator, *or* (iii) proceedings before a Court-Martial convened under *the Army Act,* the Naval Discipline Act, the Indian Navy (Discipline) Act, 1934, or the *Air Force Act.*

JUDICIAL PROCEEDINGS — As stated above, the Act applies to *all judicial proceedings.* An enquiry is *judicial,* and *not administrative,* if its *object* is to determine the legal relation between one person and another or a group of persons or between him and the community generally. Therefore, if a judge acts without such an object in view, it *cannot* be said that he is acting *judicially.*

Under the Criminal Procedure Code, the term "judicial proceeding" includes any proceeding in the course of which evidence is, or may be, legally taken on oath. An administrative inquiry is, however, *not* a judicial proceeding. Similarly, a proceeding which is subsequently found to be without jurisdiction *cannot* be a judicial proceeding. It is to be remembered that Courts have to discharge both *administrative* as well as *judicial* duties, and in order that there may be a judicial proceeding, the judge must act *in a judicial capacity, i.e.,* as a Court.

WHETHER THE ACT APPLIES TO CIVIL PROCEEDINGS — As seen above, the Act applies to *all* judicial proceedings, *civil or criminal.* Generally speaking, the rules of evidence are the same, whether the proceeding is civil or criminal. However, there are certain provisions of the Act (*e.g.,* the doctrine of estoppel) which apply only to *civil proceedings.* Likewise, some parts of the Act. (*e.g.,* provisions relating to confessions) would apply only to *criminal proceedings.*

Moreover, although the rules of evidence are the same in civil and criminal proceedings, there is a marked difference in the *legal effect* of evidence in civil matters when contrasted with criminal matters.

(This topic is discussed at greater length later in this Chapter, under the heading "Difference between probative force of evidence in civil and criminal proceedings.")

Define "Affidavit". (2 marks) M.U. Dec. 2018

AFFIDAVITS — An affidavit is a statement or declaration of a person (in writing) made on oath or affirmation before a person having authority to administer an oath or affirmation (as for instance, a Magistrate or a Notary). It is expressly provided that the Act does *not* apply to affidavits. Nor are affidavits included in the definition of evidence under S. 3 of the Act. This is so because in an affidavit, the deponent (that is, the person who make the affidavit) asserts certain things based on his *personal knowledge*. Normally, contempt proceedings are decided on the basis of affidavits. So also, affidavit evidence is accepted in interlocutory matters.

ARBITRATION — The *principal aim of arbitration* is to have a controversial matter decided without wasting time and money on a regular suit in a Court of Law. Legal technicalities do *not,* therefore, attach to proceedings before an arbitrator, and it has therefore been expressly provided that the Act does *not* apply to such proceedings. Thus, the strict rules of evidence *or* the technical rules of procedure do *not* apply to arbitration proceedings. Similarly, an arbitration award *cannot* be set aside on the ground that a particular document was improperly received by the arbitrator. However, the arbitrator must always conform to the *rules of natural justice.*

Arbitrators are specially excluded from the ambit of the Act, because such persons are chosen for their respectability and the confidence reposed in them by the parties to the dispute. Arbitrators are, therefore, *not* expected to apply the rules of evidence in proceedings before them, but are expected to act

according to fundamental principles of fairness and justice, *e.g., not* recording evidence in the absence of one of the parties, and so on.

PROCEEDINGS BEFORE TRIBUNALS — The Evidence Act has *no application to enquiries conducted by tribunals.* But the law requires that such tribunals should conform to the *rules of natural justice.* The rules of natural justice require that the party should have the opportunity to adduce all the relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given an opportunity of cross-examining the witnesses examined by the other party, and further that no material should be relied upon against him without his being given an opportunity of explaining it. (*New Prakash & Co.* v. *New Suvarna & Co.,* A.I.R. 1957 S.C. 232)

The Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the inquiry, and if they do so, their decision is *not* liable to be impeached on the ground that the procedure followed was *not* in accordance with that which prevails in a Court of Law.

B. DEFINITIONS (Ss. 3-4)

1. "Court" [S. 3]

Define "Court". M.U. May 2018

The term "Court" includes all Judges and Magistrates, and all persons (*except arbitrators*) legally authorised to take evidence.

The definition of "Court" is *not* exhaustive, but framed only for the purpose of the Act; it is *not* to be extended where such extension is *not* warranted. (*Brajnandan Sinha* v. *Jyoti Narain,* A.I.R. 1958 S.C. 66)

2. "Fact' [S. 3]

Fact means and includes? (2 marks) M.U. Nov. 2014

What is a fact? (2 marks) M.U. Nov. 2016

"Fact" *means* and *includes* —

(i) Any —

(a) thing,
(b) state of things
or
(c) relation of things

} capable of being perceived by the senses.

Illustrations — (a) That there are certain objects arranged in a certain order in a certain place, is a *fact.*

(b) That a man heard *or* saw something, *or* said certain words, is a *fact.*

(ii) Any mental condition of which any person is conscious.

Illustrations — (a) 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.*

(b) That a man has a certain *reputation,* is a *fact.*

Bentham classifies facts into *physical* and *psychological.* Clause (i) above refers to physical (or external) facts, whereas clause (ii) relates to psychological (or internal) facts. Thus, even facts which *cannot* be perceived by the senses (*e.g.,* intention, fraud, good faith, *etc.*) are *facts.* Indeed, anything which is the subject of perception or consciousness is a fact.

It follows, therefore, that a misrepresentation as to the intention of a person is a misrepresentation of a '*fact*'. As was rightly remarked by an English judge, Lord Bowen, the state of a man's *mind* is as much a fact as the state of his *digestion.*

PRINCIPAL AND EVIDENTIARY FACTS — The fact sought to be proved (*factum probandum*) is called the "*principal fact*" and the facts which lead to establish it are called '*evidentiary facts*' *(factum probans).*

3. "Relevant" [S. 3]

Define "relevant". (2 marks) M.U. Nov. 2016

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

The facts that are recognised to be relevant under the Act (by Ss. 5-55) may be grouped as follows:

1. Facts logically connected with facts in issue *or* relevant facts : Ss. 5-16.
2. Admissions and confessions : Ss. 17-31.
3. Statements by persons who *cannot* be called as witnesses : Ss. 32 and 33.
4. Statements under special circumstances : Ss. 34-37.
5. Judgments in other cases : Ss. 40-44.
6. Opinions of third persons : Ss. 45-51.
7. 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 are those facts which are necessary for proof or disproof of a fact in issue. Thus, relevant facts are those which are capable of affording a reasonable presumption as to either the facts in issue *or* the principal matters in dispute.

In *Lakhmi* v. *Haider,* (3 CWN 268), the word "relevant" has been *held* to mean *admissible.*

As regards relevancy of evidence, *Best* observes as follows:

"Of all rules of evidence, the most universal and the most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute or which form the subject of investigation. The theoretical propriety of this rule never can be a matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties, or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. Evidence may be rejected as irrelevant for one of *two reasons. First,* that the connection between the principal and evidentiary facts is too *remote* and *conjectural. Second,* that it is excluded by the state of pleading, *or* what is analogous to the pleadings, or is rendered superfluous by the *admissions* of the party against whom it is offered."

4. "Fact in issue" [S. 3]

A "fact in issue" means:

Any fact *from which*

either by itself

or

in connection with other facts,

(i) the existence,

(ii) non-existence,

(iii) nature, *or*

(iv) extent

of any (a) right,

(b) liability, *or*

(c) disability

asserted or denied in any suit or proceedings, necessarily follows.

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

Any fact asserted or denied in answer to an issue of fact recorded under the Civil Procedure Code.

WHAT ARE 'FACTS IN ISSUE' — 'Facts in issue' are facts out of which some legal right, liability, or disability, involved in the inquiry, necessarily arises, and upon which accordingly, a decision must be arrived at. Matters which are *affirmed* by one party to a suit and *denied* by the other are to be regarded as

facts in issue; what facts are in issue in *particular* cases is a question to be determined by the substantive law, or in some cases, by the law of procedure. It should be noted that a fact in issue *cannot* be held to be proved by the secondary evidence of statements made by a person who is *not* summoned as a witness.

As far as *civil* cases are concerned, facts in issue are determined by framing the issues before the Court. As regards *criminal* cases, the charge itself constitutes and includes the facts in issue.

DIFFERENCE BETWEEN 'RELEVANT FACT' AND 'FACT IN ISSUE' — Facts in issue are the matters which are in *dispute* or which form the subject of decision in the suit. They are facts out of which some legal right, liability, or disability, involved in the inquiry, necessarily arises and upon which a decision must be arrived at. They are matters *affirmed* by one party and *denied* by the other. Thus, if *A* is accused of the murder of *B,* the facts in issue will be that *A caused B's* death, that he *intended* to cause *B's* death, and so on. Relevant facts, on the other hand, are facts so connected with each other as to prove or disprove the facts in issue. Relevant facts are *not* themselves *in issue,* but are the foundation of inferences regarding them.

One can, therefore, distinguish between 'fact in issue' and 'relevant fact' thus:

1. A *fact in issue* is a necessary *ingredient* of a right or liability. It is from such fact, either by itself or in connection with other facts, that the existence or non-existence of a right or liability necessarily follows. A *relevant fact,* on the other hand, is *not* a *necessary ingredient* of a right or liability.

2. A *fact in issue* is called the "principal fact" or *factum probandum.* A *relevant fact* is called the "evidentiary fact" or *factum probans.*

5. "Document" [S. 3]

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 milkmen 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.

6. "Evidence" [S. 3]

Write a short note on : Evidence.
M.U. Nov. 2015

Define 'Evidence'. What are the different kinds of evidence? Explain their evidentiary value.
M.U. Nov. 2015
May 2017
Dec. 2018

The term "evidence" *means and includes* —

(i) *Oral evidence — i.e.*, all statements which the Court permits or requires to be made before it *by witnesses*, in relation to matters of fact under inquiry; *and*

(ii) *Documentary evidence — i.e.*, all documents, *including electronic records*, produced for the inspection of the Court.

The above definition of the term "evidence" is *not* a complete definition. Evidence, thus defined, is *not* the only medium of proof; in addition to it, there are a number of other matters like the demeanour of a witness, which the Court has to take into consideration when forming its conclusion. The definition of 'evidence' has to be read with word "proved" (see below) when determining what is 'evidence' within the scope of the Act.

Bentham defines *evidence* as "any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce in the mind, a persuasion concerning the existence of some other matter of fact, a persuasion either affirmative or disaffirmative of its existence."

Taylor uses the word evidence to mean "all the legal means, exclusive of mere argument, which tend to *prove* or *disprove* any fact, the truth of which is submitted to judicial investigation".

The confession of an accused person is *not evidence* in the ordinary sense of the term, as defined in this section, though it has to be given due consideration in deciding a 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. Thus, though a confession may be regarded as evidence in that generic sense, the fact remains that it is *not* evidence as defined by S. 3 of the Act. (*Haricharan Kurmi* v. *State of Bihar*, A.I.R. 1964 S. C. 1184)

What evidence means and includes is described in S. 3 of the Evidence Act, but affidavits are *not* included within that description. Rather, affidavits have been expressly excluded by S. 1 from the applicability of the Act. That means that affidavits *cannot* be used as evidence under any of the provisions of the Indian Evidence Act. (*Firm S. Rajkumar* v. *Bharat Oil Mills*, A.I.R. 1964 Bom. 38)

JUDICIAL EVIDENCE — The expression "*judicial evidence*" may be defined as evidence received by Courts in proof or disproof of facts, the existence of which comes into question before such Courts. It will thus be seen that *judicial evidence* is a *species* of the *genus* "evidence" and is mainly natural evidence as refined and modified by rules of positive law.

TAPE-RECORDS AS EVIDENCE — Tape-recorded conversation can be admitted as evidence, *provided* the conversation is relevant to the matters in issue, the voice can be properly identified, and the possibility of erasing parts of the tape is eliminated. (*R. M. Malkani* v. *State of Maharashtra*, A.I.R. 1973 S.C. 72)

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

The Madras High Court has, in *R. Venkatesan* v. *State* (1980 Cr. L. J. 41), considered the evidentiary value of a tape-recorded conversation. In that case, the recorded conversation was *not* audible throughout and was broken at a very crucial place. The accused alleged that the same had 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.

The observations of the *Supreme Court* (in *Yusufali Esmail* v. *State of Maharashtra*, 1968 Madras L. J. 247) in connection with tape-recorded evidence are relevant. In that case, the Supreme Court observed as follows :

> "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."

As regards admissibility of tape recordings, the Bombay High Court has, *in C. R. Mehta* v. *State of Maharashtra*, 1993 Cri. L. J. 2863), observed as follows :

> "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."

ELECTRONIC RECORDS — It is clarified, by an *amendment inserted by the Information Technology Act, 2000*, that electronic records are also included

in the definition of the term "document" under S. 3 of the Act. It is also clarified that the expressions "*Certifying Authority*", "*digital signature*", "*Digital Signature Certificate*", "*electronic form*", "*electronic records*", "*information*", "*secure electronic record*", "*secure digital signature*", and "*subscriber*" shall have the same meanings as are assigned to them in the *Information Technology Act, 2000.*

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 defined as "the sufficient reason for assenting to the proposition as true." It is the *result* of evidence, while evidence is only the *medium* of proof.

DIFFERENT KINDS OF EVIDENCE

The following are the *nine* different types of evidence:

1. *Direct evidence, i.e.,* the *testimony* of a *witness* as to the existence or non-existence of a fact in issue. It also includes the production of an *original document.*

2. *Circumstantial evidence, i.e.,* the testimony of a witness as to other relevant facts, from which the facts 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. The fundamental rule by which the *effect* of the circumstantial evidence is to be estimated is that, in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

Explain and distinguish between direct and circumstantial evidence.
M.U. Apr. 2016
Nov. 2019

It is to be noted that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, 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 of Madhya Pradesh,* A.I.R. 1952 S.C. 343)

In *Govind Reddy* v. *State of Mysore* (A.I.R. 1960 S.C. 29), it was observed that the principle that the inculpatory fact must be inconsistent with the innocence of the accused and incapable of explanation on any hypothesis other than that of guilt, does *not* mean that any extravagant hypothesis would be sufficient to

sustain the principle, but that the hypothesis suggested must be reasonable. Thus, before the prosecution can succeed in a case resting upon circumstantial evidence alone, it need *not* meet every hypothesis suggested by the accused, however fanciful and extravagant it may be.

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 of Kerala* v. *Mani,* 1992 Cri. L. J. 1682)

In a case decided by the Allahabad High Court, the prosecution's charge of murder was based purely on circumstantial evidence. No postmortem was performed, nor was even the dead body recovered. The Court *held* that the *factum* of murder must first be established by the strongest possible evidence. The absence of such evidence was fatal to the case of the prosecution. (*Ramua* v. *State of U.P.,* 1992 Cri. L. J. 3972)

Direct evidence and circumstantial evidence distinguished — Evidence is either *direct* or *indirect,* according as the principal fact follows from the evidentiary or by inference. Direct evidence 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. Circumstantial evidence is the testimony of a witness to other relevant facts from which the fact in issue may be inferred.

Direct evidence is of a superior cogency; its greatest advantage is that there is only one source of error, namely, fallibility of testimony, while the other has in addition, a further source of error, *viz.,* fallibility of inference. The weight of evidence varies according to the number of independent facts supported.

3. *Real evidence, i.e.,* any matter which the Court perceives *itself, e.g.,* that a man standing before a judge has got a scar on his face.

4. *Hearsay evidence* (*i.e.,* derivative or second-hand evidence), *i.e.,* 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.*

6. *Secondary evidence.*

7. *Oral evidence.*

8. *Documentary evidence.*

9. *Conclusive evidence, i.e.,* where the connection between the principal and evidentiary fact is a necessary consequence of the Law of Nature. (See S. 4 below.)

[*All the forms of evidence are discussed in detail* in the relevant Chapters.]

7. "Proved", "Disproved", "Not proved" [S. 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 exists.

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

A fact is said *not to be proved* when it is *neither proved nor disproved*.

Write a short note on : "Proved", "disproved" and "not proved".
M.U. Apr. 2016

"PROVED" — The English author, *Cunn,* gives the analogy of a merchant who receives information that the rate of exchange will vary, or a General who gets information about the movement of the enemy. The success of either will depend on his judging soundly when he ought to act on the assumption that what he hears is true, *or* when prudence bids him to assume it to be false. If he waits for absolute certainty, he would never be able to act at all. Similarly, all that a judge needs to look for is such a high degree of probability that a prudent man, in any other similar transaction, would act on the assumption that such a thing was true.

"MATTERS BEFORE IT" — The expression "matters before it" includes matters which do *not* fall within the definition of the term "evidence" (in S. 3 of the Act), as for instance, a fact orally admitted in Court or the result of a local investigation under the Civil Procedure Code. Therefore, in determining what is "evidence" other than evidence within the phraseology of the Act, the definition of 'evidence' must be read with that of 'proved'. It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the expression 'matters before it'. For instance, a fact may be orally admitted in Court. Such an admission would *not* come within the definition of the term 'evidence' as given in this Act. 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.* Similarly, the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court, though it is *not* 'evidence' within the definition given by the Act.

'LEGAL PROOF' AND 'MORAL CONVICTION' — '*Legal proof*' is to be distinguished from '*moral conviction*'. Legal proof is neither more nor less than what is indicated by the definition of the word 'proved' in S. 3. Whatever may be the *moral certainty* in a case, unless it is *legally proved* to such an extent as would amount to legal proof, a judicial decision *cannot* be arrived at. So also, however morally convinced a judge may feel as to the truth of a particular fact, *unless* there is a legal proof of its existence, he *cannot* take it as proved.

DIFFERENCE BETWEEN PROBATIVE FORCE OF EVIDENCE IN *CIVIL* AND *CRIMINAL* PROCEEDINGS — The rules of evidence are, in general, the same in civil and criminal proceedings. There are, however, some exceptions, as for instance, the doctrine of *estoppel* applies to *civil proceedings only.* On the other hand, the provisions relating to *confession* (Ss. 24-30), character of persons (Ss. 53-54), and incompetence of parties as witnesses (S. 129) are peculiar to *criminal proceedings.*

But, there is a marked difference as to the *effect of evidence* in civil and criminal proceedings. In *civil* proceedings, the proof required is sufficient if there is a *mere preponderance of probability;* but, in *criminal* proceedings, it must be such as to *exclude, to a moral certainty, every reasonable doubt of the guilt of the accused.* As far as criminal proceedings are concerned, in the words of the Supreme Court (in *Garib Singh* v. *State of Punjab,* (1972) 3 S.C.C. 418), "the prosecution must prove its case beyond all reasonable doubt". But, in civil cases, even though charges of criminal or fraudulent character are involved, it is wrong to insist on proving charges beyond reasonable doubt. (*Gulabchand* v. *Kudilal,* A.I.R. 1966 S.C. 1734)

The rules of evidence are the *same* in civil and criminal proceedings, and bind alike the State and the subject, prosecutor and accused, plaintiff and defendant. The Act makes no distinction between the *degree* of proof or probability required 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 trials,* the persuasion of guilt must amount to such a moral certainty as to convince the mind of the tribunal beyond all reasonable doubts" 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"*. The serious consequence of an erroneous condemnation, both to the accused and to the society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every civilised nation to lay down the principle that the persuasion of guilt must amount to a moral certainty.

The following are the main points of difference between evidence in civil and criminal proceedings:

1. *In civil cases*, issues may be proved by *preponderance of evidence*. *In criminal* cases, issues must be proved *beyond any reasonable doubt.*
2. Certain rules of evidence are applicable to *criminal cases only* because the relevant issues arise only in such cases. Examples in this regard are confessions, dying declarations, character of the accused, *etc.*
3. *In civil cases,* the rules of evidence may be *relaxed* by consent of parties or by an order of Court, *e.g.,* proof by affidavit. It is *not* so in *criminal cases.*

4. *In civil cases*, it is the duty of the parties to place their case before the Court as they think best, whereas *in criminal cases*, it is the duty of the Court to bring relevant evidence on the record to see that justice is done.

The rules regulating the *admissibility* of evidence are also, in *general*, the *same* in civil as in criminal proceedings. But, with regard to the *proof in criminal cases*, the following general rules have to be observed:

1. The accused is always presumed to be innocent until the prosecution proves him to be guilty.
2. The evidence must be such as to exclude every reasonable doubt of the guilt of the accused.
3. In case of any reasonable doubt as to the guilt of the accused, the *benefit of doubt* should always be given to the accused.
4. There must always be clear proof of *corpus delicti*, *i.e.*, the fact of commission of the crime.
5. The hypothesis of delinquency should be consistent with all the facts proved.

Courts have often applied the maxim, "*falsus in uno, falsus in omnibus*" (one falsity leads to the inference of the entire story being false). However, the Supreme Court has observed that the maxim, *falsus in uno, falsus in omnibus*, is *not to be applied mechanically*. It *held* that the mere fact that the evidence of some witnesses was found unsafe for conviction, is *not* a ground for rejection of their testimony. (*Nadodi* v. *State of Tamil Nadu*, 1993 Cri. L. J. 426) (This maxim is discussed at greater length in the next chapter.)

DEMEANOUR OF WITNESS — It will be seen that the word "matters" (and *not* the term *evidence*) is used in the definitions of the terms "proved" and "disproved". 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 manner in which he gives evidence in the Court. This is based on the psychological proposition that, by carefully watching a person tell a story, one may instinctively be able to tell whether he is lying *or not*.

One is reminded of *Locke* who, in his "*Essay Concerning Human Understanding*", gives the example of the Dutch Ambassador at the Court of the King of Siam. The Ambassador told the King that in his country during winter, the water would become so hard that men — and even elephants — could walk on it. On hearing this, the King is said to have instantaneously remarked, "Hitherto I believed the strange things you told me, because I looked upon you as a sober, fair man; but now, I am sure that you are a liar."

8. Court "may presume" a fact (S. 4)

Whenever it is provided by the Evidence Act that a Court *may presume* a fact, it may *either* (i) regard such fact as proved, unless and until it is disproved, *or* (ii) may call for proof of it.

What is "may presume"?
(2 marks)
M.U. May 2017
Nov. 2019

MEANING OF "COURT MAY PRESUME" — Whenever the Act lays down that the Court *may presume* a fact, it has a *discretion* to presume it as proved, *or* to call for confirmatory evidence of it. Thus, the Court *may* presume that a message forwarded from a telegraph office corresponds with the message delivered for transmission at the office (S. 88), or the Court *may* presume that a certified copy of foreign judicial records is genuine and accurate (S. 86); but in either case, the Court can also call for further evidence.

9. Court "shall presume" (S. 4)

Wherever it is laid down by the Act that "the Court *shall presume* a fact", it means that the Court must regard such fact as proved, *unless and until* it is *disproved*.

MEANING OF "COURT SHALL PRESUME" — When the Act lays down that the Court *shall* presume a certain fact, the Court *has no option* in the matter, and it is *bound* to take the fact as *proved, unless* the party interested in disproving it produces sufficient evidence for that purpose. Thus, the Court *has* to presume the genuineness of every document purporting to be the London Gazette or the Official Gazette (S. 81). Similarly, the Court *shall* presume the accuracy of maps and plans made by a Government authority (S. 83). Likewise, the Court *shall* presume that a power-of-attomey purporting to be executed before a proper authority was so executed (S. 85), and so on.

'PRESUMPTION' DEFINED — The term 'presumption' in its widest and most comprehensive sense, may be defined to be an inference, affirmative or disaffirmative, of the truth of falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted.

In law, a presumption means a 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 of such inference is disproved.

What is presumption of fact?
(2 marks)
M.U. May 2018

Presumptions are either presumptions of *law* or presumptions of *fact*. The former may be again sub-divided into (i) rebuttable, and (ii) conclusive presumptions. The latter are always irrebuttable.

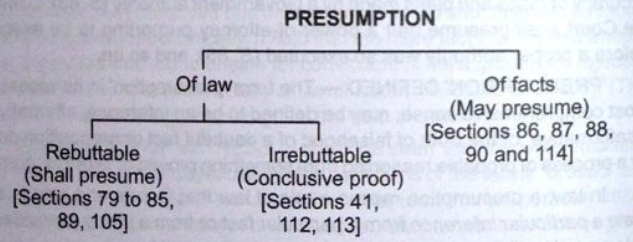
Presumptions of fact, or natural presumptions, are inferences which are naturally and logically drawn from experience and observation of the course of nature, the constitution of the human mind, the order of things in the world, *etc.*; they are akin to the expression '*may presume*' of this Act.

Presumptions of law, sometimes called intendments of law, are inferences and propositions established by common law or statute; they are either (i) *absolute*, corresponding to the expression "conclusive proof" of this Act, or (ii) *rebuttable*, *i.e.*, corresponding to the expression "shall presume" of this Act.

DIFFERENCE BETWEEN

PRESUMPTIONS OF LAW	PRESUMPTIONS OF FACT
1. **Discretion of Court :** No discretion is vested in the Court at all. The law peremptorily requires a certain inference to be made whenever the facts appear which the law assumes as the basis of the inference.	1. A discretion, more or less extensive as to drawing the inference, is vested in the tribunal.
2. **Rules of law :** Presumptions of law are, in reality rules of law and part of the law itself.	2. Presumptions of fact are *not* rules of law.
3. Presumptions of law *must* be drawn.	3. Presumptions of fact *may* or *may not* be drawn.
4. **Kinds :** There are *two kinds* of presumptions of law — rebuttable and irrebuttable.	4. There is no such division in the case of presumptions of fact.

The above can be expressed in the following tabular statement :



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

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

MIXED PRESUMPTIONS or presumptions of law and fact, lie inbetween the above two, and consist mainly of certain presumptive inferences which attract the observation of the law.

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

10. "Conclusive proof" (S. 4)

What is "Conclusive Proof"?
(2 marks)
M. U. Dec. 2018
June 2019

Write a short note on : Conclusive proof.
M.U. Nov. 2019

When one fact is declared by the Evidence Act to be conclusive proof of another, the Court must, on proof of the one fact, regard the other proved, and *cannot* allow evidence to be given for the purpose of disproving it.

CONCLUSIVE PROOF — Conclusive presumptions are inferences which the law makes so peremptorily that it will *not* allow them to be overturned by any contrary proof, *however strong.* This is the strongest of all presumptions. Ss. 41, 112 and 113 of the Evidence Act and S. 82 of the Indian Penal Code are illustrations of irrebuttable presumptions. S. 41 lays down that final judgments in probate, matrimonial, admiralty or insolvency jurisdictions are conclusive in certain respects. S. 112 lays down that if a person is *born during the continuance of a valid marriage* between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, then, unless non-access is proved, it is a conclusive proof of his legitimacy. S. 113 lays down that a notification in the Official Gazette of a *cession of territory* to a Native State is conclusive proof that a valid cession took place on the date mentioned in the notification. Likewise, S. 82 of the I.P.C. lays down that nothing is an offence which is done by a child who is under seven years of age.

Similarly, under the provisions of the Companies Act, the Certificate of the Registrar of Companies is conclusive evidence that each subscriber wrote opposite his name in the Memorandum of Association the number of shares taken by him.

Or again, the statement in an Order of a Court is conclusive of what happened before the Presiding Officer of such Court. In all these cases, no party before the Court is allowed to produce any evidence to disprove or displace such a presumption.

Thus, a certificate issued by the Director of the Central Food Laboratory is conclusive proof of the facts stated therein. Similarly, a marriage certificate is conclusive evidence of the solemnisation of the marriage and also of compliance with all its formalities. However, in such cases, the genuineness of the document stands on a different footing and can always be questioned in a court of law.

❑❑❑

2

RELEVANCY OF FACTS
(Ss. 3, 5-55 & 158)

General

Evidence may be given only of factsin-issue and relevant facts. Discuss.
M.U. May 2015

'Relevant' defined (S. 3)

One fact is relevant to another when the one is *connected* with the other in any of the ways referred to in Sections 5 to 55 below.

Of what fact may evidence be given (S. 5)

What are facts in issue? (2 marks)
M.U. May 2014

About what facts can evidence be given? (2 marks)
M.U. May 2017
May 2018

Evidence may be given of the *existence or non-existence* of every fact *in issue* and of *relevant* facts, *and of no others.*

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—(i) *A's* beating *B* with the club; (ii) *A's causing B's death* by such beating; (iii) *A's* intention to cause *B's* death.

However, it is also clarified that S. 5 would *not* enable any person to give evidence of a fact which he is *disentitled* to prove under the Civil Procedure Code.

What are "relevant facts"? Explain with illustrations and case law.
M.U. Apr. 2010

Illustration : A suitor does *not* bring with him, and have in readiness for production, at the first hearing of the case, a bond on which he relies. The section does *not* enable him to produce the bond or prove its contents at a subsequent stage of the proceeding, otherwise than in accordance with conditions prescribed by the Civil Procedure Code.

Write a short note on : Relevancy of facts.
M.U. May 2013
Dec. 2018

PRINCIPLE OF S. 5 — Evidence can be given of a fact *only if* it is either a fact in issue or one *declared* to be relevant under the following sections. Thus, *evidence* of all collateral facts which are incapable of affording any reasonable presumption as to the principal matters in dispute, are excluded in order to save public time. When the evidence is tendered, if it is *prima facie admissible, it is for the other side* to show that it is *not* admissible.

"Evidence may be given of facts in issue." Analyse the statement critically.
M.U. Nov. 2015
Dec. 2018

If the Evidence Act prescribes a particular manner in which evidence is to be given, evidence *must* be given in that manner, and in no other manner. If under the Act, two alternative modes of giving evidence are permitted, and if before the second mode can be utilised, certain conditions must be fulfilled, it is open to the parties to admit that those conditions are fulfilled, in which case the second manner of leading evidence is permitted under the Evidence Act. But the parties *cannot*, by consent, admit irrelevant evidence as relevant. (*Nathubhai* v. *Chhotubhai*, A.I.R. 1962 Guj. 68)

"AND OF NO OTHERS" — The force of S. 5 lies in these four words occurring at the end of the section. These words exclude evidence of collateral facts which are incapable of affording any reasonable presumption regarding the facts in issue. They preclude a litigant from proving any facts which are *not* in issue, *i.e.,* any facts which are *not* the principal matters in dispute or which are *not* declared to be relevant by the Act. Further, even if a fact is *relevant,* it will have to be proved in the proper manner as indicated in the Act. To take an example, secondary evidence of a document may be *relevant,* but is *not admissible,* unless the rules as to notice in S. 66 have been complied with.

What is the theory of relevancy? (2 marks)
M.U. Nov. 2014

This section applies to examinations-in-chief as well as to cross-examinations. But it must be remembered that certain questions are admissible in cross-examination, even though the same questions are *not* admissible in the examination-in-chief. (This is discussed in Chapter IX.)

What is the meaning of relevant facts? Explain giving examples and case law.
M.U. Apr. 2016

CASE — In *R.* v. *Vyapoory* (8 CLR 197), the accused was charged with receiving illegal gratification from X & Co. on three specific occasions in 1876. It was shown to the Court that in 1876, 1877 and 1878, X & Co. were doing business as contractors, and that the accused was the Manager of their office. The point in question was whether the evidence of similar but unconnected instances of receiving illegal gratification from X & Co. in 1877 and 1878 were admissible against him. The Court *held* in the negative, as such evidence was *not admissible* under the Act.

Explain in detail the theory of relevancy.
M.U. May 2017
Nov. 2019

FALSUS IN UNO, FALSUS IN OMNIBUS — This Latin maxim, which means 'False in one thing, false in everything', was once quite a favourite one with the Law Courts. However, it is *not* now strictly adhered to. If it can, the Court *must* separate the truth from falsehood. When the falsehood is merely an embroidery to the main story, the *whole* of the evidence of the witness should *not* be disbelieved. In the pursuit of justice, one *cannot* afford to chase the shadow and lose the substance.

This maxim has *not* received general acceptance in the Law Courts. In its unqualified and undiluted form, it is no longer applied, even to criminal cases. In one Indian case, the Court went to the length of observing that the maxim is neither a sound rule of law nor a rule of practice. As *Wigmore* observes, it is even untrue to human nature. It is *not* correct to say that a person who tells a single lie is necessarily lying throughout his testimony. *Once a liar* is *not necessarily always a liar.* Indeed, if the principle underlying the maxim is carried to its logical extreme, the administration of justice would come to a standstill.

[A reference may also be made to the brief discussion of this maxim under S. 3 of the Act in Chapter 1.]

DIFFERENCE BETWEEN 'RELEVANCY' AND 'ADMISSIBILITY' : 'LOGICAL RELEVANCY' AND 'LEGAL RELEVANCY' — A fact which is *logically* relevant may *not* be *legally* relevant under the provisions of the Evidence Act, and so would be *inadmissible* in evidence. All *admissible* evidence is *relevant,*

but all relevant evidence is not *necessarily 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 Evidence Act, it is *not admissible.*

A fact is said to be *logically relevant* to another when it bears such a *causal* relation with the other as to render probable the existence or non-existence of the latter. As stated above, 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 Ss. 5 to 55 of the Evidence Act.* Logical relevancy is *wider* than legal relevancy; every fact which is legally *relevant* is logically relevant, but every fact which is logically relevant is *not necessarily* legally relevant. Thus, a confession made to a police officer may appear to be *logically* relevant, but such a confession is *not legally* relevant, for S. 25 of the Act declares that it *cannot* be used as evidence against the person making it.

The Indian Evidence Act lays down, in Ss. 5-55, what facts are relevant; but the mere fact of logical relevancy does *not* ensure the admissibility of a fact. Very often, public considerations of fairness and the practical necessity for reaching speedy decisions necessarily cause the rejection of much of the evidence which may be logically relevant. Thus, all evidence that is admissible is relevant, but all that is relevant is *not necessarily* admissible. Relevancy is the *genus* of which admissibility is a *species.* Thus, oral statements which are hearsay may be relevant, but *not* being direct evidence, are *not admissible.* Legal relevancy is, for the most part, based upon logical relevancy, but it is *not correct* to say *that all that is logically relevant is necessarily* legally *relevant and vice versa.* Certain classes of facts which, in ordinary life, are relied upon as *logically relevant* are rejected by law as legally *irrelevant.* Cases of exclusion of logically relevant facts by positive rules of law are:

(i) Exclusion of oral by documentary evidence : Ss. 91-99.

(ii) Exclusion of evidence of facts by estoppel : Ss. 115-117.

(iii) Exclusion of privileged communications, such as confidential communications with a legal adviser, communication during marriage, official communications, *etc.* : Ss. 121-130

[All these are discussed in detail at their proper places below.]

The Act has, in Ss. 6-55, declared the following *seven facts alone to be relevant :*

A. Facts relevant as being *connected* with a fact in issue or relevant facts : Ss. 6-16 and 55.

Such facts are of the following *ten* types:

1. Facts forming part of the *same transaction :* S. 6.

2. Facts which are the *occasion, cause* or *effect* of relevant facts *or* facts in issue : S. 7.
3. Facts showing a *motive* or *preparation* for, or previous or subsequent *conduct* in relation to any fact in issue or relevant fact : S. 8.
4. Facts (i) necessary to *explain* or *introduce* a fact in issue or relevant fact, *or* (ii) which *support* or *rebut* an inference suggested by such a fact, *or* (iii) which establish *the identity* of any thing or person whose identity is relevant, *or* (iv) which fix the *time* or *place* at which any fact in issue or relevant fact happened, *or* (v) which show the *relation of parties* by whom any such fact was transacted : S. 9.
5. Anything *said, done or written,* by a conspirator in reference to the *common* intention of all the conspirators : S. 10.
6. Facts (i) that are *inconsistent* with any fact in issue or relevant fact, *or* (ii) which make the existence or non-existence of any fact in issue or relevant fact highly *probable or improbable* : S. 11.
7. Facts which will enable the Court to determine the amount of *damages* which ought to be awarded : S. 12.
8. Where the question is as to the existence of any *right* or *custom,* (i) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence; (ii) particular instances in which the right or custom was (a) claimed, recognised or exercised, or (b) disputed, asserted or departed from : S. 13.
9. Facts showing the existence of any *state of* (i) *mind* (*e.g.,* intention, knowledge, good faith, negligence, rashness, ill-will, goodwill), or (ii) *body,* or (iii) *bodily feeling,* when such state of mind or body is relevant : S. 14.
10. When the question is whether an act was *accidental* or *intentional* — the fact that it formed part of a series of *similar occurrences :* S. 15.

B. Facts relevant to the issue as admissions (Ss. 17-23) and *confessions* (Ss. 24-30).

C. Statements by person *who cannot be called as witness :* Ss. 32-33 and 158.

D. Statements made under *special circumstances :* Ss. 34-39.

E. *Judgments* of Courts of Justice : Ss. 40-44.

F. *Opinions* of third persons : Ss. 45-51.

G. *Character* evidence (*i.e.,* character, when relevant) Ss. 52-55.

[Each of the above topics is discussed below in necessary details.]

A. Facts relevant as being connected with facts in issue or relevant facts (Ss. 6-16 and 53)

1. Same transaction (S. 6)

When do facts not otherwise relevant become relevant? (2 marks) M.U. Apr. 2016 Nov. 2017

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.

ILLUSTRATIONS TO S. 6

FACTS	WHAT MATTERS BECOME RELEVANT
(a) *A* is accused of the murder of *B* by beating him.	(a) Whatever was said or done by *A* or *B* or the bystanders at the beating, *or* so shortly before or after it as to form part of the transaction, is a *relevant* fact.
(b) *A* is accused of waging war against the Government of India by taking part in an armed insurrection in which (i) property is destroyed, (ii) troops are attacked, and (iii) gaols are broken open.	(b) The occurrence of events (i) to (iii) 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.	(c) Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are *relevant* facts, though they do *not* contain the libel itself.
(d) The question is, whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate persons successively.	(d) Each delivery is a *relevant* fact.

This section, and the following three sections, deal with the *relevancy* of facts, *i.e.*, facts which are relevant to a fact in issue. They describe the various ways in which facts, though *not* in issue, are so related to one another as to form part of the principal fact.

A *transaction* is a group of facts so *connected* together as to be referred to by a single legal name, as a *crime*, a *contract* or a *tort*. A transaction may consist of physical acts as also of words accompanying such physical acts. [See. Illus. (a) above].

The term *"transaction"* is defined by *Sir James Stephen* (in his *"Digest of the Law of Evidence")* as:

> "a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of enquiry which may be in issue."

The Kerala High Court has observed that a statement alleged to have been made by a witness to other witnesses *cannot* fall under S. 6, *unless* it is a part of the same transaction. Such a statement can, however, be used under S. 157. (*Rajan* v. *State of Kerala*, 1992 Cri. L. J. 575)

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 continuity of purpose or design.

Statements, to be admissible as substantive evidence of the truth of the facts stated therein, must themselves be 'part of the transaction' and *not* merely uttered in the course of the transaction. Where the transaction is a single incident, a statement by a person who was perceiving the incident made simultaneously with the occurrence of the incident, may, with justification be said to be part of the transaction, inasmuch as it is the result of a spontaneous psychological reaction through perception. (*Hadu* v. *The State*, A.I.R. 1951 Orissa 53)

In the above case, it was also *held* that a statement as the one in Illus. (a) above, is relevant only if it is that of a person who has seen the actual occurrence and who uttered it simultaneously with the incident, or so soon thereafter as to make it reasonably certain that the speaker was still under the stress of the excitement caused by his having seen the incident.

RES GESTAE — Facts forming part of a transaction are described by English and American writers as being part of *res gestae, i.e.*, things done (including *words* spoken) in the course of a transaction. [See. Illus. (a) to (d) above, which are all instances of *res gestae*.]

What is res gestae? (2 marks) M.U. May 2015 Apr. 2016 Nov. 2019

It will be seen that although S.6 of the Act is based on the English doctrine of *res gestae* (a Latin term literally meaning "things done"), the framers of the Act have deliberately avoided the use of this expression, which has become a source of confusion in English criminal jurisprudence.

Acts and declarations accompanying the *transaction* or the *facts in issue* as treated as *res gestae*, and admitted in evidence. This is thus an *exception to the rule of hearsay*. The ground on which such evidence is admitted is the *spontaneity* or *immediacy* of the act or declaration.

Thus, *res gestae* are those circumstances which are the *instinctive* and *undersired* incidents of a particular act. Circumstantial facts are declared relevant and admitted in evidence, though such acts are *not* in issue, if they are so *connected* with the fact in issue as to form part of the *same transaction,* whether they occur at the same time and place *or* at different times and places. Such facts are admitted as forming part of *res gestae, i.e.,* as being part of the original proof of what has taken place. The *underlying principle* of this rule is that as they form part of the transaction which is the subject of inquiry, they ought to be included.

In a case decided by the Supreme Court, the talk between the accused and the police decoy was tape-recorded and sought to be used in evidence in a prosecution for bribery. The defence objected to its use as being a statement to the police. Rejecting the argument, the Supreme Court *held* that the dialogue formed part of the *res gestae* and was, therefore, relevant and admissible under S. 6 of the Act. However, the Court also cautioned that as magnetic tapes are capable of erasure and reuse, the Court must also be satisfied that the tape had *not* been tampered with. (*Yusufalli* v. *State of Maharashtra*, A.I.R. 1968 S. C. 147)

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 five or six times today" were rejected, the transaction being over, and as the remarks referred *not* to the *res,* but to the past acts of the driver.

It should be noted that, in order to pass the test of *res gestae,* the statement uttered, *or* the act done, must be a spontaneous reaction of the person witnessing the crime and forming part of the transaction. The bystanders' declaration must relate *only* to that which was observed by them. The declaration must be substantially contemporaneous with the fact — and *not merely* the narration of a past event. Remarks made by persons other than eye-witnesses would be only *hearsay.* The statement must have been made either *contemporaneously* with the act *or immediately thereafter*, so that there is no time for reflection or fabrication.

In a leading case on the point, a man who was prosecuted for the murder of his wife, pleaded that the gun which killed her went off accidentally. The evidence showed that the deceased had picked up the telephone and requested the operator to connect her to the police. However, before the operator could do so, the distressed caller gave her address and the phone was abruptly disconnected. It was held that her call and her words were relevant as part of a transaction which brought about her death. Her distress call indicated that the shooting was intentional and not accidental. As observed by the court, the victim of an accident would not think of calling the police before the accident happened. (Ratten v. The Queen, (1971) 3 WLR 930)

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's the butcher" (— *A* was known by that name —) were *held* to be relevant.

RES GESTAE IN CASES OF RAPE — It has been *held* that the statement of the girl who has been ravished, made as soon as she had freed herself and is in a position to complain, is admissible as *res gestae.* (*Parvati Devi* v. *State of West Bengal,* AIR 1952 Cal. 831)

But, if *after* being subjected to rape, a girl goes home and later makes a complaint to her mother, that statement *cannot* form a part of the transaction of rape and *cannot* be admitted as *res gestae.* Such a statement (to the victim's mother) may, however, be relevant as constituting *subsequent* conduct under S. 8 of the Act *or* as a *corroborative piece of evidence* under S. 157 of the Act. It *cannot*, however, form a part of the transaction of rape, which is the fact in issue. (*Indru* v. *State of H.P.*, 1989 Cr. L. J. 2238)

RES INTER ALIOS ACTAE — Collateral facts are *res inter alios actae* (*i.e.,* transactions *between others*), and *cannot* be proved; but even a collateral fact may be proved if it satisfies the condition laid down in the section, *viz.,* that it must form part of the *same* transaction.

2. Occasion, cause, effect, state of things and opportunity (S. 7)

Facts which : (a) are the (i) *occasion,* (ii) *cause, or* (iii) *effect* (immediate or otherwise) of facts in issue *or* relevant facts — are themselves *relevant*.

(b) constitute the *state of things* under which they happened — are *relevant.*

(c) afforded an *opportunity* for their occurrence or transaction — are *relevant.*

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 : (*Occasion* and *opportunity*)

(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 : (*Effect*)

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

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. Almost every child has something to gain from the death of his parents, but how rarely on the death of a parent is patricide even suspected." (*Best*)

3(i). Motive and preparation (S. 8)

Write a short note on : Motive and preparation when relevant.
M.U. Nov. 2016

Explain in detail, motive, preparation and previous or subsequent conduct.
M.U. May 2017

Any fact is relevant which shows or constitutes a *motive* or *preparation* for any fact in issue or relevant fact.

ILLUSTRATIONS S. 8

FACTS IN ISSUE	WHAT FACTS BECOME RELEVANT
(a) *A* is tried for the murder of *B*.	(a) The facts that (i) *A* murdered *C*; (ii) *B knew* that *A* had murdered *C*; *and* (iii) *B* had tried to extort money from *A* by threatening to make his (*B*'s) knowledge public — are *relevant* : ('Motive')
(b) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.	(b) 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.	(c) The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B*, is *relevant : ('Preparation').*
(d) The question is whether a certain document is the will of *A*.	(d) The facts that, *not* long before the date of the alleged will — (i) *A* made an inquiry into matters to which the provisions of the alleged will relate; (ii) that *A* consulted *Vakils* in reference to making the will; and that, (iii) he caused drafts of other wills to be prepared of which he did *not* approve, — are *relevant* : ('*Preparation*' and '*Previous conduct*').

3(ii). Conduct (S. 8)

The conduct (previous or subsequent) of —

(i) a party, or (ii) his agent *or* (iii) an accused	which	Influences *or* is influenced by	(i) a fact in issue, *or* (ii) relevant fact.

is *relevant*.

ILLUSTRATIONS TO S. 8 (Contd.)

FACTS IN ISSUE	WHAT FACTS ARE RELEVANT
(a) *A* is accused of a crime.	The facts that, either before or at the time of, or after the alleged crime, — (i) *A provided evidence* which would tend to give to the facts of the case an appearance favourable to himself; *or that* (ii) *A* destroyed or concealed evidence; *or* (iii) *A* prevented the *presence* or procured the *absence* of witnesses, *or* (iv) *A suborned* persons to give false evidence — are *relevant* : (*'Previous and subsequent conduct'*)
(b) The question is whether *A* committed a crime.	The facts that — (i) *A absconded* after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter are relevant. (ii) After the commission of the crime, *A absconded or* was in possession of property or the *proceeds* thereof; *or that* — (iii) A attempted to conceal things which were or might have been used in committing the crime, — are *relevant* : (*Subsequent conduct*)

Mere *statements do not* constitute 'conduct', unless they *accompany* and *explain* acts *other* than statements : *Expln. 1.*

Illustration : The question is, whether *A* was ravished (or robbed). The facts that, *shortly* after the alleged rape (or robbery), *A* made a *complaint* relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are *relevant.*

The fact that *A* said that she had been ravished (or robbed) *without making any complaint,* is *not relevant* as *conduct under* this section, though it may be relevant as a *dying declaration* under S. 32(1), or as *corroborative* evidence under S. 157. [These illustrations make statements of a person against whom an offence has been committed, relevant.]

Mere statements, as distinguished from acts, do *not* constitute conduct. A statement by a retiring partner, made immediately after his retirement, as to the reason for his refusing to continue to guarantee the firm's account with a bank, may be admissible to explain his *conduct.*

When the *conduct* of any person is relevant, *any statement made* (i) to him *or* (ii) in his *presence and hearing*, which *affects* such conduct, is also relevant : *Expln. 2.*

Illustrations : (1) The question is, whether *A* robbed *B.* The fact 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.*

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

CASE : *Emperor* v. *Manchankhan* [(1932) 34 Bom. L. R. 1087] — Some months before he was murdered, the deceased wrote a letter to the Commissioner of Police, Bombay, asking for protection, and stating that he apprehended injury from accused No. 2, and was in fear of his life. At the trial of the accused No. 2 for abetting the murder of the deceased by accused No. 1, the letter was offered in evidence for the prosecution. It was *held* that the letter was *admissible* in *evidence* under S. 8 of the Act, as containing statements which accompanied and explained the conduct of the deceased, such conduct having been influenced by a *fact in issue* (*viz.*, accused No. 2's alleged intention to cause the deceased's death) and a *relevant fact* (*viz.*, accused No. 2's ill-will toward deceased constituting a motive for accused No. 2's complicity in the murder of the deceased.)

In the case of documents, the Courts interpret them very often by evidence of the mode in which the property dealt with by such documents has been held and enjoyed. As *Sugden, L. C.* said in one case, "Tell me what you have done under such a deed, and I will tell you what that deed means."

4. Facts necessary to explain, introduce, support or rebut relevant facts (S. 9)

Facts which —

(i) are necessary to *explain*, or *introduce*
or
(ii) *support* or *rebut* an inference suggested by —

} a fact in issue, or relevant fact —

(iii) establish the identity of any thing or person whose identity is relevant, or

(iv) fix the *time* or *place* at which a fact in issue or relevant fact happened, or

(v) show the relation of parties by whom a fact in issue or relevant fact was transacted,

} are *relevant*, in so far as they are necessary for that purpose.

ILLUSTRATIONS TO S. 9

FACTS IN ISSUE	WHAT FACTS BECOME RELEVANT
(a) The question is whether a given document is the will of *A.*	(a) The state of *A's* property and of his family at the date of the alleged will may be *relevant facts.*
(b) *A* sues *B* for a libel imputing disgraceful conduct of *A. B* affirms that the matter alleged to be libellous is true.	(b) The position and relations of the parties at the time when the libel was published may be *relevant facts* as introductory to the facts in issue. The particulars of a dispute between *A* and *B* about a matter *unconnected* with the alleged libel are *irrelevant,* though the fact that there was a dispute may be *relevant* if it affected the *relations* between *A* and *B.*
(c) *A* is accused of a crime.	(c) The fact that, soon after the commission of the crime, *A absconded* from his house, is *relevant* under section 8, as conduct subsequent to and affected by facts in issue.

	The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is *relevant*, as tending to explain the fact that he left home *suddenly*. The details of the business on which he left are *not relevant*, except in so far as they are necessary to show that the business was sudden and urgent.
(d) *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."	(d) This statement is a *relevant fact* as explanatory of C's conduct, which is relevant as a fact in issue.
(e) *A*, accused of theft, is seen to give the stolen property to *B*, who is seen to give it to *A's* wife. *B* says as he delivers it "*A* says you are to hide this."	(e) *B's* statement is *relevant* as explanatory of a fact which is part of the transaction.
(f) *A* is tried for a riot, and is proved to have marched at the head of a mob.	(f) The cries of the mob are *relevant* as explanatory of the nature of the transaction.

CASE : Where the question was whether *A* wrote an anonymous threatening letter to *B*, requiring him to come to a particular place at an appointed time, the fact that *A* went to that place at that time would be conduct relevant under S. 9. On the other hand, the fact that *A* had some other work at that time and place would be relevant as tending to rebut the inference that he had written the anonymous letter.

The Supreme Court has *held* that, in the case of identification of the accused on a charge of murder, dogs of the police squad pointing towards the accused is *not sufficient* to connect him with the crime. (*Surinder Pal Jain* v. *Delhi Administration*, 1993 Cri. L. J. 1871)

5. Things said or done by a conspirator in reference to common design (S. 10)

What is common intention?
(2 marks)
M.U. May 2014

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	(i) in reference to their common intention (ii) 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 (i) proving the existence of the conspiracy, *and* (ii) showing that he was a party to it.		

Illustration : Reasonable grounds exist 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 the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra, *F* transmitted from Delhi to *G* at Kabul, the money which *C* had collected at Calcutta, and the contents of a letter written by *H* giving an account of the conspiracy, are each *relevant*, both to prove the existence of the conspiracy and to prove *A's* complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they have taken place *before* he *joined* the conspiracy *or after he left it*.

PRINCIPLE — This section is based on the principle that when several persons conspire to commit a crime or a tort, each makes the rest his *agents* to carry the plan into execution.

This section has no bearing on the question as to how far the conspiracy to commit an offence or actionable wrong is an offence under the Indian Penal Code. Rather, this section describes what facts are relevant to prove a conspiracy and to prove that a person was a member of that conspiracy. When concert has once been proved, each party is the agent of all the others, and the acts done by him in pursuance of the common design are admissible against his fellow conspirators.

The *object of the section* is to ensure that one person is *not* made responsible for the acts or deeds of another, until some bond in the nature of agency has been established between them and the act; words or writing of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained.

SCOPE OF S. 10 — The operation of this section is strictly conditional upon there being *reasonable ground* to believe that two or more persons have conspired to commit an offence. The section refers to things said or done by a conspirator in reference to the common intention. Anything said, done or written in reference to the common intention is admissible, and therefore, the contents of letters written by one in reference to the conspiracy are relevant against the others, even though *not* written in support of it or in furtherance of it.

PROBLEMS

1. *A* and *B* are charged with having conspired to commit the murder of *C*. At their trial for the said murder, the statement of *B* made *after* his arrest before a magistrate implicating *A* in the crime, is sought to be used against *A*. Is this permissible? Give reasons.

Ans. : This is *not permissible*. Under Section 10 of the Evidence Act, the words "in reference to their common intention" mean in reference to what at the time of the statement, was intended for the future. In this case, the confession made by *B after his arrest* before a magistrate *is* a statement of a past act, *i.e.*, of the act in connection with murder.

Reading S. 10, it appears that narratives coming from conspirators as to their past acts *cannot* be said to have reference to their common intention. The word "intention" implies that the act intended is in the future, whereas in this case the statement related to a past act, and therefore, it is inadmissible in evidence. (*Emperor* v. *Abani Bhusan*, 38 Cal. 169)

2. *A* and *B* are being tried for conspiring to cheat *C* for the sum of ₹ 2,400. *After* the transaction, *B* made certain entries in a diary, showing that each of them had profited to the extent of ₹ 1,200 in the said transaction. These entries in the diary of *B* are sought to be used as evidence against *A*. Can they be admissible?

Ans. : These entries *cannot* be admissible in evidence. Section 10 relates to anything said, done or written when the common intention of conspiracy is in existence. A statement (in this case an entry) made by a conspirator *after* the common intention of the conspirators has been achieved, *viz.*, the cheating of *C*, would *not* be admissible under section 10 of the Act.

PROOF OF CONSPIRACY — The law relating to the proof of conspiracy, as contained in Section 10 of the Act, and also as expounded by authoritative judicial decisions, may be summarised thus :

(1) *Reasonable ground* to believe in the existence of a conspiracy must be shown as a condition precedent to the admission of acts and declarations of a conspirator against his fellow conspirators. However, the judge has a discretion *whether or not* to insist on prior evidence showing such reasonable ground.

(2) The action of each of those accused with the charge of conspiracy must then be proved, *i.e.*, that the persons charged were parties to it.

(3) The acts, declarations and writings of each conspirator *in reference* to the *common design or intention* after the time when such intention was entertained by any of the persons are admissible against each of the others.

(4) "*Common intention*" signifies a common intention existing at a time when the thing was said, done or written by one of them. Therefore, things said, done or written by a conspirator *after* the conspiracy had been carried into effect or abandoned, when the common intention was no longer operating, are *not admissible* against a co-conspirator. (*Mirza Akbar* v. *R.*, 67 I.A. 336)

Narratives coming from the conspirators as to their past acts *cannot* be said to have a reference to their common intention. The word 'intention' implies that the act intended is in the future, and the section makes relevant statements made by a conspirator with reference to the future. The words "in reference to their common intention" means in reference to what, at the time of the statement, was intended in the future. (*Emp.* v. *Vaishampayan,* A.I.R. 1932 Bom. 56)

In *Emperor* v. *Vaishampayan* above, (also known as the *Lamington Road Shooting Conspiracy Case),* a Police Officer and his wife were wounded by revolver shots near the Lamington Road Police Station in Mumbai. The shots were fired by some persons in a motor car parked on the opposite side of the road. 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 the conspiracy. The Court *held* that a plain reading of S. 10 shows that narratives coming from the conspirators as to their past acts *cannot* be said to have a reference to their common intention. However, the statement about publishing a pambhlet would be relevant because the statement furthers the object of the conspiracy.

It may also be noted that Section 10 is *not* intended to remove the restriction which Section 25 of the Evidence Act and the provisions of the Criminal Procedure Code place upon admissibility of the statement made to the Police.

Where concert has once been proved, each party is the agent of all the others, and acts done by him in pursuance of the common design are admissible against his fellow conspirators. (*Emp.* v. *Shafi Ahmed*, 31 Bom. L.R. 515)

ENGLISH LAW

It may be noted that the law regarding the proof of conspiracy laid down in Section 10 of the Act is wider than the corresponding rule of English law. *Under the English law,* the statements or acts made by one conspirator *in furtherance* of the common object are admissible against the other. However, under Section 10, anything said or done *in reference* to the common intention, although it may *not* be in support, or in furtherance, of the conspiracy, is relevant against the other.

Secondly, under *the English law*, statements or acts of a conspiracy after one terminates his connection with the conspiracy are *not admissible* against the latter, but under Section 10, they *are admissible* against him.

6. Inconsistent, highly probable or improbable facts (S. 11)

Facts *not* otherwise relevant, are relevant, —

(a) if they are inconsistent with any fact in issue or relevant fact; *or*

(b) if they make 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 by *B, C* or *D*, is *relevant*.

Reg. v. *Prabhudas,* [(1874) 11 B. H. C. 90)] — In a charge of forgery, evidence of possession by the accused of other documents suspected to be forged is *inadmissible*.

What is plea of alibi? (2 marks)
M.U. May 2018
Dec. 2018
Nov. 2019

ALIBI — The fact of presence elsewhere is essentially inconsistent with the presence at the place and time alleged, and therefore, with personal participation in the act. It is on this that the *theory of alibi* is based.

Thus, if a person is charged with having committed a particular offence in Mumbai on a particular day, if he produces his passport to prove that he was in England on that day, this would be a good alibi.

In one case, where the accused was discharged from a hospital which was 160 kms away from the place where the crime was committed, and such discharge was only 90 minutes before the time of the crime, the plea of alibi was successful. (*Tulsiram v. State of Maharashtra*, 2000 Cr. L. J. 1560)

The Supreme Court has observed in several cases that the plea of alibi must be proved with *absolute certainty*, so as to completely exclude the possibility of the presence of that person at the place of occurrence of the crime. So, where the accused contended that he was attending a *Panchayat* meeting at a place which was only 400-500 yards away from the scene of the crime, his plea of alibi was *not* allowed. The court observed that, as the distance was so short, it was possible for him to commit the crime and then come back and continue to attend the meeting. (*Munshi Prasad v. State of Bihar*, AIR 2002 SC 3031)

PRINCIPLE — *Facts not otherwise relevant are made relevant by Section 11.* The effect of this section is, therefore, to clearly enlarge the classes of relevant facts. If a fact is relevant under this section, it would be relevant *even if it is not relevant under any other section of the Act.* At first sight, it would appear that this section would make every fact relevant because of the wording of clause (b). But care must be taken *not* to give this section an improperly wide scope by a liberal interpretation of the phrase "highly probable or improbable". Otherwise, this section might seem to supersede all the other provisions of the Act as to relevancy. Though the terms of this section are wide, they are controlled by the provisions regarding relevancy contained in other sections of the Act. Further, the fact relied on must be proved according to the provisions of the Act. (*Sevguon* v. *Sri Mathur,* 1940 Mad. 270)

The observations of *West. J*, in *Reg.* v. *Prabhudas,* (1874 11 B.H.C. 90) on S. 11 of the Act are interesting :

> "S. 11 of the Evidence Act is, no doubt, expressed in terms so extensive, that any fact which can, by a chain of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connexions of human affairs are so infinitely various and farreaching, that thus to take the section in its widest admissible sense, would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties."

The words "highly probable or improbable" indicate that the connection between the facts in issue the collateral facts sought to be proved must be immediate so as to render the co-existence of the two highly probable. The relevant facts under this section either (i) exclude, or (ii) imply, more or less distinctly, the existence of the fact sought to be proved. (*Jhabwala* v. *Emp.*, A.I.R. 1933 All. 690)

The words "highly probable" are of great importance, and the fact sought to be proved must be so closely connected with the fact in issue or the relevant fact, that a Court will *not* be in a position to determine it without taking them into consideration. (*Rajendra Singh* v. *Ramganit Singh*, A.I.R. 1954 Patna 566)

It must also be noted that before a fact can be *relevant* under Section 11, it must be shown that it is *admissible*.

The section declares as admissible, facts which are logically relevant to prove or disprove the main fact or the fact in issue. There may be collateral facts which have no connection with the main fact, except by way of disproving any material facts proved or asserted by the other side, *i.e.*, when they are such as to make the existence of the fact so "*highly improbable*" as to justify the inference that it never existed. A well-known instance is that of the defence of *alibi*. Another instance is non-access *of the husband* to prove the illegitimacy of a child.

In one case, 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. (*Kalu Mirza* v. *Emperor*, 1909 37 Cal. 91)

But in a case of conspiracy to commit dacoity, facts showing that the object of the illegal association, during a period of several months prior to the dacoity in question, had been the commission of thefts and other discreditable acts, was *held* to be *inadmissible* to prove the nature and character of the association. (*Emperor* v. *Wahiddudin*, 32 B.L.R. 324)

7. (i) Amount of damages (S. 12)

In a 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 suits for damages will vary with the nature of suits, *i.e.*, whether it is a suit for breach of contract, or for libel, or seduction, or breach of promise to marry, *etc.* Under this section, *only* facts which will aid in determining the quantum of damages are relevant.

7. (ii) Character relevant as affecting damages (S. 55)

In civil cases, the fact that the character (*i.e.*, general reputation or general disposition) of any person is such as to affect the amount of damages which he ought to receive, is *relevant*.

8. Right or custom (S. 13)

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

(a) any transaction —

(i) by which the right or custom was created, claimed, modified, recognised, asserted or denied; *or*

(ii) which was inconsistent with its existence;

(b) particular instances in which —

(i) the right or custom was claimed, recognised or exercised, *or*

(ii) its exercise was disputed, asserted or departed from.

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

This section applies to *all kinds* of rights, whether rights of full ownership or falling short of ownership, *e.g.*, rights of easements. A right may be public or

general or private. Further, a right may be incorporeal, *e.g.*, a right of way, or corporeal, *e.g.*, right of ownership. (*Rangayyan* v. *Innasimuthu*, A.I.R. 1956 Madras, 226.)

From the illustration (above), it appears that *not only* public rights, *but* private rights are also covered by S. 13.

TRANSACTION — A transaction is a business or dealing which is carried on or transacted between two or more persons; it is something which has been concluded between persons by a cross or reciprocal action; and in the larger sense, it means that which is done. (*Rangayyan* v. *Innasimuthu*, A.I.R. 1956 Madras, 226)

A transaction is *not* confined to a dealing with property between two persons *inter vivos*, but can be taken also to include a testamentary dealing with the property. (*Periasami* v. *Varadappa*, A.I.R. 1950 Mad. 486)

CUSTOM — The requisites of a valid custom are that it should be ancient, certain and reasonable, and that it should *not* be opposed to decency or morality. No custom which is opposed to public policy can be recognised. It must also *not* be contrary to justice, equity and good sense. It may be general or special.

9. State of mind, body or bodily feeling (S. 14)

Facts showing —

(a) the existence of any *state of mind*, such as *intention* [Illus. (e), (i), (j)], *knowledge* [Illus. (a), (b), (c), (d)], *good faith* [Illus. (f), (g), (h)], *negligence* [Illus. (n)], *rashness* [Illus. (k), (l), (m)], *ill-will or goodwill* towards any particular person; *or*

(b) the existence of any *state of body or bodily feeling*,—

are *relevant*, when the existence of any such state of mind, or body, or bodily feeling, is in issue *or* is relevant.

ILLUSTRATIONS TO S. 14

FACTS IN ISSUE	WHAT FACTS BECOME RELEVANT
(a) *A* is accused of receiving stolen goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article.	(a) The fact that, at the same time, he was in possession of many other stolen articles is *relevant*, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.
(b) *A* is accused of fraudulently delivering to another a counterfeit coin which, at the time when he	(b) The fact that, at the time of its delivery, *A* was possessed of a number of *other* pieces of

delivered it, he knew to be counterfeit.	counterfeit coin is *relevant*. The fact that *A* had been previously convicted of delivering to another as genuine, a counterfeit coin knowing it to be counterfeit, is *also relevant*.
(c) *A* sues *B* for damage done by a dog of *B* which *B* knew to be ferocious.	(c) The facts that the dog had previously bitten *X*, *Y* and *Z*, and that they had made complaints to *B*, are *relevant*.
(d) The question is whether *A*, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.	(d) The fact that *A* had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that *A* knew that the payee was a fictitious person. (Illustration (d) is based on the English case, *Gibson* v. *Hunter*, 1794 2 HBL 288.)
(e) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*.	(e) The fact of previous publications by *A* respecting *B*, showing ill-will on the part of *A* towards *B* is *relevant*, as proving *A's* intention to harm *B's* reputation by the particular publication in question. The facts that there was no previous quarrel between *A* and *B*, and that *A* repeated the matter complained of as he heard it, are *relevant*, as showing that *A* did *not* intend to harm B's reputation.
(f) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby *B*, being induced to trust *C*, who was insolvent, suffered loss.	(f) The fact that, at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbour and by persons dealing with him, is *relevant*, as showing that *A* made the representation in good faith. (Illustration (f) is based on the English case, *Sheen* v. *Bumpstead*, 1863 2 H & C 193.)

(g) *A* is sued by *B* for the price of work done by *B*, upon a house of which *A* is owner, by the order of *C*, a contractor. *A's* defence is that *B's* contract was with *C*.	(g) The fact that *A* paid *C* for the work in question is *relevant*, as proving that *A* did, in good faith, make over to *C*, the management of the work in question, so that *C* was in a position to contract with *B* on *C's* own account, and *not* as agent for *A*. (Illustration (g) is based on the English case, *Gerish* v. *Charlier*, 1845 1 C.B. 13.)
(h) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could *not* be found.	(h) The fact that public notice of the loss of the property had been given in the place where *A* was, is relevant, as showing that *A* did *not* in good faith, believe that the real owner of the property could *not* be found. The fact that *A* knew, *or* has reason to believe, that the notice was given fraudulently by *C*, who had heard of the loss of the property and wished to set up a false claim to it, is *relevant*, as showing that the fact that *A* knew of the notice did *not* disprove *A's* good faith.
(i) *A* is charged with shooting at *B* with intent to kill him.	(i) In order to show *A's* intent, the fact of *A's* having previously shot at *B* may be proved.
(j) *A* is charged with sending threatening letters to *B*.	(j) Threatening letters previously sent by *A* to *B* may be proved, as showing the intention of the letters.
(k) The question is whether *A* has been guilty of cruelty towards *B*, his wife.	(k) Expressions of their feeling towards each other shortly before or after the alleged cruelty are *relevant facts*.
(l) The question is, whether *A's* death was caused by poison.	(l) Statements made by *A* during his illness as to his symptoms are *relevant facts*.

(m) The question is what was the state of *A's* health at the time an assurance on his life was affected.	(m) Statements made by *A* as to the state of his health at or near the time in question are *relevant facts.* (Illustration (m) is based on the English case, *Aveson* v. Lord *Kinnaird*, 1805 6 Ea. 188.)

It is also provided that 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. (S. 14, Expln. 1)

ILLUSTRATIONS TO S. 14 (contd.)

Illus. — (n) *A* sues *B* for negligence in providing him with a carriage for hire *not* reasonably fit for use, whereby *A* was *injured.*	(n) The fact that *B's* attention was drawn on other occasions to the defect of that particular carriage is *relevant.* The fact that *B* was habitually negligent about the carriage which he let to hire is *irrelevant.*
(o) *A* is tried for the murder of *B* by intentionally shooting him dead.	(o) The fact that *A* on other occasions shot at *B* is *relevant* as showing his intention to shoot *B.* The fact that *A* was in the *habit* of shooting at people with intent to murder them is irrelevant.
(p) *A* is tried for a crime.	(p) The fact that he said something indicating an *intention* to commit that particular crime is relevant. The fact that he said something indicating a *general disposition* to commit crimes of that class is *irrelevant.*

RES INTER ALIOS ACTATE — This maxim implies that inferences are *not* to be drawn from one transaction to another which is *not* specifically *connected* with it, *merely* because the two resemble each other as a matter of fact. They must be *linked* together by the chain of *cause and effect* in some reasonable manner before an inference may be drawn. A fact in issue *cannot* be proved by showing that facts similar to it, but not *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 some time ago is *irrelevant.*

In *R.* v. *Shellaker* (1914 1 K.B. 414), it was *held* that to prove the occurrence of sexual intercourse on a given occasion, prior and subsequent acts between the same parties are *admissible.*

Previous conviction of accused (S. 14 Expln. 2)

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

Relevancy of previous convictions (Ss. 14 and 13)

A previous conviction may be *relevant* under S. 8 as showing *motive.* It may be relevant under S. 14 (Expln. 2) when the existence of any *state of mind or bodily feelings* is relevant. It may also be *relevant* under S. 43. [See *Illustrations* (e) and (f) to S. 43]

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

10. Accidental or intentional acts (S. 15)

When the question is *whether an act was* —

(i) *accidental,* or

(ii) *intentional,* or

(iii) 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

FACTS IN ISSUE	WHAT FACTS BECOME RELEVANT (S. 15)
(a) A is accused of burning down his house in order to obtain money for which it is insured.	(a) The fact that *A* lived in houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires, *A* received payment from a different insurance office, are *relevant,* as tending to show that the fire was *not accidental.*
(b) *A* is employed to receive money from the debtors of *B.* It is *A's* duty to make entries in a book showing the amounts received by	(b) The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A,* are *relevant.*

him. He makes an entry showing that on a particular occasion, he received less than he really did receive. The question is, whether this false entry was *accidental* or *intentional*.	
(c) *A* is accused of fraudulently delivering to *B* a counterfeit rupee. The question is whether the delivery of the rupee was accidental.	(c) The facts that, soon before or soon after the delivery to *B*, *A* delivered counterfeit rupees to *C*, *D* and *E* are *relevant*, as showing that the delivery to *B* was *not accidental*.

PRINCIPLE UNDERLYING S. 15 — Where it is uncertain whether an act was done with a guilty knowledge or intention *or* whether it was innocent or accidental, proof that It formed one of a *series of similar* acts raises the presumption that the act in question and the others, together forming a series, were done systematically, and were, therefore, *not innocent or accidental*. This section is an application of the general rule laid down in S. 14, and the words of the section, as well as of illustration (a), show that it is *not necessary* that all acts should form parts of *one* transaction, but that they should be parts of a *series of similar* occurrences. For example, in illus. (a), the fact that the houses of the same person insured against fire were successively burnt down on different occasions is *relevant* to prove that the incidents were *not accidental*, but part of a design.

In one English case, a man was charged for indecent exposure to a woman with intent to insult her. It was *held* that the fact that he had, on previous occasions, thus exposed himself to her, would be *relevant* to show that the exposure was *intentional*, and *not accidental*. (*Perkins* v. *Jeffery* (1915) 2 K.B. 702)

Problem : *X*, a clerk in charge of renewal of licences for hand-carts, was charged with cheating *A*, *B* and *C*, three hand-cart owners by receiving from them ₹ 2.50 for each such renewal, instead of the prescribed fee of ₹ 2. Evidence led at the trial showing that he had taken fifty paise excess from persons other than *A*, *B* and *C*. State, giving reasons, whether the evidence is admissible.

Ans. : The evidence is *admissible* under S. 15 of the Evidence Act, as tending to establish a systematic course of conduct on the part of the accused and negativing any reasonable or honest motive. (*Rex* v. *Wyatt*)

Emp. v. *Panchu Das* [(1920) 47 Cal. 671, F.B.] *P* introduced himself as a Raja's son to a prostitute who passed into his keeping. He then introduced *G*

as his door-keeper and both visited her house till the night of December 9, 1914, when she was found next morning to have been murdered and robbed. The accused were tried on charges of murder, conspiracy to rob, theft, and abetment of each other in the commission of the theft and murder.

It was *held* that evidence that *P* had similarly introduced himself as a wealthy man, in 1915 and 1918, to three other prostitutes, each of whom became his mistress, that he then introduced G as his doorkeeper, that both visited the women, and suddenly disappeared, and that their disappearance was followed by discovery by the women, in each case, of the loss of their money or ornaments was *not admissible* under S. 9, 14 or 15. Section 9 did *not* apply for the purpose of proving identity, as the murder and theft took place in December 1914, and the subsequent incidents in 1915 and 1918. Section 14 was *not applicable*, as the evidence of the subsequent occurrence did *not* show the state of mind of the accused towards the murdered woman. The first explanation and illustrations (i), (j) and (o) to that section excluded such evidence. Section 15 was *not applicable*, as there was no question of the acts of murder and theft being accidental or intentional or done with a particular knowledge or intent, but they were plainly intentional. Evidence of the subsequent incidents was also *not admissible* under S. 11.

Problem : *A* is charged under Section 420, Indian Penal Code, for falsely representing to *B*, that he was the Manager of a Mercantile Firm, and that he would employ *B* as a cashier, if he deposited with them ₹ 1,000, and thereby obtaining ₹ 1,000 from *B*. At the trial, evidence is led to show that *A* had made similar representations to *C* and *D*, and obtained from them ₹ 1,000. Is the evidence admissible?

Ans. : The evidence is *admissible*. All facts are *relevant* which go to show a state of mind or body or bodily feeling, when the existence of any such state is in issue or relevant in the case. The principle is that facts which tend to prove the existence or non-existence of a mental state are presumptive evidence of the existence or non-existence of that mental state.

In this case, the evidence is led to show that *A* was in the habit of faisely representing to others even prior to the representation to *B*.

But it must be noted that the evidence admissible is in proof of only a mental fact, and is *not admissible* to prove other ingredients of the right or liability.

Course of business (S. 16)

When there is a question whether a particular act was done, the existence of *any course of business*, according to which it *naturally* would have been done, is a *relevant fact*.

Illustrations — (a) The question is whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in the place, are *relevant*.

(b) The question is, whether a particular letter reached *A*. The facts that it was posted in due course, and was *not* returned through the Dead Letter Office are *relevant* : S. 16.

LETTERS SENT BY POST — The posting of a letter may be proved by the person who posted it *or* by showing facts from which the posting may be presumed. For instance, evidence of posting may be given by proving that the letter was delivered to a clerk whose duty it was, in the ordinary course of business, to post it, *or* that it was put into a post-box which is cleared everyday by the postman. Proof of posting letters raises a presumption that it reached its destination in due course. The post-mark on the envelope is *prima facie* evidence of the date, time and place of posting. Further, when the acknowledgment of a registered letter comes back (to the sender) with a signature purporting to be that of the addressee, there is a presumption of the fact of service.

B. Facts relevant to the issue as Admissions and Confessions (Ss. 17-31)

1. ADMISSIONS (Ss. 17-23 & 31)

'Admission' defined (S. 17)

What is admission and confession? (2 marks) M.U. May 2014 June 2018 Dec. 2018

An admission is a statement, *oral* or *documentary*, or contained in electronic form, which *suggests* any *inference* as to any *fact in issue* or *relevant fact*, and which is made by any of the persons, and under the circumstances mentioned below.

Define admission. (2 marks) M.U. Apr. 2014 Nov. 2014 June 2019

WHAT IS AN ADMISSION — 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. Admissions are followed 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. Admissions constitute a very weak kind of evidence, and the Court may reject them if it is satisfied, from other circumstances, that they are untrue.

Write a short note on : Admission. M.U. May 2015 June 2018 Nov. 2019

An admission is a *voluntary acknowledgment* made by a party, or someone identified with him in legal interest, of the existence of certain facts which are in issue or relevant to an issue in the case. The predominant characteristic of this type of evidence consists in its binding character.

Admissions are broadly classified into *two categories* : (a) *judicial* admissions, and (b) *extra-judicial* admissions. Judicial admissions are formal admissions made by a party to the proceeding in the case. Extra-judicial admissions are informal admissions *not* appearing on the record of the case. Judicial 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.

Extra-judicial admissions are also binding on the party against whom they are set up. Unlike judicial admissions, they are binding *only partially and not fully, except* in cases where they operate as or have the effect of *estoppel*, in which case, they are fully binding, and may constitute the foundation of the rights of the parties. (*Ajodhya Prasad* v. *Bhawani Shanker*, A.I.R. 1957 All. 1 F.B.)

In a case decided by the Supreme Court, the Plaintiff sought to rely on an admission made by the Defendant in the plaint *in an earlier suit* filed by the Defendant. It was *held* that Section 17 of the Evidence Act makes no distinction between an admission made by a party in his pleading and other admissions. Therefore, an admission made by a person in a plaint signed and verified by him may be used as evidence against him in other suits. Of course, the admission *cannot* be regarded as conclusive, and it is open to the party concerned to show that the statement is *not* true. (*Basant Singh* v. *Janki Singh*, A.I.R. 1976 S.C. 341)

What is an admission? Who can make a valid admission and when? Explain in detail. M.U. Nov. 2017

It is generally immaterial *to whom* an admission is made. An admission made to a *stranger* is also relevant. Admissions are as much binding on the Government as on ordinary persons.

ADMISSIONS DISTINGUISHED FROM CONFESSIONS — *In England*, the term *admission* is generally applied to *civil* transactions, the term *confession* being usually restricted to acknowledgment of guilt in *criminal* cases. The Indian Evidence Act also proceeds on the same principles. Thus, confessions are merely a species, of which the *genus* is the admissions. Therefore, all confessions would be admissions, but all admissions *cannot* be called confessions. (This topic is fully discussed under the topic 'Confessions'.)

Statements made by the following *six classes of persons* are admissions, *viz.* :—

1. *A party* to the proceeding (civil or criminal) *or* by his *agent*. (S. 18)

2. Parties suing or being sued in a *representative* character (*e.g.*, trustees, executors, assignee of a bankrupt, *etc.*) *while they hold that character*. (S. 18)

3. Persons having *proprietary* or *pecuniary interest* in the proceeding, *if* the statements are made –
   - (i) in their *character* of persons so interested, *and*
   - (ii) *during the continuance* of their interest. (S. 18)

4. Persons from whom the parties to the suit have *derived their interest* in the subject-matter of the suit, *provided that* the statements are made *during the continuance* of the interest of the person making the statement. (S. 18)

Thus, the admissions of an *agent* are 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. 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.

5. Persons whose position or liability it is necessary to prove as against any party to the suit if the statements are made during the continuance of such position or liability, *and* are such as would be relevant as against such persons (in relation to such position or liability) in a suit brought by or against them. (S. 19)

Illustration — *A* undertakes to collect rents for *B*.

B sues *A* for 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 a relevant fact as against *A*, if *A* denies that *C* did owe rent to *B*.

6. Persons to whom a party to the suit has *expressly* referred for information in reference to a *matter in dispute*. (S. 20)

Illustration — *The question is, whether a horse sold by A* to *B* is sound. *A* says to *B* — "Go and ask *C*; *C* knows all about it." *C's* statement is an admission.

SCOPE OF S. 20 — S. 20 forms an *exception* to the rule that admissions by *strangers* to a suit are *not* relevant. Under this section, the admissions of a third person are also receivable in evidence against, and have been held to be in fact binding upon, the party who has expressly referred another to him for information in regard to an uncertain or disputed manner.

The Illustration to S. 20 is taken from the English case, *Williams* v. *Innzs* (1 Camp 364), where *Lord Ellenborough* remarked : "If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it as much as if that had been said or done by himself."

To attract the operation of S. 20, there must be an *express reference for information* in order to make the statement of the person referred to admissible. In the application of this principle, *it does not matter* whether the question referred to is one of *law* or of *fact*, whether the persons to whom the reference is made *have or have not* any particular knowledge on the subject, or whether the statement of the referee be adduced in evidence in an action on contract or in an action for tort.

If one party in a case offers to the other party to settle it, provided that a witness makes a statement on oath as to a certain fact in dispute, and the statement is made, it binds the party making the offer. Where the defendant said, "If *C* will say that he did deliver the goods, I will pay for them," it was *held* that *C's* statement was admissible, and the defendant was bound by it.

CASE — A prisoner was indicted for receiving stolen goods, knowing them to have been stolen. To prove his guilty knowledge, evidence was given that, on being asked by the police as to the price he had given, he said he did *not* then know, but his wife would make out a list of them, and next day she, in his presence, produced a list which was received in evidence against him. It was *held* that the list was *admissible*.

Against whom admission may be proved (S. 21)

Admissions are relevant and may be proved as *against* —	(i) the person *who makes* them, *or* (ii) his *representative* in interest.

Illustration — *The question between A* and *B* is, whether a certain deed *is or is not* forged. *A* affirms that it is genuine, *B* that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A cannot* prove a statement by himself that the deed is genuine; nor can *B* prove a statement by himself that the deed is forged.

EVIDENTIARY VALUE OF AN ADMISSION — Section 21 lays down that, as a general rule, admissions are *relevant,* and may be proved against the person who makes them or his representative in interest, and if duly proved, though *not* conclusive, are sufficient evidence of the facts admitted. The *effect* usually given to admissions proved against persons who make them is *destructive,* and *not constructive*. Whether they are true or *not* does *not* matter. The effective point is that they destroy the force of inconsistent statements made later. The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. When an admission is duly proved, and the person against whom it is proved does *not* satisfy the Court that it was mistaken or untrue, the Court may decide the case in accordance with such admission. An *erroneous admission* does *not* bind the person making such admission.

The Supreme Court had *held* that a contractor's bill which is expressly stated to be a final settlement of his demand for the work done, amounts to an *admission* against the contractor, who would be bound by it, *unless* satisfactory proof to the contrary is produced. (*Central Coal Fields Ltd.* v. *Mining Constructions and Multi-contract Pvt. Ltd.*, (1982) 1 S.C.C. 415)

When admissions can be proved on behalf of persons making them (S. 21)

SCOPE OF S. 21 — The general rule is that admissions *cannot* be proved by, or on behalf of, the person who makes them, because a person will always naturally make statements that are favourable to him. To this principle, *three exceptions* are laid down in S. 21.

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

Exception 1 : When the admission is of such a nature that, if the person making it were dead, it would be relevant *as between third persons* under section 32.

Illustrations — (i) *A*, the captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course. *A* produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, indicating that the ship was *not* taken out of her proper course, *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(ii) *A* is accused of a crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post-mark of that day. The statement in the date of the letter is admissible, because, *if A* were dead, it would be admissible under section 32, clause (2).

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.

Illustrations — (i) *A* is accused of receiving stolen goods knowing them to be stolen. He offers to prove that he refused to sell them below their value. *A* may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(ii) *A* is accused of fraudulently having in his possession a counterfeit coin which he knew to be counterfeit. He offers to prove that he asked a skilled person to examine the coin, as he doubted whether it was counterfeit or *not*, and that the person did examine it and told him that it was genuine. *A* may prove these facts for the reason stated in the last preceding illustration.

The state of man's mind or body is relevant under S. 14; and statements narrating such facts indicating the state of mind or body may be proved on behalf of the person narrating them. But, such statements should have been made at or about the time when such state of mind or body existed. (See the above illustrations.) Section 14 merely declares that such statements are *relevant*. This clause shows that such facts or statements may be proved on behalf of the person making them, notwithstanding the general rule that persons *cannot* make evidence for themselves by what they choose to say.

Exception 3 : If the admission is relevant *otherwise* than as an admission.

The state of a man's mind or body, relevant under Ss. 6 to 13, will *not* be rendered *inadmissible* because they may be proved on behalf of the person making them.

This exception is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance, as part of the *res gestae* or as a statement accompanying or explaining particular conduct. Thus, a statement which is inadmissible as an admission under the general rule can be made admissible as such by reference to this exception.

In one case, Defendants Nos. 2 and 4 sold a piece of property to Defendant No. 1, which they obtained under a partition, and subsequently colluded with the Plaintiff and denied the partition as well as the sale. In the circumstances, statement made by Defendants Nos. 2 and 4 in a Petition and a Written statement filed by them in other previous suits, which showed that there had been a partition, were *held* to be admissible against them under *Exception 3*. (*Gyannessa* v. *Mobarakannessa*, 1897 25 Cal. 210)

Admission how proved (Ss. 58-65)

Facts admitted *at the hearing, or* which the parties agree to admit by writing, *or* which by rules of pleading, are deemed to have been admitted (Order 8, r. 5, of the Code of Civil Procedure) need *not* be proved; but the Court *may* require such facts to be proved by other evidence : S. 58.

Admissions, whether oral or in writing or by conduct, made *out of Court*, must be proved by other relevant evidence, oral (Ss. 59 to 60) or documentary (Ss. 61-65), as the case may be, like any other fact.

Admissions how far relevant (Ss. 22-23)

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

Oral admissions as to the *contents* of a document are *not relevant, unless* and *until* —

(i) the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document; *or*

(ii) the genuineness of a document produced is in question.

When are admissions not relevant in civil cases?
(2 marks)
M.U. Nov. 2017

The English Law on the point was laid down in *Slatterie* v. *Pooley*, where it was *held* that the oral admission of a party as to the contents of a document is admissible, even when the document might have been produced as evidence against him, when such contents are directly in issue.

Although this leading decision has held the field in England since 1840, it has received much criticism and has been applied with several modifications. The decision was disapproved in the Irish case of *Lawless* v. *Dueale*, where the Judge opined that the doctrine laid down in *Slatterie* v. *Pooley* "is a most dangerous proposition."

It is to be noted that S. 22 of the Act has rejected the rule laid down in *Slatterie v. Pooley*, and has adopted the view of the Irish case, *Lawless v. Dueale*. The *effect* of this section, read with S. 65(b), is that the contents of a document may be proved by the written admission of the person against whom it is to be used, but *cannot* be proved by oral admission, *except* when the document itself is *not* forthcoming for one of the reasons mentioned in S. 65.

When oral admission as to content of electronic records are relevant (S. 22-A)

Section 22-A, *inserted by the Information Technology Act, 2000*, recognises the advent of the electronic area in India, and provides that oral admissions as to the contents of electronic records are *not relevant*, unless the genuineness of the electronic record produced is in question.

Communications without prejudice (S. 23)

In *civil cases*, no admission is relevant, if it is made —	(i) upon an express condition, *or* (ii) under circumstances from which the Court can infer that the parties agreed together —	that evidence of it should *not* be given.

However, it is also clarified that there is nothing to exempt any barrister, pleader, attorney or *vakil* from giving evidence of any matter of which he may be *compelled to give evidence* under section 126. (Explanation to S. 23)

COMMUNICATIONS WITHOUT PREJUDICE — Section 23 lays down that in *civil* (*not* criminal) cases, an admission is *not relevant* when it is made (*i*) upon an express condition that evidence of it is *not* to be given, *or* (ii) under *circumstances* from which the Court can *infer* that the parties *agreed* together that evidence of it should *not* be given. The section 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). It is to be remembered that this section does *not* apply to *criminal* cases.

EXPLANATION TO S. 23 — Under the Explanation, the legal adviser of a party will *not* be prevented from giving evidence of any communication made in furtherance of any *illegal* purpose *or* any fact showing that *crime* or *fraud* has been committed since his employment.

"WITHOUT PREJUDICE" — This section protects communication made 'without prejudice.' Confidential overtures of pacification between litigants made without prejudice are excluded on grounds of public policy. It is to be noted that under S. 23, certain documents if they are written 'without prejudice' will be inadmissible. The rule applies only *if there is a dispute or negotiation with another*, and if they are written *bona fide*. The mere fact that a document is

stated to have been written "without prejudice" will *not necessarily* bring it within the scope of S. 23.

It has been *held* that Section 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 a privilege.

In an English case, it was observed that 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 in 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."

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

It is to be remembered, however, that an admission made to a *stranger*, under whatever terms as to secrecy, is *not* protected by law from disclosure.

An admission is *not* conclusive proof of the matter admitted, but it may operate as an estoppel under section 31.

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. (*Kishori Lal* v. *Mt. Chaltibai*, A.I.R. 1959 S.C. 504)

An admission is *not conclusive* as to the truth of the matters stated therein. It is only a piece of evidence, and the weight to be attached to it must depend upon circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has *not* acted upon it to his detriment, when it might become conclusive by way of estoppel. (*Nagubai* v. *B. Shamrao*, A.I.R. 1956 S. C. 593 at page 599)

ADMISSIONS MAY OPERATE AS ESTOPPEL — See S. 115, below.

2. CONFESSIONS (Ss. 24-30)

Write a short note on : Confession.
M.U. June 2018

The expression "confession" has *not been defined* in the Evidence Act. A confession is a statement which either admits the *offence*, or at any rate, *substantially all the facts* which constitute the offence. *Stephen* in his Digest of Law of Evidence, defines it thus : "A confession is an admission made at any time by a person charged with a crime, *stating or suggesting an inference that he committed the crime.*" This definition was adopted by the Courts in India in a number of cases.

Explain in detail kinds of confession and consequences of a confession.
M.U. Apr. 2011

The above definition suggested by *Stephen* was modified by the Privy Council, which *held* that only *a direct acknowledegment of guilt* should be regarded as a confession. A confession must *either* admit the offence or at least *substantially all* the facts which constitute the offence. (*Narayan Swami* v. *Emperor*, A.I.R. 1939 P.C. 47)

But, *Straight J. in R. v. Jagrup* (7 All. 646) *held* that only statements which are *direct acknowledgement of guilt* could be regarded as confessions, and the term *cannot* be construed to include a *mere inculpatory admission* which *falls short of being an admission of guilt.* A similar opinion was also expressed by *Chandavarkar J.* in *R. v. Santtya Bandhu* (11 Bom. 633).

What is a judicial confession? (2 marks) M.U. May 2015

The meaning of the term 'confession' is made clear by the decision of the Supreme Court in *Palvinder* v. *State*, (A.I.R. 1952, S.C. 354). Their Lordships of the Supreme Court, relying upon the pronouncement of the Judicial Committee in *Pakala Narayana* v. *R.*, (66 I.A. 66), reiterated the view that the word 'confession', as used in the Evidence Act, *cannot* be construed as meaning a statement by an accused suggesting an inference that he committed the crime. A confession must either admit, in terms, the offence, *or* at any rate, substantially all the facts, which constitute the offence. An admission of a gravely inculpatory fact, *or* even a conclusively inculpatory fact, is *not by itself* a confession. The same principle was applied by the Supreme Court in *Om Prakash* v. *State of U.P.* (A.I.R. 1960 S.C. 409).

What is a confession? (2 marks) M.U. May 2017

Differentiate between a statement and a confession. (2 marks) M.U. Apr. 2016

The Supreme Court, in *Sahool* v. *State of U.P.* (A.I.R. 1966 S.C. 40), confirmed the above definition, and further observed as follows :

"Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence, presumably on the ground that, as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession does *not* depend upon its communication to another, though just like any other piece of evidence, it can be admitted in evidence only on proof. This proof, in the case of oral admission or confession, can be offered only by witness who heard the admission or confession, as the case may be".

What is confession? (2 marks) M.U. Dec. 2018

When is a confession taken as relevant under the Indian Evidence Act? Explain the law relating to confessions. M.U. Nov. 2015

The following observations of the *Orissa High Court* in *Gadhapurni* v. *The State*, (1980 Cr. L. J. 188), on when an admission amounts to a confession are relevant :

"To make admission a confession, it must amount to a *clear acknowledgement of guilt.* A confession must relate to the particular crime with which the accused is charged. Any admission which is *not* connected with any of the ingredients of the offence charged would *not* amount to a confession."

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 Cri. L. J. 762) Likewise, a confession before an assembly of villagers called for confronting the accused does *not* amount to a "confession". (*Judumani Khanda* v. *The State*, 1993 Cri. L. J. 2701)

Explain in detail the kinds of confession and the consequences of a confession. M.U. Apr. 2016

Write a short note on : Statement and confession. M.U. Nov. 2019

Probative Value of Confession : Though the presumption that a person will *not* make an untrue statement against his own interest is the basis of receiving confessions as evidence, yet 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, peculiar relationship between sexes, to escape military duty by getting a conviction, to save the life, fortune or reputation or suffering of a party whose interests are dear to the prisoner, to endanger others by naming them as co-offenders, and so on. Therefore, confessions may *not* always be true. They 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. (*White* v. *R.*, 1945, P.C. 181)

Bose J. has observed, in *Muthuswamy* v. *State of Madras*, (A.I.R. 1954 S.C.47), 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. The Supreme Court has also observed that, normally speaking, it would *not* be safe as a matter of prudence, if *not* of law, to base a conviction for murder on a confession by itself.

In *Sahoo* v. *State of U.P.* (A.I.R. 1966 S.C. 40), it was *held* by the Supreme Court that there is a clear distinction between the *admissibility* of evidence and the *weight* to be attached to it. A confessional soliloquy is a direct piece of evidence. It may be an expression of conflict or emotion, *or* an argument to find excuse or justification for his act, or a conscious effort to stifle a pricked conscience, *or* a penitent or remorseful act of exaggeration of his part in the crime.

A confession may consist of several parts, and may reveal *not only* the actual commission of the crime, *but also* the motive, the preparation, the opportunity, the provocation, weapons used, the 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 a statement contains an admission of an offence, *not only* that admission, *but also* every other admission of an

incriminating fact contained in the statement, is part 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. (*A. Nagesia* v. *State of Bihar,* A.I.R. 1965 S.C. 119)

Confessions and admissions must either be accepted as a *whole* or rejected *as a whole,* and the Court is *not* competent to accept only the inculpatory part, while rejecting the exculpatory part as incredible (*Palvinder Kaur* v. *State of Punjab,* A.I.R. 1962 S.C. 354), unless there is other evidence on record to show the falsity of the exculpatory part, and besides the confession, there are other materials on the record establishing or indicating the guilt of the accused. Thus, the inculpatory part by itself *cannot* form the *sole basis* for conviction, even if there are other materials on the record to show the falsity of the exculpatory part. (*Kamalashanker* v. *State of Gujarat,* A.I.R. 1961 Guj. 312)

If an admission of an accused is to be used against him, the *whole* of 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. (*A. Nagesia* v. *State of Bihar,* A.I.R. 1965 S.C. 119)

RETRACTED CONFESSIONS — A retracted confession is one which is withdrawn or retracted later on by the person making it. Such a confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case, and there is no legal requirement that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law.

Three important rules regarding confessions which are retracted are:

1. A confession is *not* to be regarded as involuntary merely because it is retracted later on.

2. As against the maker of the confession, the retracted confession may form the basis of a conviction if it is believed to be true and voluntarily made.

3. The confession of a co-accused *cannot* be treated as substantive evidence, and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking an assurance in support of its conclusions deductible from the said evidence. *In criminal cases,* where the other evidence adduced against an accused person is wholly unsatisfactory, and the prosecution seeks to rely on the retracted confession of a co-accused person, the presumption of innocence, which is the basis of criminal jurisprudence, assists the accused person and compels the Court to render the verdict that the charge is *not* proved. (*Harichandra Kurmi* v. *State of*

Bihar (A.I.R. 1964 S. C. 1184)

The *Allahabad High Court* has observed that just because a confession made by an accused person is subsequently retracted, and there is little or no evidence to support the confession, such confession is *not* to be rejected in *all* cases. Rather, the credibility of such a confession is, in each case, a matter to be decided by the Court, according to the circumstances of each particular case.

The *Madras High Court* has also observed that there is no absolute rule of law that a confession made and subsequently retracted by an accused *cannot* be accepted as evidence without independent corroborative evidence. In all such cases, the weight to be given to such a confession must depend on the circumstances in which it was originally given and the circumstances in which it was subsequently retracted.

The *Calcutta High Court* has observed that it is *not* safe to convict an accused on his retracted confession which is uncorroborated. It has further ruled that it would be even more unsafe to place any reliance on a retracted confession against a co-accused.

The *Supreme Court* has observed that a retracted confession requires independent corroboration in material particulars. It was further observed that hard and fast rules *cannot* be laid down regarding the necessity of corroboration in the case of a retracted confession. The rule of prudence requires corroboration by independent evidence, but it does *not* require that each and every circumstance mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated; nor it is essential that corroboration must come from facts and circumstances discovered *after* the confession was made.

In *Pyare Lal* v. *State of Rajasthan* (A.I.R. 1963 S.C. 1094), it was *held* by the Supreme Court that a retracted confession may form the legal basis of a conviction *if* the Court is satisfied that it was true and was voluntarily made. But it was also *held* that a Court shall *not* base a conviction on such a confession without corroboration. It is *not* a rule of law, but is only a rule of prudence. It *cannot* even be laid down as an inflexible rule of practice or prudence that under no circumstances, such a conviction can be made without further corroboration, for a Court may, in a particular case, be convinced of the absolute truth of a confession and be prepared to act upon it without further corroboration. But it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less a retracted confession, *unless* the Court is satisfied that the confession is true and voluntarily made and has been corroborated in material particulars.

EXTRA-JUDICIAL CONFESSIONS — Extra-judicial confessions are those confessions which are made *either* to the police or to any *other person other than judges* and magistrates as such. The Supreme Court has observed

What is admission? What is confession? Explain in detail and compare them.
M.U. Nov. 2014
Nov. 2016
June 2019

in *State of Punjab* v. *Bhajen Singh* (1975 4 S.C.C. 472) that an extra-judicial confession is a *very weak piece of evidence.*

An extra-judicial confession, if voluntary, can be relied upon by the Court, along with other evidence, in convicting an accused. The confession will have to be proved just like any other fact. The value of evidence as to the confession, just like any other evidence, depends upon the veracity of the witness to whom it is made. (*Mulk Raj.* v. *State of U.P.* (A.I.R. 1959 S.C. 902) Usually and as a matter of caution, Courts require some material corroboration to such a confessional statement, *i.e.,* corroboration which connects the accused person with the crime in question. (*Ratan Gond* v. *State of Bihar,* A.I.R. 1959 S.C. 18)

The *Bombay High Court* has observed that an extra-judicial confession is a *weak piece of evidence,* and the Court would normally expect sufficient and reliable corroboration of such type of evidence. (*Sitaram Vishnu Chalke* v. *State of Maharashtra,* 1993 Cri. L. J. 3364)

Discuss the evidentiary value of an admission and a confession. Elaborate the distinction between the two.
M.U. Nov. 2010

Difference between Confession and Admission

(1) A *confession* is a statement made by an accused person admitting that he has committed an offence, or at any rate, substantially all the facts which constitute the offence. Confessions find place in *criminal* proceedings only. An *admission* is a general term which suggests an inference as to any fact in issue or any relevant fact. Admissions are generally used in *civil proceedings;* yet they may also be used in criminal proceedings. Every confession is an admission, but every admission in a criminal case is *not* a confession. 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 as against the person who made it. (Section 21)

(2) A *confession,* if deliberately and voluntarily made, may be accepted as evidence in itself of the matters confessed, though as a rule of prudence, the Courts may require corroborative evidence; but an *admission* is *not a conclusive proof* of the matters admitted, though it may operate as an *estoppel.*

(3) A confession always goes against the person making it, except under section 30, under which the confession of one or more accused jointly tried for the offence can be taken into consideration against the co-accused. An admission, on the contrary, may be used on behalf of the person making it under the exceptions provided in Sec. 21; but an admission by one of several defendants in a suit is no evidence against another defendant.

The distinction between a *confession* and an *admission* was discussed by the Privy Council in *Pakala Narayanaswami* v. *Emperor* (1939 66 I. A. 66), where it was observed as follows :

"No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negate the offence alleged to be confessed. Moreover, a confession

must either admit in terms the offence, or at any rate, substantially all the facts which constitute the offence. An admission of a 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 or revolver which caused a death, with no explanation of any other man's possession."

Thus, one can conclude that *all confessions are admissions, but all admissions are not confessions.*

CONFESSIONS WHEN IRRELEVANT (Ss. 24-26)

A confession becomes *irrelevant* and *inadmissible* in the following *three cases* mentioned in Ss. 24, 25 and 26:

1. Confession caused by inducement, threat or promise from a person in authority (S. 24)

Explain in detail when a confession in relevant and when it is irrelevant?
M.U. May 2017

A confession made by an accused is *irrelevant* in a criminal proceeding, if the making of the confession appears to the Court to have	been caused by any	(i) inducement, (ii) threat, or (iii) promise, (a) having reference to the charge against the accused, (b) proceeding from a person in authority, (c) sufficient, in the opinion of the Court, to give the accused person ground which would appear to him reasonable for supposing that by making it, he would gain any advantage *or* avoid any evil of a temporal nature in reference to the proceedings against him.

SCOPE OF S. 24 — The words "accused person" in S. 24 also include a person who *subsequently* becomes accused. If a person makes a statement when he is a suspect, but *not* an accused person, and if he subsequently becomes an accused, his statement will be regarded as a confession. When a person states that he had done certain acts which amount to an offence, he accuses himself of committing the offence, and the statement is, therefore, a confession by an "accused person" within the meaning of this section.

The section merely requires that if it "*appears*" to the Court, *i.e.,* if circumstances create a *probability* in the mind of the Court, that the confession was improperly obtained, it becomes *inadmissible* in evidence. The appropriate meaning of the word "appears" is "seems". It imports a lesser degree of

probability than proof. The test of proof is that there is such a high degree of probability that a prudent man would act on the assumption that the thing is true. But, under this section, *such a stringent rule is waived*, and a lesser degree of assurance is laid down as the criterion. The standard of a prudent man is *not* completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does *not* warrant a Court's opinion based on pure surmise. A *prima facie* opinion based on evidence and circumstances may be adopted as the standard laid down. In other words, on the evidence and the circumstances of 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,* A.I.R. 1963 S.C. 1094)

To *reject* a confession, it is *not necessary* that there should be positive proof to establish that the confession had been obtained by use of threat, persuasion, *etc. Anything from a nearest suspicion to positive evidence would be enough* to discard *a confession.* A confession, in its normal state, is an entirely *suspicious* piece of evidence. A retracted confession, needless to say, is *even worse.*

Moreover, the threat, inducement or promise must proceed from a person in authority. The mere existence of the threat, inducement or promise is *not enough;* such threat, inducement or promise must be sufficient to cause *a reasonable belief* in the mind of the accused that, by confessing, he would get an advantage *or* avoid any evil of a temporal nature in reference to the proceedings against him. The criterion is the *reasonable belief* of the accused. (*Pyare Lal* v. *State of Rajasthan,* A.I.R. 1963 S.C. 1094)

Therefore, positive proof of the fact that there was any inducement, threat or promise is *not necessary.* The confession itself, the evidence adduced on behalf of the prosecution, and the defence, if any, and *all* the circumstances of the case have to be taken into consideration. If, upon such consideration, the Court feels that the accused made the confession as a result of any inducement, threat or promise having reference to the charge, *or* even if the Court feels that there is reasonable doubt that there was such inducement, threat or promise, it *cannot* be satisfied that the confession is free and voluntary, and hence, it has to exclude the confession from consideration. (*Krishna Nandan* v. *The State,* A.I.R. 1958 Patna, 166)

PERSON IN AUTHORITY — A person in authority is one who is engaged in the apprehension, detention or prosecution of the accused, or one who is empowered to examine him. (*Santokhi Beldar* v. *Emp.* A.I.R. 1933 Pat. 149). It would also include a person who is concerned with, or is interested in, the investigation of a case (*Bhagan* v. *State of Pepsu,* A.I.R. 1955 Pepsu, 33). Therefore, confessions produced by inducement, threat or promise proceeding from persons having no authority are *admissible.*

Conditions necessary to attract the provisions of S. 24

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

(a) The confession must have been made by an accused person to a person in authority. (As to who is a person in authority, see above.)

(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, thereat or promise must have reference to the charge against the accused person.

(d) The inducement, threat or promise must, in the opinion of the Court, 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.

Moreover, it is also necessary that the above conditions must *cumulatively* exist. (*Laxman Padma* v. *State,* A.I.R. 1965 Bom. 195)

CASES — A confession made before a Magistrate who had told the accused that if he made a full confession, he would take that fact into consideration in awarding punishment, would *not* be admissible.

A confession made by an accused, with the explanation added that he was given to understand that he would be made an approver, *or* there was a reasonable prospect of his receiving a pardon, is *not* admissible in evidence.

So also, where the accused, in making a confession before a Magistrate, admitted that he had been told to tell the truth by the *Sahib* who told him to tell the truth, and he would be released, it was *held* that the confession was *vitiated by inducement.*

Reg. v. *Naoroji* [(1872) 9 B.H.C. 358] — *W,* a travelling auditor in the service of the G.I.P. Railway Company, having discovered defalcations in the accounts of the accused, who was a booking-clerk of the company, went to him and told him that, "he had better to pay the money than go to jail", and added that "It would be better for him to tell the truth", after which the accused was brought before the Traffic Manager in whose presence he signed a receipt for, and admitted having received, a sum of ₹ 826. The accused was subsequently put on his trial for a criminal breach of trust as a servant in respect of this and other sums. It was *held* that the words used by *W,* the travelling auditor, constituted an inducement to the accused to confess, and that *W* was a person in authority, and that the receipt signed by the accused was, therefore, *not admissible* in evidence at his trial.

Bhagbaticharan v. *Emp.* [(1933) 60 Cal. 719] — In this case, 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. Thereafter, the accused said he would tell everything to the postmaster and the postal inspector said he would do all he could to get the accused saved. In these circumstances, the Court *held* that such inducement was held out by the postal investigation officer, who was a person in authority, as had the effect of inducing the accused to make a confession of his guilt.

Emp. v. *Mahamadbuksh,* [(1906) 8 Bom. L.R. 507] — The accused made a confession of his guilt to the medical officer of his regiment, who told the accused, when he was under his treatment in the hospital, that it would be better for him to tell the truth as to how he received certain wounds. It was *held* that the medical officer was *not* a person in authority in respect of any proceeding which might be contemplated or taken against the accused who made the confession to him. All that he represented to the accused was that, on medical grounds, it would be for the accused's benefit if he told the truth as to how he got the wounds.

Rex v. *Parratt,* [(1831) 4 C. & P. 570] — The captain of a vessel said to one of his sailors suspected of having stolen a watch— "That unfortunate watch has been found, and if you do *not* tell me who your partner was, I will commit you to prison as soon as we get to Newcastle–you are a damned villain and the gallows is painted on your face." It was *held* that the confession made by the sailor *after* this threat was *not admissible* in evidence at his trial for the felony.

Q. E. v. *Babu Lal,* (1884) 6 All. 509, F.B. — An accused charged with murder, being a few days short of fourteen, was told by a man who was present when he was taken up, but *not* a constable, "Now kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty." The accused in consequence made certain statements. It was *held* that the statements were *admissible* in evidence.

2. Confession to police (S. 25)

Under S. 25, no confession made to a *police-officer* can be proved as against an accused.

OBJECT OF S. 25 — The *object* of this section and S. 26 is to prevent the practice of *oppression* or *torture* by the police for the purpose of extracting confessions from accused persons. Under this section, no confession made to a police-officer is *admissible* against the accused. Any incriminating statement made by an accused to a police-officer is *inadmissible* in evidence. Under the next section, a confession made to a private person in the custody of the police and *not* made in the immediate presence of a Magistrate, is also *inadmissible* in evidence.

It is to be noted that S. 25 is very broadly 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* is irrelevant. The *idea* is that, by rendering such confessions inadmissible, the temptation to exort confessions is taken away.

POLICE-OFFICER — The term "Police-officer" should *not* be read in a *strict technical sense,* but must be given its more comprehensive and *popular* meaning. It applies to every Police- officer, and it is *not* restricted to officers in a regular police force.

In *Raja Ram* v. *State of Bihar,* (A.I.R., 1964 S.C. 828), the Supreme Court held that the words "police-officer" are *not* to be given a narrow meaning, but have to be construed in a wide and popular sense. However, these words are also *not* to be construed in so wide a sense as to include a person on whom only some of the powers exercised by the police are conferred. The *test* for determining whether such a person is a police-officer would be whether the powers of a police-officer which are conferred on him, or which are exercisable by him because he is deemed to be an officer in charge of a police station, establish a direct or substantial relationship with the prohibition enacted by S. 25, that is, recording of a confession. In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he was appointed or the question as to what other powers he enjoys.

Following the above decision, in *Laxman Padma* v. *State,* (A.I.R. 1965 Bom. 195), the Bombay High Court *held* that the expression "Police-officer" is *not* confined only to such officers who are appointed under the Indian Police Act, but includes also other officers *who exercise the same powers as that of a police-officer* of a Police Station in respect of investigation of certain offences. The confessions recorded by them in exercise of that power of investigation into the offences would be inadmissible in evidence. Thus, a *chawkidar,* a police patel, a village headman under the Burma Police Act, an *abkari* officer, and an excise officer are all police-officers.

However, a jailor, or an excise officer, according to the Rangoon and Patna High Courts, and an Assistant Commissioner *not* acting as a Magistrate but merely as an executive officer, are *not* police officers. The view of the Patna High Court, has however been overruled by the Supreme Court in the aforesaid case of *Raja Ram* v. *State of Bihar,* (A.I.R. 1964 S.C. 828), wherein it was *held* that an Excise Inspector under the Bihar and Orissa Excise Act, which authorises him to investigate any offence under the Act, is a police-officer, and a confession recorded by him is *inadmissible* in evidence.

The Bombay High Court has *held* that Railway Protection Force Officers are *not* "police-officers" for the purpose of S. 25 of the Act. Therefore, confessions made to such officers are *not* hit by S. 25. (*Balkishan Devidayal* v. *State,* 77 B.L.R. 295)

The Madras High Court has *held* that a customs officer is *not* a Police-officer. (*Superintendent of Customs & Excise* v. *R. Sundar,* 1993 Cri. L.J. 956).

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

2. *A*, an unmarried girl, was accused of the murder of her newly-born child. She was sent, in the custody of police constables, to a doctor for examination. When being examined, she made a confession to the doctor. The police constable was standing outside the room in which *A* was being examined by the doctor. Is the confession admissible in evidence against *A*?

Ans. : The confession would *not* be admissible in evidence, as it would fall under Sec. 26 of the Act, which states that a confession made by any person while he is in custody of a police-officer is inadmissible. Mere temporary separation of the accused from the police-officer would *not* amount to severance of the custody.

CONFESSIONS WHEN RELEVANT (Ss. 27-29)

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

1. Confession made after removal of threat, inducement or promise (S. 28)

If such a confession, as is referred to in S. 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.*

This is an exception to the rule contained in S. 24. It lays down the conditions under which a confession, which is rendered *irrelevant* by S. 24, may become *relevant.* If it is proved, to the complete satisfaction of the Court, that the impression produced by the threat or promise has been totally removed, *e.g.,* by lapse of time or by any intervening caution given by a person of superior (but *not* of equal or inferior) authority, a confession subsequently made will be admissible. Such a confession is placed on the same footing as a voluntary confession. In all cases, it is for the Judge to properly weigh all the facts and circumstances of the case to come to a definite conclusion that the impression caused by the inducement, threat or promise has been completely removed.

In one case, a female servant was suspected of stealing money, and on Monday, her mistress told her, "You will be forgiven if you confess." On Tuesday, she was taken before a Magistrate, and as she did *not* confess, she was discharged. Then, on Wednesday, she was arrested once again, and the Police Superintendent told her in the presence of the mistress, "You are *not* bound to say anything, but if you do, your mistress will hear you." However, the Police Superintendent did *not* know that her mistress had promised to forgive her, and he did *not* tell her that if she made a statement, it would be given in evidence against her. The servant then made a confession. It was *held* that a confession made in these circumstances was *not receivable in evidence*, because it can be fairly presumed that the promise of the mistress was operating on the

servant's mind at the time the statement was made, all the more so, as the interval between the two days was a short one.

2. Confession made under promise, deception, etc. (S. 29)

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; or*

(e) when the accused was *not warned* —

(i) that he was not *bound* to make such confession, and

(ii) that evidence of it might be given against him.

This section is based on the well-established rule of law that any breach of confidence or of good faith or the practice of any artifice does *not* invalidate a confession. The *five* circumstances mentioned in this section are *not exhaustive*. Although the mere use of an artifice to obtain a confession does *not* make such confession inadmissible, such confession would *not* carry much weight. Thus, in an American case, a confession was obtained by fasely telling the accused that he was seen by someone when he did the act, and the Court *held* that such a confession was *inadmissible.*

Rex. v. *Shaw* — *A* was in custody on a charge of murder. *B*, a fellow prisoner, said to him, "I wish you would tell me how you murdered the boy—pray speak." *A* replied. "Will you be upon your oath *not* to mention what I tell you?" *B* promised on oath that he would *not* tell. *A* then made a statement. It was *held* that this was *not* such an inducement to confess as would render the statement inadmissible.

Rex. v. *Derrington* — The accused asked the turnkey of the goal in which he was locked to put a letter into the post for him and after his promising to do so, the accused gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmitted it to the prosecutor. It was *held* that the letter was *admissible* in evidence against the accused, notwithstanding the manner in which it was obtained.

STATEMENTS MADE WHILE MUTTERING IN SLEEP — 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. This interesting point arose in *R.* v. *Elizabeth* in England and in *People* v. *Robinson* in the U.S.A. and in both cases, such evidence was *held not* to be admissible.

3. Confession leading to discovery of fact (S. 27)

When any fact is deposed to as *discovered in consequence of information received from an accused person* in the custody of a police-officer, so much of such information (whether it amounts to a confession or *not*), as *relates distinctly to the fact thereby discovered*, may be proved.

PRINCIPLE OF S. 27 — This section 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. This rule comes into operation only—

(1) if and when certain facts are deposed to as discovered in consequence of information received from an accused person in police custody; *and*

What is "information"? (2 marks) M.U. Nov. 2019

(2) if the information relates distinctly to the fact thereby discovered. The broad ground for *not* admitting confessions made under the inducement, threat, or promise to a police-officer is the danger of admitting false confessions. However, the necessity for this exclusion disappears in a case provided for by this section, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.

Section 27 is an exception to the rules enacted in Sections 25 and 26 of the Act, which provide that no confession made to a police-officer can be proved as against a person accused of an offence, and that no confession made by any person whilst he is in the custody of the police-officer, *unless* it is made in the immediate presence of a Magistrate, can be proved as against that person : *Ramkrishan* v. *State* (1955) S.C. 104), re-stating the opinion of the Privy Council in *Pullukury Kottaya* v. *Emperor*, (1947 P. C. 67).

In the above Privy Council case, it was observed that it is fallacious to treat the 'fact discovered' as equivalent to the object produced; the fact discovered embraced the place from which the object is produced, and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. 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, as knives were discovered many years ago. It leads to the discovery of the *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 the offence, the fact discovered is *very relevant*.

The above was quoted with approval in *Prabhoo* v. *State of U.P.* (A.I.R. 1963 S.C. 113).

The Kerala High Court has *held* that there is nothing in S. 27 to indicate that the person who discovers the incriminating fact should be the *identical* person who has received the information. All that is necessary is that in respect of such information, the accused should be at the giving end and a police-officer at the receiving end. (*Sekharan* v. *State of Kerala*, 1980 Cr. C.J. 31)

The Supreme Court has *held* that failure on the part of the police to interrogate the accused, at whose instance a weapon was recovered, cannot be sufficient justification to hold that the recovery of the weapon was fake. (*State of Haryana* v. *Sher Singh*, (1981) 2 S.C.C. 300)

The Patna High Court has observed that a statement leading to the recovery of a dead body *cannot* be used against any person other than the maker of such a statement. (*Surendra Prasad* v. *State of Bihar*, 1992 Cri. L.J. 2190)

WHETHER S. 27 IS CONSTITUTIONAL — The Indian Evidence Act was passed many years prior to the enactment of the Constitution. After such enactment, the question arose as to whether S. 27 of the Act could be said to contravene Art. 20(3) of the Constitution, which provides that no person accused of any offence shall be compelled to be a witness against himself. The Supreme Court examined this question in *Nisa Stree* v. *State of Orissa* (1954 S.C. 279), and observed that Sec. 27 does *not* contravene Act 20(3) of the Constitution, as it would *not* be correct to presume that information given by the accused under Sec. 27 is compelled testimony.

The information given by an accused to a police-officer leading to the discovery of a fact which *may or may not* prove incriminatory, has been made admissible in evidence by S. 27. If it is *not* incriminatory of the person giving the information, the question does *not* arise. It can arise only when it is of an incriminatory character, so far as the giver of the information is concerned. If the self- incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that *will not* be hit by the provisions of clause (3) of Art. 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of S. 27 are *not* within the prohibition aforesaid, unless compulsion has been used in obtaining the information. (*State of Bombay* v. *Kathi Kalu*, A.I.R. 1961 S.C. 1808).

Therefore, there must have been compulsion of the person concerned to make Art. 20(3) applicable. Mere questioning of the accused person by a police-officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is *not* compulsion. (*Ahmedmiyan* v. *State*, A.I.R. 1963 Guj. 159)

Section 27 and Art. 14 of the Constitution

The constitutional validity of S. 27 of the Art. was also challenged in *State of U.P.* v. *Deoman Upadhyaya*, (A.I.R. 1960 S.C. 1125), where it was argued that the said section was *ultra vires* the Constitution, inasmuch as it was violative of Article 14 of the Constitution, on the ground that it discriminated between persons in police custody and those *not* in such custody. In that case, the respondent was convicted by the trial court on the charge of murder. The finding was that a quarrel had ensued between the respondent and the deceased, that the respondent borrowed a *gandasa*, and that the next morning, he was

seen hurrying towards a tank and taking a bath. The Court also recorded a finding that he absconded thereafter, and that the dead body was found on the same morning. When the accused was arrested two days later, he offered to produce the *gandasa* to the police, took them to the tank, and fetched it from under the water.

When the matter went to the High Court, it was contended that the statements of the accused to the police were inadmissible on the ground that section 27 was *ultra vires* Article 14 of the Constitution. The High Court accepted this contention and acquitted the accused. When the matter went in appeal to the Supreme Court, the judgment of the High Court was reversed, and the Supreme Court, by a majority, convicted the accused. In the course of the majority judgment, it was observed as follows:

> "The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will *not* by itself be a ground for holding that there is an attempted hostile discrimination, because the rule of admissibility of evidence is *not* extended to a possible, but an uncommon or abnormal class of cases."

How much of the information is to be proved

There has been some difference of opinion regarding the *extent* of information that can be proved against the accused in view of the phrase "whether it amounts to a confession or *not*." The most liberal interpretation given is that of the Madras High Court in *Re-Atthappa Goundan,* (1937 Mad. 695 E.B.) where the *whole* statement, including confession of guilt and other incriminating statement, was *held* to be admissible.

However, the Privy Council *held*, in *Pullukury Kottaya* v. *Emperor,* (1947 P.C. 67), that a stricter interpretation was to be put on Section 27. It appears that this decision of the Privy Council swung the pendulum to the other extreme. Following this decision, there was a tendency among some High Courts to give a very narrow interpretation to S. 27.

The whole law has now been put on an even keel by the Supreme Court in *Ramkishan* v. *State,* (1955 S.C. 104), where their Lordships observed as follows : "On a bare reading of the terms of the section, it appears that what it allowed to be proved is the information or such part thereof as related *distinctly* to the fact thereby discovered. If the police-officer wants to prove the information or a part thereof, the Court would have to consider whether it related *distinctly* to the fact thereby discovered, and allow proof thereof only if that condition was satisfied."

It may also be noted that if the information given by the accused to the police-officer contains parts leading to the discovery of facts and other parts *not* leading to the discovery, the Court must admit *only* such portions which

distinctly lead to the discovery of facts, whether such portions amount to confessions or *not.*

Emp. v. *Salve,* (1934) 36 Bom. L.R. 384 — An accused person stated to the police : "The throat was cut with a knife and the knife was on a *paniara* of the *mori* in the kitchen." In consequence of the statement, the police found the knife at the place indicated. At the trial of the accused, the above statement was offered in evidence. The Court *held* that the first part, which was the incriminating part of the statement and which did *not* directly lead to the discovery of the knife, should be excluded under S. 27, but the second part of the statement should be admitted.

In re Atthappa, (1937) Mad. 695, F.B. — The accused made a statement to a Sub-Inspector that he himself and one *G* killed *S* by gagging his mouth with a cloth and throttling his neck with his hands and also by putting a rope and pressing it; that in the night they got two bottles of illicit arrack by paying ₹ 2 to *G* who got it from some other place that a small quantity was left over in one bottle only; that they buried (1) the empty bottle, (2) the rope and cloth gag (the cloth which was used for gagging the mouth) in a dung-hill next to the cattle-shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a comer of another compound and that he would produce them. Subsequently, the Sub-Inspector took the first accused together with the village *munsiff* to the dung-hill, and the accused took the Sub- Inspector to the other compound and dug up and produced another empty bottle from near a log of wood. It was *held* that the *whole* of the statement was *admissible* in evidence and could be taken into consideration as against the second accused also.

[Note : This decision seems to be of doubtful validity in view of the decisions in the other cases discussed under this section.]

In *re Kamakshi,* (1943 Mad. 456) — The accused was found guilty of committing criminal breach of trust with regard to a cycle which he had hired. He had been arrested in connection with a similar offence in respect of another cycle that he had taken on hire and then sold. While in custody for that offence, he confessed that he sold another cycle to prosecution witness No. 12, and as a result of the confession, the cycle in the present case was discovered. It was *held* that the confession was *admissible* under this section. It was made when the accused was in police custody, though in connection with another offence, and as a result of that confession, the cycle had been discovered.

In one case, during a police investigation, the accused was questioned by the police. He said, "I have buried the property stolen by me in my field. I will show it." He then took the police to the spot and with his own hands dug out the earthen pot in which the property was kept. It was *held* that the statement of the accused was partially admissible against him. The part held to be *admissible* was, "I have buried the property in my field. I will show it." The part held to be *inadmissible* was "stolen by me".

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, therefore, inadmissible in evidence.

In the above case, the part "stolen by me" is self-incriminatory, and

The information which relates distinctly to the fact thereby discovered "I have buried the property. I will show it" is admissible under Sec. 27 of the Act, in spite of the fact that it amounts to a confession.

In a case decided by the Allahabad High Court, the accused gave information to the police, to the effect that they had stolen a cow and a calf, and sold them to a particular person at a particular place. As a result of this information, the cow and the calf were found. It was *held* that only the statement that the accused had *sold* the animals to a certain person could be proved under S. 27, but *not* the statement that the accused had *stolen* them.

A is accused of the murder of *B*. While in custody of the police, *A* makes the following statement:

"I have concealed behind a cupboard in my room, the knife with which I stabbed *B*." A police constable goes to the room and finds the knife behind the cupboard. Is the statement or any part of it admissible in evidence against *A* at his trial for the murder of *B*?

The statement of *A* is *partially admissible* against him at his trial for the murder of *B*. The part admissible is, "I have concealed behind a cupboard in my room [the] knife." The part inadmissible is "with which I stabbed *B*."

Joint Statements under S. 27

Joint statements are *not* contemplated by S. 27 : *Ramkishan* v. *State*, (1955 S.C. 104). If it is *not* clear as to who made the crucial statement in a joint information, the statement is inadmissible against *any* of the accused.

SUMMARY OF THE LAW AS TO CONFESSIONS (Ss. 24-29)

Confession of an accused when	
Relevant and admissible (Ss. 25-29)	**Irrelevant and Inadmissible (Ss. 25-26)**
1. When made by a person in *custody* of a Police-Officer, *but in the immediate presence of a Magistrate* : S. 26.	1. When made by a person in custody of a Police-Officer : S. 26.
2. When made to a *third* party by a person *not in police custody* : S. 25.	2. When made to a *Police-Officer* : S. 26.

3. When made *after* the inducement, threat or promise from a person in authority (referred to in S. 24 in opposite column) is *fully removed* : S. 28.	3. When caused by *inducement, threat or promise* proceeding from a *person in authority*, sufficient to make the accused believe that he would gain any advantage or avoid any evil of a *temporal* nature : S. 24.
4. Though made — (i) under a *promise of secrecy, or* (ii) in consequence of a *deception* practised on the accused person for the purpose of obtaining it, *or* (iii) when the accused was *drunk, or* (iv) in answer to questions, *he need not have answered.*	
5. When the accused was *not warned* that (i) he was not *bound* to make such confession and (ii) evidence of it might be given against him : S. 29.	
6. When it leads to the *discovery* of any fact : S. 27.	

LAW RELATING TO CONFESSION OF CO-ACCUSED (S. 30)

When the confession of an accused can be used against a co-accused (S. 30)

(a) When *two or more persons* are tried *jointly* for the *same offence*, (including its abetment and attempt) *and*

(b) a *confession* made by one such person affecting himself and some other of such persons is proved —

the Court *may* take into consideration such a confession,

(i) as against such other person, *and*

(ii) as against the person who makes such a confession.

Illustrations — (a) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said "*B* and *I* murdered *C*." The *Court may* consider the effect of this confession as against *B*.

(b) *A* is on his trial for the murder of *C*. 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 Courts against *A*, as *B* is *not* being *jointly* tried.

It will be seen that S. 30 is an exception to the rule that the confession of an accused is *relevant* against himself only.

ENGLISH LAW — This section marks a *departure from the English Common Law*. Both under the English and the Roman systems of law, a confession of a prisoner is *not admissible* against his accomplice. This departure from the well-established principles of English law has been adversely criticised by judges and jurists alike. For instance, *Markby* remarks : "The provision is flatly in contradiction to the law of England, where judges always take the greatest pains to prevent the statements of a prisoner affecting the case of a fellow prisoner."

SECTION TO BE STRICTLY CONSTRUED — On the whole, Section 30 has introduced an innovation of a serious nature and is capable of causing a miscarriage of justice, *unless* it is properly understood and applied. Time and again, Courts have *held* that it must be very strictly construed. As observed by *Reilly, J.* in an Indian case, the section must be construed with "the greatest caution and with care, to make sure that we do *not* stretch it one line beyond its necessary intention."

EVIDENTIARY VALUE OF A CONFESSION UNDER S. 30 — S. 30 of the Act empowers the Court to take into consideration a confession made by one of the accused against the others *when they are being jointly tried*. The confession of an accused is undoubtedly a very *strong* piece of evidence against the accused *himself*, provided it is voluntary *and* the Court is satisfied that it is true. But it is a *weak* piece of evidence against the co-accused. It is *not* evidence in the legal sense of the term. The person who makes a confession *does not step into* the witness-box, his testimony is *not* subjected to *cross- examination* and it is really, in a sense, *ex-parte* evidence against the other accused. Therefore, Courts have gone so far as to lay down that there must be sufficient evidence, independently of the confession, which would warrant a conviction of the *accused*. It is only when there is such evidence that the Court may proceed further and look at the confession of the co-accused, and consider it as additional evidence that would further weigh the balance against the accused.

The confession of a co-accused does *not* come within the definition of "evidence" contained in S. 30 of the Act. It is *not* required to be given on oath, nor in the presence of the accused and it *cannot* be tested by cross-examination. (*Bhuboni Sahu* v. *King*, A.I.R. 1949 P.C. 247).

The proper approach is to marshal the evidence against the accused, excluding the confession, altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course, it is *not necessary* to call the

confession in aid. But cases may arise where the Judge is *not* prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain the conviction. In such an event, the Judge may call the confession in aid and use it to lend assurance to the other evidence, and thus fortify himself in believing that without the aid of the confession, he would *not* be prepared to accept the other evidence. (*Kashmira Singh* v. *State of Madhya Pradesh*, A.I.R. 1952 *SC*. 159)

The Supreme Court has reaffirmed the above principle in *Haricharan Kurmi* v. *State of Bihar*, (A.I.R. 1964 S.C. 1184) and *held* that the confession of a co-accused *cannot* be treated as substantive evidence, and can be pressed into service only when the Court is inclined to accept other evidence, and feels the necessity of seeking an assurance in support of its conclusions deductible from other evidence. In criminal cases, where the other evidence adduced against an accused person is wholly unsatisfactory, and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence, which is the basis of criminal jurisprudence, assists the accused person and compels the Court to render the verdict that *the charge is not proved*.

"MAY TAKE INTO CONSIDERATION" — The word *"may"* in this section is important. It shows that such a confession is *not*, technically speaking, "evidence" in the sense that *by itself* it can support a conviction. Rather, the section gives a *discretion* to the Court to use it against a co-accused. Explaining the effect of these words, *Jackson, J.* observed in *R.* v. *Chandra*:

"The section does *not* provide, as has been repeatedly pointed out, that such a confession is evidence; still less does it say that it may be a foundation of a case against the person implicated. The Legislature very guardedly says that it *may* be taken into consideration, and I think that the obvious intention of the legislature in so saying was that the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence".

C. Statements by persons who cannot be called as witness (Ss. 32-33 & 158)

Discuss : Statements by a person who cannot be called as a witness.
M.U. May 2017

Write a short note on : Statements of persons who cannot be called as witnesses.
M.U. Apr. 20

General

Statements, written or verbal, of *relevant* facts made by a person who —

(a) is *dead, or*

(b) cannot be *found, or*

(c) has become *incapable* of giving evidence, *or*

(d) *cannot* be produced without unreasonable delay or expense,—

are themselves relevant in *eight cases* given below.

Before such statements are admitted in evidence, it must be proved that the person who made the statement is dead, *or* cannot be found, *or* has become

Explain in detail the provisions of law regarding statements of persons who cannot be called as witness.
M.U. Nov. 2016

incapable of giving evidence, or that his presence cannot be procured without an amount of delay or expense, which under the circumstances of the case appears to the Court unreasonable. Unless this fact is proved, the statement is not admissible.

When a statement is admitted under any of the clauses of this section, it is substantive evidence, and has to be considered along with other evidence.

1. Dying declaration [S. 32(1)]

What is a dying declaration? (2 marks) M.U. May 2014 Nov. 2016

When the statement is made by a person as to — | (i) the cause of his death, or (ii) the circumstances of the transaction which resulted in his death — | when the cause of his death is in question,

Explain in detail "dying declaration".
M.U. Dec. 2018

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 proceedings in which the cause of his death comes into question.

What is a dying declaration? What is its evidential value?
M.U. Apr. 2011 Apr. 2016 Nov. 2019

Illustration — 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 heath, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

WHAT IS A DYING DECLARATION — A dying declaration is a statement made by a dying person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death.

If the person making the dying declaration chances to live, his statement is inadmissible as a dying declaration, but it might be relied on under S. 158 to corroborate his testimony when examined. (*Emp.* v. *Rama*, (1902) 4 Bom. L.R. 434). Such a statement can also be used to contradict him under S. 145.

Section 60 lays down that oral evidence must be direct. S. 32 and the following section are exceptions to the general rule that hearsay evidence is not admissible. Hearsay evidence is excluded on the ground that it is always desirable, in the interests of justice, to get the person whose statement is relied upon, in the Court for his examination in the regular way, in order that any possible sources of inaccuracy and untrustworthiness can be best brought to light and exposed, if they exist, by the test of cross-examination.

The exceptions to the rule of hearsay evidence have been directed by necessity. This rule excluding hearsay evidence is relaxed so far as the statements contained in Ss. 32 and 33 are concerned. The general ground of admissibility of the evidence referred to in these sections is that no better evidence can be produced.

A statement of the deceased would, in its literal and natural sense, mean a statement in the words of the deceased, and whenever it is practicable to record the statement in those words, there can be no valid excuse for *not* doing so.

Write a short note on : Dying declaration.
M.U. May 2015 June 2019

When the Sub-Inspector or the Magistrate recording the statement does *not* know the script of the language spoken by the deceased, though he understands and speaks that language, he may record the statement in English, and if it is recorded as the result of the question put to the deceased and the answers given by the deceased, those questions and answers must always be recorded to enable the Courts to understand the full significance of the statement.

Write a short note on : Evidentiary value of a dying declaration.
M.U. Nov. 2017

When the statement is the result of the replies to certain questions, it is *not* possible to assess fully the value of the replies without knowing what the questions were, since the replies are always given with reference to the questions put. It is, therefore, essential to record the questions in the precise words in which the questions are put, and take down the answers in the actual words in which the answers are given, when the statement is the result of questions put and answers given. (*Sherinath Durgaprasad* v. *State*, 59 Bom. L.R. 221)

The Supreme Court had *held* that if a deceased fails 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 S.C.C. 207)

In *Kusa* v. *State of Orissa (above)*, the Supreme Court also laid down that if a dying declaration is believed by the Court, a conviction can be based upon it without any further corroboration.

In another case decided by the Supreme Court, the deceased who had made the dying declaration was seriously injured, but was conscious throughout when making the statement. The Court *held* that minor incoherence in his statement with regard to facts and circumstances would *not* be sufficient ground for *not* relying on his statement, which was otherwise found to be genuine. (*State of U. P.* v. *Suresh*, (1981) 3 S.C.C. 635)

It is no objection to the admissibility of a dying declaration that it was made in answer to a leading question *or* obtained by earnest and pressing solicitation. *Any method of communication* between mind and mind may be adopted that will develop the thought, such as a pressure of the hand, a nod of the head or a glance of the eye. Where a woman whose throat had been cut, made, in answer to questions put to her by the Sub-Inspector, certain gestures, from which the latter inferred that she accused her husband of the assault, it was *held* that the gestures were *admissible* in evidence, but that the opinion of witnesses as to the meaning of the gestures was *not admissible*. This is so

because the *interpretation* of the gestures is for the Court alone, and the opinion of the witnesses as to the meaning of such gestures is *not evidence*.

If something in a dying declaration is false, the *whole* declaration must *not necessarily* be disregarded. As a dying declaration is *not* made on oath and is *not* the subject of cross-examination, it is a weaker type of evidence than the evidence given by a witness in the witness-box. If a Judge thinks that part of a dying declaration is deliberately false, he should *not* act upon the other parts without definite corroboration.

The *Gauhati High Court* has *held* that when the interested witnesses were attending on the deceased when he was making a dying declaration, and because of the injuries, the deceased was neither physically or mentally fit, no reliance could be placed on the dying declaration, in the absence of evidence to show that the deceased was physically and mentally capable of making the dying declaration, and was *not* the victim of any tutoring. (*Gopal Chandra Bardhan* v. *State*, 1980 Cr. C.J. NOC 30)

GROUNDS FOR ADMITTING DYING DECLARATION — The *three main* grounds on which dying declarations are admitted are:

1. *Death* of the declarant;

2. *Necessity*: 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*

3. The *sense of impending death*, which creates a sanction equal to the obligation of an oath.

The *general principle* on which dying declarations are *admitted* is that they are *declarations* made in extreme conditions, when the party is at the point of death, and when every hope of this world is gone, when every motive to speak falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice.

The *reason* for admitting dying declarations 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 in pain".

The same theory is reflected in *Mathew Arnold's "Sohrab and Rustom"* where he says —

"Truth sits upon the lips of dying men."

METHOD OF PROVING DYING DECLARATION — Statements relating to dying declarations, whether oral or written, must be duly proved. If the statement is *oral*, persons who heard the statement should depose what they have heard. In the case of *written statements*, it must be proved by the evidence of the person who recorded it.

If a dying declaration is made to a Magistrate, whether such a statement itself can be admitted as evidence without calling the Magistrate as a witness, has been subjected to a great deal of controversy. The more accepted view is that Section 80 of the Indian Evidence Act is *not applicable* to a dying declaration made to a Magistrate. Therefore, the Magistrate must be called to prove it. It was observed, in one Calcutta case, that the writing made by a Magistrate could *not* be admitted to prove the statement made by the deceased. The statement must have been proved in an ordinary way by a person who heard it made. It was further observed, in another Calcutta case, that the statement is *not admissible* in evidence when made in the absence of the accused. The oral statement of the deceased, and *not* the record of such a statement, must be proved by the person who recorded it or heard it made. But in an Allahabad case, it was *held* that a dying declaration recorded by a Magistrate *can* be tendered in evidence without the Magistrate who recorded it, being called, by virtue of Section 80 of the Indian Evidence Act. But this view of the Allahabad High Court has *not* been generally accepted by other High Courts.

Section 32(2) makes a statement of a person who had died relevant, only when that statement is made by a person as to the cause of his death, *or* as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. When the person making the statement is *not* proved to have died as a result of the injuries received in the incident, his statement *cannot* be said to be the statement as to the cause of his death *or* as to any of the circumstances of the transaction which resulted in his death. (*Moti Singh* v. *State of U.P.*, A.I.R. 1964 S.C. 900)

If the statement made by the deceased does *not* relate to his death, but to the death of another person, it is *not* relevant. (*Ratan Gond* v. *State of Bihar*, *A.I.R.* 1959 S.C. 18)

It may also be noted that a dying declaration *cannot* be proved, unless the death of the person, who made the declaration is also proved. (See Section 104)

ENGLISH LAW — There are *two* vital points of distinction between the *English* and the *Indian* law on the point of admissibility of dying declarations:

(a) *Firstly, in England*, a dying declaration is relevant only in criminal cases where the *cause* of death is in question.

(b) *Secondly, under English law*, to be relevant, a dying declaration must have been made in the *expectation of death*. (There is no such requirement under the Indian law.)

THE EVIDENTIARY VALUE OF DYING DECLARATION — *In Ramnath* v. *State*, (1953 S.C. 420), the Supreme Court has observed that it is a 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, and

because 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.

However, these observations of their Lordships in the above case were held to be in the nature of *'obiter dicta'* in *Khusal Rao* v. *State of Bombay*, (A.I.R. 1958 S.C.22), and the following principles were laid down :

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

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

3. It *cannot* be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence.

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

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

6. In order to test the reliability of a dying declaration, the Court has to keep in view several circumstances, like the opportunity of the dying man for observation, *etc.* Hence, in order to pass the reliability test, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court after examining the dying declaration in all its aspects and testing its veracity, has come to the conclusion that it is *not reliable* by itself, and that it suffers from an infirmity, then, without corroboration, it *cannot* form the basis of a conviction, Thus, the 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 given case, has come to the conclusion that a particular dying declaration was *not* free from the infirmities referred to above *or* from other infirmities as may be disclosed in evidence in that case. [This view was reaffirmed by the Supreme Court in *Harbans Singh* v. *State of Punjab*, (A.I.R. 1962 S.C. 439)].

It has also been *held*, in *Pompiah* v. *State of Mysore*, (A.I.R. 1965 S.C. 939), that if the Court finds that the declaration is *not* wholly reliable, and that

an integral portion of the deceased's version of the entire occurrence is untrue, the Court may, having regard to all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration.

CASES — 1. On March 20, *K* told his wife that he was going to Berhampore, as *P's* wife had written and asked him to come and receive payments due to him. On March 21, *K* left his house in time to catch a train for Berhampore, where *P* lived with his wife. On March 23, *K's* dismembered body was found in a trunk which had been purchased for *P*. It was *held*, on the trial of *P* for the murder of *K*, that the statement made by *K* to his wife was admissible in evidence under clause (1) of S. 32 as a circumstance of the transaction which resulted in *K's* death.

2. The accused were charged under S. 330 of the Penal Code with having, for the purpose of extorting a confession, caused hurt to one *R*, who committed suicide in consequence of the ill-treatment. The question was whether a statement made by *R* as to the cause of his wounding himself with a razor (which caused his death) was admissible in evidence in the case, the accused *not* being charged with *having* caused the death of *R*. It was *held* that, as there was no doubt that the suicide of *R* was the result of the ill-treatment by the accused, that treatment was the cause, though *not* the direct cause, of the death, and although the accused were *not* legally responsible for the suicide, the cause of death came into question in this case, the whole affair, ill-treatment and subsequent suicide, being all one transaction, and consequently, the statement of the deceased was admissible under cl. (1) of this section.

Problem

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. Is the dying declaration admissible in evidence against the other persons at their trial on a charge of dacoity?

Ans. : The 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. Section 32 explicitly refers to statements as to the cause of death of the deceased *or* the circumstance of the transaction which resulted in his death.

[This principle has been laid down *in re Dannu Singh* v. *Emp.* (85 I.C. 643 — 25 Cr. L.J. 547)].

CASES UNDER S. 32(1)

1. The Calcutta High Court has observed that a conviction can be based solely on a dying declaration, without any further corroboration. Now, whether it is or it is *not* safe to do so will depend on the facts and circumstances of each case. (*Najjam Faroqui* v. *The State*, 1992 Cri. L.J. 2574)

2. The Allahabad High Court has, in a case of dowry death, *held* that a dying declaration *cannot* be rejected *only* on the ground that it was made to a relative of the deceased. (*Bhoora Singh* v. *State of U.P.* 1992 Cri. L.J. 2294)

3. In another case of an alleged dowry death before the Delhi High Court, a dying declaration was made in the presence of an Executive Magistrate. However, the declaration was *not* in a question-and-answer from; nor was it in the words and language of the deceased. The Magistrate had also made no attempt to contact a doctor to find out the declarant's state of mind. Moreover, the declarant wife was in the midst of her nearest relatives when the dying declaration was made. In the circumstances, it was *held* that the dying declaration could *not* be relied upon for a conviction under S. 302 of the Indian Penal Code. (*Surinder Kumar* v. *The State*, 1992 Cri. L.J. 616)

4. In yet another case of alleged bride-burning decided by the Supreme Court, four dying declarations were made by the deceased. One of them indicated the incident as an accident. The accused (who was the 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. In the circumstances, the Supreme Court *held* that the conviction for murder was liable to be set aside. (*Kamla* v. *State of Punjab*, 1993 Cri. L.J. 68)

5. The Madhya Pradesh High Court has *held* that a "dying declaration" of a person who survives is *not admissible*. It can, however, be used to corroborate or contradict the version subsequently put forth by him. (*Phundi* v. *State of Madhya Pradesh*, 1993 Cri. L.J. 1881)

Difference between a 'Dying Declaration' and a 'Deposition'

1. A dying declaration is a statement made by a deceased person to *anybody* who happens to be present when it is made, whereas a deposition has to be made before a Magistrate and in the presence of the accused.

2. It follows, therefore, that a dying *declaration is not made on oath*, whereas, a *deposition must be made on oath* and before a person authorised by law to take evidence.

3. A dying declaration is also *not* subject to cross-examination and therefore, is *weaker* than a deposition, whereas, a deposition is subject to cross-examination, and therefore, stronger than a dying declaration.

2. Statements made in ordinary course of business [S. 32(2)]

When the statement is made by *such* a person (*i.e.*, a person who is dead or *cannot* be found, *etc.*) in the ordinary course of business, and in particular when it consists of any —

(a) an entry or memorandum made by him in books kept in —

(i) the ordinary course of business, or (ii) the discharge of professional duty; or

(b) an acknowledgment (written or signed by him) of the *receipt* of money, goods, securities or properties of any kind, *or*

(c) documents used in *commerce*, written or signed by him, or

(d) the date of a letter or other document usually dated, written or signed by him,—

are relevant.

Illustrations — (i) The question is as to the date of *A's* birth.

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

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

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

(iii) The question is, whether a ship sailed from Bombay harbour on a given day.

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

(iv) The question is, whether *A*, a person who *cannot* be found, wrote a letter on a certain day.

The fact that the letter written by him is dated on *that day*, is *relevant.*

(v) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased *Banya*, in the ordinary course of his business, is a *relevant fact.*

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

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

The section speaks of "*such* person", *i.e.*, a person referred to earlier, namely, a person who is dead, or *cannot* be found, or had become incapable of giving evidence, or who *cannot* be produced without unreasonable delay or expense.

Under English law, before a statement or entry as is referred to in this

section is admitted, *four* conditions have to be satisfied, namely —

(i) The declaration or entries must have been in the discharge of a duty to a third person.

(ii) The declaration must have been made contemporaneously with the occurrence of facts recorded, that is, the entries should have been made at the time when the facts occurred.

(iii) The entries or declarations must have been made by one who had personal knowledge of the facts.

(iv) The entries are evidence of the facts which it was the duty of the deceased to record, and they are *not* evidence of other connected matters which they may contain in addition to those facts.

It will be seen that these restrictions are *not* embodied by the Indian Evidence Act. Under the Act, it is enough that such statements or entries relate to a *relevant fact.*

3. Statements against interest of maker [S. 32(3)]

When the statement —

(a) is against the pecuniary or proprietary interest of the person making it, *or*

(b) would, if true, *expose* him to a criminal *prosecution* or suit for damages, such a statement is itself relevant.

Illustrations — (i) 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.*

(ii) The question is, whether *A* and *B* were legally married.

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

This section is based on the ground that *what a person says against his own interests is very likely to be true.* The *principle* underlying the admissibility of such a statement is that in the ordinary course of business, a person is *not* likely to make a statement to his own detriment, unless such statement is true.

Under the English law, such statements are admissible against third parties *only if* they are against their *pecuniary* or *proprietary* interest. *In India,* such a restriction does *not* exist.

It has been *held* that a statement made by a deceased in a deed, to the effect that he is governed by the *Mitakshara law,* is against his *proprietary* interest, because such a statement implies that he is *not* the sole and absolute owner of the property. (*Sukdeb v. Mritunjoy,* 43 CWN 395)

4. Opinion as to public right, custom, etc. [S. 32(4)]

When the statement gives the opinion of any such person as to the existence of any *(a) public* right or custom, *or (b)* matter of *public* or *general* interest (of the existence of which, if it existed, he would have been *likely* to be aware) and was made *before* any controversy as to such right, custom or matter had arisen, such a statement is relevant.

Illustration — 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.*

It must be noted that the statement must be regarding any *public* right or *public* custom or regarding a matter of public or general interest. If the statement is regarding a *private* right, it *cannot* be admitted under this clause. Moreover, the settlement must have been made before any controversy as regards such right, *etc.,* had arisen. If it is made *after* the dispute had arisen, it is *not relevant* under this clause.

In order that such an opinion may be admissible, the following *three conditions* must be satisfied:

1. The right or custom must be of a public or general nature or it should be a matter of public or general interest.
2. The person making the declaration must be one who would be likely to be aware of the existence of the right in question. In other words, such a person should be a person of competent knowledge.
3. The third condition is that the declaration must have been made *ante litem motam, i.e.,* before the date on which the controversy as to such right, custom or matter arose and which later became the subject-matter of a suit.

5. Statement as to existence of relationship [S. 32(5)]

When the statement relates to the existence of relation- ship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption, the person making the statement had special means of knowledge, and such statement was made *before* the question of dispute was raised, such a statement is relevant.

Illustration — The question is, whether *A*, who is dead, was the father of *B.*

A statement by *A* that *B* was his son, is a *relevant* fact.

6. Statement in will or deed relating to family affairs [S. 32(6)]

When the statement relates to the existence of any relationship by blood, *marriage* or adoption between *deceased persons, and* is made in a *will or deed* relating to the affairs of family of the deceased *or* upon any *tombstone,*

family portrait or other things on which such statements are usually made, and made before the question in dispute was raised, such a statement is relevant.

Illustrations — (i) The question is, what was the date of the birth of A.

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

(ii) The question is whether, and when, A and B were married.

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

Sub-clauses (5) and (6) and S. 32 cover the topic of pedigree evidence. Declarations made by deceased relatives are received on the ground of necessity, better evidence on such facts being often unobtainable.

The following four points of distinction between sub-clauses (5) and (6) of the section may be noted:

S. 32(5)	S. 32(6)
1. S. 32(5) refers to a statement relating to the existence of a relationship between any person, living or dead.	1. S. 32(6) refers to a statement relating to the existence of a relationship between deceased persons only.
2. The declarant should have had special means of knowledge.	2. There is no such requirement as to special means of knowledge.
3. The evidence is the declaration of a person who is deceased or whose attendance cannot be secured.	3. The evidence is that of concrete things, e.g., tombstones. family portraits, etc.
4. Applies to both verbal as well as written statements.	4. Applies only to written statements.

7. Statement in a document relating to a transaction creating a right [S. 32(7)]

When the statement is contained in any deed, will or other document, which related to any transaction by which any right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence, such a statement is relevant.

8. Several persons expressing feelings [S. 32(8)]

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

Illustration — A sues B 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

libellous character. The remarks of a crowd of spectators on these points may be proved.

This clause lays down that statements made by a number of persons expressing feelings or impressions relevant to the matter in question are admissible, when such persons are dead or incapable of giving evidence, or whose attendance *cannot* be secured.

The *grounds* on which such evidence is admitted are *necessity* and *convenience*, as it would be *very difficult, if not impossible* (in the above illustration) to produce all the persons forming the crowd. This section may be compared with Section 14, which deals with expression of feelings by an individual.

RELEVANCY OF CERTAIN EVIDENCE FOR PROVING, IN A SUBSEQUENT PROCEEDINGS, THE TRUTH OF FACTS STATED THEREIN (S. 33)

When a witness	Before whom such witness has to give evidence	When the evidence becomes relevant (S. 33)
(a) is *dead, or* (b) *cannot* be found, *or* (c) is *incapable* of giving evidence, *or* (d) is *kept out* of the way by the adverse party, *or* (e) *cannot* be *produced* without unreasonable delay or expense —	evidence given by the witness — (i) in a *judicial* proceeding, *or* (ii) before any person *authorised* by law to take it —	is relevant for the purpose of proving, in a *subsequent proceeding or* in a later stage of the same judicial proceeding, truth of the facts which it states; *provided that* — (i) the *proceeding* was *between* the same parties or representatives in interest; (ii) the *adverse party* in the first proceeding had the right and opportunity to cross-examine; *and* (iii) the *questions* in issue were substantially the same in the first as in the second proceeding.

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

SCOPE OF S. 33 — Evidence of deposition in former trials is admissible, as it forms an exception to the hearsay rule. Depositions are, in general, admissible only after proof that the persons who made them *cannot* be produced before the Court to give evidence. It is only in cases where the production of the primary evidence is beyond the party's power that secondary evidence of oral testimony is admissible.

It may be noted that this provision deals with *relevancy* of evidence and *not with mode* of proof. If evidence is irrelevant, consent of the parties cannot make it relevant.

It is only if *all* the conditions of S. 33 are satisfied that evidence given in a judicial proceeding becomes relevant. The Court may hold that such evidence is relevant, if it is satisfied by evidence, or by admission of the parties, that the requisite conditions are fulfilled. [*Nathubhai* v. *Chhotubhai,* (A.I.R. 1962 Guj. 68)]

Evidence given on a *different* occasion is admissible to *contradict* a witness (S. 115) or to *corroborate* him (S. 157).

It is also to be noted that a deposition of a witness taken in the proceedings before the Coroner *cannot* be taken in evidence under

S. 33 of the Indian Evidence Act, at the trial of the case in High Court, the *reason* being that an inquiry before the Coroner is *not* a proceeding between the prosecutor and the accused. (*Emperor* v. *Mahomed Usuf,* 35 Bom. L.R. 1020)

What matters can be proved when statements are admitted under Ss. 32 and 33 (S. 158)

When any statement relevant under section 32 or 33 (*i.e.,* made by a person who *cannot* be called as a witness) is proved, *all matters which might have been proved if that person had been called* as a witness and had denied, upon cross-examination, the truth of the matter suggested, *may be proved* to *contradict* or to *corroborate* the statement or to *impeach* or *confirm* the credit of the person.

Sections 32 and 33 of the Act permit the introduction of statements, oral or written, or statements made in a judicial proceeding, by a person who *cannot* be examined as a witness. The Legislature intends, by this section, to submit such statements to the tests of contradiction and corroboration, in the same way as *if* those statements were made by the witness in the box. 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.

ADMISSIBILITY OF 'HEARSAY' EVIDENCE — It will be seen that Ss. 32 and 33 (above) are *exceptions to the general rule that hearsay evidence is not admissible.*

D. Statements made under special circumstances (Ss. 34-39)

There are *five* kinds of statements which become *relevant* on account of the special circumstances in which they are made.

1. Regular entries in account books (S. 34)

When are entries in books of account relevant? (2 marks) M.U. Nov. 2017

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 inquire; *but* such statements are *not alone sufficient* evidence to *charge* any person with *liability.*

Illustration — A sues *B* for ₹ 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.*

This section is based upon *the principle* that entries made regularly in the course of business are likely to be accurate. In all such entries, the writer has full knowledge, no motive for falsehood, and there is the strongest improbability of untruth.

This section provides (1) that entries in books of account regularly kept in the course of business are relevant, and therefore admissible, whenever they refer to a matter into which the Court has to enquire; and (2) that such entries, though admissible, are *not alone sufficient* to charge a person with liability, unless corroborated by other evidence.

But such entries admitted under section 32(2) are substantiative evidence and can be made the basis of judgment to charge the person with liability.

Under the English common law, entries in a person's books of account in support of his own claim are generally *not admissible* in his favour, on the principle that a *man cannot make evidence for himself.* S. 34 of the Indian Act is based on Roman Law and conforms to the French and American rules of law on this point.

2. Entries in public and official books (S. 35)

An entry in any public or other official book, register or record or an *electronic record,* stating a fact in issue or relevant fact, and made by a public servant in the discharge of his *official* duty, or by any other person in performance of a duty *specially enjoined by the law of the country* in which such book, register or record *or an electronic record* is kept, is itself a relevant fact.

Under this section, when it is the duty of a public officer to make certain entries in any public or other official book, it is admissible in evidence to prove the truth of the facts so entered, as well as the fact that entries were made by such officer. The *reason* for this rule is that when a public servant makes an entry in the discharge of his official duty, the probability of its being truthfully recorded is quite high. It is presumed in such cases that the officer is discharging his duty with *accuracy* and *fidelity*.

In a case decided by the Madhya Pradesh High Court, it was *held* that a birth entry in the Register of Births and Deaths can be taken as the basis for determining the age of the accused. It was *also held* that the opinion of a radiologist *cannot* be preferred over such an entry. (*Anita* v. *Atal Bihari*, 1993 Cri. L.J. 549)

In a case decided by the Supreme Court, a School Certificate was produced as proof of the age of the accused. However, the Certificate did *not* mention the name of the school from where the transfer certificate was obtained and on the basis of which certificate the accused was admitted to the school. In the circumstances, it was *held* that the School Certificate could *not* be relied upon for proving the age of the accused. (*Jagtar Singh* v. *State of Punjab*, 1993, Cri. L.J. 2886)

3. Statements in maps and charts (S. 36)

Statements (of facts in issue or relevant facts) made in —

(i) published *maps* or charts, generally offered for public sale, *or*

(ii) *maps or plans, made under the authority of the Central Government or any State Government,*

as to matters usually represented or stated therein are themselves *relevant facts*.

4. Statements in Acts of Parliament of England or India (S. 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 are *relevant facts*.

5. Law of a foreign country (S. 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 (S. 39)

When any statement of which evidence is given —

(a) forms part of :
  (i) a longer statement *or*
  (ii) a conversation, *or*
  (iii) an isolated document, *or*

(b) is contained in a document which forms part of a book, *or*

(c) is contained in a part of an electronic record or of a connected series of letters or papers, evidence can be given of *so much (and no more)* of the statement, conversation, document, electronic record, books or series of letters or papers, as the *Court considers necessary in that particular case to the full understanding of the nature and* effect of the statement, and of the circumstances under which it was made.

This rule is broad-based on *justice* and *convenience*. In the absence of such a rule, the precious time of the Court would be unnecessarily wasted. At the same time, the law does *not* allow an unfair use to be made of a man's statement, torn away from its context. If, for instance, a party makes a qualified statement, such a statement *cannot* be used against him, apart from the qualification or explanation attached to it.

E. Judgments of Courts of Justice, when relevant (Ss. 40-44)

1. *Res judicata, autrefois convict, autrefois acquit* (S. 40)

When the question is whether a Court ought —

(a) to take cognizance of a suit, or (b) to hold a trial,

the existence of any judgment, order or decree which by law, *prevents* the Court from taking *cognizance of a suit or holding a trial* is a *relevant fact*.

When are judgments of courts of justice relevant? M.U. Nov. 2014

Under this section, the existence of a judgment, decree, or order, is a relevant fact, if it has the effect of *preventing any Court from taking* 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.

Explain the law relating to relevancy of judgments of courts of justice. M.U. May 2015

The *main object* of the doctrine of *res judicata* is to *prevent* multiplicity of suits and interminable disputes between litigants. *Res judicata* means, by its very words, a thing upon which the Court has exercised its judicial mind. Section 11 of the Civil Procedure Code lays down the law as to *res judicata*. Similarly, the Criminal Procedure Code bars a second trial of a person. This is known as the principle of *autrefois convict or autrefois acquit*.

2. Relevancy of certain judgments in probate, etc., jurisdiction (Ss. 41-44)

Write a short note on : When judgments are relevant.
M.U. June 2018

A final judgment, order or decree	of a competent Court in the exercise of	(i) probate, (ii) matrimonial, (iii) admiralty, or (iv) insolvency jurisdiction,

which confers upon or taken away from any person any *legal character*, or declares any person to be entitled to any such character, or any specific thing, *not* as against any specified person, *but* absolutely,

is *relevant*, when the existence of any such legal character or the title of any such person to any such thing is relevant.

Such judgment, order or decree is *conclusive proof* that —

(1) any legal character —

(i) which it confers, *accrued* at the time when such judgment, etc., came into operation;

(ii) to which it declares any person to be entitled, *accrued* to him at the time when it declares it to have *accrued* to him;

(iii) which it *takes* away from any person, *ceased* at the time from which it decreed, it had ceased or should cease;

(2) anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property. (S. 41)

SCOPE OF S. 41 — This section consists of *two parts*. The *first part* makes the final judgment, order or decree of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction relevant; the *second part* makes the judgments *conclusive proof* in certain matters.

JUDGMENTS *'IN REM'* and *'IN PERSONAM'* — This section deals with what are usually called judgments *in rem*, *i.e.*, judgments which are conclusive *not only* against the parties involved in the judgment, but also against all the world. A judgement *'in rem'* has been defined to be "an adjudication pronounced, as its name indeed denotes, upon the status of same *particular subject-matter* by a tribunal having competent authority for that purpose". The distinction between a judgment *'in rem'* and a judgment *'in personam'*, is that, in the former, the point adjudicated upon is conclusive against all the world as to status, whereas in the case of a judgment *in personam*, the point is only conclusive between the parties and their privies.

DIFFERENCE BETWEEN

Judgments in personam	*Judgments in rem*
1. These are judgments between parties in cases of contract, tort, crime, *etc.*	1. Judgments *in rem* are judgments by a Court having special jurisdiction.
2. They are conclusive proof, in subsequent proceedings, between the same parties or their privies.	2. They are conclusive evidence for or against all persons whether parties, privies or strangers.

JUDGMENTS NOT *INTER PARTES* WHEN RELEVANT — Judgments in previous cases, although *not inter partes* (that is, *not* between the same parties) are admissible in evidence under S. 13, *i.e.*, as transactions or instances of the nature described in S. 13, where the question is as to the existence of a right or custom. They are also admissible if (1) their existence is a fact in issue (S. 43), *or* (2) they are relevant otherwise (S. 43), *or* (3) they are final judgments *in rem* of a competent Court in the exercise of its probate, matrimonial, admiralty or insolvency jurisdiction (S. 41), *or* (4) they relate to matters of a public nature relevant to the inquiry. (S. 42)

JUDGMENTS *NOT INTER PARTES* WHEN CONCLUSIVE — Judgments *not inter partes*, even where they are relevant, are *not conclusive*, except when they are final judgments *in rem* of a competent Court in the exercise of its probate, matrimonial, admiralty or insolvency jurisdiction.

Judgments refusing probate — In *Chinaswami* v. *Hariharabadra*, (16 Mad. 360), it was *held* that the judgment of a Court refusing probate is as much a judgment *in rem* as one which grants it, for such a judgment takes away from the executors named in the will, the legal character of executors, and from the legatees and beneficiaries, their legal character, and this result is final against *all* persons interested under the will.

But, in a Full Bench judgment of the Bombay High Court, it was *held* that the only kind of negative judgment contemplated by S. 41 is one which expressly takes away from a person a legal character which he has held till such judgment, and that this *cannot* cover the case of a finding that an attempted proof of a right to such a character has failed. Therefore, a judgment refusing probate is *not* a judgment *in rem*. Such a judgment would *not* confer upon or take away from any person a legal character. (*Kalyanchand* v. *Sitabai*, (1913) 38 Bom. 309)

INSOLVENCY JURISDICTION — A Full Bench of the Madras High Court has *held* that the judgment of a Court exercising insolvency jurisdiction, declaring a particular person to be a creditor of the insolvent, is *not* a *judgment in rem*. (*In Re An Advocate*, (1931) 54 Mad. 601). However, a judgment adjudicating a

person insolvent will be covered by S. 41. (*Bibi Amar Kaur* v. *Shiv Karan*, A.I.R. 1965 Pun. 206)

JUDGEMENT BASED ON A COMPROMISE — A judgment based on a compromise is *not* a judgment *in rem* within the meaning of S. 41. Therefore, a subsequent suit is *not* barred. (*R. A. Khan* v. *M. B. Zuhra*, (1911) PR 14 of 1912)

(a)Judgments, orders or decree other than those mentioned in Section 41, are *relevant* if they relate to matters of a *public* nature relevant to the enquiry; but such judgments, orders or decrees are *not conclusive* proof of that which they state. (S. 42)

Illustration — *A* sues *B* for trespass on his land. *B* alleges the existence of a public right of way over the land, which *A* denies. The existence of a decree in favour of the defendant, in a suit by *A* against *C* for a trespass on the same land, in which *C* called the existence of the same right of way, is relevant, but it is *not conclusive proof* that such right of way exists.

(b) Judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42 are *irrelevant, unless* the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act. (S. 43)

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

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

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

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

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

The judgment against *B* is *irrelevant* as against *C*.

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

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

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

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

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

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

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 and 42, and which has been proved by the adverse party, was delivered by a Court *not competent* to deliver it, *or* that it was obtained by *fraud* or *collusion*. (S. 44)

It may be noted that judgment *in rem* can only be impeached if it can be shown —

(a) that the Court had no jurisdiction; *or*

(b) that the judgment was obtained by fraud or collusion; *or*

(c) that it was *not* given on the merits; *or*

(d) that it was *not* final (*e.g.*, if it was interlocutory.)

F. Opinions of third persons, when relevant (Ss. 45-51)

1. Opinions as to foreign law, science, handwriting, etc. (Expert evidence) (Ss. 45, 46)

When the Court has to form an opinion —

(a) upon a point of foreign law or science or art;

or

(b) as to the identity of handwriting or finger impressions,— the opinions upon that point of experts (*i.e.*, persons specially *skilled* in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions) are *relevant*. (S. 45)

Illustrations — (a) The question is, whether the death of *A* was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are *relevant*.

(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 the act or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are *relevant*.

(c) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are *relevant*.

When the opinions of experts are relevant, *facts* (not otherwise relevant) *which* support or are *inconsistent* with such opinions, are also *relevant*. (S. 46)

Write a short note on : Opinion of an expert.
M.U. Nov. 2014

Write short note on : Opinions of third persons, when relevant.
M.U. Nov. 2010

Who is an expert? When is evidence of an expert relevant?
M.U. May 2015

Write a short note on : Experts and the relevancy of their opinions.
M.U. May 2014

Who is an expert? When does the opinion of a third person becomes relevant?
M. U. June 2018
Dec. 2018

Illustrations — (a) *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*.

(b) The question is whether an obstruction to a harbour is caused by a certain sea-wall. The fact that other harbours similarly situated in other respects, but where there was no such sea-wall, began to be obstructed at about the same time, is *relevant*. (Illustration (b) is based on the English case, *Folkes* v. *Chadd*, 1782, 3 Doug, 157).

Write a short note on : Expert opinion.
M.U. Nov. 2015

EXPERT EVIDENCE — 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 or perceived by any other sense. It is the function of the Judge and the Jury to form their own conclusion or opinion on the facts stated. Thus, the opinion or the impression of a witness that it appeared to him from the conduct of a mob that they had collected for an unlawful purpose is *not admissible* to prove the object of the assembly.

When is the opinion of an expert relevant? (2 marks)
M.U. Apr. 2016
June 2019

There are, however, cases in which the Court is *not* in a position to form a correct judgment, without the help of the persons who have acquired special skill or experience in a particular subject. In such cases, the help of experts is required. In these cases, the rule is relaxed, and expert evidence is admitted to enable the Court to come to a proper decision and under this head come matters of science, art, trade, handwriting, finger impressions and foreign law. The rule admitting expert evidence is founded on *necessity*.

What is opinion of an expert? (2 marks)
M.U. Nov. 2016

Who is an expert — The expression "expert" covers 'person specially skilled'. An expert may be defined as a person who, by practice and observation, has become experienced in any science or trade. He is one who has devoted time and study to a special branch of learning, and is thus specially skilled in that field wherein he is called to give his opinion. The term implies both superior knowledge and practical experience in the art or profession, but generally, nothing more is required to entitle one to give testimony as an expert than that he had been educated in a particular art or profession.

Before such evidence can be considered, it must be proved that the person giving the evidence is an *expert*. If on considering the evidence, the Court comes to the conclusion that the person who has given evidence is *not* an expert, his opinion has to be discarded.

HOW AN EXPERT'S TESTIMONY DIFFERS FROM THAT OF AN ORDINARY WITNESS :

(1) An expert's evidence is *not* confined to what actually took place, but covers his opinions on facts, *e.g.*, although a doctor may *not* have attended the victim, he can still give his opinion as to the cause of the victim's death or the effect of a certain poison.

(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.

THE VALUE OF EXPERT EVIDENCE — Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These witnesses are usually required to speak *not facts, but* to give *opinions; and* when this is the case, it is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes or the interests of the parties who call them. They do *not* indeed wilfully misrepresent what they think, but their judgment becomes so warped by regarding the subject from one point of view, that even when conscientiously disposed, they are incapable of forming an independent opinion.

Testimony of experts is usually considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them.

As the Privy Council once observed : "There *cannot* be any more unsatisfactory evidence than that of an interested party called as an expert."

In *Kishore Chandra Singh Deo* v. *Babu Ganesh Prasad Bhagat*, (A.I.R. 1954 S.C. 316), the Supreme Court observed that the conclusions based on mere comparison of handwriting must, at best, be indecisive, and therefore, should yield to the positive evidence in the case.

Similarly, in *Emperor*, v. *Ramrao Mangesh*, it was *held* that expert evidence, as a mode of proof, though permissible, is *hazardous* and *inconclusive*, and as a method of proving disputed handwriting, it is accepted by the Courts with great caution. It is indeed *unsafe* to base a conviction on the uncorroborated opinion of a handwriting expert.

As observed in an American case (*People* v. *Patrick*, 182 N.Y. 131) — "Expert witnesses are affected by that pride of opinion and that kind of mental fascination with which men are affected when engaged in the pursuit of what they call scientific enquiries."

As remarked by *Pope* in his "*Essay on Criticism*" —

"Of all the causes which conspire to blind,
Man's erring judgment and misguide the mind,
What the weak head with strongest bias rules,
Is pride, the never-failing vice of fools."

EVIDENCE OF AGE — The Allahabad High Court has *held* that a doctor's opinion regarding the age of a person based on his height, weight and teeth does *not* amount to legal proof of the age of the person. (*Emperor* v. Qudrat (1939) All. 871)

FINGER-PRINT EXPERT — The Court may accept the evidence of a fingerprint expert without any corroboration. But the Court should be careful not to delegate its authority to a third party. The Court has to be satisfied that the accused is guilty, and the Court *cannot* hold him guilty merely because an expert comes forward and says that, in his opinion, the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of the other evidence.

The Court has to rely on the expert upon *two* distinct points: *first of all*, on the question of similarity between the marks, which is a question of fact on which the Court should, with the assistance of the expert, satisfy itself; and *secondly*, on the point, which is one for expert opinion, whether it is possible to find the fingerprints or thumb-impressions of two individuals corresponding in as many points of resemblance as may be shown to exist between the impressions found in the case before the Court and those of the accused. (*Fakir Mahomed* v. *Emperor*, A.I.R. 1936 Bom. 151)

When is the opinion of a handwriting expert relevant?
(2 marks)
M.U. Apr. 2011

HANDWRITING EXPERTS — The Supreme Court has observed that the evidence of a hand-writing expert need *not* invariably be corroborated. It is for the Court to decide whether to accept such uncorroborated evidence or not. This question should be approached cautiously by the Court, and after examining the reasoning behind the expert opinion and after considering all other evidence, the Court should reach its conclusion. (*Murari Lal* v. *State of M.P.*, (1980) 1 S.C.C. 704)

In *Murari Lal's case (above)*, the Supreme Court 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.

SCIENCE OR ART — The words "science or art" are to be broadly construed; the term "*science*" is *not* limited to the higher sciences, and the term "*art*" is *not* limited to fine arts, but having its original sense of handicraft, trade, profession and skill in work, which, with the advance of culture, had been carried beyond the sphere of common pursuits of life into that of 'artistic' and 'scientific' action. The following tests may be applied — (a) Is the subject-matter of the inquiry such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts? (b) Does it so far partake the character of a science or art as to require a course of previous habit of study in order to obtain a competent knowledge of its nature, or is it one which does *not* require such habit or study? (*Mahadeo Dewanna* v. *Vyakammabai*, A.I.R. 1948, Nagpur 287)

EVIDENCE OF TYPEWRITER — 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 S. 45. (*Hanumant* v. *State of M.P.*, A.I.R. 1952 S.C. 343)

DOGTRACKING — The Supreme Court has observed that, in the present stage of scientific knowledge, evidence of dogtracking, even if admissible, *cannot* ordinarily be given much weight. (*Abdul Razak* v. *State of Maharashtra*, A.I.R. 1970 S.C. 283)

WHEN OPINION OF NON-EXPERTS MAY BE RECEIVED — Normally, opinions of ordinary persons, *i.e.*, non-experts are *not relevant*. Such persons are liable to err, and their impressions may be superfluous. Further, different persons are likely to form different impressions from the same set of facts. However, the general rule has certain exceptions, and in certain cases, the opinion of an ordinary witness is admitted by the Court. "The ground upon which opinions are admitted in such cases is that, from the very nature of the subject in issue, it *cannot* be stated or described in such language as will enable persons, *not* eye-witnesses, to form an accurate judgment in regard to it. How can a witness describe the weight of a horse? Or his strength? Or his value?" (*Foster, C.J.*)

Judicial decisions show that opinions of non-experts have been received, *inter alia*, as regards —

(i) the disposition or temper of animals (*Sydleman* v. *Beckwith*);
(ii) matters of colour, weight, state of similar facts (*Bass Furnace Co.* v. *Glasscock*);
(iii) the age of person (*Bell* v. *Bearman*);
(iv) that a man and woman were intimate (*S.* v. *Match*); *or* that two persons who are on a bed seemed to have sexual intercourse (*Bizer* v. *Bizer*); *and*
(v) that a person was intoxicated (*Harbison* v. *Lemon*).

Foreign law how proved (Ss. 38 & 45)

Foreign law may be proved —

(i) by the evidence of a person specially skilled in it (S. 45); or
(ii) by direct reference to books printed or published under the authority of the foreign Government (S. 38).

In one case, the question before the Allahabad High Court was whether the Shia law of marriage can be "foreign law". The Court answered the question in the *negative* and observed: "The Shia law on marriage is the law of the land and is in force in India. It can, by no means, be called foreign law; nor is such law a science or art within the meaning of S. 45."

2. Opinion as to handwriting (S. 47)

When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was or was not written or signed, by that person, is a relevant fact.

Explanation — A person is said to be *acquainted* with the handwriting of another person when —

(a) he has seen that person write, *or*

(b) he has received documents purporting to be written by that person in answer to documents written —

(i) by himself or

(ii) under his authority—

and addressed to that person; *or*

(c) In the ordinary course of business, documents purporting to be written by that person have been *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* for the purpose of advising him thereon.

The opinions of *B*, *C* and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither *B*, *C* nor *D* ever saw *A* write.

VARIOUS WAYS OF PROVING HANDWRITING (Ss. 45, 47, 60, 73)

The handwriting of a person may be proved in the following seven ways:

1. By the opinion of *experts* as to identity of handwriting, that it was signed or written by him. (S. 45)

2. By the evidence of a person acquainted with such handwriting, *either* by receiving letters purporting to be written by the person in answer to documents written by the witness or under his authority and addressed to that person, *or* when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. (S. 47)

Problem : *A files a suit against B for recovering ₹ 40,000 from B for breach of an agreement for the sale of twenty bales of cloth. At the hearing, A wants to tender in evidence, a letter mentioning some of the material terms of the agreement, written by C, a clerk, in his office, to B. Is the letter admissible in evidence without C being called as a witness?*

Ans. : *Yes,* the letter is admissible in evidence without C being called as a witness. Under Sec. 47 of the Act, evidence of a person acquainted with the handwriting of the writer is admissible in evidence. C is a clerk in the office of *A*, and *A* would naturally, therefore, be acquainted with the writing of C.

3. By the opinion of any person acquainted with the signature or writing of the person that it was signed or written by him (S. 47). Where the Court has to form an opinion as the *digital signature* of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate is a *relevant fact.* (S. 47-A)

4. By the evidence of the writer *himself.* (S. 60)

5. By the *admission* of the person signing or writing the documents.

6. By the evidence of another person who *has* seen him signing or writing the documents. (S. 60)

7. By the *Court comparing the document* in question with any other proved to the satisfaction of the Court to be genuine. (S. 73)

The Court may direct any person present in Court to write any words or figures for purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. This will apply to fingerprints also.

A comparison of handwriting as a mode of proof is at all times *hazardous* and *inconclusive*, and especially when it is made by one *not* conversant with the subject and without such guidance as might be derived from the arguments of counsel and evidence of experts. Several decided cases have discouraged the practice of Judges declaring whether a disputed signature is the same as other signatures of a certain person without the assistance of other evidence, but merely on inspection.

3. Opinion as to right or custom (S. 48)

Write a short note on : Relevancy of opinion as to rights, customs and usages.
M.U. Apr. 2011

When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are *relevant*.

Explanation — The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration — The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of the section.

Under this section, the opinion of persons likely to know about rights prevailing in a village as regards the use of roads, paths and water courses as also the right to use tanks and bathing ghats would be relevant.

It has been *held* that a person who has habitually written sale deeds would be in a position to give his opinion on whether a particular custom or usage prevailed in a given locality. The opinions of such persons would therefore be admissible.

However, if the opinion of such a person is *not* based on reliable information, but mere repetition of hearsay, such opinion would not carry any weight.

So also, a statement made by a deceased person *after* the controversy in question had arisen is *not admissible* under S. 48 of any other provision of the Act.

4. Opinion as to usages, tenets, etc. (S. 49)

Opinions of persons having special means of knowledge on —

(i) the *usages or tenets* of any body of men or family, *or*

(ii) the *constitution* and government of any *religious* or charitable foundation, *or*

(iii) the *meaning of words* or terms used in particular districts or by particular classes of people,—

are relevant.

5. Opinion as to relationship (Ss. 50 & 51)

When the Court has to form an opinion as to the *relationship* of one person to another, the opinion (i) expressed by *conduct, (ii)* as to the *existence* of such relationship, *(iii)* of any person who, as a *member* or his family or otherwise, has *special* means of knowledge on the subject, is a *relevant fact.* (S. 50)

Such opinion is, however, *not sufficient* to prove a marriage in —

(i) proceedings under the *Indian Divorce Act, or*

(ii) prosecutions for *bigamy, adultery* and *enticing* away a married woman (under S. 494, 495, 497 or 498, Indian Penal Code).

Illustrations — (a) The question is, whether *A* and *B* were married.

The fact that they were usually received and treated by their friends as husband and wife, is *relevant.*

(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.*

The essential requirements of the section are: (1) There must be a case where the Court has to form an opinion as to the relationship of one person to another. (2) In such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact. (3) But the person whose opinion is expressed must be a person who, as a member of the family or otherwise, has special means of knowledge on the particular subject or relationship. In other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere relating of

gossip or of hearsay; it means judgment or belief, that is, a belief of a conviction resulting from what one thinks on a particular question. (*Dolgobinda* v. *Nimai Charan,* A.I.R. 1959 S.C. 914)

This section does *not* make evidence of mere general reputation (without conduct) admissible as proof of a relationship. (A.I.R. 1959 S.C. 914, *above*)

Whenever the opinion of any expert is relevant, the *grounds* on which such opinion is based are *also relevant.* (S. 51)

Illustration — An expert may give an account of experiments performed by him for the purpose of forming his opinion.

The opinion of the expert, by itself, may be relevant, but would carry little weight with a Court, *unless* it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should put before the Court *all* the materials which induced him to come to his conclusion, so that the Court may form its own judgment on these materials. (*Mt. Titli* v. *Albert Robert Jones,* A.I.R. 1934 All. 273)

G. Character, when relevant (Ss. 52-55)

According to Webster, "Character is a combination of the peculiar qualities impressed by nature or by habit of the person, which distinguishes him from others."

CHARACTER

When relevant (Ss. 52-55)	When irrelevant (Ss. 52, 54 & 55)
In civil cases, a party's character *cannot* be proved for the purpose of showing that any conduct attributed to him is probable or improbable. (S. 52)	The fact that the character of any person concerned is such as to *render probable or improbable any* conduct imputed to him is *irrelevant.* (S. 52)
A party's character is *relevant* whenever it affects the amount of damages which he ought to receive. (S. 55)	
In *criminal* proceedings, the fact that the accused is of a good character is *relevant.* (S. 53)	In *criminal* proceedings, the bad character of the *accused* is *irrelevant, except* – (i) in reply to evidence given of his good character, or (ii) where the bad character itself is a *fact in issue.* (S. 54)

Explain in detail when the character of a person is relevant in civil and criminal cases.
M.U. Nov. 2017

Write a short note on : Charactoer of a person in Civil and criminal cases.
M.U. Nov. 2010
May 2013
May 2014

When is previous good character relevant?
(2 marks)
M.U. Apr. 2016

When is character regarded as relevant in criminal cases? (2 marks) M.U. Nov. 2015

When is character relevant? (2 marks) M.U. May 2017 Nov. 2019

A previous conviction is relevant as evidence of bad character. (S. 54) Evidence of the accused's *bad character* is relevant *(i)* to rebut evidence of good character, *or (ii)* where his bad character is itself a fact in issue. (S. 54)	The word "character" includes both *reputation* and *disposition*; but (except as provided in S. 54, above), evidence may be given only of general reputation and general disposition, and *not* of particular acts by which reputation or disposition were shown. (S. 55, Explanation)

CHARACTER AS AFFECTING DAMAGES — In civil cases, good character of a person is presumed. So, *good* character of a person cannot be proved in aggravation of damages, but proof of *bad character* can be admitted in mitigation of damages. For instance, in cases of defamation, the general bad reputation of the plaintiff can be proved. Similarly, in the case of a breach of promise to marry, the plaintiff's generally immoral character is relevant. Likewise, in cases of seduction, evidence of the generally immoral character of the person seduced will be *relevant*.

RELEVANCY OF CHARACTER IN CASES OF SEXUAL OFFENCES – Under S. 53-A of the Act (*as amended by the Criminal Law (Amendment) Act, 2018*), in cases of prosecution for offences under Ss. 354, 354-A, 354-B, 354-C, 354-D, 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E of the Indian Penal Code (dealing with sexual offences), or for an attempt to commit any such offence, *where the question of consent is in issue*, evidence of the character of the victim or of such person's previous sexual experience with any person *shall not be relevant* on the issue of such consent or the quality of consent.

EVIDENCE SHOULD RELATE TO SPECIFIC TRAITS — Needless to mention, any evidence of reputation must be confined to the particular traits which the charge involves. Thus, if a person is charged for *cruelty*, evidence of his *honesty* would be of no value. However, if he is charged for *theft*, his reputation for *honesty* would be relevant.

CHARACTER OF WITNESS — Witnesses are the media through which the Court is to come to its conclusion on the matters submitted to it, and it has to be ascertained whether such media are trustworthy. Therefore, the character of a witness, whether party or *not*, is always material as affecting his credit. A witness may be asked any question which tends (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. (See Ss. 146-150 below.)

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3

FACTS WHICH NEED *NOT* BE PROVED (Ss. 56-58)

Which facts need not be proved? (2 marks) M.U. Nov. 2014 Nov. 2016 June 2019

The following *two facts need not be proved*, viz., —

1. Facts which the parties or their agents *agree* to admit at the hearing or which they are *deemed* to have admitted by their pleadings. The Court may, however, require such facts also to be proved *otherwise* than by such admission. (S. 58)
2. Facts of which the Court will take judicial *notice*. (S. 56)

Judicial notice (S. 57)

What is judicial notice? (2 marks) M.U. May 2014

The Courts take *judicial notice* of the following *thirteen* facts, viz., —

1. *Laws* in force in India.
2. Public *Acts of Parliament*, and local and personal Acts declared by it to be judicially noticed.
3. *Articles of War* for the Indian Army, Navy or Air force.
4. The course of proceedings of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the Legislatures established in a State.

Write a short note on : Facts which need not be proved. M.U. Nov. 2010 Apr. 2011 May 2013 Apr. 2016 June 2018

5. The *accession* and the *sign manual* of the Sovereign of the U.K. and Ireland.
6. All seals of which English Courts take judicial notice; the seals of all the Courts *in India*, and of all Courts *out of India* established by the authority of the Central Government; the seals of Courts of Admiralty and Maritime Jurisdiction, and of Notaries Public, and all seals which any person is authorised to use by the Constitution or by Act of Parliament of the U.K. or an Act or Regulation having the force of law in India.

Mention any two facts of which the court must take judicial notice. (2 marks) M.U. Nov. 2015

7. The accession to office, names, titles, functions and signatures of *public officers* in any State, if their appointment is notified in the Official Gazette.
8. The existence, title and *national flag* of every State or Sovereign recognised by the Government of India.
9. The divisions of *time*, geographical divisions of the world and gazetted public festivals, feasts and holidays notified in the Official Gazette.
10. The *territories* under the dominion of the Government of India.

Enumerate the facts which need not be proved, giving at least three examples of your own. M.U. Nov. 2010

11. The commencement, continuance and termination of hostilities between the Government of India and any other State or body of persons.
12. The names of (a) the members and officers of the Court, (b) their deputies, subordinates and assistants, (c) officers executing its process, (d) advocates, attorneys, proctors, vakils, pleaders, and (e) other persons legally authorised to appear and act before it.
13. The rule of the road on land or at sea (as for instance, that vehicles in India must keep to the left of a road, that steamboats in the sea should give way to sailing ships, *etc.*).

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

TAKING JUDICIAL NOTICE — This expression means recognition without proof of something as existing or as being true. Judicial notice is based upon very obvious *reasons of convenience and expediency;* the wisdom of dispensing with proof of matters within the common knowledge of everyone has never been questioned.

Judicial notice is the cognisance taken by the Court itself of certain matters which are so notorious or clearly established, that the evidence of their existence is deemed unnecessary. S. 56 provides that no fact of which the Court will take judicial notice need be proved, and S. 57 enumerates the facts of which the Court must take judicial notice. The Court takes judicial notice of these facts, and in doing so, it may resort for aid to appropriate books or documents of reference. A party calling upon the Court to take judicial notice of any fact must be ready to supply it with any necessary book or document for reference.

"Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence." (*Beardsley* v. *Irving*)

The Supreme Court has *held* that the Court can take judicial notice of the fact that an all-India strike was imminent on a particular day and that it actually took place from a certain day. (*Omkar Nath* v. *Delhi Adm.*, A.I.R. 1977 S.C. 1108)

In one interesting English case (*McQuaker* v. *Goddard*, (1940) 1 K.B. 687), the question was whether the Court ought to take judicial notice that a camel is *not* a wild animal. The plaintiff in this case was bitten by a camel whilst visiting the zoo belonging to the defendant. If the camel was held to be a wild animal, the plaintiff would be entitled to damages under the Rule in *Rylands* v. *Fletcher*, whereas if the Court held that the camel was a domestic animal,

the plaintiff would have to show that the defendant had knowledge of its vicious nature. Ultimately, 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.

SECTION *NOT* EXHAUSTIVE — The *thirteen matters* enumerated in S. 56 *do not form an exhaustive list.* The section merely provides that the Courts must take judicial notice of the facts enumerated therein; but, it does *not* prohibit the Courts from taking judicial notice of other facts, *not* to be found in the list. Thus, in England, the Court takes judicial notice of matters appearing in its own proceedings, and there is no reason why Indian Courts also would not take judicial notice of such proceedings.

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4

EVIDENCE
(Ss. 59-90 & 114)

[*NOTE:* The definition of the term "evidence", as well as the different kinds of evidence have been discussed in Chapter 1.]

Discuss the kinds of evidence and the evidentiary value of each of them.
M.U. Nov. 2010

A. ORAL EVIDENCE (Ss. 59-60)

Oral evidence means "all statements made before the Court by witnesses." (S. 3)

Write a short note on : Oral evidence must be direct.
M.U. Nov. 2016
June 2019

All facts *(except* the contents of documents or *electronic records)* may be *proved* by oral evidence (S. 59) which *must,* in all cases, be *direct,* that is to say, —

Define 'evidence'. What are the different kinds of evidence?
M.U. Dec. 2018
Nov. 2019

— if it refers to a fact which could be *seen,* it must be evidence of a witness who says *he saw* it;

— if it refers to a fact which could be *heard,* it must be evidence of a witness who says *he heard* it;

— if it refers to a fact which could be *perceived* by any other sense or in any other manner, it must be the evidence of a witness who says *he perceived* it by that sense or in that manner;

What facts can be proved by oral evidence?
(2 marks)
M.U. Nov. 2016
Nov. 2017

— 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.

However, it is also provided as follows :

1. The opinions of experts and the grounds thereof expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of such treatise, *if* the author — *(i)* is dead, *or (ii) cannot* be found, *or (iii)* has become incapable of giving evidence, *or (iv) cannot* be called as a witness without unreasonable delay or expense. (This is a departure from the English rule of law, under which medical and other treatises are *not* admissible, whether the author is alive or *not.*)

'Oral evidence must be direct'. Explain this statement. Establish the relevancy of a hersay evidence under the Act.
M. U. June 2018

2. If oral evidence refers to the existence or condition of any material thing *other* than a document, the Court may require it to be produced for its inspection. (S. 60)

Oral evidence and documentary evidence are the foundation stones of any trial. Comment.
M.U. Apr. 2011

1. BEST EVIDENCE RULE

The *best evidence rule* means that the best evidence of which the case in its nature is susceptible, must always be produced. 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, that is to say, if a fact is 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 would be impossible to test, by cross examination, the truth of the testimony; and the law rejects the evidence which *cannot* adequately be tested. *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 that the Court will accept what is known as *secondary evidence.* Secondary evidence will never be received until the party tendering it proves that it is out of his power to obtain the best evidence. (See also S. 61.)

2. HEARSAY EVIDENCE

Write a short note on : Hearsay Evidence.
M.U. May 2015

When will a Court disallow oral evidence? Explain in detail, with exceptions, if any.
M.U. Nov. 2017

Section 60 aims at rejection of evidence which is *not direct, i.e.,* what is known as *hearsay evidence.* It is a fundamental rule of the law of evidence that *hearsay is not admissible.* The word 'hearsay' is capable of various meanings and is ambiguous in the extreme. It has at least 3 *distinct meanings:*

(i) *Firstly,* the word 'hearsay' may mean whatever a person is heard to say.

(ii) *Secondly,* it may mean whatever a person declares on information given by someone else.

(iii) *Thirdly,* it is sometimes regarded as being synonymous with the word "irrelevant".

In the Evidence Act, to avoid this confusion, the word 'hearsay' is not used. On this point, the Law Commission has observed : "We have abstained from making use of the word 'hearsay' from the uncertainty and vagueness of the meaning attributed to that word." A statement, oral or written, by a person *not* called as a witness comes under the general rule of hearsay. Section 60 of the Act is directed against avoiding hearsay evidence in the *second sense* of *the term* as given above. The gist of section 60 of the Act is that statements made out of Court *cannot* be used to prove the truth of the matter contained in such statements. But this rule that hearsay evidence is *not* admissible must be accepted with great caution.

The *test* to distinguish between *direct evidence* and *hearsay* evidence is as follows: It is *direct evidence* if the Court, to act upon it, has to rely only upon the witness, whereas it is *hearsay,* if it has to rely *not only* upon the witness, *but* some other person also.

Thus, a statement made by the widow of the deceased that she had heard from her husband that a bicycle had been given to him by his employer, so that he may *not* be late in attending the factory, was *held* to be hearsay.

Likewise, on a charge that no tickets were issued to the passengers, evidence of an inspector and a constable that when they had demanded the tickets, they were informed by the passengers that none had been issued to them, is *hearsay.*

Thus, if *X* is charged with the murder of *Y*, and if *Z*, in his evidence, states that "I saw *X* stabbing *Y* with a knife", it would be a case of *direct evidence.* Instances of *hearsay evidence* would be the evidence of *A* that "*Z* told me that he had seen *X* stabbing *Y*" or that "*Z* wrote a letter to me stating that he had seen *X* stabbing *Y*" or that "I read in the newspaper that *X* had murdered *Y*".

Problem : The question is whether *A* was driving a bus at a particular time. There are no eye-witnesses, but the witnesses tell the Court what others told them. Can such evidence be allowed?

Ans. : *No,* such evidence is *not admissible,* as it is *hearsay.* (*Jaddoo Singh v. Malti Devi,* A.I.R. 1983 All. 87)

HEARSAY EVIDENCE *NOT ADMISSIBLE* EVEN IF CONSENTED TO — It may be noted that hearsay evidence is not *admissible even if not objected to or even if consented to.* The language of S. 60, which prescribes that oral evidence, in all cases, *must* be direct, leads to the conclusion that the Court has no discretion in the matter, *except* in the cases which fall under the exceptions discussed below. Thus, it is *not* open to a Judge to admit hearsay evidence which is *not* admissible by the statute, just because it appears to him that such evidence would throw some light on the issue.

Problem : *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". Is the statement of C relevant and admissible in evidence?*

Ans. : This statement of *C* made to *A* is *inadmissible* inasmuch as it is hearsay.

GROUNDS FOR REJECTING HEARSAY EVIDENCE — Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the persons whose statements are relied upon, into Court for examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be best brought to light and exposed, if they exist, by the test of cross-examination.

It can be said that hearsay evidence is no evidence at all, *inter alia,* for the following reasons.

1. It is *not* given on oath.
2. It *cannot be tested* by cross-examination.
3. In many cases, it suppresses some better testimony which, though available, is *not* adduced.
4. Its admission tends to prolong trials unduly by letting in statements, the *probative value* of which is very slight.

5. Its admission tends to open the door for *fraud,* which might be practised with impunity.
6. It is *second-hand evidence, not* connected with personal responsibility, which exposes a witness to all the penalties of falsehood which may be inflicted by any of the sanctions of truth. The person giving such evidence does *not* have any sense of responsibility. If confronted with a contrary position, he always has a line of escape by pleading that this was *not* his personal knowledge and that he was so informed by somebody else.
7. There is a tendency that truth will be diluted and diminished with each repetition.

If the rule were otherwise, it would attach undue importance to a false rumour flying from one foul tongue to another.

As rightly observed by *Pope,* —

"The flying rumour gathered as they rolled,
Scarce any tale was sooner heard than told,
And all who told it added something new,
All who heard it made enlargement too,
In every ear it spread, on every tongue it grew."

EXCEPTIONS TO THE RULE OF HEARSAY EVIDENCE

"Hearsay evidence" is no evidence. Explain. Are there any exceptions ?
M.U. Apr. 2010
Apr. 2016

The following are the *exceptions* to the general rule that hearsay evidence is *not admissible:*

(1) A statement made outside the Court by a person who is *not* a witness may be a matter in issue, *or* it may be part of the circumstance which it is essential to ascertain. In such circumstances, the statement becomes admissible. For example, 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 statement, *but* regarding the *fact* of the statement being made.

When is the evidence of a third person taken as relevant in a Court?
M.U. Nov. 2015

(2) Sections 32 and 33 also lay down well-known exceptions to the general rule that hearsay evidence is *not* admissible.

Thus, S. 32 (which has been discussed earlier) deals with the cases in which a statement of a relevant fact by a person who is dead, or who *cannot* be found, *etc.*, is relevant.

Similarly, S. 33 (which has also been discussed earlier) lays down that evidence given by a witness in a judicial proceeding is relevant for the purpose of proving, in a subsequent judicial proceeding, the truth of the fact which it states, when the witness is dead, or *cannot* be found, etc.

(3) Under Section 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 *(res gestae).*

B. DOCUMENTARY EVIDENCE (Ss. 51-90)

1. General

What is documentary evidence? How are contents of a document proved in a court of law? M.U. May 2015

Documentary evidence means all *documents* produced for the inspection of the Court. (S. 3)

DIFFERENCE BETWEEN 'ORAL' AND 'DOCUMENTARY' EVIDENCE — *Oral evidence* means and includes all statements which the Court requires, or permits, to be made before it, *by witnesses* in relation to matters of fact under inquiry; *documentary evidence* means and includes *all documents* produced for the inspection of the Court.

What is primary and secondary evidence? When can secondary evidence be given? M.U. Nov. 2014 Apr. 2016 Nov. 2016

Oral evidence is a statement of *witnesses*; documentary evidence is a statement of *documents*. Documents are sometimes referred to 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*. There are more ways of verifying the genuineness of documentary evidence than there can be of disproving oral evidence. In many cases, the existence of documentary evidence excludes the production of oral evidence.

2. Primary and secondary evidence

What is primary evidence? (2 marks) M.U. May 2015 Nov. 2015 Dec. 2018 June 2019

The *contents* of documents may be proved either by *primary* or by *secondary evidence*. (S. 61)

Commenting on the scope of S. 61, the Supreme Court observed that the contents of a document have to be proved by admissible evidence, *but not necessarily* by the author of the document. (*Ramji Dayawalla & Sons Pvt. Ltd. v. Invest Import*, (1981) 1 S.C.C. 80)

Documents are of *two kinds* : *public* and *private*. Section 74 gives a list of documents which are regarded as public documents. All other documents are *private documents*. The production of documents in Courts is regulated by the provisions of the Civil Procedure Code and the Criminal Procedure Code.

Documentary evidence is either —

Primary (S. 62)	Secondary (Ss. 63-66)
Primary evidence means that the *document itself* is produced for the inspection of the Court.	Secondary evidence means and includes —
1. Where a document is executed in —	1. *Certified copies* given under S. 74
(i) several parts, each part is *primary evidence* of the document.	2. *Copies* made from the original, *by mechanical processes*, which in themselves ensure the accuracy of the copy.

(ii) *counterpart* (each counterpart being executed by one or some of the parties only), each *counterpart* is *primary* evidence as *against* the parties executing it : (S. 62, *Explanation 1*)	3. Copies *compared* from copies made from the original by mechanical process.
2. Where a number of documents are all made by one *uniform process* (as in the case of *printing, lithography* or *photography*), *each* is primary evidence of the contents of the *rest*. But where they are all *copies of a common original*, they are *not* primary evidence of the contents of the *original*. (*Explanation* 2, S. 62)	4. Copies made *from* the *original*.
Illustration — A person is shown to have been in possession of a number of placards, all printed at one time from one original.	5. Copies compared with the *original*.
Any one of the placards is primary evidence of the contents of any other, but no one of them is a primary evidence of the contents of the original.	6. *Counterparts* of documents as against the parties who did *not* execute them.
	7. *Oral accounts of* the contents of a document given by some person who has himself seen it. (S. 63)

Explain the meaning of "evidence". When can secondary evidence be given place of primary evidence? M.U. May 2015

When can oral evidence of contents of a document be given? (2 marks) M.U. May 2017

Write a short note on : Secondary evidence. M.U. Nov. 2014 June 2019

Illustrations — (a) A photograph of an original is secondary evidence of its contents, though the two *have not been compared, if it is proved that the thing photographed was the original*.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy *not* so compared is *not* secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a *copy compared with* the *original*, nor an oral account of a photograph or machine copy of the original is secondary evidence of the original.

PRIMARY AND SECONDARY EVIDENCE DISTINGUISHED

How are contents of a document proved? What is primary and secondary evidence? When can it be given and how?
M.U. Nov. 2017

Primary evidence is the *best* or *highest* evidence; in other words, it is the kind of proof which, in the eyes of the law, affords the *greatest certainty* of the *fact in question*. Until it is shown that the production of primary evidence (i.e., the original document) is out of the party's power, no other proof of the fact is, in general, admitted. All evidence falling short of this in its degree is termed *secondary*. *Primary evidence* of a transaction, evidenced by writing, is the document itself, which should be produced in original to prove the terms of the contract, if it exists and is obtainable. *Secondary evidence* of the contents of a written instrument *cannot* be given, *unless* there is some legal excuse for non-production of the original. This is based on the principle that the *best evidence* of which the subject is capable ought to be produced or its absence be reasonably accounted for or explained, before secondary evidence (which is inferior) is admitted.

It may be noted that the party who wishes to give *secondary* evidence must lay the foundation for reception of the *secondary* evidence. The burden of proof to show that the *secondary* evidence is admissible is on him. "If the foundation was *not* laid for reception of the *secondary* evidence under section 65, the alleged copy produced should be excluded from consideration." (*Sital Das v. Sant Ram*, (1954, S.C. 606)

3. When secondary evidence can be given to prove contents of a document

Explain the circumstances in which secondary evidence relating to documents may be given.
M.U. Nov. 2010

Documents must be proved by *primary evidence*, except in the *eight* cases mentioned below.

S. 65 provides that secondary evidence of the existence, condition or contents of a document may be given in the following *eight* cases:

1. When the *original is in the possession* or power —
   (a) of the person *against* whom the document is sought to be proved; *or*
   (b) of any person *out* of reach of, or *not* subject to the process of the Court; *or*
   (c) of any person legally bound to produce it, and when, after notice, such person does *not* produce it.
2. When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest.
3. When the *original* has been *destroyed* or *lost*.

To prove the *loss* of a document, some evidence of *diligent* search is required. Therefore, if a person *cannot* show proof of the *search* of the original, he will *not* be allowed to produce copies as evidence. However, in a case

decided by the Privy Council, when a promissory note filed along with a plaint *disappeared* from the files of the Court, it was *held* that the plaintiff was entitled to give secondary evidence of the document. He was *not* bound to show how the loss or disappearance arose or who removed it from the file. (*Tulsi Ram* v. *Ram Saran*, 27 B.L.R. 777 P.C.)

4. When the party offering evidence of the contents *cannot* (for no fault or neglect of his) produce the original in reasonable time.

5. When the original is of such a nature as *not* to be easily *movable* (e.g., a writing on a wall, inscription on tombstones, trees, *etc.*). Secondary evidence is admissible in such cases because of the *gross inconvenience* and *impracticability* of producing the original.

[In cases, 1, 3, 4 and 5, any secondary evidence of the contents of the document is admissible.

In case 2, the written admission of such a document is admissible.]

6. When the original is a *public document*.

This clause protects the originals of public records from the danger of constant production in Court.

7. When the original is a document of which a *certified copy is permitted* to be given in evidence.

Where, however, an original document *cannot* be given in evidence due to a statutory prohibition (as for instance, an income- tax return), its certified copy also *cannot* be admitted in evidence.

8. When the fact to be proved is the *general result* of *numerous accounts* or other documents which *cannot* conveniently be examined in Court. In such a case, the evidence of any person *skilled* in the examination of such documents, and who has examined them, is admissible.

This clause is meant for saving public time. Where the fact to be proved is the *general result* of the examination of numerous documents, and *not* the *contents* of each particular document, and the documents are such as *cannot* be conveniently examined in the Court, evidence may be given as to the *general result* of the documents by a person who has examined them and who is skilled in the examination of such documents, although such documents may *not* be public documents within the meaning of this section.

It will thus be seen that S. 65 enumerates the *eight* exceptional cases in which *secondary evidence* is *admissible*.

It may be noted that, under S. 65, the word 'document' means a document admissible in *evidence*. If a document is inadmissible in consequence of *not being registered*, or *not* being properly *stamped*, or for any other reason, secondary evidence *cannot* be given of its existence. S. 65 presupposes that but for one or other of the barriers stated therein, the document would have been capable of proving its contents under Ss. 62 and 64. Secondary evidence

can only be given when the primary evidence or the document itself is admissible. When certain evidence is inadmissible, no secondary evidence is admissible. An unstamped or an insufficiently stamped pronote is not admissible in evidence; see S. 35 of the Indian Stamp Act. Therefore, a copy of such a document is also inadmissible. (*Raja of Bobbili* v. *Inuganti*, 26 I. A. 262; *Hiralal* v. *Shankar*, 45 Bom. 1170)

So also, if a deed of gift is inadmissible in evidence for want of registration, no secondary evidence of the deed can be given in a suit to recover the gifted property.

Several cases have laid down that if a copy of a document is admitted in evidence in the Court of the first instance without any objection, no objection as to its admissibility can be taken in the Appeal Court. The question of proof of a document is a *question of procedure*, and *cannot* be waived. However, a question of *relevancy* of a document is a *question of law* and can be raised at the appellate stage also.

Write a short note on : Rules as to notice to produce.
M.U. Apr. 2010
June 2019

RULES AS TO NOTICE TO PRODUCE — S. 66 provides that secondary evidence of the contents of the document referred to in section 65 [item (1)(c) above] *cannot* be given, *unless* the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is (or to his attorney or pleader), *notice to produce* it. If no notice is prescribed by law, it must be such as the Court considers *reasonable* under the circumstances of the case.

Such notice is *not* required —

(i) when the Court thinks it fit to *dispense* with it;

(ii) when the document to be proved is itself a *notice*;

(iii) when the person in possession of the document is *out of reach of*, or *not* subject to the process of the *Court*; *or*

(iv) when the adverse party —

(a) had *admitted* the loss of the original; *or*

(b) has the *original in Court*; *or*

(c) has obtained possession of the original by *fraud or force*; *or*

(d) *knows* that he will be *required* to produce it.

This section lays down that a notice must be given before secondary evidence can be received under S. 65(a). Notice to produce a document must be in writing. Order XI r. 15 and r. 16 of the Civil Procedure Code prescribe the form of a notice to produce a document. Notice is required in order to give the opposite party a sufficient opportunity to produce the document, and thereby to secure the best evidence of its contents. Such notice may be dispensed with if it is *not* necessary on the pleading or if the Court thinks fit to dispense with it.

4. Special provisions as regards electronic records (Ss. 65A & 65B)

Write a short note on : Admissibility of electronic records.
M.U. Nov. 2016
May 2017

Under the *newly inserted Ss. 65A and 65B*, if the *four conditions* listed below are satisfied, any information contained in an electronic record which is printed on paper, stored, recorded or copied in an optical or magnetic media, produced by a computer ("computer output") is to be deemed to be a "*document*" — and becomes *admissible* in any proceedings — without further proof or production of the original, as *evidence* of any contents of the original or any facts stated therein, of which direct evidence would be admissible.

What is documentary evidence? Examine the law relating to admissibility of electronic records in a court of law.
M.U. May 2018

The *four conditions* referred to above are:

(1) The computer output containing such information should have been produced by the computer during the period when the computer was used regularly to store or process information for the purposes of any activities regularly carried on during that period by the person having lawful control over the use of the computer.

What is electronic record? (2 marks)
M.U. June 2019

(2) During such period, information of the kind contained in the electric record was regularly fed into the computer in the ordinary course of such activities.

(3) Throughout the material part of such period, the computer must have been operating properly. In case the computer was *not* properly operating during such period, it must be shown that this did *not* affect the electronic record or the accuracy of its contents.

(4) The information contained in the electronic record should be such as reproduces or is derived from such information fed into the computer in the ordinary course of such activities.

Where in any proceedings, it is desired to give evidence of an electronic record, a Certificate containing the particulars prescribed by S. 65B of the Act, and signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities would be *sufficient evidence* of the matters stated in such a Certificate.

It is also provided that, if over any period of time, the function of storing or processing information for the purposes of any activities regularly carried on during that period, as mentioned in condition (2) above was regularly performed by computers, whether -

(a) by a combination of computers operating over that period, or

(b) by different computers operating in succession over that period, or

(c) by different combinations of computers operating in succession over that period, *or*

(d) in any other manner involving the successive operation over that period, of one or more computers and one or more combinations of computers, -

all the computers used for that purpose during that period are to be treated as constituting one single computer.

5. Proof of signature, digital signature or handwriting of a document

1. If a document is alleged to be *signed* or to have been *written* by any person, the *signature* or the *handwriting* as is *alleged* to be in that person's handwriting must be proved to be in his handwriting. (S. 67)

2. If the *digital signature* of any subscriber is alleged to have been affixed to any electronic record, the fact that such digital signature is the digital signature of the subscriber must be proved, except in the case of a *secure digital signature*. (S. 67A)

3. In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may —

(a) direct that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;

(b) direct any other person to apply the public key listed in the Digital Signature Certificate and verify such digital signature. (S. 73A)

4. To ascertain the *signature, writing, seal* or *finger impression* of a person, it may be *compared* with the admitted or proved signature, writing, seal or finger impression of that person, although such signature, *etc.*, has *not* been produced or proved for any other purpose. (S. 73) The Court may also direct *any person* present in Court to write any words or figures or to make any finger impression, to enable it to compare them with those alleged to have been written or made by him. (S. 73)

In *Khajotia* v. *The State of Maharashtra*, the Bombay High Court *held* that the Court can direct an accused to give his specimen handwriting in Court, with a view to forming its opinion as to whether the disputed writing was the handwriting of the accused or *not*. However, it was further *held* that this power does *not* extend to directing the specimen handwriting of the accused so taken in Court, to be sent to the Handwriting Expert to help the prosecution.

6. Proof of execution of a document required by law to be attested

The law requires several documents to be attested, as for example, (1) Wills, (Ss. 57 and 63, Indian Succession Act); (2) a mortgage, the principal money secured by which is ₹ 100 or more (Transfer of Property Act, S. 59); and (3) a gift of immovable property (Transfer of Property Act, S. 132). The *four ways* of proving such a document are as follows:

1. The *admission* of a party to an attested document of its execution by himself is sufficient proof of its execution as against him. (S. 70)

This admission relates only to the execution. It must be distinguished from the admissions mentioned in Ss. 22 and 65(b), which relate to the *contents* of a document.

To be effectual under this section, 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 S. 68, by calling the attesting witnesses.

2. *Such* a document *cannot* be used in evidence until *one attesting witness* at least has been called for proving its execution, *if* there is an attesting witness (*i*) alive, and (ii) subject to the process of the Court, and (iii) *capable* of giving evidence. But, it is *not necessary even* to call an attesting witness if the document (*not* being a *will*), *is registered, unless its execution* by the person by whom it purports to have been executed is *specifically denied*. (S. 68)

How is a public document certified? (2 marks) M.U. May 2015

This provision of S. 68 simplifies the difficulty of calling attesting witnesses where the document to be proved is a *registered* one, and is *not* a will, and its execution is *not* specifically denied by the person executing it. Under this provision, if the execution is *not* denied, it is *not necessary* to call any attesting witness.

3. (i) If no such attesting witness can be found, *or* (ii) if the document has been executed in the United Kingdom, it must be proved that —

(a) the attestation of *one* attesting witness at least is in his handwriting; *and*

(b) the *signature* of the person executing the document is in his handwriting. (S. 69)

4. If the attesting witness *denies* or *does not recollect* the execution, the execution may be proved by *other* evidence. (S. 71)

It is to be noted that fate of an attested document *does not* lie at the mercy of an attesting witness. If the attesting witness turns hostile, other evidence *may* be given to prove execution and attestation of the document. Such a document may then be proved in the same manner as documents which are *not* required to be attested.

An attested document which is *not* required by law to be attested may be proved *as if it was unattested*. (S. 72) "To attest" is to bear witness to a fact. To attest a document means *not only* to subscribe one's name to it, *but also* to be in fact *present at its execution*. To prove an *attested document*, one must prove (i) attestation, and (ii) *signature;* to prove an *unattested* document, one has to prove *execution* only.

Provisions of the Evidence Act as to attestation (Ss. 89-90)

1. The Court must presume that every document called for and not produced after notice to produce, was attested and executed in the manner required by law.

2. There is a presumption of the execution and attestation in the case of a document 30 years old produced from proper custody.

Various modes of proving execution of documents (Ss. 67-73)

Ss. 67 to 73 deal with the various modems of proving execution of documents.

Where a document is alleged to be signed or written by a particular person, the signature or writing must be proved to be in that person's handwriting (S. 67). The following modes of proving a signature or writing are recognised 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 : S. 45;

(4) by calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written : S. 47;

(5) by comparing in Court the disputed signature or writing with some admitted signature or writing : S. 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 a 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.

The signature or handwriting may also be proved by any other circumstantial evidence.

What are private documents?
(2 marks)
M.U. Nov. 2015
June 2018
Dec. 2018

PUBLIC DOCUMENTS (Ss. 74-76)

All documents are *private* (S. 75), *except* the following, which are *public* documents, *viz.*,

1. Documents forming the acts or records of the acts —
   (i) of the sovereign authority,
   (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. (S. 74)

Write a short note on : Public document.
M.U. Nov. 2014
Nov. 2015
June 2019

Certified copies of public documents (S. 76)

What is a public document?
(2 marks)
M.U. May 2017
Nov. 2019

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, signed and sealed) at the foot that it is a true copy. A copy so certified is called a *'certified copy'*.

Explanation — An officer is deemed to have custody of a document who, by the ordinary course of official duty, is authorised to deliver certified copies of it.

PUBLIC DOCUMENTS HOW PROVED (Ss. 77-78)

What are public documents? How are they proved?
M.U. Apr. 2010
Dec. 2018

1. The contents of public documents may be proved by the production of their *certified copies*. (S. 77)

The word 'may' in this section denotes another mode of proof (optional to the party) that the ordinary one, *viz.*, the production of the original.

Special modes of proving certain public documents (S. 78)

Write a short note on : Evidentiary value of public and private documents.
M.U. Apr. 2010
Apr. 2011

The following *public* documents may be *proved* as follows :

1. Acts, orders or notifications of the Central Government in any of its documents, or of the Crown Representative or any State Government or any department of any State Government — by the records of the departments, certified by the heads of those departments respectively, or by any document purporting to be printed by order or any such Government or, as the case may be, of the Crown Representative.

2. The proceeding of the Legislatures — by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order to the Government concerned.

3. Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government — by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer.

4. The Acts of the Executive or the proceedings of the legislature of a foreign country — by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign or recognition thereof in some Central Act.

5. The proceedings of a municipal body in a State — by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body.

6. Public document of any other class in a foreign country — by the original or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

DEPOSITION OF A WITNESS HOW PROVED — 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.

8. PRESUMPTIONS AS TO DOCUMENTS (Ss. 79-90)

(a)The Courts *shall* presume as follows:

Explain in detail different presumptions as to documents. M.U. June 2019

Documents	Presumption
1. Every certificate, certified copy or other document, admissible as evidence of any particular fact and duly certified by any officer of the Central Government or of a State Government or by any officer in Jammu and Kashmir authorised thereto by the Central Government :	1. (i) That it is genuine, provided it is (a) substantially in the form, and (b) purports to be executed in the manner directed by law. (ii) That any officer by whom it purports to be signed or certified held, when he signed it, the official character he claims in such paper. (S. 79)

This section proceeds upon the maxim *omina praesumuntur rite esse acta* (all acts are presumed to be rightly done). In fact, all the following sections (inclusive of Sec. 90) are illustrations of, and founded upon, this principle. But though the Courts are directed to draw a presumption in favour of official certificates, it is *not* a conclusive presumption; it is rebuttable. It is only a *prima facie* presumption, and if the certificate is *not* correct, its correctness may be shown. On the same maxim stands the last clause of this section. It is well-settled law that where a person acts in an official capacity, it is to be presumed that he was duty appointed.

Documents	Presumption
2. Any document purporting to be (a) a record or memorandum of evidence of a witness in a judicial proceeding or before an officer authorised to make evidence, *or* (b) a statement or confession by a prisoner or accused person taken in accordance with law and signed by a Judge or Magistrate or officer :	2. (i) That the document is genuine. (ii) That the evidence, statement or confession was duly taken. (iii) That statements as to the circumstances under which such evidence, statement or confession was taken and made by the person signing it are true. (S. 80)
3. Any gazette, newspaper, journal, copy of a private Act of Parliament, printed by the Queen's Printer or document, directed by law to be kept by any person :	3. That the document is genuine, if it is — (i) kept substantially in the form required by law, *and* (ii) produced from proper custody. (S. 81)

4. Any document admissible in any Court of England or Ireland without proof of seal or stamp or official character of the person signing it :	4. (i) That such seal, stamp or signature is genuine. (ii) That the person signing it held, at the time, the judicial or official character which he claims. (S. 82)
5. Maps or plans made by the authority of Government :	5. (i) That they were so made. (ii) That they are accurate. (S. 83)

Maps or plans made for the purposes of any cause must be proved to be *accurate*. (S. 83)

Under S. 81A of the Act, the Court *shall* presume the genuineness of every electronic record, purporting to be the Official Gazette, *or* purporting to be an electronic record directed by law to be kept by any person, *if* such electronic record is kept substantially in the form required by law and is produced *from proper custody*.

6. Any book printed or published under the authority of the Government of any country containing the laws or repor ts of decisions of such country :	6. That it is genuine. (S. 84)

S. 57 authorises the Courts to take judicial notice of the existence of all laws and statutes in the territory of India and in the United Kingdom. S. 74 recognizes statutory records to be public records. S. 78 lays down the method of proving the statutes passed by the legislature.

7. A Power-of-attorney executed before and authenticated by a Notary Public, or Court, Judge, Magistrate, or an Indian Consul, or Vice-Consul :	7. That it was so executed and authenticated. (S. 85)
8. Every document called for and *not* produced after notice to produce :	8. That it was *attested*, stamped and *executed* in the manner required by law. (S.89)

(b) The Court *may* presume as follows :

Documents	Presumption
1. Certified copy of a judicial record of a country *not* forming part of India or of Her Majesty's dominions :	1. That it is genuine and accurate. (S. 86)

Such a presumption will arise only if it purports to be certified in any manner which is certified by a representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records. [A Political Agent is a representative of the Central Government : S. 86.]

2. (a) A book to which the Court may refer for information on matters to public or general interest;	2. That it was written and published : (i) by the person by whom it purports to have been written or published and (ii) at the time and place in which it purports to have been written or published : S. 87.
(b) A published map or chart (produced for its inspection) the statements of which are relevant facts :	
3. A message forwarded from a telegraph office to the person to whom it purports to be addressed :	3. That it *corresponds* with a message delivered for transmission at that office. (S. 88)

The Court cannot, however, make any presumption as to the person by whom such message was delivered for transmission. (S. 88)

4. Ancient documents (S. 90) *(See below.)*

9. PRESUMPTION AS REGARDS ELECTRONIC AGREEMENTS, DIGITAL SIGNATURE CERTIFICATES AND ELECTRONIC MESSAGE (Ss. 85A, 85B, 85C, 88A & 90A)

What is the presumption as regards electronic messages? (2 marks) M.U. Nov. 2016 June 2018

What is a secure digital signature? (2 marks) M.U. May 2015 Nov. 2015 Dec. 2018

Define a digital signature. (2 marks) M.U. Apr. 2016

The Indian Evidence Act has been amended by the *Information Technology Act, 2000*, to provide for presumptions in respect of electronic documents. A summary of these new provisions is given below.

(a) Presumption as to electronic agreements

S. 85A provides that 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 signatures of the parties.

(b) Presumption as to electronic records and digital signatures

Under S. 85B, in any proceedings involving a secure electronic record, the Court *shall presume*, unless the contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status relates.

Until the contrary has been proved, the Court *shall presume* that the secure electronic signature is affixed by the subscriber with the intention of signing or approving the electronic record.

However, except in the case of a secure electronic record or a secure electronic signature, there is *no presumption* regarding the *authenticity* and *integrity* of the electronic record or any electronic signature.

(c) Presumption as to Digital Signature Certificates

Under S. 85C, *unless the contrary is proved*, the Court *shall presume* that the information listed in a Electronic Signature Certificate is correct, except for information specified as subscriber information, which has *not* been verified, if the Certificate was accepted by the subscriber.

(d) Presumption as to electronic messages

Under S. 88A, the Court *may presume* that an electronic message forwarded by the originator through an electronic mail (e-mail) server to the addressee to whom the message purports to be addressed, corresponds with the message as fed into his computer for transmission. However, the Court *shall not make any presumption* as to the person by whom such message was sent.

(e) Presumption as to electronic records which are five years old

What is the presumption as to electronic records which are five years old as per S. 90-A? (2 marks) M.U. May 2017 Nov. 2019

S. 90A provides that where any electronic record, purporting or proved to be *five years old*, is produced from any custody which the Court considers *proper in that particular case*, the Court *may presume* that the electronic signature which purports to be the electronic signature of any particular person was so affixed by him or any person authorised by him in this behalf.

What is proper custody as regards electronic records? — It is clarified that electronic records are said to be *in proper custody* if they are in the place in which, and under the care of the person with whom, they naturally would be. However, no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable. *(Explanation to S. 90A)*

10. 'ANCIENT' DOCUMENT, HOW PROVED

Where any document, purporting or proved to be *thirty years* old, produced from any custody which the Court considers *proper*, the Court may presume that the *signature* and every other part of such document which purports to be in the handwriting of any particular person, is in that *person's handwriting*, and in the case of document *executed* or *attested*, that it was *duly* executed and *attested* by the persons by whom it purports to be executed and attested. (S. 90)

What is proper custody

Documents are said to be in *proper custody* if they are in the place in which, and under the care of the person with whom, they would *naturally* be. However, no custody is improper if it is proved to have had a *legitimate* origin, or if the circumstances of the particular case are such as to render such an origin *probable*. (S. 90, Expln.)

Illustrations of 'Proper custody' — *(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 lands in *B*'s possession, which were deposited with him by *B* for safe custody. The custody is *proper*.

ANCIENT DOCUMENTS — The *object* of this section is *not* to make it too difficult for persons relying upon ancient documents to utilise those documents in proving their cases. It is intended to do away with the insuperable difficulty of proving the handwriting, execution, and attestation of documents in the ordinary way after a lapse of many years.

The *principle* underlying this section is that if a private document, which is thirty years old or more, is produced from proper custody, and is, on the face of it, free from suspicion, the Court *may presume* that it has been signed or written by the person whose signature it bears or in whose handwriting it purports to be, and that it has been duly attested and executed, if it purports so to be. In other words, *documents which are thirty years old prove themselves*. The age of a document, its unsuspicious character, the production from proper custody and other circumstances are the foundation for the presumption.

This rule is founded on *necessity* and *convenience*. It is often extremely difficult, and may sometimes be impossible, to prove the handwriting or signature or execution of ancient documents after a lapse of many years. It is, therefore, presumed that all persons acquainted with the execution of documents are dead, and proof of those facts are dispensed with. *Thus*, the *presumption relates to the execution of the documents, that is, signature, attestation, etc., in other words, its genuineness, but not to the truth of its contents.* (Ramkrishna v. Gangadhar, A.I.R. 1958 Orissa, 26)

As stated above, when a document is or purports to be more than thirty years old, if it is produced from what the Court considers to be proper custody, it may be presumed (a) that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting; *and* (b) that it was duly executed and attested by the person by whom it purports to be executed and attested.

The presumption allowed by this section is *not* a presumption which the Court is bound to make, and the Court may require the document to be proved *in the ordinary manner*. It is in the discretion of a Court *whether or not* to raise the presumption in favour of a document covered by this section. But this discretion is *not* to be exercised arbitrarily; it must be governed by principles which are consistent with law and justice. And while, on the other hand, it is clear that care is called for in applying the presumption, on the other hand, it is

clear that very great injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously *or* for inadequate reasons.

If a document purports to be an ancient document and to come from proper custody, the party relying upon it fails to satisfy the Court of its due execution, it does *not* follow that its genuineness will *not* be presumed. But if no such grounds exist, and it satisfies the conditions prescribed by S. 90 of the Act, then proof of execution is dispensed with, and it is to be dealt with on the same footing as any other genuine instrument.

The section requires the production of the document in regard to which the Court may make the statutory presumption. Production of a *copy* is *not sufficient* to justify the presumption. (*Basant Singh* v. *Brij Saran*, A.I.R. 1935 P.C. 132). Therefore, the presumption can be raised *only with reference to original documents*, and *not* to copies thereof. If the document appears to be signed by the agent of the person, and if there is no proof that he was an agent, the section does *not* authorise the presumption on the part of the agent to represent that person. (*Harihar Prasad* v. *Deonarin Prasad*, A.I.R. 1956 S.C. 305)

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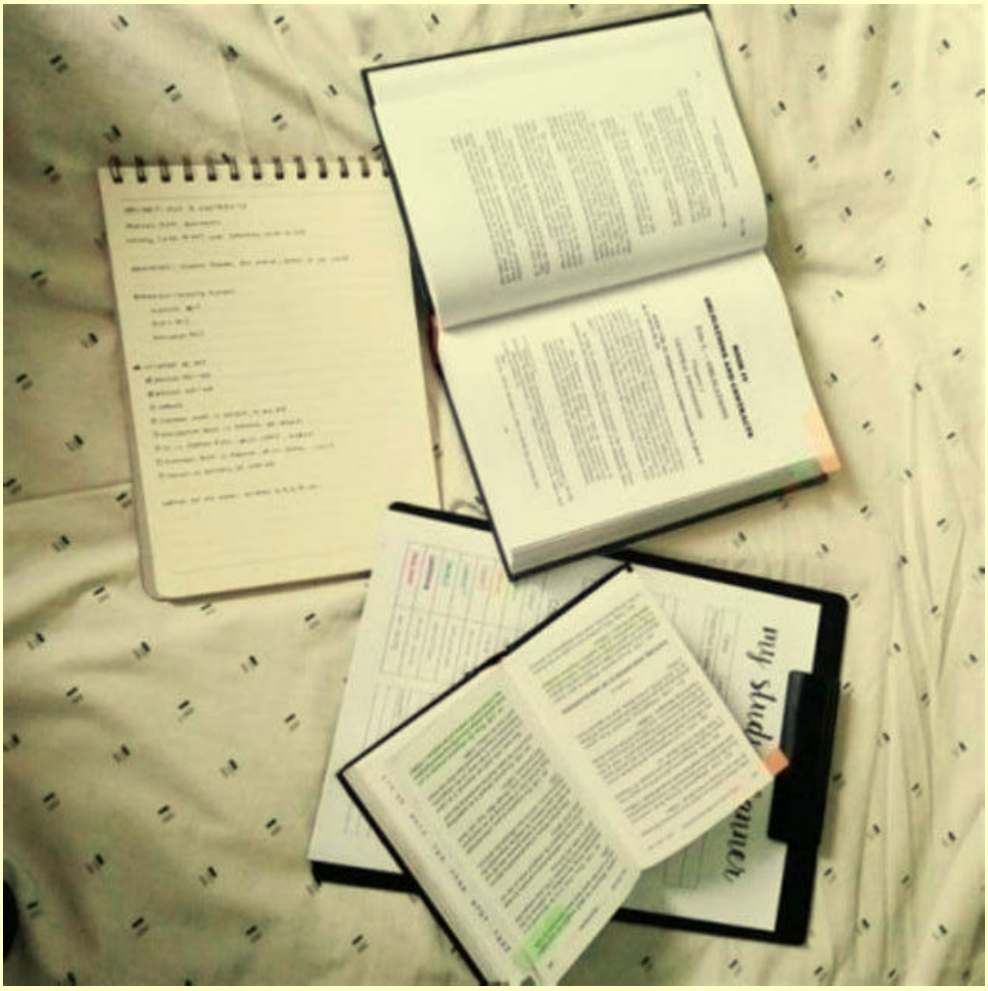

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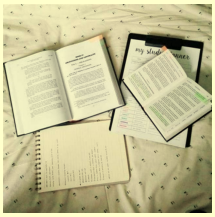

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EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE (Ss. 91-100)

A. Evidence of Terms of Contracts, Grants, and Other Dispositions of Property Reduced to Form of Document (Ss. 91-92 & 99)

When the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document, and when any matter is required by law to be reduced to the form of a document —	no evidence can be given in proof of the terms of such contract, grant, etc., except —	(i) the document itself, or (ii) secondary evidence of its contents, in cases in which secondary evidence is admissible. (S. 91)

Explain : Exclusion of oral by documentary evidence.

M.U. Nov. 2014
Nov. 2016
June 2019

Exception 1 — When a *public officer* is required by law to be appointed in writing, and when it is shown that any particular person has *acted* as such officer, the *writing* by which he is appointed *need not be proved.*

Exception 2 — *Wills* admitted to probate in India may be *proved by the probate.*

Probate means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator. Probate of a will is evidence of the contents of the will against all the parties interested thereunder. Probate is secondary evidence, but it is made admissible by this section.

Explanation 1 — This section applies equally to cases in which the contracts, grants or dispositions of property referred to, are contained in one document and to cases which they are contained in *more documents than one.*

Explanation 2 — Where there are more originals than one, *one* original *only* need be proved.

Explanation 3 — The statement, in any document whatever, of a fact *other* than the facts referred to in this section, does *not* preclude the admission of *oral* evidence as to the *same* fact. (S. 91)

Illustrations : (a) If a contract is contained in several letters, *all* the letters in which it is contained must be proved.

(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.

(d) *A* contracts in writing with *B*, for a delivery of indigo upon certain terms. The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo.

The evidence is admissible.

(e) *A* gives *B* receipt for money paid by *B*.

Oral evidence is offered of the payment.

The evidence is admissible.

SCOPE OF S. 91 — When a transaction has been reduced to writing, either by agreement of the parties or *by requirement of law*, the writing becomes the *exclusive* memorial thereof, and no evidence can be given to prove the transaction, except the *document itself*, or *secondary evidence* of its contents, where such secondary evidence is admissible.

This rule is based on the principle that *the best evidence, of which the case in its nature is susceptible,* should always be presented. The rule does *not* demand the *greatest* amount of evidence which can be possibly given of any fact, but its aim is to *prevent* the introduction of any evidence which, from the nature of the case, supposes that better evidence is withheld. In such cases, it is only fair to presume that the party has some s*inister motive* for *not* producing it, and that, if produced, his design would be frustrated.

It is a well-established rule of law that whenever written instruments are involved, any other evidence is excluded from being used, either as a substitute for such instrument *or* to contradict such instrument. As rightly remarked, this is a matter both of principle and of policy– because it would be attended with great danger, if a written document was allowed to be impeached by collateral evidence.

Summary of S. 91

(1) When the terms of *(a)* a contract, *(b)* a grant or *(c)* any disposition of property, have been reduced to the form of a document; *and*

(2) Where any matter is required by law to be reduced to the form of document —

then *(a) the document itself*, or *(b) secondary evidence of* its contents, must be put in evidence.

The *first* provision refers to a transaction *voluntarily* reduced to writing. The *second* refers to those cases in which any matter is required by law to be reduced to the form of a document, *e.g.*, sale of immovable property of the value of one hundred rupees or more, a lease of immovable property, etc.

There are two exceptions to these provisions:

1. When a public officer is required by law to be appointed in writing and any officer has acted as such, the writing need *not* be proved.

This exception is based on the presumption that when a person acts in an official capacity, it is presumed that he was duly appointed.

2. Wills admitted to *probate* in India may be proved by the probate.

A probate, it must be remembered, is the only proof of a will. It is for this reason that it is considered to be primary evidence.

Exclusion of evidence of oral agreement (S. 92)

(1) When the terms of *(a)* a contract, *(b)* a grant, *(c)* any other disposition of a property, have been reduced to the form of a document; *or*

(2) When the terms of any matter required by law to be reduced to the form of a document,

have been proved by the production of the document or by giving secondary evidence of its contents —

no evidence of any oral agreement or statement can be admitted, as between the parties to any instrument or their representatives in interest, for the purpose of *(i)* contradicting, *(ii)* varying, *(iii)* adding to, *(iv)* subtracting from, its terms.

Illustrations : (a) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped on a particular ship which is lost. The fact that the particular ship was orally excepted from the policy *cannot* be proved.

(b) A agrees absolutely in writing to pay *B* ₹ 1,000 on the first March 1873. The fact that, at the same time, an oral agreement was made that the money should *not* be paid till the thirty-first March, *cannot* be proved.

(c) An estate called "the Rampur Tea Estate" is sold by a deed which contains a map of the property sold. The fact that land *not* included in the map had always been regarded as part of the estate and was meant to pass by the deed, *cannot* be proved : S. 92.

Problem : A deed of gift is executed by *D* in favour of his wife and sons. Within a year thereafter, *D* is adjudicated insolvent on a petition by some of his creditors, and his estate vests in the Official Assignee. The Official Assignee takes out a notice of motion against *D's* wife and sons, for a declaration that the deed of gift executed in their favour by *D* was void. At the hearing of the notice of motion, *D's* wife and sons want to lead oral evidence to show that

though the document purported to be a gift, it was really a transaction supported by valuable consideration. Can they lead such oral evidence? Give reasons.

Ans. : *Yes.* The donees can lead oral evidence to show that the gift was really a transaction for consideration, as the Official Assignee is *not* a representative of the insolvent. The rule of excluding oral evidence under section 92 is applicable only as between parties to an instrument or their representatives in interest. *Strangers to the documents are outside the scope of section* 92. Therefore, the contents of documents can be varied or contradicted by oral evidence against the Official Assignee, who is *neither* a party to the document nor a representative of the party to the document. (*Bai Hira* v. *Official Assignee*, A.I.R. 1958 S.C. 448)

As seen above, under section 91, when the terms of any transaction have been reduced to the form of a document, they must be proved by the production of the document itself, the *reason* being that admission of extrinsic evidence would be equivalent to permission to substitute another contract by introduction of terms which are *not* to be found in the document.

The rule embodied in sec. 92 is a logical sequence to the rule in S. 91, and may properly be said to be a part of it. If the intention is that no substitution of the terms of a voluntary and a deliberate transaction should be allowed, it follows that no variation to the terms should also be allowed. This section, therefore, enacts that when the terms and conditions of a transaction have been reduced to writing, either by agreement of parties or by requirement of law, no oral evidence can be admitted to contradict, vary, add to, or subtract from its terms.

Under this rule, extrinsic parole (*i.e.*, oral) evidence controlling, varying, adding to, or subtracting from, the terms of solemn written instrument is *inadmissible*. Since the parties have 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. Moreover, the reception of oral testimony could create mischief and open the doors to fraud.

S. 92 does *not* exclude oral evidence of an oral agreement which contradicts or varies, *not* the terms of the contract, *but* some recitals in the contract itself (*Mukhi* v. *Kishun*). Thus, when a lease was taken on behalf of a joint family, but only one member's name appeared in the deed, it was *held* that S. 92 is no bar to the other members asserting their rights, by showing that the lease was taken on behalf of the joint family.

The following are *six exceptions* to the general rule of exclusion of evidence of oral agreement:

1. Any fact which would *(i) invalidate* any document, *or (ii) entitle* any person to any decree or order relating thereto, may be proved, such as fraud, intimidation, illegality, failure of consideration, mistake of fact or law.

Illustrations : (i) *A* enters into a written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B* as to their value. This fact may be proved.

(ii) *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 its provisions, as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.

2. Any separate oral agreement *(i)* as to any matter on which the document is silent, and *(ii)* which is *not* inconsistent with its terms, may be proved.

Illustrations : (i) *A* orders goods of *B* by a letter, in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.

(ii) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words : "Bought of *A* a horse for ₹ 500." *B* may prove the verbal warranty.

(iii) *A* hires lodgings of *B*, and gives *B* a card on which is written — "Rooms, ₹ 200 a month." *A* may prove a verbal agreement that the terms were to include partial board.

(iv) *A* hires lodging of *B* for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. *A* may *not* prove that board was included in the terms verbally : S. 92.

In such cases, the separate agreement should be on a distinct collateral matter, although it may form a part of the same transaction. The important point is that it should *not* vary or contradict the terms of the written contract.

In considering whether a case falls under this exception, the formality of the document is often an important consideration. The more formal the document (as for instance, when made by an Advocate or an Attorney), the greater will be the Court's reluctance to admit oral evidence of supplementary terms.

3. Any separate oral agreement, constituting a *condition precedent*, or the attaching of any obligation under the document, may be proved.

Illustrations : (i) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does *not* send the money. In a suit for the amount, *A* may prove this.

(ii) *A* and *B* make a contract in writing to take effect 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 it was delivered.

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 has happened, oral evidence is admissible to show that as the event did *not* take place, there is no agreement at all.

Thus, in one case, where the defence was that a pro-note was executed by the defendant only as a receipt for the earnest money paid to him under an agreement with the plaintiff to purchase the defendant's properties, and that the note was *not* to be acted upon in the case of failure of the transaction, it was *held* that oral evidence *can* be admitted to support such a plea.

ESCROW — A deed may be delivered as an *escrow* (or scroll), *i.e.*, as a simple writing, *not* to become the deed of the party expressed to be bound thereby, until some condition is performed, *or* until the person to benefit under the deed executes some other deed or document as agreed with the party delivering the escrow. No particular form is required for an escrow; nor should the delivery of an escrow be in any particular form. Delivery as an escrow may be made in words or by conduct, the important thing in case of such delivery being that the party should, expressly or impliedly, declare his intention to be bound by the provisions of the deed, *not* immediately, *but only* in the case of and upon the performance of some other condition.

4. Any subsequent oral agreement to *rescind* or *modify* any such contract, grant, or disposition of properly, may be proved — *except* when such contract or grant *(i)* is required to be in *writing or (ii)* has been *registered*.

This exception deals with *three* distinct situations. *Firstly*, in case where the law does *not* require a *written* agreement, the parties may choose, for their own convenience, to reduce their agreement into writing. In such cases, evidence of any subsequent *oral* agreement modifying the written agreement or rescinding it altogether, is *admissible*.

Secondly, if an agreement is reduced to writing, because the law requires it to be so done, such agreement can be rescinded or modified only by another written instrument. Parole (*i.e.*, oral) evidence *cannot* be given of any subsequent agreement rescinding or modifying it.

Lastly, if a writing has been registered (whether or *not* registration is compulsory for such a document), it can be rescinded or modified by another registered instrument only. Parole evidence of any subsequent agreement rescinding or modifying the registered instrument will *not* be admitted.

5. Any usage or custom by which incidents *not* expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are *not* repugnant to, or inconsistent with, its express terms.

This exception reproduces the *English rule of law* on the subject. Under this exception, oral evidence is admissible to explain or supply terms in commercial transactions like contracts, bills of exchange, insurance policies, *etc.* on the presumption that the parties did *not* intend to put into writing the whole of their agreement, but tacitly 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. The rule is *not* confined to mercantile transactions, but applies also to other transactions where established usages prevail.

6. Any fact which shows in what *manner* the language of the document is related to existing facts, may be proved.

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.

SCOPE OF S. 92 — When a transaction has been reduced to writing, either by requirement of law or by agreement of the parties, the writing becomes the exclusive memorial thereof, and no *extrinsic evidence is admissible*, either *to prove* the transaction *independently or to contradict, vary, add to or subtract from*, the terms of the document, though the contents of such a document may be proved either by primary or secondary evidence.

This rule is based on *two* grounds : (1) that to admit inferior evidence when the law requires superior evidence would be to nullify the law; *and* (2) that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves that they intended the writing should be placed beyond the reach of future controversy, bad faith or treacherous memory. All parole testimony of conversation held between parties, or declarations made by either of them, whether before, or after, or at the time of a contract, will be rejected, because such evidence would tend to substitute a new and different contract for the one actually agreed upon.

This section excludes the evidence of oral agreements, and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under S. 91; in other words, it is *after* the document has been produced to prove its terms under S. 91, that the provisions of S. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases between parties to the instrument or their representatives in interest.

Inter-relation between S. 91 and S. 92

It will be noticed that Ss. 91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid of S. 92, and S. 92 would be inoperative without the aid of S. 91. Since S. 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under S. 91, it may be said that it makes the proof of the document conclusive of its contents. Like S. 91, S. 92 also can be said to be based on the *best evidence rule*.

Section 91 applies to all documents, whether they purport to dispose of rights or *not*, whereas S. 92 applies to documents which can be described as dispositive. S. 91 applies to documents which are both bilateral and unilateral, unlike S. 92, the application of which is confined only to bilateral documents.

S. 91 lays down the rule of universal application, and is *not* confined to the executant or executants of the documents. S. 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that S. 92 does *not* apply to strangers, who are *not* bound or affected by the terms of the document. Persons other than those who are parties to the document are *not* precluded from giving extrinsic evidence to contradict, vary, add to, or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by

S. 92 about the exclusion of oral agreements can be invoked. This position is made absolutely clear by the provisions of S. 99, which provides that persons who are *not* parties to the document or their representatives in interest, *may* give evidence of facts to show a contemporaneous agreement varying the terms of the document. (*Hira Devi* v. *Official Assignee, Bombay,* A.I.R. 1958 S.C. 448)

Who may give evidence of agreement varying terms of document (S. 99)

Persons who are *not parties* to a document, or their re- presentatives in interest, may give evidence of a *contemporaneous agreement,* varying the terms of the document.

Illustration : A and *B* make a contract in writing, that *B* shall sell *A* certain cotton, to be paid for on delivery. At the same time, they make an oral agreement that three months' credit shall be given to *A*. This could *not* be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

SCOPE — Section 92 forbids the admission of evidence of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from, the terms of a written document as *between the parties to such document or their representatives in interest.* The rule of exclusion laid down in the section does *not*, however, apply to the case of a *third* party who is *not* a party to the document. On the contrary, S. 99 distinctly provides that persons who are *not* parties to a document *may give evidence* tending to show a *contemporaneous* agreement varying the terms of the document. Though only variation is specifically mentioned in S. 99, there can be no doubt about the right of a third party to lead evidence, *not only* to vary the terms of the document, *but* to contradict the said terms, or to add to or subtract from them. (*Hira Devi* v. *Official Assignee, Bombay*, A.I.R. 1958 S.C. 448)

Evidence as to matters in writing (S. 144)

Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property as to which he is giving evidence, was *not* contained in a document, and the contents of any document, which, in the opinion of the Court, *ought* to be produced. The adverse party may object

to such evidence being given until such document is produced, or until such facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation — A witness may give oral evidence of statements made by other persons about the contents of documents, if such statements are in themselves relevant facts.

Illustration : The question is whether A assaulted B.

C deposes that he heard A say to D, "B wrote a letter accusing me of theft, and I will be revenged on him." This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

SCOPE — S. 144 lays down a rule for the purpose of carrying out the provisions of section 91, as to the exclusion of oral by documentary evidence. Thus, 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, he may be stopped, and the production of the document enforced or the right to give secondary evidence made out.

This rule extends to any document which, in the opinion of the Court, ought to be produced. Care must, however, be taken *not* to apply it to cases in which oral evidence is given of statements are relevant. If, for instance, the question, is whether A had murdered B, a witness might prove that A had said "B's bond is iniquitous. I will kill him sooner than pay it", without the bond being produced, the reason obviously being that what the witness wants to prove is not the contents of the document, but A's *feeling* about the contents of the document, as supplying a motive for his crime.

B. Extrinsic Evidence to Explain Ambiguity in a Document (Ss. 93-98 & 100)

What is an ambiguous document? (2 marks) M.U. Nov. 2017

Sections 93 to 98 lays down the rules as to interpretation of documents with the aid of extrinsic evidence. It often happens that the language used in a document is ambiguous, and the question of the admissibility of extraneous evidence comes up before the Court. Interpretation of a document involves the ascetainment of the meaning of a document. The most general rule on this point is that of Lord Eldon, who once said, "Generally speaking, you must construct an instrument by what is found within the four corners." Of course, this rule is subject to several qualifications, depending on the facts and circumstances of each case.

Commenting on this rule of evidence, it was observed in an English case (*Shore v. Wilson*, (1842) 9 Cl & F 355), as follows:

"If the rule were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, for the ablest advice might be controlled and the clearest title undermined,

if at some future period, parole evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument or of the objects he meant to benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

When extrinsic evidence

Can be given (Ss. 95-98)	*Cannot* be given (SS. 93-84)
1. When the *language* used in the document is *plain* in itself, *but* unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. (S. 95) *Illustrations : A* sells to *B* by deed "my house in Calcutta." *A* has no house in Calcutta, but it appears that he had a house at Howrah, of which *B* had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house at Howrah.	1. When the *language* used in a document is, *on its face, ambiguous* or *ineffective*, evidence may *not* be given of facts which would show its meaning or supply its defects. (S. 93) *Illustrations : (a) A* agrees, in writing, to sell a horse to *B* for "₹ 1,000 or ₹ 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.
2. When the facts are such that the language used might have been meant to apply to any *one*, and could not have been meant to apply to *more* than one of several persons or things, — evidence may be given of facts which show *which* of those persons or things it was intended to apply to. (S. 96) *Illustrations : (a) A* agrees to sell to *B*, for ₹ 1,000, "my white horse." *A* has two white horses. Evidence may be given of 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	2. 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 has *not* meant to apply to such facts. (S. 94) *Illustrations : A* sells to *B*, by deed, "my estate at Rampur containing 100 bighas". *A* has an estate at Rampur containing 100 bighas. Evidence may *not* be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

in the Deccan or Hyderabad in Sind was meant.

3. When such language applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply. (S. 97)

Illustrations : 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.

S. 97 is based upon the maxim *falsa demonstration non nocet* (a false description does not vitiate a deed).

4. Evidence may be given to show the meaning of —

(a) illegible or not commonly intelligible characters,

(b) foreign, obsolete, technical, local and provincial expressions,

(c) abbreviations,

(d) words used in a peculiar sense. (S. 98)

Illustrations : A, a sculptor, agrees to sell to B, "all my mods." A has both models and modelling tools. Evidence may be given to show which he meant to sell.

'PATENT' AND 'LATENT' AMBIGUITY — Ambiguities in documents are said to be either *patent* or *latent*, the former arising where the instrument, on its face, is unintelligible, as where the name of a legatee is left wholly blank in a will. Latent ambiguity, on the other hand, arises where the words of the instrument are clear, but their application to the circumstances is doubtful, as where a legacy is given to "my niece Jane" and the testator has two nieces of that name. Section 93 embodies the rule with regard to *patent ambiguity* and Ss. 95-97 relate to *latent ambiguity*.

In other words, *patent ambiguity* must be understood as an ambiguity which is inherent in the words and is incapable of being dispelled, either by any legal rules or by applying a known, conventional meaning. A *latent ambiguity*, on the other hand, is *not* ambiguity in the language, but in the relation of the language used to the existing facts. Thus, if *X* agrees to sell his "house in Mumbai", the language is *not* ambiguous. But, it would be a case of latent ambiguity if *X* has no house in Bombay, but only a house in Pune, *or* if he has two houses in Mumbai.

Thus, 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 of the pleader. The Court *held* that the ambiguity in the document was *not patent ambiguity, but latent ambiguity* which could be cleared up by extrinsic evidence under S. 96.

Lastly, it is clarified that nothing in this Chapter affects the provisions of the Indian Succession Act, 1925, as to the construction of *wills*. (S. 100)

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6

BURDEN OF PROOF (Ss. 101-114)

The following *seven* topics are discussed in this Chapter:

A. Definition
B. On whom burden of proof lies
C. Presumption as regards offences in disturbed areas
D. Conclusive proof
E. Presumption in certain cases of suicide and dowry deaths
F. Presumption of existence of certain facts
G. Presumptions in rape cases.

A. Definition (S. 101)

When a person is bound to *prove the existence of any fact,* it is said that the *burden of proof* lies on that person.

BURDEN OF PROOF — The phrase "burden of proof" has *two* distinct (and frequently confused) meanings:

Elaborate fully : Burden of proof. M.U. Nov. 2010 June 2018 Dec. 2018 Nov. 2019

(i) The burden of proof as a *matter of law and pleading, the burden, as it has been called, of establishing a case.* This burden rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is fixed, at the beginning of the trial, by the statements of the pleadings, and it is settled as a question of law, *remaining unchanged under any circumstances whatever.* This rule is embodied in Section 101.

On whom does the burden of proof lie? (2 marks) M.U. Nov. 2016 Nov. 2017

(ii) The burden of proof as *matter of adducing evidence* — The burden of proof in this sense is always unstable, and may shift constantly throughout the trial. This aspect of the burden of proof is contained in Section 102. It lies at first on the party who would be unsuccessful if no evidence at all was given on either side. This being the test, the burden of proof *cannot remain constant,* but 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 rebutting evidence is produced by his opponent. This being the position, the question as to the *onus of the proof* is only a rule for deciding on whom the obligation rests of going further if he wishes to win.

Write a short note on : Burden of proof versus onus of proof. M.U. Nov. 2010

Write a short note on : Burden of proof. M.U. Nov. 2014 May 2015 Apr. 2016

As observed by the Gauhati High Court, in a criminal trial, the burden of proving the prosecution's case lies squarely on the prosecution and *this general burden never shifts.* The defence version may even be false; nevertheless, the prosecution *cannot* derive any advantage from the falsity or other infirmities of

the defence version, so long as it does *not* discharge its initial burden of proving the case beyond all reasonable doubt. (*Md. Alimuddin* v. *State of Assam,* 1992, Cri. L.J. 3287)

What is burden of proof? On whom does the burden of proof lie? Explain with the help of sections 101 to 114 of the Evidence Act. M.U. Nov. 2017

On whom lies the burden of proof as to ownership? (2 marks) M.U. Nov. 2014

What is burden of proof? Explain the law relating to burden of proof. M.U. June 2018

PROBLEMS

1. *A* filed a suit against a Railway Company for compensation for injuries received in an accident while travelling in a train of the Railway Company. Does the onus of proving negligence on the part of the Railway Company lie on the plaintiff?

Ans. : The onus of proving negligence of the Railway Company lies on the plaintiff, when the plaintiff asserts that the injuries caused to him are by reason of the negligence of the Railway Company. It is for *him* to show that there was negligence on the part of the company.

2. In a suit on a promissory note, which was executed by the defendant in the presence of the plaintiff, the defendant admits in his written statement the execution of the promissory note, but denies consideration.

The plaintiff died before the suit came up, and the plaintiff's son came on record as his heir and legal representative. What evidence has the plaintiff's son to adduce to succeed in getting a decree?

Ans. : In this case, as the defendant admits the execution of the promissory note, he fails if he does *not* prove the absence of consideration. Therefore, the burden of proof regarding consideration lies on the defendant. All that the plaintiff's son has to prove here is that he is an heir and legal representative of the plaintiff, and state that he relies on the promissory note which is presumably produced by the plaintiff. To prove that he is the legal representative and heir of the plaintiff, he has to produce a probate or letters of administration or a succession certificate.

3. *A* files a suit against *B* for the possession of certain lands. *A*'s case is that he purchased the land from *Y*. *B*'s defence is that he has been in possession of the land for over twenty years and his title to the land is perfected by adverse possession.

What is the nature of burden of proof in this suit? What must be proved by *A* and *B* and in what manner?

Ans. : As *B* would retain the possession of land if neither of the parties did *not* adduce any evidence, the burden of proof is on *A* to prove (a) that he purchased the land from *Y*, and (b) that *Y* was authorised to sell the land.

If *A* proves this, the burden shifts on *B* who has to prove that he had been in possession of the land continuously for 20 years, adverse to the rightful owner of the property.

ONUS PROBANDI — The term *onus probandi,* in its proper sense, 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. It does *not* mean that he must call all conceivable evidence. It merely means that the evidence he lays before the Court should be sufficient, if *not* contradicted, to form the basis of a judgment and decree upon that point in his favour. Where there is an admission by a party, the burden of proof shifts, and it is for the party making the admission to explain it away.

The question of *onus probandi* is certainly important in the early stage of his case. It may also assume importance where no evidence at all is led on the question in dispute by either side. In such a contingency, the party on whom the onus lies to prove a certain fact must fail. (*Devadattam* v. *Union of India*, A.I.R. 1964 S.C. 880)

But, there is an essential distinction between the *burden* of proof and the *onus* of proof; the *burden* of proof lies on the person who has to prove a fact and it never shifts, but the *onus* of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence : *Raghavamma* v. *Chenchamma*, (A.I.R. 1964 S.C. 136)

B. On Whom Burden of Proof Lies

Burden of proof

Generally (Ss. 101-104)	In particular cases (Ss. 105-111)
1. Whoever *desires* any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, *must prove* that those facts exist. (S. 101) *Illustrations :* (a) *A* desires a Court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed. *A* must prove that *B* has committed the crime. (b) *A* desires a Court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts and which *B* denies to be true. *A* must prove the existence of those facts. **2.** The burden of proof in a suit or proceeding lies on that person who	**1.** *The burden of proving* the existence of circumstances bringing the case of an accused person within the general or special *exceptions* in the Penal Code lies upon such accused, and the Court *presumes the absence* of such circumstances. (S. 105) *Illustrations :* (a) *A*, accused of murder, alleges that, by reason of unsoundness of mind, he did *not* know the nature of the act. The burden of proof is on *A*. (b) *A*, accused of murder alleges that by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on *A*. (c) Section 325 of the Indian Penal Code provides that whoever, except

would *fail* if no evidence at all were given on the either side. S. 102. *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 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*. The party on which the onus of proof lies must, in order to succeed, establish a *prima facie* case. He *cannot*, on failure to do so, take advantage of the weakness of his adversary's case. He must succeed by the strength of his own right and the clearness on his own proof. The *general rule* that a party who desires to move the Court must prove all facts necessary for that purpose is subject to *two exceptions* : (a) He will *not* be required to prove such facts as are specially within the knowledge of the other party (S. 106) *and* (b) He *will not* be required to prove so much of his allegations in respect of which there is any presumption of	in the case provided for by S. 335, voluntarily causes grievous hurt, shall be subject to certain punishments. *A* is charged with voluntarily causing grievous hurt under section 325. The burden of proving the circumstances, bringing the case under section 335 lies on *A*. 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. Under S. 105, the burden of proving the existence of circumstances bringing the case within any exception lies on the accused, and the Court presumes the absence of such circumstances. The accused has to rebut the presumption that circumstances did *not* exist, by placing material before the Court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a prudent man. If the material before the Court satisfies the test of a prudent man, the accused will have discharged his burden. The evidence so placed may *not* be sufficient to discharge the burden under this section, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It the judge has such reasonable doubt, he has to acquit the accused, for in that

law (Ss.107-113); or in some cases, of fact (S. 114) in his favour.

3. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, *unless* it is provided by any law that the proof of that fact shall lie on any particular person. (S. 103)

Illustrations : *A* prosecutes *B* for theft, and wishes the Court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

4. The burden of proving any fact necessary to be proved in order to *enable any person to give evidence of any other fact* is on the person who wishes to give such evidence. (S. 104)

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.

event, the prosecution will have failed to prove conclusively the guilt of the accused. 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 to make out his defence of insanity: *Dahyabhai* v. *State of Gujarat*, A.I.R. 1964. S.C. 1563.

2. The burden of proving any fact which is especially within the knowledge of any person is upon him. (S. 106)

Illustrations : (a) When a person does an act with some intention other than that which the character and the circum- stances of the act suggest, the burden of proving that intention is upon him.

(b) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket lies on him.

3. The burden of proving that a person is *dead*, who has been shown to have been *alive within 30 years*, lies on the person who affirms that he is *dead*. (S. 107)

If a man is shown to have been alive within *thirty years*, the burden of proving him to be *dead* lies on the person affirming it.

The section provides that if it appears that a person, whose present existence is in question was alive within *thirty years* and nothing whatever appears to suggest the probability of his being dead, the Court is bound to regard the fact of his still being alive as proved. But,

as soon as anything appears which suggests the probability of his being dead, the presumption disappears, and the question has to be determined on the balance of proof.

4. The burden of proving that a person is *alive* who has *not been heard of for 7 years*, by those who would naturally have heard of him, lies on the person who affirms that he is *alive*. (S. 101)

On whom is the burden of proving that a person is alive? (2 marks) M.U. Nov. 2015

If a person has *not* been heard of for *seven* years, there is a presumption of law that he is *dead*, and the burden of proving that he is *alive* is shifted to the *other side*. But at what time within that time he died is *not* a matter of presumption, but of evidence, and the onus of proving that the death took place at any *particular time* within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption that he died at the end of the first seven years *or* at any particular date *or* at any subsequent period.

5. The burden of proving that persons who stand in the relationship of *(i)* partners, *(ii) landlord and tenant, or (iii) principal* and *agent* (and who have been acting as such), do *not* stand, *or* have ceased to stand, to each other in those relationship respectively, lies on the person who affirms that they do *not* stand in such relationships. (S. 109)

6. The burden of proving that a person is *not* the owner of anything of which he is shown to be in

	possession is on the person who affirms that he is *not* the owner. (S. 110) This section gives effect to the principle that possession is *prima facie* evidence of a complete title. Any person who intends to oust the possessor must establish a right to do so. This is to be presumed from lawful possession until the want of title, or a better title, is proved.
	7. The burden of proving the good *faith* of a transaction between parties, one of whom stands to the other in a position of active confidence, is on the party who is in a position of active confidence. (S. 111) *Illustrations :* (a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the *attorney.* (b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the *father.*

C. Presumption as Regards Offences in Disturbed Areas (S. 111-A)

Under S. 111-A, if a person is accused of having committed any offence under Ss. 121, 121-A, 122 or 123 of the Indian Penal Code, or of a criminal conspiracy or attempt to commit, or abetment of an offence under S. 122 or 123 of the I.P.C., in any area which has been declared to be a disturbed area or an area in which there has been extensive disturbance of the public peace for more than a month, and it is shown that such person had been in that area when firearms or explosives were used to attack or resist armed forces or forces charged with maintenance of public order, *it shall be presumed, unless the contrary is shown, that such a person had committed the offence.*

D. Conclusive Proof (Ss. 41, 112, 113)

Write a short note on : Conclusive proof.
M.U. May 2015
Apr. 2016
Nov. 2016

There are *three sections* in the Act which deal with conclusive proof, *viz.*, Ss. 41, 112 and 113. The contents of these sections are discussed below.

1. Judgments in probate and other jurisdictions (S. 41)

A *final* judgment, order or decree of a competent Court, in the exercise of its
- *(i)* probate,
- *(ii)* matrimonial,
- *(iii)* admiralty, *or*
- *(iv)* insolvency jurisdiction

What is conclusive proof? (2 marks)
M.U. May 2014
Nov. 2017

is conclusive proof, *not* against any specific person, but absolutely, that is, *in rem*, -

(a) that any *legal character*

(i) which it *confers*, accrued at that time when such judgment, decree or order came into operation;

(ii) which it *declares* any such person to be entitled to, *accrued* to him at the time when such judgment, decree or order declares it to have accrued to him;

(iii) which it *takes* away from any person, *ceased* at the time from which such judgment, decree or order *declared* that it had ceased or should cease;

(b) that anything to which it declares any person to be *entitled* was his *property* at the time from which such judgment, decree or order declares that it had been or should be his property.

[S. 41 has already been discussed in an earlier Chapter.]

2. Birth during marriage conclusive proof of legitimacy (S. 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 eight 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 begotten.

Birth during marriage is conclusive proof of legitimacy. Explain. (2 marks)
M.U. May 2017
Nov. 2019

SCOPE OF S. 112 — Evidence that a child is born during wedlock is sufficient to establish its legitimacy, and shifts the burden of proof to the party seeking to establish the contrary.

Sections 41, 112 and 113 (discussed later) are the only sections which deal with matters which are to be *regarded as "conclusive proof"*. No rule of the kind can be based on considerations of evidence, because enquiry is *altogether excluded.*

The *basis of the rule* contained in S. 112 seems to be that it is undesirable to inquire into the paternity of a child whose parents have access to each other. This section refers to the point 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.

The presumption as to paternity in this section arises only in connection with the offspring of a *married* couple. The section applies to the legitimacy of the children of *married* persons only. On the birth of a child *during* marriage, the presumption of legitimacy is conclusive, *no matter how soon the birth occurs* after the marriage. Under the section, a child born in wedlock should be treated as the child of the father who was at the time of its birth, the husband of the mother, *unless* it is shown that he had no access to the mother at the time of its conception, *irrespective of the question whether the mother was married or not at the time of the conception.*

The presumption contemplated by this section is a *conclusive presumption of law*, which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage at a time when, according to the ordinary course of nature, the husband could have been the father of the child. (*Venkateswarlu* v. *Venkatnarayan*, A.I.R. 1954 S.C. 176)

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. (*Bhagwan Bakhsh* v. *Mahesh Bakhsh*, A.I.R. 1935 P.C. 199)

In a case decided by the Kerala High Court, the facts were interesting: A wife had become pregnant after her husband had undergone a vasectomy operation. The husband alleged that she had conceived because of illicit intercourse, and claimed to be entitled to a decree for divorce on this ground. The success of the operation was *not* proved before the Court. Nor was any case made out by the husband that he had no sexual intercourse with the wife during the period when she could have conceived. Also, the allegation of illicit relations was *not* repeated by the husband on oath when in the witness box. Taking all these circumstances into consideration, the Court *held* that the *presumption* would be that the husband was the father of the child. No decree for divorce was, therefore, passed in his favour. (*Chandramathi* v. *Pazhetti Balan*, A.I.R. 1982 Ker. 68)

The Calcutta High Court has *held* that the paternity of a child born during lawful wedlock *cannot* be decided by a blood group test, in view of the provisions of S. 112. (*Tushar Roy* v. *Sukla Roy*, 1993, Cri. L.J. 1659)

The principle of this section does *not* apply to the case of a *paramour*, and the presumption can be rebutted when the mother of child is *not the wife*, but a *mistress*, and it would be open for the mistress to prove that the real

father of the child born during the period of her concubinage is different from the paramour.

A wife can be examined to prove non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of the children. She is a competent witness to prove access or non-access by her husband.

In a leading case, *Russell* v. *Russell* (1924 A.C. 687), it has been laid down that neither the declarations of the wife, nor her testimony that the child was the child of a man other than her husband are admissible, nor of the husband that he was *not* the father of the child.

The Allahabad High Court has *held* that the English rule that such evidence is inadmissible because it is evidence which tends to bastardize the child is *not* applicable to the Courts in India; there is nothing in the Indian Evidence Act which renders this evidence inadmissible. In a suit for divorce by the husband on the ground of the wife's adultery, alleged to be established by the fact of her having given birth to an illegitimate child, evidence by the husband of non-access to the wife, at any time when the child could have been begotten is *admissible*, and an admission by the wife that the child is illegitimate is also *admissible* in evidence.

3. Cession of territory (S. 113)

A Notification in the Official Gazette that any portion of British territory has, before the commencement of Part III of the Government of India Act, 1935, been ceded to any Native State, Prince or Ruler is *conclusive proof* that a valid cession of such territory took place at the date mentioned in such Notification.

E. Presumption in Certain Cases of Suicide and Dowry Deaths (Ss. 113-a & 113-b)

Presumption as to abetment of suicide by a married woman (S. 113-A)

Write a short note on : Presumptions under the Evidence Act.
M.U. Apr. 2011 May 2014

S. 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 that such a suicide has been abetted by the husband or his relative, *if the following two conditions are satisfied:*

(a) The suicide was committed *within a period of seven years from the date of her marriage; and*

(b) Her husband, or his relative, has subjected her to *cruelty* (as the term is defined in S. 498-A of the Indian Penal Code).

Write a short note on : Presumption of law.
M.U. Nov. 2019

Such a presumption must, however, be drawn by the Court after having regard to *all the other circumstances of the case.*

Before the provisions of S. 113-A can be applied, it should be shown that the deceased woman had committed suicide. *If it is not a case of suicide*, but

What is the presumption as to dowry death?
(2 marks)
M.U. Nov. 2014
Apr. 2016
Nov. 2017

of accidental death, the presumption of abetment by the husband or his relative does *not* arise. (*Suresh* v. *State of Maharashtra*, 1992 Cri. L.J., 2455)

Likewise, it must also be shown that the wife had been subject to cruelty within the meaning of that term as defined in S. 498-A of the I.P.C. Thus, it has been *held* that mere consumption of wine and coming home in the late hours of the night, much against the will of the wife, would *not* per se amount to "cruelty". (*Jagdish Chander* v. *State of Haryana*, 1988 Cri. L.J. 1048) But, if such acts are coupled with regular beating of the wife, demanding dowry, and harassing her to bring more and more money, the case would be one of "cruelty". (*P.B. Pathi* v. *State of A.P.*, 1989 Cri. L.J. 1186; *Gurbachan Singh* v. *Satpal Singh*, 1990 Cri. L.J. 562)

In one *case*, 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 both *unsafe*, as well as *unjust*, to invoke the presumption of guilt under S. 113-A of the Act. (*Samir* v. *State of West Bengal*, 1993 Cri. L. J. 134)

It has been *held* that the wife's death caused by suicidal hanging is also covered by S. 113-A. (*Public Prosecutor, A.P.* v. *T. Basava*, 1989 Cri. L.J. 2330)

Since S. 113-A *does not create any new offence*, but relates only to a procedural matter of evidence, *it has been held to be retrospective in nature*, and would also apply to cases of suicide committed prior to the date on which it came into force, namely, 12th December, 1983. (*Gurbachan Singh* v. *Satpal Singh* referred to above.)

Presumption as to dowry deaths (S. 113-B)

Under S. 113-B, when the question is whether a person has committed the *dowry death* 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 presume that such a person had caused the dowry death*. (The term *"dowry death"* has the same meaning as in S. 504-B of the Indian Penal Code.)

S. 113-B raises a *presumption of guilt* against any person who has been proved to have subjected the deceased woman, soon before her death, to *cruelty* or *harassment*, in connection with dowry. Needless to state, it is a presumption intended to be raised against the husband and his relatives in the case of dowry deaths, which have become increasingly common in India.

In a *case* decided by the Supreme Court, the bride's in-laws did *not* allow her to go to her parents' house, and when her father and brother came to meet her, they were driven away, complaining that a scooter and a T.V. had *not* been given in dowry. When the bride suffered an unnatural death within seven years of marriage, *the presumption under S. 113-B was allowed to be invoked*, and one of the in-laws was convicted for the dowry death. (*Shanti* v. *State of Haryana*, A.I.R. S.C. 1126)

In another case, a newly wedded wife was subjected to severe beating by her in-laws right from the date of marriage, until she died with 100 per cent burn injuries. It was *held* that the presumption under this section *could* be invoked to sentence the accused. (*State of M.P.* v. *Sk. Lallu*, 1990 Cri. L.J. 129)

In another *case*, the wife was shown to have died by poisoning by aluminium phosphide, within three years of marriage. However, there was *no evidence* that, soon before her death, she was subjected to any cruelty or harassment by the husband or any of his relatives for any demand for dowry. In the circumstances, *the Court refused to invoke the presumption under S. 113-B* of the Act. (*Jagbir Singh* v. *State of Punjab*, (1992) 2 Crimes 746)

Write short notes on : Presumption of Law.
M.U. June 2018

It should also be noted that the presumption under S. 113-B is *not a conclusive presumption*. In view of S. 4 of the Act, it is a *rebuttable presumption*. So, once the presumption is invoked, the burden shifts to the accused to demonstrate his innocence.

F. Presumption of Existence of Certain Facts (Ss. 114)

What is presumption of fact?
(2 marks)
M.U. June 2018

S.114 of the Act lays down that 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.

Write a short note on : Presumption of fact.
M.U. May 2015

As seen above, presumptions are of *two* kinds : presumptions of *law* and presumptions of *fact*. Presumptions of fact are nothing more than logical inferences of the existence of one fact drawn from some other known or proved facts. Such presumptions are always *rebuttable*.

Discuss in detail any four presumptions under the Indian Evidence Act.
M.U. Apr. 2010

The difference between presumptions of *law* and presumptions of *fact* can be tabulated as under:

Presumptions of Law	Presumptions of Fact
1. Presumptions of law derive their force from *law*.	1. Presumptions of fact derive their force from *logic*.
2. A presumption of law applies to a *class of cases*.	2. A presumption of fact applies to *individual cases*.
3. Presumptions of law are to be drawn *by the Court*.	3. *In England*, presumptions of fact are to be drawn by the *jury*.

This section authorises the Court to make certain presumptions of *facts*. They are all presumptions which may naturally arise, but the section, by the use of the word 'may' instead of 'shall', both in body of the section, and in the illustrations, shows that the Court is *not* compelled to raise them, but is to consider whether, in the circumstances of the case, they *should* be raised.

When may a Court presume a fact? Explain the law relating to presumption of facts.
M.U. Nov. 2015

Illustrations to S. 114

The Court *may* presume —	But the Court shall also have regard to such facts as the following, in considering whether such maxims do or *do not* apply to the particular case before it, *viz.*, —
(a) 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. This *illustration* is taken from *Taylor*. The words "soon after the theft" indicate that in order to raise the presumption, the possession must be *recent*. Moreover, the possession must be *conscious* and *exclusive*. The question as to what is recent possession will depend upon the facts and circumstances of every case, and upon whether the stolen article passes easily from hand to hand in the ordinary course of business. Thus, in one case, when a stolen woolen cloth with its ends in an unfinished state was found with a person two months after the theft, it was *held* that the burden was on such person to show how he came into possession of such property.	*As to illustration* (a) : A shop-keeper has in his till a marked rupee soon after it was stolen, and *cannot* account for its possession specifically, but is continually receiving rupees in the course of his business.
(b) That an accomplice is unworthy of credit, *unless* he is corroborated in material particulars. [*Illus. (b)* must be read with S. 133 below, where the law as to accomplice evidence is discussed.]	As to *illustration (b)* : *A*, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. *B*, a person of equally good character, who also took part in the arrangement, describes precisely what was done and admits and explains the common carelessness of *A* and himself; or

(c) That a bill of exchange accepted or endorsed was accepted or endorsed for good consideration.	A crime is committed by several persons, *A*, *B* and *C*, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating *D*, and the accounts corroborate each other in such a manner as to render previous concert highly improbable. *As to Illustration (c)* : A, the drawer of a bill of exchange, was a man of business. *B*, the acceptor was a young and ignorant person, completely under *A*'s influence.
(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence.	*As to Illustration (d)* : It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course.
(e) That judicial and official acts have been regularly performed. This illustration is founded on the maxim *omnia praesumuntur rite essa acta* (all things are presumed to be rightly done). There is a general disposition in Courts of Justice to uphold official acts, rather than to render them inoperative, and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts. It must, however, be noted that the presumption that the act was regularly done arises only on proof that the act was in fact done, as the presumption is limited to the *regularity* of the act done and does *not* extend to the *doing* of the act	*As to Illustration (e)* : A judicial act, the regularity of which is in question, was performed under exceptional circumstances.

itself. For example, if a notification is issued under the powers given by law, there is a presumption that it was regularly published and promulgated in the manner in which it was required to be done, *but* there is *no* presumption that it was issued according to the terms of the section which empowered it. *Correctness of procedure, but not the factum of act,* is presumed under the illustration.	
(f) That the common course of business has been followed in particular cases.	*As to Illustration (f)* : The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances.
(g) That evidence which could be and is *not* produced, would, if produced, be unfavourable to the person who withholds it.	*As to Illustration (g)* : A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure, the feelings and reputation of his family. The Supreme Court has observed, commenting on Illustration (g), that an adverse inference against a party 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. (*Pandurang Jivaji Apte* v. *Ramchandra Gangadhar Ashtekar,* (1981) 4 S.C.C. 569)
(h) That if a man refuses to answer a question which he is *not* compelled to answer by law, the answer if given, would be unfavourable to him.	*As to Illustration (h)* : A man refuses to answer a question which he is *not* compiled by law to answer, but the answer, to it might cause loss to him in a matter in relation to which it is asked.

(i) That when a document creating an obligation is in the hand of the obligor, the obligation has been discharged.	*As to Illustration (i)* : A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

G. Presumption in Rape Cases (S. 114-A)

The newly-added S. 114-A deals with cases of prosecution for rape under clauses (a), (b), (c), (d), (e) or (g) of S. 376(2) of the Indian Penal Code, where sexual Intercourse by the accused is proved, and the question before the Court is whether such intercourse was with or without the woman's consent. In such cases, if the woman, in her evidence, states before the Court that she did *not* consent, the Court must presume that she did *not* so consent.

This *new* provision (inserted in 1983) has brought about a rather *radical change in the Indian Law relating to rape cases.*

Formerly, the rule was that corroboration of the victim's version was *not* essential for a conviction, but as a matter of prudence, it would have to be established in the mind of the judge, *unless* circumstances were strong enough to make it safe to convict the accused without such corroboration. *As observed by the Supreme Court,* although the victim of a rape *cannot* be treated as an accomplice, her evidence is to be treated almost like accomplice evidence, requiring corroboration. (*Sk. Zakir* v. *State of Bihar,* 1983 Cri. L.J. 1285)

Now, of course, the position is different, and S. 114-A raises a presumption in favour of the rape victim.

The following *three conditions* must be satisfied before the presumption contained in S. 114-A can be raised:

(a) It should be proved that there was sexual intercourse.

(b) The question before the court should be whether such intercourse was with or without the consent of the woman.

(c) The woman must have stated, in her evidence before the court, that she had not consented to the intercourse.

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 of Orissa,* 1992 Cri. L.J. 1808)

In a case of alleged gang rape of a girl above the age of 16, the F.I.R. was lodged seven 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 S. 114-A could not be invoked.* (*Sharrighan* v. *State of M.P.,* 1993 Cri. L.J. 120)

Lastly, it may be noted that the presumption under S. 114-A can be drawn only when the accused says that he indulged in sexual intercourse with the consent of the girl. If the case of the accused is *not* that such intercourse was had with her consent, no presumption can be drawn under the section. (*Ravindranath* v. *State of U.P.*, 1991 Cri. L.J. 31)

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7

ESTOPPEL (Ss. 115-117)

Definition (S. 115)

When a person has —	(i) *declaration* (ii) *act, or* (iii) *omission*	intentionally caused or permitted another person	(i) to believe a thing to be true, *and* (ii) to act upon such belief —

neither he *nor* his representative can be allowed to deny the truth of that thing in a suit or proceeding between himself and such person or his representative.

Write a short notes on : Estoppel.
M.U. Dec. 2018
June 2019

Illustrations : A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it. The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that at the time of the sale, he had no title. He must *not* be allowed to prove his want to title.

Write a short note on : Doctrine of estoppel.
M.U. Apr. 2010
Nov. 2015
Apr. 2016

PRINCIPLE OF S. 115 — Estoppel is based on the principle that it would be most *inequitable and unjust* that if one person, by a representation, or by conduct amounting to a representation, has induced another to act as he would *not* otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.

Define estoppel. Explain the law relating to estoppels under the Indian Evidence Act, 1872.
M. U. June 2018

Sir Edward Coke had defined *estopple* in these words : An estoppel exists "where a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." In simpler language, a person *cannot* be allowed to say one thing at one time and the contrary at another. He *cannot* blow both hot and cold at the same time.

This section is founded upon the doctrine laid down in *Pickard* v. *Sears* (1837 6A. & E. 475), namely, that where a person "by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is *concluded* from averring against the latter, a *different* state of things as existing at the same time." This doctrine precludes a person from denying the truth of some statement previously made by himself. No cause of action arises upon estoppel itself.

SCOPE OF S. 115 — In order to hold that a case comes within the scope of this section, a Court must find:

1. That *A* believed a thing to be true.
2. That in consequence of that belief, he acted in a particular manner.

What is the Doctrine of Estoppel in law ? Give any two illustrations of contractual estoppel.
M.U. Apr. 2010

3. That belief, and *A's* so acting were brought about by some representation by *B*, either by a declaration, act, or omission, which representation was made intentionally to produce that result.

If the above *three* points are established, *B* is prohibited by law from denying *the truth of his representation* in a proceeding by or against *A* or *A's* representative.

It may be noted that it is *not necessary* to prove any *fraudulent intention* on *B's* part. He will be nonetheless estopped if he himself was acting under a mistake or misapprehension.

Explain the doctrine of Estoppel.
M.U. Nov. 2014

The section does *not* apply where the statement relied upon is made to a *person who knows the true facts* and is *not* misled by the untrue statement. *There can be no estoppel if true facts are known to both the parties.* Therefore, if *A* knew the true facts, no estoppel arises.

In *Chhaganlal Mehta* v. *Haribhai Patel*, [(1982) 1 S.C.C. 223], the Supreme Court analysed the scope of S. 115 of the Act, and laid down that the following *eight conditions* must be satisfied to bring a case within the scope of estoppel, as defined in S. 115:

(i) There must have been a representation by a person (*or* his authorised agent) to another person. Such a representation 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, act or omission 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 (or his representative) can avail of the doctrine.

There are *four* classes of estoppel to be found in section 116 and 117 of the Act, *viz.*, estoppel of —

1. *Tenant* (S. 116)	2. *Licensee of a person in possession* (S. 116)	3. *Acceptor of a bill of exchange* (S. 117)	4. *Bailee or licensee* (S. 117)
No tenant of immovable property (or person claiming through such tenant) *can, during the continuance of the tenancy*, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a *title* to such immovable property.	No person who came upon immovable property by the licence of the person in possession thereof can deny that such person had a title to such possession at the time when such licence was given.	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.	No bailee or licensee can deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence. But, if a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

What is estoppel? Explain in detail the different types of estoppel.
M.U. Nov. 2016
June 2019
Nov. 2019

KINDS OF ESTOPPEL — Estoppels are of *seven kinds* : 1. Estoppel by record; 2. Estoppel by deed; 3. Estoppel by conduct; 4. Equitable estoppel; 5. Estoppel by negligence; 6. Estoppel on *benami* transactions; and 7. Estoppel on a point of law. (Additionally, there is also the concept of promissory estoppel, which is discussed later.)

1. *Estoppel by record* — Under this kind of estoppel, a person is *not* permitted to dispute the facts upon which a judgment against him is based. It is dealt with by (i) Ss. 11 to 14 of the Code of Civil Procedure, *and* (ii) Ss. 40 to 44 of the Indian Evidence Act.

2. *Estoppel by deed* — Under this kind of estoppel, where a party has entered into a solemn engagement by deed as to certain facts, *neither* he, *nor* any one claiming through or under him, is permitted to deny such facts.

Problem : A deed of gift by *D* in favour of his daughter *M* for life provided that the property should go to her male issue, and in default, to *D's* sons. One of *D's* two sons *induced* a purchaser to buy his sister's property, and the sale

deed was attested by the other son. *M* died without leaving any male issue, and *D's* son filed a suit to recover the property from the purchaser. State, giving reasons, whether the plea of estoppel would be available to the defendant against the plaintiff.

Ans. : So far as the son who had induced the purchaser is concerned, he is estopped. But, so far as the son attesting the document is concerned, the plea of estoppel will *not* be available, if such attesting person denies the knowledge of the contents of the document. The Privy Council has *held* in *Pandurang Krishnaji* v. *Markandeya Tukaram* (40 I.A. 60), that the knowledge of the contents of the deed is *not* to be inferred from the mere fact of attestation. In the above problem, there is nothing to show that the attesting son did so attest with the knowledge of the contents of the document. Therefore, the plea of estoppel will *not* be available against him.

3. *Estoppel by conduct*, sometimes called estoppel *in pais*, may arise from agreement or misrepresentation. Estoppel *in pais* is dealt with in Ss. 115 to 117. (Estoppel *in pais* means "estoppel in the country" or "estoppel before the public.")

If a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will *not* offer any opposition to it, although it could *not* have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained from doing, he *cannot* question the legality of the act to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.

If a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no right to challenge the act to their prejudice. (*Chand Sing* v. *Commr., Burdwan,* (A.I.R. 1958 Cal. 415).

S. 115 deals with estoppel by representation by act or conduct, and Ss. 116 and 117 deal with estoppel by agreement or contract.

4. *Equitable Estoppel* — The Evidence Act is *not* exhaustive of the rules of estoppel. Thus, although S. 116 only deals with estoppel that arises against a tenant or licensee, a similar estoppel has been held to arise against a mortgagee, an executor, a legatee, a trustee, or an assignee of property, precluding him from denying the title of the mortgagor, the testator, the author of the trust, or the assignor, as the case may be. Further, S. 116 is *not exhaustive* of *all* instances of estoppel as between landlord and tenant. Thus, there are cases of estoppel which, though *not* within the terms of Ss. 115 to 117 of the Evidence Act, are recognised instances of estoppel. Estoppels which are *not* covered by the Evidence Act may be termed *equitable estoppels*.

5. *Estoppel by Negligence* — This type of estoppel enables a party, as against some other party, to claim a right of property which in fact he does *not* possess. Such estoppel is described as estoppel by negligence *or* by conduct or representation *or* by a holding out of ostensible authority. Such estoppel is based on the existence of a duty which the person estopped is owing to the person led into the wrong belief or to the general public of whom the person is one. (*Mercantile Bank* v. *Central Bank*, (A.I.R. 1938 Privy Council, 52)

6. *Estoppel on benami transactions* — If the owner of property clothes a third person with the apparent ownership and a right of disposition thereof, *not merely* by transferring it to him, *but also* by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who has taken it in good faith and for value. (*Li Tse Shi* v *Pong Tse Ching*, (A.I.R. 1935 P.C. 208)

7. *Estoppel on a point of law* — Estoppel refers to a belief in a *fact*, and *not* in a proposition of *law*. A person *cannot* be estopped for a misrepresentation on a point of *law*. An admission on a point of law is *not* an admission of a "thing" so as to make the admission matter of estoppel. Where persons merely represent their conclusions of law as to the validity of an assumed or admitted adoption, there is no representation of a fact to constitute an estoppel.

The principle of estoppel *cannot* be invoked to defeat the plain provisions or a statute. There is no estoppel against an Act of the Legislature. Thus, if a minor represents himself to be of the age of majority, and thereafter enters into an agreement, the agreement is *void*, and the minor is *not* estopped from pleading that the agreement is void *ab initio*, as he was, in truth, a minor at the date of making the contract. Estoppel only applies to a contract *inter partes*, and it is *not* open to parties to a contract to estop themselves or anybody else in the face of an Act. The rule of estoppel is one of *evidence*. It *cannot* prevail against a plain and mandatory provision of *law*.

[See also, "Estoppel of minor", below]

The Supreme Court has observed that the doctrine of estoppel does *not* operate where the mandatory conditions laid down by law on grounds of public policy are ignored. Thus, estoppel would *not* apply against a sanction obtained by fraud or by collusion between the parties. (*S.B. Noronah* v. *Prem Kumari Khanna*, (1980) 1 S.C.C. 52)

PROMISSORY ESTOPPEL AGAINST GOVERNMENT — The Government and its agencies are *not immune* from the operation of the doctrine of promissory estoppel. The doctrine *can* be involved to hold the Government bound to its promises, whether such promises are of an executive or administrative character. (*Union of India* v. *Indo-Afghan Agencies*, A.I.R. 1969 (S.C. 718)

ESTOPPEL AGAINST UNIVERSITIES — The doctrine of estoppel was allowed to be invoked against a University, where a person was appointed Vice-Chancellor for one term only, on the assurance that his appointment would be extended for one more term. On the faith of this assurance, he had given up his political career, as well as his seat in the Legislative Assembly. The Court *held* that the University was bound by its assurance. (*Hardwari Lal* v. *G.D. Tapase*, A.I.R. 1982 P & H 439)

DIFFERENCE BETWEEN 'ESTOPPEL' AND 'PRESUMPTION' — An *estoppel* is a personal disqualification imposed 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.

ESTOPPEL AND *'RES JUDICATA'* — 1. *Estoppel* is a part of the law of evidence, and proceeds upon the equitable principle of an *altered situation*; the doctrine of *res judicata*, belongs to *procedure*, and is based upon the principle that there must be an end to *litigation*.

2. *Estoppel* prohibits a *party* from proving anything which contradicts his previous declaration of acts to the prejudice of the party, who relying upon them, altered his position. *Res judicata*, on the other hand, prohibits the Court form inquiring into a matter already adjudicated. In other words, *res judicata* precludes a man averring the same thing twice over in successive litigation, while *estoppel* prevents him from saying one thing at one time and the opposite at another.

ESTOPPEL AND CONCLUSIVE PROOF — When a fact is conclusively proved, it is so against all the world. Estoppel operates only as a personal disability which disables a particular individual from asserting or denying certain facts.

ESTOPPEL AND BREACH OF CONTRACT — The same false statement may give rise to a cause of action in contract for damages, but as estoppel, it would *not*; it only precludes the defendant from denying the truth of some statement previously made by himself. No suit can be founded on it. The plaintiff is only awarded relief owing to his opponent being estopped; and in cases where the plaintiff is estopped, it serves as a good defence to the defendant.

ESTOPPEL AND WAIVER — Estoppel and waiver are entirely different. Estoppel is *not a cause of action*. It may, if established, assist a plaintiff in enforcing a cause of action, by preventing the defendant from denying the existence of some fact essential to establish the cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant (or his authorised agent) to the plaintiff or someone on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement, *and* (c) the plaintiff *does* act upon the faith of the statement. On the other hand, waiver is contractual, and *may constitute* a

cause of action; it is an agreement to release or *not* to assert a right. Thus, if an agent with an authority to make such an agreement on behalf of the principal agrees to waive his principal's right, then (subject to any other question such as consideration), the principal will be bound by the contract, *not by estoppel*. There is no such thing as estoppel by waiver. (*Dawason's Bank Ltd.* v *Nippon Menkwa Kabushiki Kaisha*, 62 I.A. 100)

ESTOPPEL AND ADMISSION — 1. An *admission* may, under certain circumstances, bind strangers as well, whereas *estoppel* binds only parties and privies thereto. It *cannot* be taken advantage of by strangers.

2. *Estoppel* being a rule of evidence, an action *cannot* be founded on it, whereas an action may be founded on an *admission*.

Explain in detail what is estoppel and distinguish it from an admission.
M.U. Apr. 2011

3. An *admission* of a party is strong evidence against him, but he is at liberty to prove that such admission was mistaken or untrue. But, if another person has been induced by it to alter his position, the party is estopped from disputing its truth with respect to that person. When an admission has been acted upon by another person, the admission is an estoppel, and the estopped party is required to make good his representation; in other words, the admission is conclusive. An estoppel differs from an admission in that it *cannot* be taken advantage of by strangers. It binds only the parties and privies. An estoppel is only a rule of evidence, for an action *cannot* be founded upon it.

Admission may operate as estoppel — Admissions are *not conclusive proof* of the matter admitted, *but* they are *strong evidence* against the person making them. The person against whom an admission is proved is at liberty to show that it was mistaken or untrue; but such admissions, if they have been acted upon by a third person, and if substantive rights have been created, operate as estoppel. The party making an admission is bound to make good his representations. Thus, though admissions are *not* conclusive proof, they are sufficient proof without corroboration. A person is said to be estopped when he 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. In such cases, neither he nor his representative can deny the truth of that thing.

ESTOPPEL OF MINOR — A rule of evidence such as an estoppel (S. 115 of the Evidence Act) *cannot* be allowed to override the provisions of the statutory law that a minor's contract is absolutely *void* in India. (S. 11 of the Contract Act). Where an infant 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. [*Gadigippa* v. *Balangowda*, 33 Bom. LR 1313 (FB)]

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8

COMPETENCY OF WITNESSES (Ss. 118-134)

The following topics are discussed in this Chapter:

A. Who is competent to be a witness

B. Law as to accomplice evidence

C. Compellability of witnesses

D. Privileged communications.

A. WHO IS COMPETENT TO BE A WITNESS

Who is qualified to testify in a Court of law? (2 marks) M.U. May 2013

Who may testify as a witness in a Court of law? (2 marks) M.U. May 2015 May 2017 June 2019 Nov. 2019

GENERAL — *All persons* are competent to testify, *unless* the Court considers that, by reason of tender age, extreme old age, disease, 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.

Husbands and wives are, in all civil and criminal cases, competent witnesses against each other, subject to the qualification that communications between the spouses made during marriage are protected from disclosure.

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 to the suit. And 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.

Write a short note on : Blind witnesses and dumb witnesses. M.U. May 2014

1. *All persons are competent* to testify, *unless* prevented from
   - (a) *understanding* the questions, *or*
   - (b) giving *rational answers*

   by reason of —
   - *(i)* tender years,
   - *(ii)* extreme *old age*,
   - *(iii)* disease of body or *mind, or*
   - *(iv)* any other similar cause. (S. 118)

Explain "Dumb Witness". (2 marks) M. U. Dec. 2018

2. A *lunatic* is competent to testify — *unless* he is prevented by lunacy from understanding the questions and giving rational answers to them. (S. 118)

3. A *witness who is unable to speak* may give evidence in any manner in which he can make it intelligible, *e.g.*, by writing or by signs in open Court. Such evidence shall be deemed to be *oral evidence*. (S. 119)

What is the legal position of a dumb witness? (2 marks) M.U. May 2013

State the legal position of a dumb witness? (2 marks) M.U. Apr. 2011

How can a witness who is unable to speak give evidence in the court? (2 marks) M. U. June 2018

A witness who has taken a religious vow of silence is deemed to be *"unable to speak"*, and he may give his evidence in writing to questions put to him. (*Lakshan Singh* v. *Emperor*, (1941) 20 Pat. 898) When a deaf-mute witness is to be examined, the Court has to ascertain, before he is examined, that he has the necessary amount of intelligence and that he understands the nature of the oath and of the questions put to him.

Child Witness — A *child* 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 of the evidence of a child is required. The child's evidence is made admissible, whether corroborated or *not*. Once there is admissible evidence, a Court can act upon it; corroboration, unless required by statute, goes only to the *weight* and *value* of evidence. 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.* (*Mohamed Sugal Esa* v. *The King*, A.I.R. 1964 P.C. 3)

Write a short note on : Child witness. M.U. May 2013 Dec. 2018 Nov. 2019

Dealing with the competency of a child witness, the Gauhati High Court has *held* that a child who is 12 years of age *can* be a competent witness with an intellectual capacity and capability of giving a rational account of what he has seen or heard. (*Musst. Jarina Khatun* v. *State of Assam*, 1992 Cri. L.J. 733)

In the above case, the Court also observed that there is *no general rule* that the evidence of a *child witness cannot*, under any circumstances, be acted upon without corroboration of a direct nature.

Discuss the different types of witnesses and their evidential value. M.U. June 2019

Interested persons as witnesses — The High Court of Jammu & Kashmir has *held* that, although a witness may be interested in the well-being of the person who produces him, if on scrutiny, it is found that there is no indication that the depositions were given because of such interest, such depositions need *not necessarily* be disbelieved. If, for instance, 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*, A.I.R. 1979 J. & K. 6)

4. *No particular number of witnesses* is, in any case, required for the proof of any fact. (S. 134)

In the olden days, the emphasis seemed to be on *quantity* rather than *quality*. As observed by *Gibbon* in his *"Decline and Fall of the Roman Empire,"* —

> "The prophet published a law of domestic peace, that no woman should be condemned unless *four male witnesses* had seen her in the act of adultery."

S. 134 of the Indian Evidence Act enacts that no particular number of witnesses are required for the proof of any fact. Thus, more importance is

attached to the *quality* than to the *quantity* of the evidence; testimony is weighed, *not counted*. A finding may be based on the testimony of a *single witness*. This rule applies both to *civil* and *criminal* cases. Thus, a conviction may even be based on an uncorroborated testimony of a *single witness*. However, instances of convictions for *capital offences* on the testimony of a solitary witness are rare, and are to be found in exceptional circumstances.

The Orissa High Court has reiterated, in a murder case, that what is material is the acceptability of evidence, and *not* the numerological sufficiency of witnesses. It was *held* that a conviction can be maintained even on the basis of a sole, reliable witness. (*Kedar Behera* v. *The State*, 1993 Cri. L.J. 378)

The Supreme Court has in *Vadivelu Thevar* v. *State of Madras* (A.I.R. 1957 SC 614), laid down the following *three principles* in connection with convicting an accused on the testimony of a sole witness:

(a) As a general rule, a Court may — even in cases of murder — act on the testimony of a single witness, though uncorroborated. One credible witness outweighs the testimony of a number of witnesses of indifferent character.

(b) Unless corroboration is insisted upon by statute, Courts should *not* insist on corroboration – except in cases where the nature of the testimony itself of the single witness requires such corroboration as a rule of prudence, as for instance, in the case of a child witness.

(c) Whether corroboration of the testimony of a sole witness *is or is not* necessary must depend on the facts and circumstances of each case, and *no general rule can be laid down in this connection.*

The *"Unus Nullus Rule"* of English Law, that *one is equal to none*, has thus been rejected by S. 134. However, even in England, this rule is applied only in certain classes of cases, as for instance, in cases of perjury and treason, where *at least two witnesses* are required.

On the other hand, despite the universal nature of the provisions of S. 134, there are certain classes of cases where the Courts in India have followed the English *unus nullus rule* as a rule of caution and prudence, as for example, cases of perjury and cases involving sexual offences.

As far as *sexual offences* are concerned, the general trend of the Courts is to require corroboration in the case of a grown-up woman, though *not necessarily* in the case of a child of tender years. However, the Privy Council has cautioned that as a matter of prudence, conviction should *not* ordinarily be based on the uncorroborated evidence of a child witness.

As regards *divorce cases*, the general practice of the English Courts, which is also now well-established in India, is to hold that the evidence of the husband or the wife *alone* is never to be accepted without corroboration *either* by witnesses *or* at least by strong surrounding circumstances.

5. In all *civil* proceedings, the parties to the suit, and the husband or wife of any party to the suit, are competent witnesses. In *criminal* proceedings against any person, the husband or wife of such person, respectively, is a competent witness. (S. 120)

6. An *accomplice* is a *competent witness* against an accused person, and a *conviction is not illegal* merely because it proceeds upon the *uncorroborated* testimony of an accomplice. (S. 133)

B. LAW AS TO ACCOMPLICE EVIDENCE [S. 133 & Illus. (b) to S. 114]

The law as to accomplices is laid down in S. 133 and illustration (b) to S. 114 of the Act.

1. An accomplice is a *competent witness* against an accused person and a *conviction is not illegal*, merely because it proceeds upon the *uncorroborated* testimony of an accomplice. (S. 133)

2. However, the Court *may presume* that an accomplice is *unworthy of credit, unless* he is *corroborated* in material particulars. [S. 114]

Who is an accomplice? (2 marks) M.U. May 2015 Nov. 2015 Dec. 2018 June 2019

WHO IS AN ACCOMPLICE — An *accomplice* is a person who has concurred in the commission of an offence. The term 'accomplice' signifies a guilty associate in a crime or a partner in a crime who makes admission of facts showing that he had a conscious hand in the offence. The term 'accomplice' includes both the principals and the abettors.

Who is not an accomplice — The following classes of persons are *not* accomplices:

(1) 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 a victim* of such circumstances. (*Srinivas Mall* v. *Emperor*, (1977) 49 Bom. L.R. 688, P.C.)

Write a short note on : An accomplice as a witness. M.U. Nov. 2014

(2) So also, a person who merely witnesses a crime, and does *not* give information of it to anyone else out of fear, is *not* an accomplice.

(3) Detectives, paid informers and trap witnesses are *not* accomplices. As the learned author *Wigmore* observes, when the witness has made himself an agent for the prosecution before associating with the wrongdoers, *or* before the actual perpetration of the offence, he is *not* an accomplice. However, it must be noted that if such a person or spy or informer, in the exuberance of his enthusiasm, actually instigates others to commit a crime, even if it be for detection of an offence or to get the credit of having him arrested, he is an *abettor* under the Penal Law, and his position *cannot* be anything other than that of an accomplice. (*R.* v. *Dinkar*, 55 All. 654).

The Supreme Court has severely condemned, in *Siv Bahadur* v. *State*, (1934 S.C. 325), the action of the Police authorities in supplying the bribed

What is the evidentiary value of accomplice? (2 marks) M.U. Apr. 2016

money to the giver in order to entrap the accused and secure the commission of the offence. But in the same case, the Supreme Court has observed that the evidence of witnesses who were *not* willing parties to the giving of the bribe, but were only actuated by the motive of trapping the accused, cannot be treated as that of accomplices.

Problem : *A*, a police officer, lays a trap and receives gratification with the intention of bringing to book *B* who had offered him the gratification. Can *A* be called an accomplice? Give reasons.

Ans. : *A cannot* be called an accomplice, as his object was *not* to concur in the commission of an offence with the accused. He is *not* a guilty associate. He is an agent for the prosecution before associating himself with the wrongdoer. Therefore, it *cannot* be said that *A* is an accomplice.

Why accomplice evidence is untrustworthy

Accomplice evidence is untrustworthy for the following *three* reasons :

(1) An accomplice is likely to swear falsely in order to shift the guilt from himself.

(2) As a participator in crime, he is likely to disregard the sanction of an oath.

(3) He gives evidence under a promise of a pardon *or* in the expectation of implied pardon, if he discloses all he knows against those with whom he acted criminally; and this hope would lead him to favour the prosecution. (*Queen Empress* v. *Maganlal*, (1889) 14 Bom. 115)

The emphatic statement in Section 133 that a conviction is *not illegal* merely because it proceeds upon the uncorroborated testimony of an accomplice may, at first sight, lead an inexperienced and untrained reader to suppose that the legislators desired to encourage convictions on the uncorroborated evidence of an accomplice. However, this is *not* so, because the law in Section 133 is qualified by a rule of caution and prudence in illustration (b) to Section 114, where it is declared that an accomplice is unworthy of credit *unless* he is corroborated in material particulars. This rule of caution has thus now acquired the force of law.

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.* v. *Baskerville* (1916 2 K. B. 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 crime.

(2) The confirmation by independent evidence must be of the identity of the accused in relation to the crime, *i.e.*, confirmation of some fact which goes to fix the guilt of the particular person charged, by connecting or tending to

connect him with the crime. In other words, there must be confirmation in some material particulars, that *not only* has the crime been committed, *but* that the accused has committed it.

(3) The corroboration must be independent testimony, that is, 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.

This rule has been confirmed by the Supreme Court in *Rameshwar* v. *State of Rajasthan*, (1952 S.C. 54), and *Vemmireddy* v. *State*, (1956 S.C. 379).

It may also be noted that Rules No. (1) and (4) (above) were re- affirmed by the Supreme Court in *S.* v. *Baswant*, (1958 S.C. 500).

The same question came for consideration before the Supreme Court in *Bhiva* v. *State of Maharashtra*, (A.I.R. 1963 S.C. 599), in which it was *held* that the combined effect of S. 133 and S. 114, illustration (b) may be stated as follows:

"According to the former, which is a rule of law, an accomplice is competent to give evidence, and according to the latter, which is a rule of practice, it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice *cannot* be said to be illegal, yet the Courts will, as a matter of practice, *not* accept the evidence of such a witness without corroboration in material particulars. The corroboration should be in material particulars and *qua* each accused."

Problem : *A*, a public servant, demanded with threats, a bribe from *B*. Upon information given by *B*, the police arranged a trap. *A* was caught red-handed in the act of accepting the bribe from *B* in the presence of *C*, a Panch witness. In the circumstances, can *B* and *C* be regarded as accomplices? Comment.

Ans. : *B* and *C cannot* be regarded as accomplices. Persons who have entered into a communication with conspirators, but who, either on account of a subsequent repentance, or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to ensure the conviction, *cannot* be treated as accomplices.

Persons who are present at the time of giving of bribes are also *not* accomplices. In the above case, *B* had no intention of giving a bribe. He was threatened and asked to give it. Therefore, a trap was laid to catch the bribe-taker red-handed. *B* had no criminal intention of committing the act. The difference is that in the case of an accomplice, he acknowledges himself to be a criminal; in the case of these men, they do *not* acknowledge anything of the kind. *B* gave the money to the public servant, with the purpose of trapping him

in the act of taking the bribe, and he did so in general public interest. Therefore, he does *not* partake of the criminal contamination of an accomplice. As far as *C* is concerned, he is merely present at the time of the transaction. He does *not* take any part as such in the criminal act, and hence, he is *not* an accomplice.

TRAP WITNESS — A trap witness is *not* an approver, but he is certainly an interested witness, in the sense that he is interested to see that the trap laid by him succeeds. He can at least be equated with a partisan witness, and it is *not* safe to rely upon his evidence without corroboration. It is also equally clear that his evidence is *not* tainted, but it would only make a difference in the degree of corroboration required rather than the necessity for it.

The corroboration must be by independent testimony confirming in some material particulars, *not only* that the crime was committed, *but also* that the accused committed it. It is *not necessary* to have corroboration of *all* the circumstances of the case or every detail of the crime. It is sufficient if there is corroboration as to the material circumstances of the crime and of the identity of the accused in relation to the crime. (*Major E.G. Barsay* v. *State of Bombay*, A.I.R. 1961 S.C. 1762)

Problem : *N* sold certain goods to *J*, and charged a price above the controlled one. *P*, a constable, came to know about it. *N* paid some bribe to *P* to avoid suspicion. *J* came to know of the bribe and was paid rupees ten as hush money. State whether *J* was an accomplice of either *N* or *P*.

Ans. : In view of the fact that *J* is an accessory after the fact, under the Indian Penal Code, he is *not* an abettor. But the Privy Council has *held*, in a number of cases, that for the purpose of ascertaining the *trustworthiness* of his evidence, he must be treated as an accomplice. He is on the same footing as an accomplice, and his evidence is no better. The presumption of untrustworthiness equally attaches to his evidence and on the same principle as that of an accomplice. It would, therefore, be better to require corroboration.

The Supreme Court has *held*, in *Siddeshwar* v. *State of W. Bengal*, (A.I.R. 1958 SC 143), that a girl who is a victim of an outrageous act is, generally speaking, *not* an accomplice, though the rule of prudence requires that the evidence of prosecutrix should be corroborated before a conviction can be based on it.

CONFESSION OF CO-ACCUSED DISTINGUISHED FROM ACCOMPLICE EVIDENCE — The confession of a co-accused (S. 30) is *not* treated in the same way as the testimony of an accomplice (S. 133). The two differ mainly in the following ways:

1. The confession of a co-accused stands on a different footing from the testimony of an accomplice; as the latter is taken on oath and tested by *cross-examinations*, a *higher* probative *value* is, therefore, given to accomplice evidence.

2. The confession of a co-accused can hardly be called *substantive* evidence, as it is *not* "evidence" within the definition in S. 3; it must only be taken into consideration along with other evidence in the case, and it *cannot alone* form the *basis* of a conviction. But a conviction is *not illegal* merely because it proceeds upon the uncorroborated testimony of an accomplice. (S. 133)

3. The testimony of an accomplice is ordinarily treated as the *foundation* of the prosecution story. The confession of a co-accused, on the other hand, *cannot* be the *basis* of a prosecution case.

C. COMPELLABILITY OF WITNESSES (Ss. 121-132)

Cases in which a witness *cannot* be :

Compelled to make particular statements *or* to produce documents — (Ss. 122, 124-125, 129-131)	*Permitted* to make particular statements — (Ss. 122-123, 126-128)
1. No Judge or Magistrate can be compelled to answer question as to — (i) his own conduct, *or* (ii) anything which came to his knowledge, in Court as such Judge or Magistrate, *except* — (i) under a special order of a superior Court, *or* (ii) as regards other matters which occurred in his presence whilst he was so acting. (S. 121) *Illustrations :* (a) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B cannot* be compelled to answer questions as to this, *except* upon the special order of a superior Court. (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 the superior Court.	1. Under S. 122, no person who is, or has been, married, can be permitted to disclose any communication made to him during marriage by any person to whom he is married, *except* — (a) when the person who made it or his representative in interest consents; *or* (b) in suits between married persons; *or* (c) in proceedings in which one married person is prosecuted for any crime committed against the other. PRINCIPLE OF S. 122 — 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 solace of married life. The protection is *not* confined to cases where the communication

(c) *A* is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before *B*, a Sessions Judge. *B* may be examined as to what occurred.

Write a short note on : Privileged communication made during marriage.
M.U. Nov. 2017

2. No person who, is or has been, *married* can be *compelled* to disclose any communication made to him during marriage by the person to whom he is or has been married. (S. 122)

S. 122 applies only to communications made during a valid marriage and the rule also applies *after* a marriage has been *dissolved* or *after* one of the parties has *died*. A communication between husband and wife, which has been heard or seen by a third person may be proved by the latter because the section only refers to the *parties* to the marriage.

3. No *public* officer can be compelled to disclose communications made to him in *official confidence*, when he considers that the public interests would suffer by the disclosure. (S. 124).

4. *No Magistrate* or *Police-officer* can be compelled to say whence he got any information as to the commission of any offence, and no *Revenue officer* shall be compelled to say whence he got any information as to sought to be given in the evidence is of a strictly confidential character, but the seal of the 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, however, limited to such matters as have been communicated during the marriage. This section limits the rule enunciated in S. 120.

2. No one can be permitted to give any evidence derived from unpublished official records relating to any affairs of State, *except* with the permission of the officer at the head of the department concerned, who may give or withhold such permission as he thinks fit. (S. 123)

3. No barrister, attorney, pleader, *vakil*, his clerk, or servant and interpreter (even after the employment has ceased) can be permitted:

(a) *to disclose*

(i) any communication made to him, in the course, and for the purpose, of his employment;

(ii) any advice given by him to his client;

the commission of any offence against the public revenue. (S. 125)

5. No *person taking legal advice* can be compelled to disclose to the Court any confidential communication between him and his legal professional adviser.

Exception — When a person offers himself as a witness, he may be compelled to disclose any such communications necessary to be known in order to explain any evidence which he has given, but no others. (S. 129)

6. No *witness* who is *not a party* to a suit can be compelled to produce:

(a) his title deeds to any property, *or*

(b) any document

(i) by which he holds any property as pledgee or mortgagee, *or*

(ii) the production of which might tend to criminate him —

unless he has agreed in writing to produce them with the person seeking their production *or* some person through whom he claims. (S. 130)

7. No person can be compelled to produce documents in his possession, or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession or control *unless* such last-mentioned person *consents* to their production. (S. 131)

(b) to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his employment as such.

Exception — Provided that, nothing in this section protects from disclosure:

(1) any such communication made in furtherance of any illegal purpose;

(2) any fact observed by any barrister, pleader, attorney or *vakil*, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or *vakil was or was not* directed to such fact by or on behalf of his client. (Ss. 126-127)

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 a man known to be guilty is *not* a criminal purpose, this communication is protected from disclosure.

(b) A, a client says to *B*, an attorney, "I wish to obtain possession of property by the use of a forged deed on which I request you to sue". The communication, being made in furtherance of a criminal purpose, is *not* protected from disclosure.

(c) A, being charged with embezzlement, retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A's* account book, charging *A* with the sum said to have

	been embezzled, which entry was *not* in the book at the commencement of his employment. This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is *not* protected from disclosure. (*Illus.* (c) above is based on the English case, *Brown* v. *Foster*, 1857 I.H. & N. 736.) If any party to a suit gives evidence at his own instance, he is *not* deemed to have *consented* thereby to such disclosure as is mentioned in S. 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or *vakil* as a witness, he is deemed to have *consented* to such disclosure, *only if* he questions such barrister, pleader, attorney or *vakil* on matters which, but for such question, he would *not* be at liberty to disclose. (S. 128)

CASES

1. The Allahabad High Court has *held* that privilege *cannot* be claimed in respect of professional communication between an advocate and his client in respect of a letter of advice already filed before the Court. (*Daya Shanker Dubey* v. *Subhas Kumar*, 1992 Cri. L.J. 319)

2. In one case, the Court was faced with an unsigned and undated letter, alleged to have been written by the accused, an Advocate, to his client (a terrorist). The letter did *not* reach the absconding terrorist, but the Advocate was charged with abetment under the TADA. (Terrorist & Disruptive Activities (Prevention) Act). It was *held* that the letter was a professional communication, and *not* an "abetment" under the TADA. It could, therefore, *not* be used as evidence against the accused Advocate. (*D. Veerasekaran* v. *State of Tamil Nadu*, 1992 Cri. L.J. 2168 40).

D. PRIVILEGED COMMUNICATIONS

The Indian Evidence Act mentions *three* kinds of communications as privileged from disclosure:

1. Matrimonial communications;
2. Official communications; and
3. Professional communications.

Write a short note on : Privileged Communication.
M.U. Apr. 2010

1. Matrimonial communications : *A person cannot be compelled* to disclose any communication *made* to him or her *during marriage* by any person to whom he or she is or has been married; nor will such communication be *permitted* to be disclosed except in the following *three* cases, *viz.*,: —

(i) if the person who made it, or his or her representative in interest, *consents; or*

(ii) in suits between married persons; *or*

(iii) in proceedings in which one married person is prosecuted for any crime committed against the other. (S. 122)

(This has already been discussed above.)

2. Official communications : The provisions of the Act relating to official communications are contained in Ss. 123 and 124 of the Act, and can be discussed under the following *two heads, viz.* :

(a) Evidence as to affairs of State (S. 123)

(b) Disclosure of communications made in official confidence (S. 124)

(a) Evidence as to affairs of State (S. 123)

S. 123 lays down that no one can be permitted to give any evidence derived from unpublished official records relating to any affairs of State, *except* with the permission of the officer at the head of the department concerned, who may give or withhold such permission as he thinks fit.

Under this section, the question whether the production of the document in question would be injurious to public interest is to be determined, *not by* the judge, *but by* the head of the department having custody of the document. (*Beatson* v. *Skene*, 1860 L.J. Ex. 430)

Write a short note on : Privileged communication and its exceptions.
M.U. May 2014

Commenting on this privilege, the Privy Council has remarked that the privilege regarding production of State papers is a narrow one, which must be exercised most sparingly. The *principle* and *foundation* of the rule is concern for public interest, and the rule *cannot* be applied any further than the attainment of the object requires. (*Henry Greer* v. *State*, 1931 P.C. 254)

The Act does *not* lay down as to what documents are to be regarded as unpublished official records relating to affairs of State or communications made to an officer in his official capacity. It is *not* every official record or register or every official communication which can be regarded as privileged. The principle to be applied in every case is that documents otherwise relevant and liable to production must *not* be produced if the public interest requires that they should be withheld. This test may be found to be satisfied *either* (a) by having regard to the contents of the particular document, *or* (b) by the fact that the document

belongs to a class which, on ground of public interest, must as a class be withheld from production.

Who can testify? Who are privileged witnesses? What privilege do they enjoy and what are the limitations on such privileges?
M.U. Nov. 2017

The following are examples of unpublished records of State, *viz.* —

(a) document exchanged between two States;

(b) document exchanged between the State and its own subjects;

(c) document exchanged between Heads of Department of another State;

(d) document exchanged between Heads of Department or between Ministers.

(b) Disclosure of communications made in official confidence (S. 124)

Under S. 124, no public officer can be compelled to disclose communications made to him in official confidence, if he considers that the public interest would suffer by the disclosure.

The question that arises under this section is whether the communication in question was made to the public officer in his official capacity. This is a condition precedent which must be satisfied before the privilege can be claimed, and this question is primarily to be decided by the Court before which the privilege is claimed.

Courts have adopted a basic principle for deciding whether a particular document is a communication made in official confidence to a public officer or *not*, namely, whether the document produced was under a process of law or *not*. If the former is the case, it would be difficult to say that the document produced under the process of law is a communication made in official confidence. If, on the other hand, a document is produced in a confidential departmental enquiry, *not* under the process of law, but for gathering of information by the department for guiding them in future action, if any, which they have to take, it would be a case of communication made in official confidence. (*Killi Suryanarayana*, 1954 Mad. 278)

Who is a witness? When is a communication said to be a professional communication?
M.U. Nov. 2015

Write a short note on : Professional communication.
M.U. May 2017

What is Professional Communication? (2 marks)
M. U. June 2018
Nov. 2019

3. Professional communications : A professional communication means a *confidential* communication between a professional *legal adviser* and his client made to the former in the course, and for the purpose, of his employment as such advisor. 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.* A professional legal adviser means a barrister, attorney, pleader or *vakil*. A client *cannot be compelled*, and a legal adviser *cannot be allowed*, without the express consent of his client, to disclose the oral or documentary communications passing between them in professional confidence (S. 126). Similarly, an interpreter, clerk or servant of such legal adviser *cannot* disclose such communication. (S. 127)

The Bombay High Court has *held* that a salaried employee who advises his employer on legal matters is entitled to the same protection as other advisers like a barrister, attorney or pleader, under Sections 126 and 129 of the Act.

Therefore, any communication made in confidence to him by his employer seeking his legal advice would be protected under Ss. 126 and 129, *provided that* such communication is *not* made in furtherance of any illegal purpose. (*Municipal Corporation of Greater Bombay* v. *Vijay Metal Works*, A.I.R. 1982 Bom. 6)

Who is a witness? Analyse the law relating to examination of witnesses.
M. U. June 2018

Problem : A lawyer, in the course, and for the purpose, of his employment as legal adviser, receives certain instructions from his client. The employment ceases and the client dies. The lawyer is subsequently called to give evidence and disclose the said instructions. Can he be permitted to do so? Explain giving reasons.

Ans. : The lawyer *cannot* be permitted to do so. A lawyer is under an obligation to respect the confidence reposed in him and *not* to disclose communications which have been made to him in professional confidence, *i.e.*, in the course of and for the purpose of his employment, by or an behalf of his clients. If such communications were *not* protected, no man would dare to consult a professional advisor, with a view to his defence, or the enforcement of his rights, and no man could safely come to Court, either to obtain redress or to defend himself.

WAIVER OF PRIVILEGE — The privilege as regards protection of professional communication from disclosure is the privilege of the *client* who can waive it. Such waiver may be (i) *express*, as where he expressly consents to the communication being disclosed by the legal adviser (S. 126), *or* (ii) *implied* : (Ss. 128 and 129).

A party to a suit who *gives evidence at his own instance* is *not* deemed thereby to have waived the privilege, *i.e.*, to have consented to a disclosure by his legal advisor of professional communications. If a client offers himself as a witness, the Court can compel him to disclose only such confidential communication between himself and his legal adviser as the Court thinks necessary to explain his evidence. (S. 129) If a party to a suit calls his legal adviser *as a witness*, he is deemed to have consented to such disclosure *only if* he questions such legal advisor on matters which, but for such question, he would *not* be at liberty to disclose.

When a witness is not excused from answering a question (S. 132)

A witness is *not excused from answering a question* on the ground that the answer will criminate him or expose him to a penalty or forfeiture of any kind.

The answer which a witness is *compelled* to give *cannot* —

(a) subject him to arrest or prosecution, *or*

(b) be proved against him in any criminal proceedings, *except* a prosecution for giving false evidence by such answer. (S. 132)

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9

EXAMINATION OF WITNESSES (Ss. 135-166)

The following topics are discussed in this Chapter:

A. The order of production and examination of witnesses
B. Judge to decide as to admissibility of evidence
C. Rules relating to examination-in-chief
D. Rules relating to cross-examinations
E. Rules relating to re-examination
F. Rules relating to corroboration
G. Rules as to refreshing memory
H. Rules as to production of documents

What is a witness? Examine the law relating to examination of witnesses.
M.U. June 2018

A. THE ORDER OF PRODUCTION AND EXAMINATION OF WITNESSES (S. 135)

Explain in detail examination of witnesses by the Court.
M.U. Nov. 2014

The order of production and examination of witnesses is regulated (a) by the law and practice relating to civil and criminal procedure, *and in the absence thereof,* (b) by the discretion of the Court.

B. JUDGE TO DECIDE AS TO ADMISSIBILITY OF EVIDENCE (S. 136)

What should be the order of examination in a criminal trial?
M.U. May 2015

When either party proposes to give evidence of any fact, the judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be *relevant.* The Judge shall admit the evidence if he thinks that the fact, if proved, would be *relevant, and not otherwise.*

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, *unless* the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

Illustrations : (a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under S. 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, *or* require evidence to be given of the second fact before evidence is given of the first fact.

Write a short note on: Examination of witnesses.
M.U. Nov. 2015
Dec. 2018

(c) A is accused of receiving stolen property, knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, *either* require the property to be identified before the denial of the possession is proved, *or* permit the denial of possession to be proved before the property is identified.

Explain what is examination in-chief, cross-examination and re-examination? When is it held and for what purpose?
M.U. May 2017

(d) 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 facts *B, C* and *D,* which must be shown to exist before the fact *A* can be regarded as the cause or effect of the fact in issue. The Court may *either* permit *A* to be proved before *B, C* and *D* are proved, *or* may require proof of *B, C* and *D* before permitting proof of *A.*

Order of examination (S. 138)

Witnesses are to be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

C. RULES RELATING TO EXAMINATION-IN-CHIEF (Ss. 137-138, 141-142)

1. Definition (S. 137)

What is examination-in-chief?
(2 marks)
M.U. Nov. 2014

The examination of a witness by the *party who calls him* is called his *examination-in-chief.*

2. Its scope (S. 138)

The examination-in-chief must relate to *relevant facts.*

3. Whether leading questions can be asked (Ss. 141-142)

What is the meaning and necessity of examination of a witness? What is the order of examination of a witness? Explain in detail.
M.U. Nov. 2010

Leading questions, *i.e.,* any *question suggesting the answer* which the person putting it wishes or expects to receive, *must not be asked,* if objected to by the opposite party, *except* with the permission of the Court.

The Court must permit leading questions as to matters —

(i) which are introductory *or* undisputed; *or*

(ii) which have been already sufficiently proved in the opinion of the Court.

WHAT IS A "LEADING QUESTION" — A 'leading question' is one which *suggests* to the witness the answer which it is desired he should give. But, if it

In what circumstances can leading questions not be asked?
(2 marks)
M.U. May 2013
Apr. 2016

merely suggests a subject *without* suggesting an answer or a specific thing, it is *not* a leading question.

Any question suggesting the *answer* which the person putting it *wishes or* expects to receive is called a leading questions. 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? Have you *not* lived so many years with him? Here, the question suggests to the witness the answer which he is to give, or puts into his mouth words which he is to echo back.

What is a leading question?
(2 marks)
M.U. Nov. 2016
June 2019

Leading questions *cannot* ordinarily be asked in examination-in- chief or re-examination. The witness is presumed to be biased in favour of the party examining him and might thus be prompted. The *reason* for excluding leading questions is quite obvious; it would enable a party to prepare his story and evolve it in his very words from the mouth of his witness in Court. It would tend to diminish chances of detection of a concocted story. If a witness is allowed to give his narrative in his own words, he is likely, if the story is made up, to leave some loop-holes, to which the cross-examiner will scarcely fail to direct his attack.

Write a short note on : Leading questions.
M.U. May 2017

What is a leading question? When it cannot be asked?
M.U. Apr. 2011

Leading questions *can*, only be asked when they refer to matters, which are (1) introductory; (2) undisputed; *or* (3) sufficiently proved. For, if such questions were *not* allowed, the examination would be most inconveniently protracted.

What kind of questions cannot be asked to a witness?
(2 marks)
M.U. Nov. 2015

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 learned author, *Best*, gives *two main reasons* why leading questions are *not* allowed in examination-in-chief, but are to be freely allowed in cross- examination. *Firstly,* one can generally suppose that a witness in biased in favour of the party who brings him and is hostile to the opponent. *Secondly*, the party calling the witness has a distinct advantage, in that he knows before-hand what the witness will try to prove, and if he could ask leading questions to his own witness, he could extract from the witness only as such as would be favourable to him.

If the Court makes a general order that no leading questions would be allowed in cross-examination, such an order is *illegal* and vitiates the trial. (*Sri L. P.* v. *Inspector General of Police*, 1954 A.L.J. 316)

The Supreme Court has *held* that the prosecutor *cannot* put leading questions on a material part of the evidence which a witness intends to give against the accused. Such leading questions would offend the right of the accused to a fair trial, enshrined in Art. 21 of the Constitution of India. (*Vaskey Joseph* v. *State of Kerala*, 1993 Cri. L. J. 2010)

D. RULES RELATING TO CROSS-EXAMINATIONS (Ss. 137-140, 145-155)

1. Definition (S. 137)

The *examination* of a witness by *the adverse party* is called his *cross-examination.*

WHAT IS CROSS-EXAMINATION — After a party examines his witness, his opponent has a right to cross-examine him. A cross-examination follows upon the examination-in-chief, *unless* the Court, for some reason, postpones it. The essence of cross- examination is that it is the interrogation by one party of witness called by his adversary with the object *either* to obtain from such witness an admission favourable to his cause *or* to discredit him.

What is the necessity and scope of cross-examination of a witness?
(2 marks)
M.U. Apr. 2011

The *idea* behind cross-examination is *two-fold* : to weaken, qualify or destroy the case of the opponent, *and* to establish a party's own cause by means of his opponent's weakness. The *main objects* of cross-examination are to measure the accuracy, credibility and general value of the evidence given in chief, so as to sift the facts already stated by the witness, to detect and to expose the discrepancy, and to elicit suppressed facts which will support the case of the party who cross-examines the witness.

What is cross examination?
(2 marks)
M.U. Dec. 2018

2. Scope of cross-examination (S. 138)

Cross-examination must relate to *relevant* facts, but it *need not to be confined to the facts to which the witness testified on his examination-in-chief.*

3. Whether leading questions can be asked (S. 143)

Leading questions *may be asked* in a cross-examination. (This has been discussed above.)

4. Cross-examination of a person called to produce a document (S. 139)

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 witness summoned merely to produce a document does *not* become a witness for purposes of cross-examination, since he may *either* attend the Court personally *or* may even depute any person to produce the document in Court.

5. Cross-examination as to previous statements in writing (S. 145)

A witness may be cross-examined as to previous statements made by him in writing (or *reduced* into writing), and *relevant* to matters in question, *without* such writing being shown to him, or being proved. However, *if* it is intended to *contradict* him by the writing, *his attention must*, before the writing

Write a short note on : The law regarding cross-examination of a witness as to previous statements.
M.U. May 2017

can be proved, *be called* to those parts of it which are to be used for the purpose of *contradicting* him.

This section indicates one of the modes in which the credit of a witness may be impeached.

A witness may be cross-examined as to any statements as to relevant facts made by him on a former occasion, in writing or reduced to writing, without showing the writing to him or proving the same. But, if it is intended to contradict him by the writing, his attention must be called to the writing. The *object of this provision* is *either* to test the memory of a witness *or* to contradict him by previous statements in writing. Such writing may be on documents, letters, depositions, police diaries, *etc.* The witness may also be contradicted by his previous verbal statements. (S. 153, Exception 2)

Another mode of impeaching the credit of a witness is to be found in S.155 (below).

The credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted : S. 155 [See below.]

6. Questions lawful in cross-examination (Cross- examination to shake credit) : (Ss. 146-150 & 155)

What is cross examination? What questions can be asked in a cross-examination?
M.U. Dec. 2018

When a witness is cross-examined, he may be asked any question which tends —

1. to test his *veracity; or*
2. to *discover who he is,* and what is his position in life; *or*
3. to *shake his credit,* by *injuring his character,* although the answer to such questions might tend directly or indirectly to criminate him or might expose, or tend directly or indirectly to expose him to a penalty or forfeiture. (S. 146)

What questions are lawful in a cross-examination? When can impeaching the credit of a witness be allowed?
M.U. Nov. 2016

In a cross-examination, a witness may be asked questions *not only* regarding the facts in issue or directly relevant to them, *but also* regarding the following:

(a) Questions tending to test the witness, means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment.

(b) Questions tending to expose the errors, omissions, contradictions and improbabilities in his testimony.

(c) Questions tending to impeach his credit by attacking his character, antecedents, associations and mode of living; and in particular by eliciting:

(i) that he has made previous statements inconsistent with his present testimony; *or*

(ii) that he is biased or partial in relation to the parties in the case, *or*

(iii) that he has been convicted of any criminal offence.

It may also be noted that —

(i) leading questions may be put in a cross-examination;

(ii) the questions in cross-examination need *not* be limited to the matters upon which the witness has already been examined-in- chief, but they may be extended to the whole case;

(iii) the Court may, in its discretion, permit the person who calls a witness to cross-examine him under some circumstances. (A reference may be made to the discussion on hostile witnesses, below.)

S. 146 also provides that in a prosecution for certain sexual offences listed therein (-see below-), or for an attempt to commit any such offence, where the question of consent is in issue, it shall *not* be permissible to adduce evidence or to put questions in the cross-examination of the victim, as to the general immoral character, or the previous sexual experience of such a victim with any person, for proving such consent or the quality of consent.

The list of offences referred to above (*as amended by the Criminal Law (Amendment) Act, 2018*) are: Ss. 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E of the Indian Penal Code.

Impeaching the credit of a witness (S. 155)

When can an adverse party impact the credibility of a witness? (2 marks)
M.U. Nov. 2015

The credit of a witness may be impeached in the following *three ways* by the *adverse* party (or, with the *consent of the Court*, by the party who calls him):

1. By the evidence of *persons* who *testify* that they, from their knowledge of the witness, believe him to be *unworthy of credit.*
2. By proof that the *witness* has been *bribed*, or has accepted the *offer* of a bribe, or has *received* any other *corrupt inducement* to give his evidence.
3. By proof of a former statement inconsistent with any part of his evidence which is liable to be contradicted.

Give any two ways by which the credit of a witness may be impeached by the adverse party. (2 marks)
M.U. June 2018

However, it may also be noted that a witness declaring another witness to be unworthy of credit *cannot*, in his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination. Moreover, the *answer which he gives cannot be contradicted*, though if they are false, he may afterwards be charged with giving *false evidence* (S. 155)

How can one impeach the credit of a witness? (2 marks)
M.U. Nov. 2017

Illustrations : (a) *A* sues *B* for the price of the goods sold and delivered to *B*. C says that *A* delivered the goods to *B*.

Evidence is offered to show that, on a previous occasion, he said that he had *not* delivered the goods to *B*.

The evidence is *admissible*.

(b) *A* is indicted for the murder of *B*.

C says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was *not* given by *A* or in his presence.

The evidence is *admissible*.

Secs. 146 and 155 are the two sections in the Act which lay down certain rules by which the *credit* of a witness can be shaken in cross-examination. Ss. 147 to 152 lays down *rules for checking improper use of cross-examination*.

If any such question relates to a matter *relevant* to the suit or proceeding, the provisions of section 132 apply thereto. If such a question relates to a matter *not relevant* to the suit or proceeding, but only affects his credit by injuring his character, the Court decides, on the following considerations, *whether or not* the witness is to be compelled to answer it, and may (i) warn the witness that he is *not* obliged to answer it, and (ii) report (if the question was asked by a barrister, pleader, *vakil* or attorney without reasonable grounds for thinking that the imputation which it conveys is well-founded) the circumstances of the case to the High Court or other authority to which such barrister, *etc.*, is subject in the exercise of his profession.

(a) Such questions are *proper*, if the truth of the imputation conveyed by them would seriously affect the Court's opinion as to the credibility of the witness.

(b) Such questions are *improper* (i) if the truth of the imputation conveyed by them would *not* affect, or would affect in a slight degree, the Court's opinion as to the credibility of the witness; *or* (ii) if there is a great disproportion between the importance of the imputation and the importance of the evidence.

The Court may *infer* from the witness' *refusal* to answer that the answer, if given would be *unfavourable*. (Ss. 147-150)

Write a short note on : Scandalous questions.
M.U. May 2013
Dec. 2018

The Court *may* also forbid any question or inquiries which it regards as *indecent* or *scandalous*, although such questions or inquiries may have some bearing on the questions before the Court, *unless* they relate to facts in issue *or* to matters necessary to be known in order to determine whether or *not* the facts in issue existed. (S. 151) Likewise, the Court must forbid any question which appears to it to be intended to insult or annoy, *or* which though proper in itself, appears to the Court needlessly offensive in form. (S. 152)

The controversy regarding indecent and scandalous questions often arises in cases of sexual offences, adultery, desertion and legitimacy. Thus, courts have often remarked that the purpose of cross-examining a victim of rape is to get to the truth of the matter, and *not* to humiliate her or cause her any embarrassment or discomfiture.

As observed by *Taylor*, the mere indecency of a question is *not* sufficient to exclude a question, where evidence is necessary for the purpose of civil or

criminal justice, as for instance, when the legitimacy of a person is in question.

Where an indecent or scandalous question has been asked merely to impeach the credit of a witness, such a question should be disallowed. Thus, in one case, a female witness was asked whether she had become pregnant by a certain person. This question was disallowed by the court, as the object of asking this question was merely to impeach the credit of that witness. (*Mohammad Mian v. Emp.*, 20 Cr. L. J. 566)

However, if the unchastity of a woman is a fact in issue in a particular case, a question put to her as to whether she had become pregnant by a certain person is relevant. (*Subala Dasi v. Indra Kumar Hazra*, 65 IC 692)

It has also been *held* that, in proceedings to recover maintenance under S. 125 of the Cr.P.C., questions put to the wife to prove non-access of her husband during their marital life can be allowed. (*Rozario v. Ingles*, (1893) 18 Bom. 468)

The practice generally followed by courts in cases where a particular question is objected to as being "indecent" or "scandalous" is to first record the question itself and then to give the court's ruling on whether it is to be allowed or *not*.

Exclusion of evidence to contradict answer to questions testing veracity (S. 153)

When a witness has been asked, and has answered, any question which is relevant to the inquiry, *only in so far as it tends to shake his credit by injuring his character,* no evidence can be given to contradict him, *but,* if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1 — If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2 — If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted. [See Illus. *(d)*]

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 *not admissible*.

(b) A witness is asked whether he was dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty. The evidence is *not admissible*.

(c) *A* affirms that on a certain day he saw *B* at Lahore. 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.

In each of these cases, the witness might, if his denial was false, be charged with giving false evidence.

(d) *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 tends to impeach his impartiality.

When a witness deposes to facts which are *relevant*, evidence may be given in contradiction of what he has stated. But when what he deposes to affects only his *credit*, no evidence to contradict him can be led, for the sole purpose of shaking his credit by injuring his character.

However, a witness answering falsely can be proceeded against for giving false evidence under S. 193 of the Indian Penal Code. There are *two exceptions* to this : (1) a previous conviction, when denied, can be proved (under the Criminal Procedure Code); *and* (2) any fact tending to impeach his impartiality, when denied, can be proved. This is a salutary rule, and is meant to curtail every inquiry. If contradictory evidence were to be allowed on a side issue, for instance, as shaking the witness' credit by injuring his character, there would be no limit to an enquiry. The main issue in the case is almost always likely to be fogged by subsidiary inquiries which are quite useless as well as perplexing.

Write a short note on : Hostile witness.
M.U. Apr. 2008
Nov. 2009
May 2014

Cross-examination of one's own witness (Hostile witness) (S. 154)

The Court may, in its discretion, permit the person who calls a witness, to put any questions to him which might be put in cross-examination by the adverse party.

It is, however, clarified that this shall *not* disentitle a person so permitted from relying on any part of the evidence of such a witness.

HOSTILE WITNESS — A "hostile witness" is one who, from the manner in which he gives 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 a hostile witness. The mere fact that at a Sessions trial, a witness tells a different story from that told by him before the Magistrate does *not necessarily* make him hostile.

Who is a hostile witness? (2 marks)
M.U. May 2013
Apr. 2016

It is interesting to note that the Act does *not* use the expression "hostile witness", thereby avoiding the confusion prevailing under English law by the use of the term. The section merely confers a discretion on the Court to allow a party to cross-examine his own witness.

If the testimony of a witness is adverse to the party calling him, such a party is *not* entitled as a *matter of right* to cross-examine his own witness; he

can do so only with the leave of the Court. A discretion is given to the Court to allow or not to allow a person to cross-examine his own witness as hostile. Such a witness may then be asked leading questions (S. 143), *or* questions as to his previous statements in writing (S. 145), *or* any questions under S. 146, *or* his credit may be impeached (S. 155)

The rule prohibiting the asking of leading questions to a party's own witness has its foundation on the assumption that a witness is always biased in favour of the party calling him. This rule must of necessity, be relaxed when the witness exhibits an opposite feeling, *viz.*, when he, by his conduct, *i.e.*, attitude, demeanour, or unwillingness to give answers, shows that he is *hostile* or *unfriendly* to the party calling him. The Court, in such a case, may, in its discretion, permit a party to put any question to his own witness which might be put in cross-examination by his opponent, *i.e.*, may permit a party to cross-examine his own witness, although the putting of leading questions does *not* always amount to cross-examination. It is to be remembered that the discretion of the Court to permit "cross-examination" is absolute and independent of any question of "hostility" or adverseness.

Merely giving unfavourable testimony *cannot* be enough to declare a witness *hostile*, for he might be telling the truth, which goes against the party calling him. He is hostile if he tries to injure the party's case by suppressing the truth. The Court has, by this section (*i.e.*, S. 154), been given a very wide discretion, and is at liberty to allow a party to cross-examine his witness:

(1) When his temper, attitude, demeanour, *etc.*, in the witness- box show a distinctly hostile feeling towards the party calling him; *or*

(2) When concealing his true sentiments, he does *not* exhibit any hostile feeling, *but* makes statements contrary to what he was called to prove, and by his manner of giving evidence and conduct, shows that he is *not* desirous of giving evidence fairly and telling the truth to the Court.

Write a short note on : What is the meaning of a "hostile witness"? What part of his evidence can be used by a court?
M.U. Nov. 2010

If a witness is allowed to be cross-examined by the party calling him, on the ground that he has turned hostile, the *entire* evidence of such a witness does *not* become worthless. The Court can, in such cases, consider the evidence, and a *part* of the evidence can be used, either to support the prosecution *or* in defence of the accused.

As is clear from a series of decisions of the Supreme Court, the testimony of a witness is *not necessarily* to be rejected, in whole or in part, just because he is declared to be a *hostile witness*. (*Ravindra Kumar Ray* v. *State of Orissa*, 1976 S.C.C. 566)

As observed by the Allahabad High Court, the mere fact that a witness is declared hostile does *not* make him an undesirable witness, so as to completely exclude his evidence from consideration. (*Kunwar* v. *State of U.P.*, 1993 Cri. L.J. 3421)

E. RULES RELATING TO RE-EXAMINATION (Ss. 137-138, 142)

What is re-examination? Which party can re-examine a witness? (2 marks) M.U. May 2015

1. Definition (S. 137)

The examination of a witness *subsequent* to the cross- examination (by the party who called him), is called his *re-examination*.

2. Its scope (S. 138)

Re-examination is to 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 the witness upon *that* matter.

What is re-examination of a witness? (2 marks) M.U. May 2014

3. Whether leading questions can be asked (S. 142)

Leading questions must *not* be asked in re-examination, if objected to by the adverse party, *except* with the permission of the Court. The Court must permit the asking of leading questions as to matters —

When can re-examination of a witness be asked for? (2 marks) M.U. Apr. 2011

(i) which are introductory *or* undisputed, *or*

(ii) which have been already sufficiently proved in the opinion of the Court.

Witness to character (S. 140)

Witnesses to character may be cross-examined and re-examined : S. 140 [See note *under* S. 53 above.]

F. RULES RELATING TO CORROBORATION (Ss. 156-157)

1. When a witness, whom it is intended to corroborate, gives evidence of any relevant fact, he may be questioned as to any *other* circumstances which he observed *at* or *near* to the time or place at which such relevant fact occurred, if the Court is of the opinion that such circumstances, if proved, *would corroborate* the testimony of the witness as to the relevant fact which he testifies. (S. 156)

Illustrations : 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.

2. 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. (S. 157)

Problem : *B, the accused, was the cashier of a company. He was suspected to have embezzled the company's funds. Before filing the FIR, B*

was taken to S, a solicitor of the 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. State giving reasons whether the notes of attendance made by S, soon afterwards, are admissible in evidence.

Ans. : The notes of attendance prepared by the solicitor are statements within the meaning of Sec. 157 of the Evidence Act, and as such *admissible* in evidence.

[See *Bhogilal Chunilal* v. *State of Bombay*, *61* Bom. L.R. (S.C.) 746]

G. RULES AS TO REFRESHING MEMORY (Ss. 159-161)

What is refreshing? (2 marks) M.U. Nov. 2014

Write a short note on : Refreshing memory. M.U. Nov. 2016 May 2017

A witness may refresh his memory by referring to —

(1) any writing made by himself

(i) at the time of the transaction concerning which he is questioned; *or*

(ii) so soon afterwards that the transaction was fresh in his memory;

(2) any such writing made by another person, and read by the witness and known by him to be correct, while his memory was still fresh;

(3) professional treatises, if he is an expert.

A witness may, with the Court's permission, refer to a *copy* of the document to which he might refer if it were produced, *provided* there is a sufficient reason for non-production of the original. (S. 159) He may also testify to facts mentioned in any such document, although he has no recollection of them, if he is sure that the facts were correctly recorded in the document. (S. 160). Thus, a book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he may have forgotten the particular transactions entered in them.

Any document to refresh memory must be shown to the adverse party, who may cross-examine the witness upon it. (S. 161)

Sections 159-161 deal with the extent to which, and the mode in which, a witness may refer to writing in order to refresh is memory while giving evidence. Although a witness should always state what he himself remembers, he may nevertheless, when giving evidence, refresh his memory as to details, by referring to documents made by himself or another by his orders or very shortly after the date on which the events in questions occurred. The *reason* behind the rule allowing a witness to refresh his memory is that he should *not* suffer from a mistake and should be allowed to explain an inconsistency.

As stated by *Field J.*, the *grounds* on which the opposite party is permitted to inspect a writing used to refresh the memory of a witness are *three-fold*,

namely, (i) to secure the full benefit of the recollection of the witness as to the whole of the facts; (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement. (*In Re Jhoubhoo Mahton* (1832) 8 Cal. 739)

A witness is sometimes permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry in a book. This can however, (except in the case of scientific witness referring to professional books as the foundation of their opinion) be done, only where the writing has been made, or its accuracy recognised, at the time of fact in question, or at furthest, so recently afterwards, as to render it improbable that the memory of the witness had *not* then become defective. Accordingly, in a Scottish case, a witness was *not* allowed to consult notes prepared by him *some weeks after* the transaction had occurred, and when he had reason to believe that he should be called to give evidence. *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 brief of a Barrister and even a Horoscope.

Problem : *X*, a Panch witness in a case of dacoity, refreshes his memory by the Panchnama. The Panchnama is inadmissible in evidence. Can *X* refresh his memory by the use of the Panchnama? Give reasons.

Ans. : *X can* make use of the Panchnama for the purpose of refreshing his memory where the Panchnama, immediately after it was made, was read over to the Panch and admitted by him to be correct. (*Emperor* v. *Mahadeo Dewoo*, 47 B.L.R. 992)

The *form* of document used by a witness to refresh his memory is *immaterial*. Since the document used to refresh his memory is *not* used as a piece of evidence, the question whether the document is admissible or *not* does *not* arise.

Thus, in one case, the question at issue was the amount of a debt, and the Court had refused to admit in evidence, the account books of the Plaintiff on the ground that they were *not* produced in time. Neverthless, the Court allowed him to refresh his memory by referring to those account books. (32 C.W.N. 565 P.C.)

It may be noted that S. 159 lays down that a witness *may* refresh his memory in the manner stated therein. However, he is *not bound to do so*, and the accused *cannot* compel him to do it. (*In Re Kali Churn Chunari*, (1881) 8 Cal. 154)

H. RULES AS TO PRODUCTION OF DOCUMENTS (Ss. 139, 162-164)

1. A witness *summoned to produce a document* must (if it is in his possession or power) bring it to Court, notwithstanding any objection as to its

production or admissibility. It is for the Court to determine the validity of such objection.

The Court may —

(a) inspect the document, unless it refers to matters of State, *or* | to enable it to determine its admissibility;

(b) take other evidence —

(c) direct the translator to keep the contents secret, *unless* the document is to be given in evidence. (S. 162)

What are the rules as to notice to produce? (2 marks) M.U. Nov. 2016

Write a short note on : Rules as to notice to produce documents. M.U. Nov. 2017

Reading Ss. 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 S. 123. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, 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 the evidence relates to an affair of State under S. 123 or *not*. (*State of Punjab*. v. *S. S. Singh* A.I.R. 1961 S.C. 493)

Affairs of State

At the time when the Evidence Act was enacted, "affairs of State" may have had a comparatively narrow context. Having regard to the notion about governmental functions and duties then prevailing, "affairs of State" would have meant matters of political or administrative character relating, for instance, to national defence, public peace and security, and good neighbourly relations. But the inevitable consequence of the change in the concept of the functions of the State is that the State, in pursuit of its welfare activities, has undertaken, to an increasing extent, activities which were treated as purely commercial, and documents in relation to such commercial activities undertaken by the State in the pursuit of public policies of social welfare are also apt to claim the privilege of documents relating to the affairs of State. (*State of Punjab* v. *S. S. Singh*, A.I.R. 1961 S.C. 493)

A person *summoned to produce a document* does *not become a witness* by the *mere* fact that he produces the document, and *cannot be cross-examined* until he is called as a witness. (S. 139)

2. When a party calls for a document which he has given the other party *notice to produce*, and such document is *produced and inspected* by the party calling for its production, *he is bound to give it as evidence if the party producing it requires him to do so*. (S. 163)

3. When a party *refuses to produce a document* which he has had *notice to produce*, he *cannot afterwards* use the document as evidence, *without (i)* the *consent* of the other party, *or (ii)* the *order of the Court*. (S. 164)

Illustrations : *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 the document itself to contradict the secondary evidence given by *A*, or in order to show that the agreement is *not* stamped. He *cannot* do so.

Write a short note on : Judge's power to put questions or order production.
M.U. Nov. 2014
Nov. 2016
Nov. 2017

Judge's power to put questions or order production (S. 165)

In order to discover or to obtain proper proof of relevant facts, the judge may —

(a) ask any question
  (i) to any party, or witness,
  (ii) in any form,
  (iii) at any time,
  (iv) about any fact (relevant *or* irrelevant); *or*

(b) order the production of any document or thing.

Neither the parties nor their agents are entitled –

(i) to make any objection to any such question or order; *or*

(ii) without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

However, the judgment must be based upon facts declared by this Act to be *relevant* and duly proved.

It is also to be noted that the Judge *cannot* —

(a) ask any question which it would be *improper* for any other person to ask under section 148 or 149; *or*

(b) *compel* a witness to answer any question, which he would be *entitled to refuse* to answer if asked by the adverse party under section 121 to 129; *or*

(c) compel any witness to produce any document which he would be entitled to refuse to produce, if called for by the adverse party under section 130; *or*

(d) dispense with primary evidence of any document, except in the cases excepted.

When can a judge put questions to a witness?
(2 marks)
M.U. Nov. 2015

In India, in an enormous mass of cases, it is absolutely necessary that the Judge should *not only* hear what is put before him by others, *but* that he should ascertain, by his own inquiries, how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are *not* themselves relevant to the matter in issue, but may lead to something that is; and it is in order to arm Judges with express authority to do this, that this section has been framed.

The scope of S. 165 of the Act has been examined by the Supreme Court in several cases. It has been observed that courts have to play a participatory role in a trial. They have to monitor the proceedings to elicit all the materials and ensure that things which are *not* relevant are *not* unnecessarily brought on record.

Particularly in criminal cases, the fate of the proceedings *cannot* be left in the hands of the parties, as crimes are public wrongs which affect the whole community and are harmful to society in general.

As observed by the Supreme Court, it is the duty of the Judge to discover the truth, and for this purpose, he can ask any question in any form at any time, whether to any witness or any of the parties, about any fact *which is relevant, or even irrelevant*. (*Ram Chunder v. State of Haryana*, AIR 1981 SC 18)

Lastly, it may be noted that, in cases tried by a jury or assessors, the jury or assessors may put any question to the witness (through or by leave of the Judges) which the Judge himself might put and which he considers *proper*. (S. 166)

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EFFECT OF IMPROPER ADMISSION OR REJECTION OF EVIDENCE

Under S. 167, the improper (a) admission, or (b) rejection of evidence is no ground for a new trial or reversal of any decision, if —

(a) in the case of *improper admission* —

there is sufficient evidence to justify the decision independently of the evidence objected to and admitted; *or*

(b) in the case of *improper rejection* —

the decision could *not* be varied if the rejected evidence had been received.

The *object* of section 167 is that the Court of Appeal or Revision should *not* disturb a decision on the ground of improper admission or rejection of evidence, if in spite of such evidence, there is sufficient material in the case to justify the decision. In other words, *technical objections will not be allowed to prevail where substantial justice has been done.*

The provisions of this section are applicable to *all* judicial proceedings in or before any Court. Thus, the section applies to *civil* as well as *criminal* cases. Although the word *decision* (appearing in S. 167) is generally used as applicable to *civil cases*, it is an expression which would apply with equal force to a *criminal proceeding as well.*

In *Narain* v. *State of Punjab,* (A.I.R. 1959 S.C. 484), a person was attacked and injured and was being carried away, when his brother came on the scene to rescue the victim after shooting one of the assailants in self-defence. The other assailants were tried for various offences. The brother (who shot one of the assailants) was cited as a prosecution witness, but he claimed protection under Article 20 of the Constitution, and was, therefore, *not* examined. When the matter came in appeal before the Supreme Court, it was *held* that the prosecution could *not* rely on section 167 of the Evidence Act, because the question under that section is *not* so much whether the evidence rejected would *not* have been accepted against the other testimony on record, as whether evidence ought *not* to have varied the decision.

OBJECTION IN APPEAL TO DOCUMENTS ADMITTED BY CONSENT — Where evidence is admitted by the trial Court with the consent of the parties (or without any objection to its reception) and the evidence is admissible and relevant, no objection will be allowed to be taken to its reception at any stage of the litigation on the ground of *improper proof.*

But if the evidence is *irrelevant* or *inadmissible*, as for instance, owing to want of consent or omission to take objection to its reception, the objection may be raised *even in appeal for the first time*. The question of relevancy is a question of law, and therefore, such a question can be raised at *any* stage. The question of proof is, however, a question of procedure, and is capable of being waived. (*Pandappa* v. *Shivlingappa*, 47 Bom. L.R. 962)

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